2017 YEAR IN REVIEW:
10 INDIANA CASES OF NOTE
(Plus 2 Updates From 2016 Cases)

1. Employment Law, ADA, and Extended Leave as a Reasonable Accommodation: *The Seventh Circuit Court of Appeals weighs in on the parameters and necessity of an employer providing employees leave as a reasonable accommodation under the Americans with Disabilities Act (ADA), when an employee has already exhausted the leave provided under the Family Medical Leave Act (FMLA).*

2. Construction Jobsite Injuries and Construction Manager Liability**:** *Employee of subcontractor was injured when a sixteen-foot-long 2X4 lumber infill struck him in the head while he was working on a construction site. Injured worker sues formwork contractor and Construction Manager. Indiana Court of Appeals addresses liability of each, including interpretation of jobsite safety provisions of the AIA A232 General Conditions for Construction.*

3. Environmental Cost Recovery for Demolition and Vapor Intrusion Mitigation Under CERCLA**:** *Under the federal Comprehensive Environmental Response Compensation & Liability Act, 42 U.S.C. § 9601, et seq. ("CERCLA"), a private party or the government can recover the costs it incurred in responding to environmental contamination. The U.S. District Court for the Northern District of Indiana addresses costs associated with demolition and vapor intrusion mitigation under CERCLA.*

4. Employer's Liability for Employee's Negligence – *Respondeat Superior* and Negligent Hiring Claims: *Employee is involved in traffic accident, and employer acknowledges that employee was working within his scope of employment at the time of the accident. Indiana Supreme Court addresses whether a plaintiff can maintain claims against the*

employer for both respondeat superior and negligent hiring, or whether respondeat superior precludes the negligent hiring claim.

5. INDOT Liability to Local Government**:** *INDOT project allegedly caused septic system damage on three landowners' private property. County sought to have INDOT repair the septic systems, but INDOT denied any responsibility. County filed suit for declaratory judgment seeking an injunction against INDOT and forcing INDOT to repair the damaged property. Indiana Supreme Court addresses whether a local government has standing to sue INDOT for such damages.*

6. Builders Risk Insurance and Soft Cost Coverage**:** *A significant delay occurs on a $1 Billion airport project, triggering a dispute between the airport and its insurer as to the scope of available coverage under a specially tailored insurance policy that included builders risk and soft cost coverage. The Court weighs in on interpretation of these complex insurance issues.*

7. Construction Jobsite Accident and General Contractor's Right to Indemnity and Additional Insured Protection from Sub-Subcontractor**:** *An employee of a sub-subcontractor sues the general contractor for a jobsite injury on a construction project. General contractor seeks indemnity and additional insured coverage from sub-subcontractor. Indiana Court of Appeals addresses whether general contractor's claims are barred by Indiana's Anti-Indemnity Statute.*

8. Contract Law – When is an Agreement Really Just an Agreement to Agree?: *A dispute arises between a design professional and an owner regarding the parties' "agreement to agree" on a future scope of work that lacked essential terms regarding the scope and fee amount. The court is asked to determine whether the owner breached the contract by refusing to award the future scope items to the design professional.*

9. Sexual Orientation Discrimination is Prohibited by Title VII in the Seventh Circuit (For Now): *Plaintiff files a claim with the EEOC and eventually brings suit in federal court for discrimination under Title VII based on sexual orientation as a sex discrimination claim. Although the EEOC had assumed the official position by that time that sexual orientation discrimination was covered by Title VII, this was not a position that had been adopted by any of the Circuit Courts of Appeal, and indeed, the position was contrary to established case precedent in the Seventh Circuit. The Seventh Circuit revisits this issue here.*

10. Surety's Liability on Payment Bond for Design Professional's Claim: *A dispute arises regarding the scope of the project sureties' payment bond obligations for design work on a public-private-partnership (P3) project. The court is asked to determine whether a design professional's claim for $4,678,451.61 was covered under the payment bond.*

BONUS CASES –
UPDATES FROM TWO CASES INCLUDED
IN THE DSV *2016* YEAR IN REVIEW:

UPDATE #1 – Construction Jobsite Injury and Design/Builder's Liability to Subcontractor's Employee**:** *On a design-build project, an employee of sub-subcontractor is injured during the project. The Indiana Supreme Court decides whether the design-builder assumed responsibility for safety of employee of sub-subcontractor.*

UPDATE #2 – Personal Injury, Loss of Income, and Immigration Status**:** *An undocumented worker performing work for a construction company is injured on the jobsite. The Indiana Supreme Court is asked to determine the permissible methods of calculation for lost wages, with consideration to the undocumented worker's earning capacity in the United States versus earning capacity in his home country.*

1. **Employment Law, ADA, and Extended Leave as a Reasonable Accommodation:**

***Severenson v. Heartland Woodcraft, Inc*., 872 F.3d 476 (7th Cir. 2017)**
Summary By: Melanie M. Dunajeski

For years, employers have struggled with the parameters and necessity of providing employees leave as a reasonable accommodation under the Americans with Disabilities Act (ADA)—especially when an employee has already exhausted the generous leave provided under the Family Medical Leave Act (FMLA). The Seventh Circuit Court of Appeals (which has jurisdiction over the federal courts of Indiana, Illinois, and Wisconsin) has long disagreed with the EEOC's guidance "Employer Provided Leave and the Americans with Disabilities Act", which states that employers should consider long term leaves of absence as reasonable accommodations, but recently took their position a step further to hold that leave for an extended period is not a required reasonable accommodation under the ADA.

In *Severenson v. Heartland Woodcraft, Inc*., the employee had a back problem that was exacerbated by an injury. After a 12-week FMLA leave, the employee notified his employer that he would be undergoing back surgery and would need at least another three months off for recovery. The employer declined to provide this leave as a reasonable accommodation under the ADA, and it terminated employee's employment, with an invitation to the employee to reapply when he was once again able to work. The employee did get his surgery, but instead of reapplying, he sued his employer for disability discrimination under the ADA. The trial court granted summary judgment in favor of the employer and against the employee, and the employee appealed to the U.S. Seventh Circuit Court of Appeals.

In its opinion upholding the trial court's ruling in favor of the employer, the Seventh Circuit noted that while the ADA makes it unlawful for an employer to discriminate against a "qualified individual on the basis of disability," a "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position. The court further noted that the notion of "reasonable accommodation" as set forth in the statute, while being a flexible standard, in the end is one that permits the "qualified individual" to "perform the essential functions of his position" and that as such, long term leave is not a reasonable accommodation because it does not permit the employee to do his job, only to be absent from it. If the proposed accommodation does not permit an employee to do his job, the employee cannot be considered a "qualified individual with a disability" as the statute defines that term.

As the court put these interlocking definitions together, it determined that "a long-term leave of absence cannot be a reasonable accommodation", citing its prior holdings in *Byrne v. Avon Products, Inc.*, 328 F.3d 379, 381 (7th Cir.2003). Quoting *Byrne*, the court noted that "[n]ot working is not a means to perform the job's essential functions", and that "an extended leave of absence does not give a disabled individual the means to work; it excuses his not working." The court concluded, as it had held in Byrne, that "[a]n inability to do the job's essential tasks means that one is not 'qualified'; it does not mean that the employer must excuse the inability."

The court contrasted the long term medical leave as provided by the Family and Medical Leave Act (FMLA) with the accommodation requirements of the ADA-pointing out that twelve weeks of protected FMLA was available to employees due to serious health conditions that make the employee unable to perform their job duties, while the ADA applies "only to those [employees] who can do the job."

The Seventh Circuit declined to follow the EEOC's Guidance and precedent in other federal Circuit Courts of Appeal that suggest long term leave may be a reasonable accommodation under the ADA, and held that the ADA does not require an open-ended extension of the leave available under the FMLA. The Seventh Circuit held that the ADA is not a "medical leave statute", and found that leave for an extended period of time is not a reasonable accommodation under the ADA.

This case represents a substantial departure from the holdings in other federal Circuits that have adopted the EEOC Guidance that requires employers to evaluate employee leave requests on a case-by-case basis to determine whether grant of the leave would present a "substantial hardship" to the employer. The court also gave some idea of what it would consider reasonable with respect to leave as an accommodation: "[i]ntermittent time off or a short leave of absence—say, a couple of days or even a couple of weeks—may, in appropriate circumstances, be analogous to a part-time or modified work schedule…But a medical leave spanning multiple months does not permit the employee to perform the essential functions of his job. To the contrary, the inability to work for a multi-month period removes a person from the class protected by the ADA."

Significantly, only weeks after this September decision, the Seventh Circuit issued another decision buttressing this position. In *Golden v. Indianapolis Housing Authority*, 698 Fed.Appx. 835 (7th Cir. 2017) an employee facing expiration of a 12-week FMLA leave sought additional leave of an unspecified length, up to six months, for cancer treatment. The Authority granted an additional 4 weeks of leave, but terminated the employee when she was unable to return at that time. The Seventh Circuit found for the employer again- emphasizing that a multi-month leave of absence is "beyond the scope of reasonable accommodation under the ADA."

What do these two cases mean for employers? First—note that if your employment relationship is not in Indiana, Illinois or Wisconsin (the states that comprise the Seventh Circuit), this is not binding precedent for you. If you are in these states, the court's guidance that a few days or weeks may be required under the ADA, but not a few months, will be very helpful to employers—including in handling requests for open ended leave. Note also that leave may not be the only effective accommodation that you might be able to provide, and that the undue hardship analysis may still be a valid concern. Hence, even with these favorable holdings, every request for leave as an accommodation should still result in an individualized assessment to determine if it would be an effective accommodation.

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2. **<u>Construction Jobsite Injuries and Construction Manager Liability</u>:**

***Gleaves v. Messer Construction Co.*, 77 N.E.3d 1244 (Ind. Ct. App. 2017)**
Summary By: Sean T. Devenney

Gleaves is one of the newest iterations of the construction job site safety cases spawned by the Indiana Supreme Court's landmark decision in *Hunt Construction Group, Inc. v. Garrett*, 964 N.E.2d 222 (Ind. 2012).

In *Gleaves*, the Plaintiff was injured when a sixteen-foot-long 2X4 lumber infill struck him in the head while he was working on an Indiana University owned construction site. Gleaves sued Peri Formwork Systems ("Peri") and Messer Construction ("Messer") (the Construction Manager on the Project).

The Plaintiff's theory against Peri was that the lumber infill was a necessary part of using/installing the Peri formwork (even though the lumber infill was not actually manufactured by Peri). The Plaintiff contended that since the Peri formwork system installation required the use of a lumber infill, Peri was responsible for warning Gleaves about the dangers of the use of the lumber infill. The Plaintiff's theory was basically a products liability claim, even though Peri did not have anything to do with the manufacture of the lumber infill. In deciding to grant summary judgment in favor of Peri, the Court noted that the mere fact that the Peri system required the use of the lumber infill did not make Peri responsible for the proper use of the lumber infill that Peri had no part in manufacturing. In addition, the Court noted that Mr. Gleaves was well-aware of the potential risks associated with the Peri forms, that the risks were open and obvious; therefore, Peri was entitled to summary judgment on Mr. Gleaves' products liability claims.

The Plaintiff's theory against Messer was that Messer had assumed a duty of safety on the Project to protect individuals on site like Mr. Gleaves. Messer and Indiana University were operating under the AIA A232 General Conditions for Construction. In reviewing that document the Court noted that Messer was to be:

> [R]esponsible for the oversight of the health safety programs of the contractors; each contractor was to remain the controlling employer as to its employees and was to comply with the applicable safety laws; and Messer's responsibility for review of the safety precautions did not extend to direct control over or charge of the acts or omissions of the contractors or their employee, nor did it constitute approval of safety precautions of any construction means methods or procedures.

The Court noted that consistent with the AIA A232 general conditions, that Messer created a jobsite safety program that all contractors were required to follow.

The Court first acknowledged the controlling precedent was *Hunt v. Garrett.* Analyzing the *Hunt* case against the facts presented in *Gleaves* the Court noted that Messer, like *Hunt*, had agreed to perform safety obligations on the Project. However, Messer did not have contract language requiring Messer to take responsibility for the safety of employees of other contractors like Gleaves; rather Messer's duties ran solely to Indiana University.

In addition, the Court was asked to determine whether Messer had assumed a duty (beyond its contract with Indiana University) through Messer's actions on the job site. The Court analyzed the issues and determined that everything Messer had done in relation to safety was within the parameters of its contractual obligations to Indiana University. Consistent with the teaching of *Hunt*, since Messer's actions were contractually required to fulfill Messer's obligation to Indiana University they could not form a basis to create a duty to Mr. Gleaves. Therefore, the Court granted summary judgment in favor of Messer.

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3. **Environmental Cost Recovery for Demolition and Vapor Intrusion Mitigation Under CERCLA:**

***Valbruna Slater Steel Corp. v. Josyln Manufacturing Co.*, __ F.Supp. 3d ___, 2017 WL 2080934 (N.D. Ind. 2017)**
Summary By. Erik S. Mroz

Under the federal Comprehensive Environmental Response, Compensation & Liability Act, 42 U.S.C. § 9601, et seq. ("CERCLA"), a private party or the government can recover the costs it incurred responding to environmental contamination. In *Valbruna Slater Steel Corp. v. Josyln Manufacturing Co.*, the United States District Court for the Northern District of Indiana found that costs associated with demolition and vapor intrusion mitigation were not recoverable under CERCLA.

The Court observed that to be recoverable under CERLCA, "expenses must be both necessary and consistent with the National Contingency Plan.". "Costs are 'necessary' if they are incurred in response to a threat to human health or the environment and they are necessary to address that threat."

The District Court found that certain costs incurred by the Plaintiff were recoverable under CERCLA. These included: A $500,000 escrow payment to IDEM as part of a prospective purchaser agreement to be used for remediation; the cost of pre-purchase environmental studies; and, the cost to excavate contaminated soil. However, the District Court found that demolition costs were not recoverable under CERCLA because, while "groundwater in that area was contaminated, there is no evidence that the building itself posed an environmental harm." Instead, the Court found that the Plaintiff "demolished [the building] in order to construct a new [building]."

The District Court also found that the cost to install a vapor barrier beneath the new construction was not recoverable under CERCLA. This is true even though the vapor barrier was installed to prevent contaminated groundwater vapors from entering the interior space of the building. In finding that these costs were not recoverable, the District Court noted that the vapor barrier was designed only for protecting the Plaintiff's own employees. According to the District Court, "ensuring safe working conditions is not within the scope of CERCLA." The Court

further noted that "to be compensable, expenses must address a broader threat to human health or the environment."

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4. **Employer's Liability for Employee's Negligence – *Respondeat Superior* and Negligent Hiring Claims:**

Sedam v. 2JR Pizza Enterprises, LLC, 84 N.E.3d 1174 (Ind. 2017)
Summary By: Anthony M. Eleftheri

In *Sedam v. 2 JR Pizza Enterprises, LLC*, the Indiana Supreme Court reaffirmed a principle of Indiana law that had been cast aside by the Indiana Court of Appeals. In so doing, the Indiana Supreme Court reaffirmed over 40 years of Indiana precedent involving a party's inability to bring negligent hiring, training and supervision claims, in addition to claims for *respondeat superior*. Specifically, the Court found that any argument that the Comparative Fault Act or Indiana law necessitated a different view, was improper.

In *Sedam*, an Estate brought suit against a delivery driver, a Pizza Hut restaurant business and a motorist as a result of a tragic accident. Defendant driver was delivering pizzas at the time of the accident. Unfortunately, she collided with the back of a scooter driven by the decedent, causing him to lose control. The decedent fell onto the road and was struck and killed by another motorist.

The decedent's Estate brought a wrongful death suit against among others, the delivery driver and the pizza restaurant business alleging negligence. Specifically, the Complaint alleged the employee-driver's negligent hiring, training and supervision caused the accident. The Estate also alleged that the restaurant was liable for the employee's negligence, under the doctrine of *respondeat superior*. The restaurant conceded that the driver was in the course and scope of employment.

At the Trial Court, the restaurant filed a partial Motion for Summary Judgment arguing that as it conceded that the delivery driver was acting in the course and scope of her employment at the time of the accident, the claims of negligent hiring, training or supervision should be dismissed. Specifically, the restaurant cited long standing Indiana law and argued that the negligent hiring, training and supervision claims were irrelevant due to the *respondeat superior* claim. The Trial Court agreed and dismissed the claims (for negligent hiring, training and supervision). The Estate appealed.

On appeal, the Indiana Court of Appeals surprisingly reversed the Trial Court, notwithstanding the opinion of the Indiana Supreme Court on the exact issue, issued more than 40 years ago. The Court of Appeals found that the Indiana Supreme Court erred in its opinion in *Tindall v. Enverle*, 320 N.E. 2d 764 (Ind. 1974) and referenced an opinion by the Indiana Supreme Court from 1907. Specifically, the Court of Appeals found that claims for *respondeat superior* were different than claims for negligent hiring, training and supervision as each were "separate torts that are not derivative of the employee's negligence." *Sedam* at 1176. The Court

of Appeals also argued that their finding was more consistent with the Indiana Comparative Fault Act, enacted after the Supreme Court's opinion in *Tindall* (in 1974).

In affirming the Trial Court, the Indiana Supreme Court first noted the existence of "a line of Indiana precedent spanning nearly five decades holding that an employer's admission that an employee was acting within the course and scope of his employment precludes negligent hiring claims." *Id*. The Court accepted that the *respondeat superior* claim included an act *within* the scope of employment, while negligent hiring claims required an act *outside* the scope of employment. *Id*. 1178. Yet, the Court reasoned that under each claim, the Plaintiff sought the same result, namely finding employer liability for the negligent act of the employee. *Id*.

As a result, the Court found that allowing both claims to proceed when a party concedes the employee was in the course and scope of employment "would serve only to prejudice the employer, confuse the jury and waste traditional resources…" *Id*. An admission that an employee is within the course and scope of employment "exposes an employer to liability for any and all fault assessed to the employee's negligence, and thus a negligent hiring claim becomes duplicative since the Plaintiff may not recover twice for the same damage." *Id*. The Court re-affirmed the partial Motion for Summary Judgment.

From a precedence standpoint, the Indiana Supreme Court reaffirmed what was established Indiana law regarding an employer's liability for tortious conduct of its employee. From a practical standpoint, if an employer can reasonably state that the employee was in the course and scope of employment, then an employer defendant should challenge and attack all negligent hiring, supervision and training claims. Not only are these claims duplicative and invalid, doing so may limit the nature and type of discovery to the Defendant. More importantly, the attacking and defeating of these claims may limit Plaintiff from having "two bites of the apple" at trial.

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5. **INDOT Liability to Local Government:**

***Board of Commissioners of Union County v. McGuineess*, 80 N.E.3d 164 (Ind. 2017)**
Summary By: Scott P. Fisher

In approximately 2011, INDOT performed construction and repair work on U.S. Route 27 in Union County and allegedly caused septic system damage on three landowners' private property. Union County sought to have INDOT repair the septic systems, but INDOT denied any responsibility to Union County and, in turn, Union County filed suit for declaratory judgment seeking an injunction against INDOT and forcing INDOT to repair the damaged property. INDOT filed a motion to dismiss based upon Union County's lack of standing to sue INDOT for damage to private property. The trial court agreed and dismissed Union County's complaint. The Court of Appeals reversed finding that a declaratory judgment was an appropriate vehicle for resolving the question of responsibility for US 27. The appellate court also determined that Union County could maintain an action for injunctive relief (forcing INDOT to repair the systems) under third party standing doctrines.

The Indiana Supreme Court granted transfer and reversed the appellate court. The general rule of standing holds that "the proper person to invoke the court's power is limited to those who have a personal stake in the outcome of the litigation and who show that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of conduct." The Court found that Union County has no interest in US 27 noting that US 27 is a part of the Federal highway system. INDOT, not Union County, is responsible for US 27's maintenance. Moreover, private property rights extend to the centerline of US 27, and US 27 merely rests upon the public right of way or easement. Thus, only INDOT and the private landowners have an interest in US 27. Since Union County could not suffer a harm from INDOT's conduct, Union County had no standing to bring suit.

Union County also argued it had public standing to force INDOT to redress the damage in that INDOT's actions may impact other properties and may implicate a broader public health and safety concern for Union County. Public standing dispenses with the personal interest standing requirement in cases where public rather than private rights are at issue and in cases which involve the enforcement of a public rather than a private right. However, under public standing, only a member of the public has standing to enforce rights granted to the public. As Union County is not a citizen, it cannot assert public standing.

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6. **Builders Risk Insurance and Soft Cost Coverage:**

***Indianapolis Airport Authority v. Travelers Property Casualty Co. of America*, 849 F.3d 355 (7th Cir. 2017)**
Summary By: Sean T. Devenney

This case arises from the $1 Billion Indianapolis Airport Midfield Terminal project. During the course of construction two shoring towers failed, causing damage to the project and delays in construction. The Airport brought claims against its insurer, Travelers, for "builders risk" type damages. Quotes are placed around "builders risk" because the insurance program in place was a non-standard insurance program with customized terms.

The policy at issue included three categories of coverage that were at issue in the litigation, including builder's risk; soft costs; and expenses to reduce the amount of loss, or ERAL, which paid for certain expenses incurred by the Airport to reduce delay and mitigate soft costs. With regard to the soft cost coverage, the dispute on appeal involved bond interest that accrued during the period of delay. The policy provided that the insurer would pay for bond interest incurred during the period of delay in completion in excess of "budgeted amount". However, the term "budgeted amount" was not defined in the policy. The Court concluded that the Airport's unanticipated drawdown on its capitalized interest account left the Airport with less bond principal to spend on other endeavors. This, the Court concluded, was a soft cost under the policy.

Because of the unique nature of the underwriting process for this policy, the outcome of this case obviously focused on the very specific language in the insurance contracts and how that

language governs the outcome. The case may have narrow application for future cases given the specific analysis of the contract language. With that said, the case is an important reminder to construction professionals charged with procuring insurance on complex projects: the language in the policy matters, and failure to understand what the policy says and how it will cover construction project risks can cost project participants dearly.

NOTE: The newly released American Institute of Architects (AIA) Insurance and Bond Exhibit (a new exhibit to the A101 and A102 Owner/Contractor agreements) includes a menu of optional insurance coverages that a project owner may procure in addition to traditional builder's risk coverage. Among the optional coverages is "soft cost" coverage. So, even though this particular case may have narrow application as precedent for many builder's risk coverage disputes, it may have future application as to interpretation of different types of soft cost damages to the extent that more project owners procure "soft cost" and related coverages as part of these polices.

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7. **Construction Jobsite Injury and General Contractor's Right to Indemnity and Additional Insured Protection from Subcontractor:**

***Wilhelm Construction, Inc. v. Secura Insurance*, 2017 WL 2265402 (Ind. Ct. App. 2017)**
Summary By: William E. Kelley, Jr.

NOTE: This opinion is an unpublished decision from the Indiana Court of Appeals. Under the applicable rules of procedure and appellate law, this opinion does not create binding precedent for future lawsuits. However, the holding is noteworthy because of its unique analysis, and further because the parties have asked the Indiana Supreme Court to grant transfer to review this decision. If the Indiana Supreme Court issues its own opinion, then this could be a case to watch in 2018 as it relates to construction jobsite injuries, indemnity obligations, and additional insured coverage. As a result, we have included discussion of this case in this 2017 summary.

This case involves a jobsite injury to the employee of a sub-subcontractor on a construction project. A co-worker (also employed by the sub-subcontractor) was operating a lull to lift a section of scaffolding on the project site. The injured worker was standing next to the scaffolding being lifted by the lull when the scaffolding toppled over and struck the employee. The injured employee sued the general contractor and the subcontractor for negligence. (Presumably the sub-subcontractor, as employer, was immune from the lawsuit because of Indiana's worker's compensation protections.)

The trial court held that (1) the general contractor had assumed a nondelegable duty for jobsite safety, by virtue of the language in the general contractor's contract with the project owner; and (2) because of this nondelegable duty, the general contractor was vicariously liable for the negligence of its subcontractors. The general contractor apparently did not challenge these holdings on appeal. Instead, the issue on appeal was whether Indiana's Anti-Indemnity

Statute applied to this nondelegable duty for jobsite safety. Indiana Code §26-2-5-1 provides that any provision in a construction or design contract which purports to indemnify the promise against liability for (1) death or bodily injury to persons; (2) injury to property; or (3) design defects; from the sole negligence or willful misconduct of the promise, is against public policy and is void and unenforceable. This statute is referred to as Indiana's Anti-Indemnity Statute.

Here, the general contractor sought indemnity from its sub-subcontractor and its insurance company. The general contractor argued that the accident at issue was not due to the general contractor's negligence, but rather the general contractor was merely vicariously liable for the negligence of its subcontractors and sub-subcontractors. As a result, the general contractor was seeking indemnity from the very entities that were allegedly negligent and purportedly caused the accident at issue. However, the sub-subcontractor's insurance company argued that the demand for indemnity violated Indiana's Anti-Indemnity Statute, since the general contractor had a nondelegable duty for jobsite safety. In other words, the insurance company argued that a "nondelegable duty" means that the general contractor is solely responsible and liable for jobsite safety issues on the project, and that any request for indemnity would be void as it would be seeking indemnity for the general contractor's "sole negligence". The Court of Appeals agreed with the insurance company.

In its analysis, the Court of Appeals looked at the history of Indiana's Anti-Indemnity Statute and concluded that Indiana's General Assembly had inserted broad language "which extends application of the statute to not only the sole negligence of the promise, but also the sole negligence of promisee's agents, servants, and independent contractors who are directly responsible to the promisee." The Court of Appeals then held that the sub-subcontractor was an independent contractor to the general contractor, meaning that the sub-subcontractor fell into the class of entities covered under the Anti-Indemnity Statute. As a result, the Court of Appeals held that the Anti-Indemnity Statute rendered the indemnity clauses void, since the statute disallowed indemnity for both the sole negligence of the promisee and the sole negligence of the promisee's independent contractors. Thus, neither the sub-subcontractor nor its insurance company owed indemnity to the general contractor.

NOTE: A core principle throughout the vast majority of standard construction contract forms is that a general contractor's subcontractors should indemnify the general contractor for damages or injuries caused by the subcontractors' negligence. This indemnity obligation is often covered by insurance in the form of additional insured provisions that name the general contractor, so that the general contractor can seek defense and indemnity directly from the subcontractor's insurer for claims arising from the subcontractor's own negligence. That appears to be the exact situation here, where the accident at issue allegedly occurred when one employee of a sub-subcontractor engaged in acts that caused injury to his co-worker, also an employee of the sub-subcontractor. The general contractor sought indemnity from the sub-subcontractor and the sub-subcontractor's insurance company. The Court of Appeals, though, found that this contracting format was void as a matter of law, even though the general contractor's liability appears from the record to be purely vicarious (i.e., arises solely from the negligence of its subcontractors).

Because the parties are currently seeking review from the Indiana Supreme Court, this is a case to watch in 2018. If the Supreme Court affirms the Court of Appeals, this decision could have far reaching effects on (1) contract language that general contractors will be willing to use as it relates to jobsite safety, so as to avoid being held liable for the negligence of its subcontractors; (2) the scope of coverage provided under an additional insured endorsement, where the coverage arises from the subcontractor's indemnity obligations; and (3) the means and methods used on construction sites as to the administration of jobsite safety obligations.

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8. **Contract Law – When an Agreement is Really an Agreement to Agree:**

***RQAW Corp. v. Dearborn Cty.*, 83 N.E.3d 745, 748 (Ind. Ct. App. 2017)**
Summary By: Thaddeus J. Schurter

RQAW Corporation ("RQAW"), and Dearborn County, Indiana ("County") entered into a professional design services contract ("Contract") wherein RQAW agreed to provide certain architectural design services for the renovation and expansion of the Dearborn County Jail (the "Project"). The Contract consisted of two AIA documents, the B102–2007 Standard Form of Agreement Between Owner and Architect without a Predefined Scope of Architect's Services, and B201-2007 for Design and Construction Contract Administration. The Contract provided that RQAW would complete a Pre-Design Study to evaluate how best to meet the County's current and future needs for a fee of $90,000. Although the Contract included a general scope of the basic services for the anticipated subsequent Project phases, it lacked specific details regarding the exact scope and fee which the parties agreed would be defined at a later time.

After RQAW completed and was paid $90,000 for its Pre-Design Phase work, the subsequent phases were awarded to another design firm. Shortly thereafter, RQAW filed suit against the County for breach of contract and unjust enrichment. Both parties filed competing summary judgment motions on RQAW's breach of contract claim. The Court denied RQAW's motion and granted the County's. RQAW appealed.

RQAW asserted that the County breached the Contract by awarding the post-design phases to another firm and by failing to pay the termination expenses set forth in the Contract's termination for convenience provisions. The County maintained that it had satisfied its obligations to RQAW under the Contract and was not required to pay termination expenses for the post-design phase work because the Contract's termination provisions only applied to the Project's Pre-Design Phase.

The Court of Appeals noted that although the Contract suggested the parties' intent was for RQAW to provide architectural services for all phases of the Project, the Contract only contained specific terms pertaining to the Pre-Design Phase scope of work. Because the Contract lacked essential terms regarding the exact scope of the Project's post-design phase work and further lacked any detail regarding the cost of that work, there was no enforceable contract as to that scope. The Court reasoned that in the absence of such terms, it was impossible to determine whether a future breach of contract occurred, and if so, what damages were

appropriate. The Court concluded if it were to enforce the Contract against the parties as to the subsequent phases, it would create the substantial danger of enforcing something that neither party intended.

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9. **Sexual Orientation Discrimination is Prohibited by Title VII in the Seventh Circuit-(For Now)**:

***Hively v. Ivy Tech Comm. College*, 853 F.3d 339 (7th Cir. 2017) (On rehearing en Banc, reversing 830 F.3d 698)**
Summary By: Melanie M. Dunajeski

This case kicked around the federal system since 2015 before making big news earlier this year on the issue of whether Title VII of the Civil Rights act prohibits discrimination on the basis of sexual orientation. It started in the U.S. District Court for the Northern District of Indiana when an Ivy Tech adjunct professor claimed she was passed over for a position based on her sexual orientation as a lesbian. She filed a claim with the EEOC and eventually brought suit in federal court for discrimination under Title VII based on sexual orientation as a sex discrimination claim. Although the EEOC had assumed the official position by that time that sexual orientation discrimination was covered by Title VII, this was not a position that had been adopted by any of the Circuit Courts of Appeal, and indeed, the position was contrary to established case precedent in the Seventh Circuit.

The case was dismissed by the trial court and appealed to the Seventh Circuit. The original Seventh Circuit panel ruled that Title VII offers no protection from, nor remedies for, sexual orientation discrimination, finding that discrimination based on sex extends only to discrimination based on one's gender, not sexual orientation. The Seventh Circuit had already recognized that gender non-conformity claims are protected as sex discrimination under Title VII but declined to extend protections to sexual orientation. The Claimant moved for rehearing of her appeal by all 11 judges of the court-an "*en banc*" rehearing where the full court reviews the decision of the original three judge panel. After *en banc* rehearing in November 2016, the full Seventh Circuit issued a new opinion, reversing the panel decision and holding Title VII **does** cover sexual orientation as a form of sex-based discrimination. Thus, the Seventh Circuit, which covers Indiana, Illinois and Wisconsin, became the first federal circuit in the nation to rule that sexual orientation discrimination is illegal under Title VII. No appeal was taken from that *en banc* decision.

At the same time, this same issue was working its way through other U.S. Circuit Courts of Appeal. In the Federal Courts of Georgia, claimant Tamika Evans filed suit against her employer Georgia Regional Hospital claiming that she was terminated from her position as a security guard because of her sexual orientation as a lesbian (Evans v. Georgia Regional Hospital). Her case was dismissed by the district court, and that dismissal was affirmed by the U.S. Circuit Court of Appeal for the Eleventh Circuit. From there Ms. Evans (with the support of multiple friends of the court) filed a petition for writ of certiorari to the U.S. Supreme Court, urging the Supreme Court to resolve the split between the Circuits on this issue of law-pointing

to the Seventh Circuit's position in *Hively*. However, her Petition was denied by the Supreme Court on December 11, 2017, leaving the current split among the Circuits intact. The reasons for the Supreme Court's denial of the petition are not clear, but procedural issues may have contributed to that decision, as well as the fact that other, more clear-cut cases are currently working their way through other Federal Circuit Courts of appeal at this time. For example, in Zarda v. Altitude Express, Inc., an *en banc* review of the Second Circuit's decision that Title VII does not prohibit sexual orientation discrimination has garnered considerable attention-including arguments from the Trump Administration Department of Justice that Title VII does not cover sexual orientation- directly in opposition to the EEOC position that it does.

What does this mean for Indiana employers? For the time being, the law in Indiana, Illinois and Wisconsin is clear- it is a violation of Title VII to discriminate against an employee on the basis of that employee's sexual orientation. Employers in Indiana, Illinois and Wisconsin should evaluate their employment policies in light of the Hivley ruling. Illinois and Wisconsin already had state statutory protections in place prohibiting sexual orientation discrimination in the workplace. While Indiana has not adopted sexual orientation discrimination as protected under its state civil rights statute, eighteen Indiana cities, including Anderson, Bloomington, Carmel, Columbus, Evansville, Hammond, Indianapolis, Kokomo, Lafayette, Michigan City, Muncie, Munster, New Albany, South Bend, Terre Haute, Valparaiso, West Lafayette and Zionsville, already prohibit such discrimination.

But stay tuned-it is likely that this issue will find its way to the U.S. Supreme Court in 2018.

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10. **Surety's Liability on Payment Bond for Design Professional's Claim:**

***Aztec Eng'g Group, Inc. v. Liberty Mutual Ins. Co.*, 2017 WL 1382649 (S.D. Ind. April 18, 2017)**
Summary By: Thaddeus J. Schurter

Aztec Engineering Group, Inc., and Tecnica y Proyectos S.A. ("Aztec") entered into an Engineering Services Agreement ("ESA") with Isolux-Corsan ("Isolux") wherein it agreed to provide certain engineering consulting services related to the development, construction, and operations of 21 miles of existing State Route 37 (the "Project"). Under the ESA, Aztec was to submit monthly payment applications together with supporting documentation. In turn, Isolux was required to either approve Aztec's applications or issue a written deficiency notice specifically identifying those items Isolux refused to approve payment for. Although Isolux reserved the right to withhold payment on disputed items, it was nevertheless obligated to issue payment on undisputed items within 60 days of receiving Aztec's payment applications.

Isolux accepted nearly all of Aztec's payment applications, but fully disputed some items and partially disputed others. After Isolux refused to issue payment on $4,678,451.61 of undisputed items, Aztec issued a default notice and ultimately stopped work on the Project. Aztec subsequently sought payment from the Project's four sureties ("Co-Sureties"). The Co-

Sureties claimed that Aztec's design services were not covered by the bond and refused payment. Shortly thereafter, Aztec filed a complaint alleging breach of the payment bond. Aztec and the Co-Sureties each filed cross-motions for summary judgment.

Aztec claimed that its work was covered because the bond expressly incorporated the Project's design build contract ("DBC") and had further characterized the DBC as a contract "*related to the performance of design and construction work*." Aztec also contended that the payment bond itself expressly applied to "all just claims for labor performed . . . for the work under the [DBC], whether said labor be performed . . . under the original [DBC], *any subcontract*, or any and all duly authorized modifications thereto." Finally, Aztec argued there was no design exclusion in the payment bond and that because Isolux was liable to it for non-payment of the undisputed items, the Co-Sureties were obligated to issue payment under the bond.

The Co-Sureties maintained that Aztec's professional design services were not covered by the payment bond and that even if they were, Isolux's payment defenses, offsets and counterclaims against Aztec precluded entry of summary judgment. They also argued that the bond covered only "just claims for labor performed" under the DBC and Aztec's design services were not labor because Indiana does not require payment bond coverage for the design portion of public design-build construction projects, and that there was no payment bond coverage requirement for design-build contractors under the Indiana Code.

Rejecting the Co-Sureties argument that design services were not "labor" for purposes of the bond, the Court found that the Public-Private Agreement between the Project Owner and Developer defined "Construction Work" on the Project as "all *Work* to build or construct, reconstruct, rehabilitate, make, form, manufacturer, furnish, install, integrate, supply, deliver or equip the Project" and that the definition of the term "*Work"* included design, among other things. The Court concluded that the payment bond coverage contracted for in the various Project agreements (including the DBC and payment bond agreement), necessarily included coverage for the design work under the DBC, and its related subcontracts, including the ESA. Accordingly, because it was undisputed that Isolux failed to pay certain undisputed amounts to Aztec as required by the ESA, Aztec was entitled to summary judgment on its payment claim for $4,678,451.61.

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UPDATE #1 – Construction Jobsite Injury and Design/Builder's Liability to Employee of Subcontractor:

***Ryan v. TCI Architects/Engineers/Contractors, Inc.*, 72 N.E.3d 908 (Ind. 2017)**
Summary By: William E. Kelley, Jr.

In DSV's *2016 Year in Review: 10 Indiana Cases of Note*, we highlighted the Indiana Court of Appeals opinion in this same lawsuit. In 2017, the Indiana Supreme Court granted transfer and issued its own opinion, which reversed the Court of Appeals. The lawsuit involves a jobsite injury to the employee of a subcontractor and the scope of a general contractor's liability to that employee. The background facts are as follows:

An employee of a sheet metal sub-subcontractor was injured while working on a construction project. He was removing ductwork hanging above the second-floor decking of the building and fell while standing on the top step of an eight-foot ladder. (There was conflicting evidence as to whether taller ladders were available at the jobsite, but the allegation by the injured employee was that he was given the ladder by his employer and that the ladder was too short.) The injured worker sued the Design/Builder on the project for his injuries.

The Design/Builder's contract with the project owner was in the form of Design Build Institute of American (DBIA) Document No. 535, Standard Form of General Conditions of Contract Between Owner and Design-Builder. In 2016, the Court of Appeals addressed the issue of whether Design/Builder had a legal duty to the injured employee for the purposes of the negligence allegations. The Court recognized that "an employer does not have a duty to supervise the work of an independent contractor to assure a safe workplace", and thus was generally not liable for the negligence of an independent contractor. However, an exception to this rule exists where a party assumes a duty by contract. For example, the Court of Appeals cited to several cases where a general contractor was found to have assumed a duty to a subcontractor's injured employee where the contract language provided that the general contractor would "take precautions for the safety of employees on the work site."

Ultimately, the Court of Appeals found that the Design/Builder's contract was different and distinguishable from other cases were a general contractor assumed a duty for safety through contract. Here, the Design/Builder's contract provided that the Design/Builder would "supervise" the "implementation and monitoring" of safety precautions, but that others (i.e., the downstream subcontractors/employers) would actually be doing the "implementation and monitoring" of safety precautions. As such, the Court held that the Design/Builder did <u>not</u> assume a duty of care toward the sub-subcontractor's injured employee. Therefore, summary judgment was entered in favor of the Design/Builder. There was one dissenting opinion.

In 2017, the Indiana Supreme Court granted transfer, and it reversed the Court of Appeals. The Supreme Court disagreed with the Court of Appeals approach of trying to compare the DBIA contract language with prior cases (involving different contracts and different contract forms) in an effort to determine whether the Design/Builder had assumed a duty for jobsite safety. Instead, the Supreme Court held that courts should interpret contract language on a case-by-case basis, using prior case law as a guide rather than binding precedent.

The Supreme Court proceeded to analyze the language in the DBIA contract document, and it held that the Design/Builder assumed a duty to the subcontractor's employee by agreeing to be responsible for jobsite safety. In support of that holding, the Supreme Court cited to the following contract provisions:

- Section 2.8.1 provided that the Design/Builder "recognizes the importance of performing the Work in a safe manner so as to prevent damage, injury or loss to … all individuals at the Site, whether working or visiting…"

- The contract also directed the Design/Builder to "assume…responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work."
- The contract provided that the Design/Builder was to "designate a Safety Representative with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the Work", and that the Safety Representative would "make routine daily inspections of the Site and … hold weekly safety meetings with [Design/Builder's] personnel, Subcontractors and others as applicable."
- Finally, the contract provided that Design/Builder and its subcontractors "shall comply with all Legal Requirements relating to safety."

The Supreme Court held that the contract language—taken as a whole—made clear that the Design/Builder "intended to assume the duty of keeping the worksite reasonably safe." As a result, the Supreme Court's holding means that the Design/Builder assumed a duty of care toward the subcontractor's employee, through the Design/Builder's contract with the project owner. The case was sent back to the trial court, where the trier of fact (either the judge or the jury) would determine at trial whether the Design/Builder breached its duty or met its standard of care as to jobsite safety.

NOTES: Pursuant to Indiana's worker's compensation statutory provisions, the injured worker's employer presumably was immune from the lawsuit, and thus was not a party to the lawsuit. It is not clear from the court's opinion whether the Design/Builder was an additional insured on the subcontractor/employer's general liability insurance policy. In addition, the Supreme Court's opinion—similar to the Court of Appeals opinion—refers to the Design/Builder as the "general contractor". The Supreme Court did note, however, that under the design/build project delivery method, a single entity assumes responsibility for both the design and construction of a project. Presumably the Design/Builder's design responsibilities were not at issue, meaning that only the construction activities typical of a "general contractor" were relevant. Thus, while it would be more accurate to refer to the "design/builder" throughout, the courts' reference to a "general contractor" does not appear to affect the ultimate analysis and holding.

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UPDATE #2 – <u>Personal Injury, Loss of Income, and Immigration Status</u>:

***Escamilla v. Shiel Sexton Co., Inc.*, 73 N.E.3d 663 (Ind. 2017)**
Summary By: Scott P. Fisher

Noe Escamilla, an undocumented worker from Mexico employed by subcontractor, Masonry by Mohler, Inc., injured himself while working at a construction project site. He sued the project's general contractor, Shiel Sexton, seeking medical expenses, lost wages, and future lost income. Prior to trial, Shiel Sexton filed a *motion in limine* seeking to exclude expert witnesses that Escamilla planned to call to discuss earning capacity, because those experts would testify only about Escamilla's income made in the United States. Shiel Sexton contended

Escamilla's earning capacity should be limited to income earned in Mexico, his country of origin. Escamilla also filed a *motion in limine* to exclude evidence that Escamilla was an undocumented worker arguing in support of the motion that such evidence would prejudice Escamilla. The trial court granted Shiel Sexton's motion barring testimony from Escamilla's experts because they had not considered what his earnings might be in Mexico. The trial court denied Escamilla's motion, finding that his immigration status was relevant to the issue of his claim for future income.

On transfer from the Court of Appeals, the Indiana Supreme Court ruled that while the evidence of Escamilla's unauthorized immigration status was relevant, Escamilla's status was inadmissible unless Shiel Sexton could prove that is was more likely than not, a preponderance of the evidence standard, that Escamilla would be deported. Shiel Sexton argued that his immigration status is relevant because it affects Escamilla's chances of deportation and ability to work in the United States over the course of his career. While the Court noted that even though Escamilla's unauthorized immigration status was relevant to his decreased earning capacity, the dangers of confusion and unfair prejudice make it inadmissible unless Shiel Sexton could prove Escamilla would likely be deported. Introducing his immigration status would be prejudicial because immigration policy is constantly shifting, and Escamilla could be granted lawful status in the future.

The Court further ruled that exclusion of Escamilla's expert testimony on the issue of decreased earning capacity was an abuse of discretion, even though Escamilla's experts failed to take into account Escamilla's immigration status. The experts' failure to account for his immigration status went to the weight of the experts' testimony but not to its admissibility. The standard of admissibility under Rule 702 of the Indiana Rules of Evidence is whether an expert's testimony "will help the trier of fact to understand the evidence or to determine a fact in issue." The Court noted that "this standard is a liberal one; that evidence need not be conclusive to be admissible." Because the experts' testimony would help the trier of fact determine Escamilla's decreased earning capacity, even though that testimony did not account for his immigration status, it was an abuse of discretion to exclude it.

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