SEARCHING FOR ROAD SIGNS ON INDIANA'S SCOPE OF EMPLOYMENT HIGHWAY

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I. Introduction

To the uninitiated, Indiana's interpretation of respondeat superior, vicarious liability, and the scope of employment doctrine can seem both overwhelming and random. Many Indiana courts seem to treat these three doctrines as interchangeable—an error which leads to no small amount of confusion in later cases building on this precarious foundation. Too often, these cases wrestle with seemingly conflicting precedents before finally resting on the dicta and inapplicable quotations most convenient for the desired result. Indeed, Indiana courts cannot even agree on the authorities undergirding these doctrines; some decisions rely on different versions of the *Restatement of Agency* while others seem to craft a standard unique to Indiana. Because of this, it is nearly impossible to apply Indiana's scope of employment analysis correctly without an understanding of the underlying case law history.

This article reviews more than forty of the most frequently cited cases on scope of employment decided by Indiana courts over the past thirty years (plus a few historical decisions dating back to the early 1900s). In so doing, this article synthesizes those decisions into five distinct "road signs" to help guide unwary travelers and, at the same time, debunk certain persistent misconceptions.

In Part II, this article establishes the current framework for examination of scope of employment issues under Indiana common law. Part III debunks three persistent misconceptions surrounding the scope of employment inquiry so as to clarify the proper mode of analysis. Part IV reviews several decades of respondeat superior case law, separating these cases into five distinct categories for ease of comparison. Finally, Part V synthesizes the common-law history into a workable five-point framework for use in future applications of the scope of employment analysis.

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II. SCOPE OF EMPLOYMENT: THE BASICS

Vicarious liability is "indirect legal responsibility."[1] It is a legal fiction by which a court can hold a party legally responsible for the negligence of another because of the party's relationship to the wrongdoer.[2] Courts employ various legal doctrines to hold people vicariously liable including respondeat superior, apparent or ostensible agency, agency by estoppel, and the nondelegable duty doctrine.[3] Some of these doctrines are based in tort law; others are based in agency law.

When a litigant seeks to impose liability against an employer for the wrongdoing of the employee, respondeat superior is the applicable tort theory of vicarious liability. Under respondeat superior (meaning "let the master answer"[4]), an employer who is not liable because of his own acts can be held liable to a third party "for the wrongful acts of his employee which are committed within the scope of employment."[5] Although there is some disagreement as to its origin,[6] it generally is agreed that the doctrine is based on a policy decision that the employer (rather than the employee or the injured party) is in the best position to bear certain losses, to allocate risks through the purchase of insurance,[7] and "to exercise some precautionary impetus to [its] employee's work habits and thereby induce accident avoidance."[8] As such, respondeat superior is in essence a doctrine of strict liability in that it renders the employer liable "regardless of what he knew or should have known or did or should have done . . . ."[9] Thus, even if an employee engages in forbidden conduct or commits gross negligence, the

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1 BLACK'S LAW DICTIONARY 1404 (5th ed. 1979).

2 Sword v. NKC Hosps., Inc., 714 N.E.2d 142, 148 (Ind. 1999).

3 *Id.*

4 BLACK'S LAW DICTIONARY 1311-1312 (6th ed. 1990).

5 Stropes v. Heritage House Childrens Ctr., 547 N.E.2d 244, 247 (Ind. 1989). *See also* Helfrich v. Williams, 84 Ind. 553, 554-55 (1882). *See also* W. PROSSER & J. KEETON, PROSSER AND KEETON ON TORTS §§ 69-70 (5th ed. 1984); WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 83 (1964).

6 Although some commentators have traced respondeat superior to ancient Roman law, *see* 5 HARPER, ET AL., THE LAW OF TORTS § 26.2 at 8-10 (2d ed. 1986); Holmes, *Agency*, 4 HARV. L. REV. 345 (1891), others have suggested that respondeat superior has Germanic origins. *See* Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 388 (1894).

For a thorough review of the doctrine's historical evolution, see Christine W. Young, *Respondeat Superior: A Clarification and Broadening of the Current "Scope of Employment" Test*, 30 SANTA CLARA L. REV. 599, 636 (1990).

7 PROSSER, *supra* note 5, § 69 at 459 ("The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business.").

8 Cummings v. Hoosier Marine Props., Inc., 173 Ind. App. 372, 363 N.E.2d 1266, 1272 (1977).

9 Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990). *See also* IND. LAW ENCYCLOPEDIA § 124 at 191 (West 2009).

employer remains accountable under respondeat superior as long as the employee acts within the scope of his employment.[10]

The question then becomes: when is an employee's act committed within the scope of employment?[11] Unfortunately, there can be no easy answer to that question because scope of employment is an indefinite concept. According to Professor Prosser, it is "devoid of meaning in itself" and is "obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not."[12] Thus, there is no precise definition of the concept because the parameters depend on the facts of each case.

Indiana's own efforts to define scope of employment have evolved over the past century. Indiana spent much of the twentieth century applying a three-pronged disjunctive standard to determine whether conduct occurred within the scope of employment:

> Prior cases have held the conduct of a servant to be within the scope of his employment where the conduct was actuated to an appreciable extent by the purpose to serve the master, Great American Tea Co., *supra*; where the conduct was performed substantially within the authorized time, Vincennes Packing Corp. v. Trosper (1939), 108 Ind. App. 7, 23 N.E.2d 624 (transfer denied); or where the work is the kind the servant is employed to perform, Biel, Inc. v. Kirsch (1958), 240 Ind. 69, 161 N.E.2d 617.[13]

As more Indiana cases began to examine respondeat superior, however, the "performed substantially within the authorized time" prong became subsumed within the broader examination of the servant's actual job duties. Consequently, by the latter part of the century, the Indiana Supreme Court had settled on a two-pronged "either/or" standard. As explained in *Warner Trucking, Inc. v. Carolina Casualty Insurance Co.*,[14]

> an employee's wrongful act may fall within the scope of his employment if his purpose was, to an appreciable extent, to further

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[10] IND. LAW ENCYCLOPEDIA § 124 at 191 (West 2009) (citing Underwood v. Gale Tschuor Co., Inc., 799 N.E.2d 1122 (Ind. Ct. App. 2003)).

[11] Needless to say, any analysis of scope of employment presupposes the existence of an employment relationship between the employer and the person committing the tortious act. PROSSER, *supra* note 5, § 71 at 470; Kahrs v. Conley, 729 N.E.2d 191, 194 (Ind. Ct. App. 2000). The considerations governing the existence of an employer-employee relationship far exceed the scope of this article. *See generally* IND. LAW ENCYCLOPEDIA § 125 at 191-92 (West 2009).

[12] J.T. Griffith, *Respondeat Superior and the Intentional Tort: A Short Discourse on How to Make Assault and Battery a Part of the Job*, 45 U. CIN. L. REV. 235, 236 (1976) (citing PROSSER, *supra* note 5, § 70 at 460-61).

[13] Gibbs v. Miller, 152 Ind. App. 326, 283 N.E.2d 592, 595 (1972).

[14] 686 N.E.2d 102, 105 (Ind. 1997) (internal quotations omitted).

> his employer's business, even if the act was predominantly motivated by an intention to benefit the employee himself or if the employee's act originated in activities so closely associated with the employment relationship as to fall within its scope.

When parsed, the either/or standard assigns liability via respondeat superior where (1) the employee's purpose was "to an appreciable extent" to further his employer's business or (2) the employee's act originated in activities closely associated with the employment.

After a subtle yet significant evolution in recent years,[15] the either/or standard now dictates that in order for an employee's act to fall within the scope of employment, the injurious act

> (1) must be incidental to the conduct authorized; or
> (2) must, to an appreciable extent, further the employer's business.[16]

Thus, a litigant seeking to impose vicarious liability on a tort-feasor's employer has two avenues from which to choose, and a failure of proof under one prong does not prevent the possibility of success under the remaining prong.

III. CORRECTING THE MISCONCEPTIONS

Though seemingly simple, this two-pronged standard has generated no small amount of confusion from intermediate appellate courts. This confusion stems from three interrelated misconceptions that, once corrected, make the scope of employment inquiry much easier to understand and apply:

> (a) the foregoing standard is *not* the same as that outlined in the second *Restatement of Agency*;
> (b) though the question of whether conduct is "incidental" to employment or "originated in activities closely associated with the employment" always has involved a purely objective assessment, the "further the employer's business" prong was once (but is no longer) an inquiry into the tort-feasor's subjective intent; and
> (c) negligent and intentional torts are treated identically under the foregoing standard such that intentional torts no longer trigger more stringent scrutiny.

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[15] *See infra* § III.B.

[16] Barnett v. Clark, 889 N.E.2d 281, 283-84 (Ind. 2008) (citing Celebration Fireworks, Inc. v. Smith, 727 N.E.2d 450, 453 (Ind. 2000); Kemezy v. Peters, 622 N.E.2d 1296, 1298 (Ind. 1993); Hurlow v. Managing Partners, Inc., 755 N.E.2d 1158, 1162 (Ind. Ct. App. 2001), *trans. denied*).

Only by understanding these distinctions can one make sense of the myriad precedents bearing on the scope of employment inquiry.

A. INDIANA'S STANDARD VERSUS THE SECOND RESTATEMENT OF AGENCY

Though many Indiana cases on respondeat superior decided before 2006 cite the second *Restatement of Agency* en route to their respective results,[17] in reality the second *Restatement*'s standard differs in one critical respect from that developed in Indiana: the second *Restatement*'s standard is presented in the conjunctive whereas Indiana's standard applies the disjunctive.

The second *Restatement of Agency* provides:

> Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master; and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.[18]

Note that by presenting this standard in the conjunctive, § 228(1) requires a plaintiff to meet all of these requirements before respondeat superior will apply. Thus, litigants operating under § 228(1) must satisfy both an objective inquiry (*i.e.*, showing the kind of work the employee typically performs as well as showing that the wrongful act occurred at-work during work hours) *and* a subjective inquiry (*i.e.*, examining the employee's motivation in performing the wrongful act vis-a-vis whether the act furthered the employer's interests).

Indiana's two-prong standard, however, is presented in the disjunctive; in other words, an Indiana plaintiff need proceed down *either* the "incidental/closely associated" path (*i.e.*, show that the employee's conduct is "incidental" to her employment or that it "originated in activities closely associated with the employment") *or* the "further the employer's business" path (*i.e.*, show that the employee furthered her employer's interests to an appreciable extent). Indeed, although the court of appeals has been less rigorous in its adherence to the disjunctive standard than has the supreme court, Indi-

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[17] *See, e.g., Celebration Fireworks*, 727 N.E.2d at 453 (quoting RESTATEMENT (SECOND) OF AGENCY § 229 & cmt. b (1958)); *Sword*, 714 N.E.2d at 148; Jacobs v. City of Columbus, 454 N.E.2d 1253, 1261 (Ind. Ct. App. 1983); Gibbs v. Miller, 152 Ind. App. 326, 283 N.E.2d 592, 595 (1972).

[18] RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958).

ana courts have cleaved to the disjunctive standard in almost all pronouncements on respondeat superior over the past fifteen years.[19]

With the 2006 issuance of the third *Restatement of Agency*, the authors of the *Restatement* implicitly confirmed that Indiana's approach to respondeat superior has become the mainstream view. Quoted by the supreme court in *Barnett v. Clark*,[20] the third *Restatement of Agency* provides:

> Employee Acting Within Scope of Employment.
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> (1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.
> (2) An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.[21]

This more recent explication of scope of employment accomplishes three things, all of which expand the reach of respondeat superior.

First, the second sentence of subsection (2) makes clear that to be excluded from scope of employment, the wrongful act must be part of an "independent course of conduct" (*i.e.*, not originating in activities associated with

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[19] *See, e.g., Barnett*, 889 N.E.2d at 283-84; *Warner Trucking*, 686 N.E.2d at 105. *See also* Gregg v. Cooper, 812 N.E.2d 210, 216 (Ind. Ct. App. 2004) ("[N]o evidence was designated to demonstrate that Gregg was acting within the scope of his employment with Simpson *or* acting to further Simpson's business at the time of the accident."); *Hurlow*, 755 N.E.2d at 1162 ("In sum, an employer is liable under respondeat superior: 1) if an employee's act furthered the employer's business interest to an appreciable extent, or 2) if an employee's authorized acts and unauthorized acts are so closely associated that the employee can be said to have acted within the scope of his employment.").

However, in a baffling passage, the Indiana Supreme Court in *Celebration Fireworks* seems to attempt a reconciliation between the second *Restatement*'s standard and Indiana's transition to a disjunctive standard. Assessing whether a fire chief's defamatory statements were made within the scope of employment for purposes of Tort Claims Act immunity, *Celebration Fireworks* begins its analysis with two quotes from the second *Restatement of Agency*, follows those with an Indiana citation referencing the subjective motivation requirement, and then closes with a U.S. Supreme Court case quoting the second *Restatement of Agency*'s conjunctive standard. 727 N.E.2d at 453 (quoting RESTATEMENT (SECOND) OF AGENCY § 229 (1958); *Kemezy*, 622 N.E.2d 1296; Faragher v. City of Boca Raton, 524 U.S. 775, 793 (1998)). Then, concluding that the fire chief's statements satisfied the "conduct of a kind a servant is employed to perform" and the "substantially within the authorized time and space limits" of the second *Restatement*'s standard, the *Celebration Fireworks* court proceeds to *equate* the inquiry into whether the statements were "incidental to the conduct authorized" with whether the fire chief intended "to an appreciable extent to further his employer's business." *Id.* Although inartful, this reformulation of the scope of employment inquiry has the net effect of creating a disjunctive standard whereby *either* evidence that the wrongful act was "incidental to the conduct authorized" *or* evidence that the tort feasor was motivated "to an appreciable extent to further his employer's business" is sufficient to trigger respondeat superior.

[20] 889 N.E.2d at 284.

[21] RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006).

the employment) *and* the employee does not intend to serve any purpose of the employer. In other words, by phrasing the limitation in this way, the authors of the third *Restatement* make clear that the employer must meet both standards to escape liability; conversely, the plaintiff will succeed by meeting *either* standard.

Second, as explained in comment *b*, the revised formulation expands liability by eliminating the "occurs substantially within the authorized time and space limits" language, thereby increasing its scope to include those "employees in contemporary workforces [who] interact on an employer's behalf with third parties although the employee is neither situated on the employer's premises nor continuously or exclusively engaged in performing assigned work."

Third, as explained in comment *b*, the second *Restatement* invited confusion by creating the possibility of certain acts being motivated by some purpose to serve the employer yet still being "too little actuated" to be within the scope of employment. The third *Restatement* eliminates this problem by eliminating the "actuated, at least in part" requirement.

By clarifying the correct application of the scope of employment analysis and, moreover, confirming that Indiana has been correct in its use of a disjunctive standard for the past fifteen years, the third *Restatement* clears the murky waters surrounding respondeat superior. As such, it becomes much easier to understand many of the precedents surrounding these issues.

B. THE EROSION OF SUBJECTIVE INTENT

In its nascent state, the scope of employment inquiry invoked a subjective inquiry into the tort-feasor's motivation by examining whether the wrongful act was "actuated, at least in part, by a purpose to serve the master . . . ."[22] In the decades surrounding the second *Restatement of Agency*, Indiana cleaved to this subjective requirement with multiple Indiana cases declaring that an act was outside the scope of employment if done without the intent to perform the act as part of or incident to the tort-feasor's employment.[23] Although Indiana courts allowed themselves an out (presumably to avoid creating wholesale respondeat superior immunity for intentional torts) by allowing the possibility of multiple motivations,[24] it remained a necessary condition for respondeat superior liability that the employee's purpose "to an appreciable extent" in committing the wrongful act was to

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22 RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958).

23 *See, e.g.*, Gomez v. Adams, 462 N.E.2d 212, 223 (Ind. Ct. App. 2004); Wells v. Northern Indiana Pub. Serv. Co., 111 Ind. App. 166, 168, 40 N.E.2d 1012 (1942).

24 *See, e.g.*, *Stropes*, 547 N.E.2d at 247; *Gomez*, 462 N.E.2d at 223 ("[E]ven though the employee's predominant motive in performing the act is to benefit himself, the act may still fall within the "scope of employment" if the employee's purpose, to an appreciable extent, was also to further his master's business."); Konkle v. Henson, 672 N.E.2d 450, 456-57 (Ind. Ct. App. 1996); Roberson v. Bethlehem Steel Corp., 912 F.2d 184, 186 (7th Cir. 1990) (citing *Gomez*).

further his employer's business.[25] To that end, an employee's subjective motivation alone could be sufficient to trump other objective indicia when assessing whether a tort occurred within the scope of employment.[26]

In 1989 and again in 2008, however, the Indiana Supreme Court signaled significant shifts in how subjective motivation should factor into the scope of employment analysis. As the law stands currently, it is no longer certain that a tort-feasor's subjective intent should play any role at all in determining whether respondeat superior should apply in a given case.

1. From Necessary to Sufficient Condition

The Indiana Supreme Court first signaled its dissatisfaction with using subjective intent as a necessary condition to respondeat superior in 1989. In *Stropes by Taylor v. Heritage House Children's Center of Shelbyville, Inc.*,[27] the supreme court considered whether a sexual assault by a nursing facility caregiver against a patient could fall within the caregiver's scope of employment. Acknowledging that the sexual assault was committed for the caregiver's own gratification,[28] the *Stropes* court wrestled with the importance to be given to the tort-feasor's subjective intent. Noting that "other courts have recognized that the resolution of the question [whether a criminal act could fall within the scope of one's employment] does not turn on the type of act committed or on the perpetrator's emotional baggage,"[29] the *Stropes* court looked to a Minnesota Supreme Court decision that concluded "the employee's motivation should not be a consideration at all in determining the imposition of liability" and that "it is both unrealistic and artificial to determine at which point the [acts] leave the sphere of the employer's business and become motivated by personal animosity—or . . . an improper, personal benefit."[30] Rather than expressly adopt the Minnesota view, however, the *Stropes* court concluded that determinations of a tort-feasor's subjective motivation (and, therefore, whether an act was committed within the scope of employment) should be left to the jury.[31]

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[25] *Gibbs*, 283 N.E.2d at 595. *See also* Vincennes Packing Corp. v. Trosper, 108 Ind. App. 7, 23 N.E.2d 624 (1939); Great American Tea Co. v. Van Buren, 218 Ind. 462, 33 N.E.2d 580 (1941).

[26] *See, e.g.*, Boyle v. Anderson Fire Fighters Ass'n., 497 N.E.2d 1073, 1078 (Ind. Ct. App. 1986) ("Here, the Strikers were acting strictly on their own behalf. Their action were motivated by self-interest . . . ."); Reinhart v. Ideal Pure Milk Co., Inc., 135 Ind. App. 338, 347, 193 N.E.2d 655 (1963) ("Under the Indiana holdings, as we interpret them, the fact that Hudson intended to and did return to his work for appellee after his departure therefrom, is insufficient, of itself, when considered in the light of the evidence as to the cause, purpose and reason for his original turning aside from his work . . . .").

[27] 547 N.E.2d 244.

[28] *Id.* at 249.

[29] *Id.*

[30] *Id.* (quoting Marston v. Minneapolis Clinic of Psychiatry, 329 N.W.2d 306, 311 (Minn. 1982)) (internal quotations omitted) (alterations in original).

[31] *Id.* at 250.

Following *Stropes*, the supreme court continued to quote the subjective requirement as a necessary *condition to respondeat superior* while at the same time emphasizing the factual nature of the determination.[32] Yet in 1997, the supreme court—with an innocuous sleight of hand—transformed the subjective requirement from a *necessary* condition to a *sufficient* condition. As explained by the court in *Warner Trucking, Inc. v. Carolina Casualty Insurance Co.*:

> Acts done "on the employee's own initiative, with no intention to perform it as part of or incident to the service for which he is employed" are not "in the service of the employer" and are thus outside the scope of employment. However, an employee's wrongful act may still fall within the scope of his employment if "his purpose was, to an appreciable extent, to further his employer's business, even if the act was predominantly motivated by an intention to benefit the employee himself" *or* if the employee's act "originated in activities so closely associated with the employment relationship as to fall within its scope."[33]

Note the two things accomplished by this passage: (1) by using the word *or* instead of *and* in the latter sentence, the *Warner Trucking* court replaced decades of respondeat superior jurisprudence with a heretofore unknown disjunctive standard; and (2) the court relegated the subjective inquiry to just one prong of the two-pronged standard, thereby opening the door to acts being within the scope of employment irrespective of the tort-feasor's subjective intent. From this, the *Warner Trucking* court affirmed the trial court's denial of summary judgment to the defendant trucking company by looking solely to "the relationship of the driver's activities to the business of Warner Trucking" without any mention of the truck driver's testimony or subjective motivation.[34]

2. From a Subjective Standard to an Objective Standard

Had Indiana courts stopped there, subjective intent would have remained an important consideration in the scope of employment analysis; although no longer necessary, the tort-feasor's subjective motivation in committing a wrongful act would still serve as a condition sufficient to trigger respondeat superior. But between 2001 and 2008, a series of court decisions combined to (arguably) eradicate subjective intent entirely from the scope of employment inquiry.

In 2001, imprecise analysis by the Indiana Court of Appeals upended the decades of precedent that previously had imbued the tort-feasor's subjective

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[32] *Kemezy*, 622 N.E.2d at 1298; *Warner Trucking*, 686 N.E.2d at 105.

[33] 686 N.E.2d at 105 (citing *Stropes*, 547 N.E.2d at 247) (internal citations omitted) (emphasis added).

[34] *Id.*

intent with significance. Attempting to summarize the state of the law in Indiana, the court of appeals in *Hurlow v. Managing Partners, Inc.*[35] began its analysis with a direct quote of the subjective requirement.[36] After reciting the law surrounding the objective prong followed by brief descriptions of two prior holdings,[37] the *Hurlow* decision summarized the scope of employment inquiry thus:

> In sum, an employer is liable under respondeat superior: 1) if an employee's act furthered the employer's business interest to an appreciable extent, or 2) if an employee's authorized acts and unauthorized acts are so closely associated that the employee can be said to have acted within the scope of his employment.[38]

Note that in so doing, *Hurlow* transmuted the subjective examination of the employee's motivation into a purely objective assessment of whether the wrongful act *actually* furthered the employer's business interest. Moreover, under this revised standard, the clause "to an appreciable extent" no longer modified the employee's subjective motivation but, rather, imposed a further limitation on the reach of that particular prong, that is, an act that furthers the employer's business interest might still fail this prong if the extent of the furtherance is insufficiently "appreciable."

Although a single mischaracterization by the court of appeals typically would not carry significant precedential weight, it took little time for Indiana courts to compound *Hurlow*'s error. Although it attempted to self-correct a mere eleven months after issuing its opinion in *Hurlow*,[39] the court of appeals in 2006 repeated its apparent abandonment of any subjective component to the scope of employment analysis.[40] Then, in 2008, the Indiana Supreme Court (citing *Hurlow*) seemed to confirm that for an employee's act to fall within the scope of employment, the injurious act (1) must be incidental to the conduct authorized or (2) must, to an appreciable extent, further the employer's business.[41] Yet further confusing the issue, in its application of facts to this standard, the supreme court explicitly found that

> acts of confining, sexually touching, and raping the plaintiff were not an extension of authorized physical contact. Such acts were

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[35] 755 N.E.2d 1158.

[36] *Id.* at 1162.

[37] *Id.* at 1162-63.

[38] *Id.* at 1163.

[39] *See* Miller v. City of Anderson, 777 N.E.2d 1100, 1105 n.1 (Ind. Ct. App. 2002) (citing *Hurlow* for proposition that employee's purpose could trigger vicarious liability).

[40] *See* Board of Sch. Com'rs v. Pettigrew, 851 N.E.2d 326, 333 (Ind. Ct. App. 2006) (citing *Hurlow*, "respondeat superior liability turns on whether an employee's act furthered the employer's business interest to an appreciable extent . . . .").

[41] *Barnett*, 889 N.E.2d at 283-84.

> not incidental to nor sufficiently associated with the deputy trustee's authorized duties. They did not further his employer's business. *And they were not motivated to any extent by his employer's interests.*[42]

In light of these decisions, the current state of the scope of employment inquiry in Indiana stands on uncertain ground. With the supreme court's apparent complicity in redefining the "further the employer's business" prong, the current Indiana litigant must now be wary of precedents that rely on subjective considerations. Some Indiana cases no longer reference subjective motivation at all when discussing scope of employment.[43] Once deemed a necessary examination, it is now uncertain whether a tort-feasor's subjective intent, purpose, or motivation will carry any weight at all under the current state of Indiana law.[44]

C. INTENTIONAL TORTS DO NOT ENJOY SPECIAL STATUS UNDER THE INDIANA STANDARD

Although it is well-settled that an employer is liable for intentional torts as well as negligent torts committed within the scope of employment,[45] it has been more difficult to establish such liability in the former category.[46] For those jurisdictions following the second *Restatement of Agency*'s view,[47] the imposition of a foreseeability requirement has made it exceedingly difficult for plaintiffs to show that an intentional, willful, or even criminal act

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[42] *Id.* at 286 (emphasis added).

[43] *See, e.g.*, Smith v. Indiana Dep't. of Correction, 871 N.E.2d 975, 986 (Ind. Ct. App. 2007) ("When the employee's conduct is 'of the same general nature as that authorized, or incidental to the conduct authorized,' it is 'within the scope of employment.'") (citing *Celebration Fireworks*, 727 N.E.2d at 452).

[44] *See, e.g.*, Sandage v. Board of Com'rs of Vanderburgh County, LLC, 897 N.E.2d 507, 509 (Ind. Ct. App. 2008) ("In light of the designated evidence, we cannot say that Moore's actions . . . were in furtherance of the business or interests of Porter's Parking"). *See also* Galluzzo v. Hosley Int'l, Inc., 2:11-CV-429-TLS (N.D. Ind., Aug. 17, 2012) ("No party has argued that Defendant Gibertini's conduct appreciably furthered Defendant Hosley's business"). *But see* Hansen v. Board of Trustees of Hamilton Southeastern Sch. Corp., 551 F.3d 599, 614 (7th Cir. 2008) ("His conduct did nothing to further HSSC's business, nor were those acts motivated by the school district's interests. Instead, his conduct was motivated by his own personal desire to engage in a sexual relationship.").

[45] *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 26.9 at 1389-90 (1956); W. PROSSER, THE LAW OF TORTS § 70 at 464 (4th ed. 1971).

[46] F. MECHEM, OUTLINES OF THE LAW OF AGENCY § 394 at 266 (4th ed. 1952). Indeed, the disparate treatment of intentional torts in the scope of employment inquiry dates back to the earliest American pronouncements on respondeat superior. *See* Wright v. Wilcox, 19 Wend. 343, 345-46 (N.Y. Sup. Ct. 1838) (holding that master was not liable for the willful tortious conduct of his servant absent express assent, and "the law will not imply assent"; rejecting the traditional justification of risk allocation away from the innocent, injured third-party plaintiff, declaring that such an argument proves too much and would result in holding "the master accountable for every mischievous act of the servant.").

[47] "A master is subject to liability for the intended tortious harm by a servant to the person or things of another by an act done in connection with the servant's employment, although the act was unauthorized, if the act was not unexpectable in view of the duties of the servant." RESTATEMENT (SECOND) OF AGENCY § 245 (1957).

could have been foreseen by the employer; for those jurisdictions conditioning respondeat superior on the employee's subjective motivation, the disconnect between an intent to serve the employer versus the intent to serve oneself frequently justifies absolving the employer.[48]

With neither of these considerations weighing down Indiana litigants, however, Indiana courts have been pellucid in stating that the scope of employment inquiry does not turn on the type of act committed.[49] In Indiana, intentional criminal acts may fall within the scope of employment if the criminal acts originated in activities closely associated with the employment relationship.[50] Thus, Indiana courts have held that sexual assaults[51] and acts of criminal conversion[52] might fall within the wrongdoer's scope of employment. Likewise, willful, wanton, or malicious misconduct might fall within the scope of employment.[53] As with acts grounded in mere negligence, the inquiry turns on the degree of association between the employee's authorized actions and his unauthorized acts.[54] No Indiana state case published within the past fifty years has applied a different standard or mode of analysis to claims of respondeat superior arising out of intentional or criminal conduct.

Nevertheless, this clarity has not stopped federal courts[55] from attempting to cloud the inquiry by imposing an additional requirement on respondeat superior claims arising out of intentional conduct. Beginning with *Tippecanoe Beverages, Inc. v. S.A. El Aguila Brewing Co.*,[56] the Seventh Circuit Court of Appeals observed that

> ordinarily the employer is liable for damages (whether actual or punitive) from an employee's *intentional* tort, such as conversion, only if the employee was acting not only within the scope of his employment but in furtherance of it—that is, only if the tort was intended, however misguidedly, to promote the employer's busi-

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48 Griffith, *supra* note 11, at 236-37 ("This is so because it is easier for courts to find either that the employee was not acting with a purpose to serve the employer or that the employee's act was not foreseeable and thus to conclude than an intentionally tortious act is outside the scope of employment.").

49 *Konkle*, 672 N.E.2d at 457 (citing *Stropes*, 547 N.E.2d at 249).

50 *Kemezy*, 622 N.E.2d at 1298 (quoting *Gomez*, 462 N.E.2d 212).

51 *Stropes*, 547 N.E.2d at 248-50.

52 *Gomez*, 462 N.E.2d at 225.

53 *Kemezy*, 622 N.E.2d at 1298 (citing Indiana Dep't. of Correction v. Stagg, 556 N.E.2d 1338, 1343 (Ind. Ct. App. 1990). *See also* IND. LAW ENCYCLOPEDIA § 130 at 201 n.1 (West 2009) (citing Pittsburgh, C., C. & St. L. Ry. Co. v. Sullivan, 141 Ind. 83, 40 N.E. 138 (1895); Mock v. Polley, 116 Ind. App. 580, 66 N.E.2d 78 (1946)).

54 *Stropes*, 547 N.E.2d at 250; *Konkle*, 672 N.E.2d at 457.

55 In fairness, commentators examining Indiana state court precedent have contributed to this misconception, as well. *See, e.g.,* IND. LAW ENCYCLOPEDIA § 130 at 201-202 (West 2009) (creating separate section and analysis for "Scope of employment — Intentional torts and criminal acts").

56 833 F.2d 633 (7th Cir. 1987).

> ness, as where an overzealous employee beats up someone who owes his employer money, in an effort to collect it.[57]

Thus, the *Tippecanoe Beverages* court appears to separate the question of whether an act is committed within the scope of employment from whether an act is intended to further the employer's business. Nevertheless, *Tippecanoe Beverages* affirmed a jury verdict in favor of the plaintiff against the tort-feasor's employer based on the employee's criminal conversion of a cashier's check. Finding that a reasonable jury could conclude that the employee had acted to further "to an appreciable extent . . . his master's business," Judge Posner observed: "whatever [El Aguila's employee] had in

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[57] *Id.* at 638 (emphasis in original). *Tippecanoe Beverage* draws from three different authorities as support for this limitation (*i.e.*, that vicarious liability for intentional torts requires proof that the employee intended to further his employer's business). Yet none of the cited authorities actually creates said limitation.

First, *Tippecanoe Beverage* cites to *Lancaster v. Norfolk & Western Railway Co.*, 773 F.2d 807, 808 (7th Cir. 1985). In that case, the Seventh Circuit Court of Appeals considered *inter alia* whether the Federal Employers' Liability Act precluded respondeat superior for intentional torts. In its analysis, the *Lancaster* Court observed:

> In an ordinary tort case involving an employee's intentional misconduct, the plaintiff sues the employer for the employee's tort and can recover damages on a theory of respondeat superior if he can show that the employee committed the tort in the course of his employment. Under most definitions of "course of employment" the plaintiff must show that the employee's tort was in attempted (though often misguided) furtherance of the employer's business, as where the employee assaults the plaintiff to collect a debt owed the employer.

Id. at 817. In other words, *Lancaster* merely observed that cases involving intentional misconduct implicate the same standard as the "ordinary tort case," that is, liability will attach for conduct committed within the course of employment, which in turn, often (but not always) requires the plaintiff to show a subjective intent to further the employer's business. Thus, *Lancaster* treats intentional torts no differently from negligence-based torts.

Next, *Tippecanoe Beverages* cites to Prosser, *supra* note 5, at § 70 at 505-06. While the cited passage does, in fact, suggest that liability for an employee's intentional torts is to be imposed where the employee's "purpose, however misguided, is wholly or in part to further the master's business," *Id.* at 505, Prosser and Keeton do *not* suggest that intentional torts enjoy treatment distinct from other torts. Rather, Prosser and Keeton (along with the second *Restatement of Agency*) merely define *all* conduct (including intentional torts) to be within the scope of employment when "actuated at least in part, by a purpose to serve the [employer]." *Id.* at 502; Restatement (Second) of Agency §§ 228(1)(c), 230 (1958).

Finally, *Tippecanoe Beverages* explicitly indicts *Gomez v. Adams*, 462 N.E.2d 212 (Ind. Ct. App. 1984), for reading a subjective motivation requirement into Indiana's statute on criminal conversion. Yet in the cited passage, *Gomez* vacated an award of punitive damages against the employer because (1) Indiana statutorily authorizes criminal prosecutions against corporations for employee offenses committed within the scope of the employee's authority; and (2) at that time, Indiana precluded punitive damages where criminal sanctions are possible. *Id.* at 227. Although *Gomez* did focus on the tort-feasor's subjective intent, nowhere does *Gomez* suggest that consideration of subjective intent is relegated solely to intentional torts. Indeed, as with all predisjunctive standard scope of employment cases in Indiana, *Gomez* cites a variety of negligence-based scope of employment cases in support of the subjective requirement. *Id.* at 223 (citing Wells v. Northern Ind. Pub. Serv. Co., 111 Ind. App. 166, 40 N.E.2d 1012 (1942); Vincennes Packing Corp. v. Trosper, 108 Ind. App. 7, 23 N.E.2d 624 (1939) (concerning negligent operation of a wagon while hauling company waste products to employee's farm for employee's benefit); Great Am. Tea Co. v. Van Buren, 218 Ind. 462, 33 N.E.2d 580 (1941) (concerning negligent vehicle operation)).

mind when he received payment from [Tippecanoe Beverages] for the beer, the transaction (beer for money) was within the scope of [his] authority."[58]

Three years later in the case of *Roberson v. Bethlehem Steel Corp.*,[59] the Seventh Circuit Court of Appeals again declared (relying on *Tippecanoe Beverages* and *Lancaster*) that a plaintiff victimized by an intentional tort must prove both scope of employment and furtherance of the master's business before liability may attach to the tort-feasor's employer.[60] Nevertheless, the court again upheld a jury verdict in favor of the plaintiff, concluding that a plant supervisor's act of punching the plaintiff (thereby breaking his jaw) could have been within the supervisor's scope of employment: "If the smooth operation of the loading docks furthered Bethlehem Steel's business, and Borucki acted so as to keep the dock running smoothly, he acted with the intent to further Bethlehem Steel's interest."[61]

Later that same month, in a case involving sexual harassment, the Seventh Circuit Court of Appeals once again declared (this time without any citation to authority) that respondeat superior "makes the employer liable, regardless of what he knew or should have known or did or should have done, for the torts that his employees commit in the course of, or (in the case of intentional torts) in the furtherance of, their employment."[62] As the court concluded that respondeat superior did not apply to Title VII's prohibition against sex discrimination, it provided no further analysis of the supposed distinction between respondeat superior for intentional torts versus negligence-based torts.

While the *Tippecanoe Beverages / Bethlehem Steel* formulation might bolster Indiana's removal of the employee's subjective motivation from its scope of employment inquiry,[63] it otherwise stands completely at odds with Indiana's respondeat superior jurisprudence. The *Tippecanoe Beverages / Bethlehem Steel* formulation is borne of misinterpretation and imprecise analysis. Intentional, criminal, wanton, willful, and malicious acts are all measured by the same scope of employment standard in Indiana, and the

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58 833 N.E.2d at 638.

59 912 F.2d 184 (7th Cir. 1990).

60 *Id.* at 187-88. In a footnote, however, the *Bethlehem Steel* court comes tantalizingly close to recognizing its error in treating the employee's subjective intent as a separate inquiry unto itself:

Whether an employee acted "to an appreciable extent . . . to further his master's business" may be another way of stating that he acted within the scope of his employment. As the Indiana appellate court has stated: "[a] master is *not liable* for acts of his servant committed outside the line of his duty *and* not connected with his master's business . . . ." Thus, stated in the positive rather than negative form, if Roberson could prove *either* that Borucki acted within the scope of his employment *or* in connection with Bethlehem Steel's business, he could recover under respondeat superior. *Id.* at 188 n.3 (internal citations omitted).

61 *Id.* at 188.

62 *Guess*, 913 F.2d at 465.

63 *See supra* § III.B.

attempted reintroduction of subjective intent as a secondary condition in cases of intentional conduct is found only in federal analyses.

IV. Understanding the Precedents

> [Scope of employment] does not turn on the type of act committed or on the perpetrator's emotional baggage . . . . Rather, . . . the focus must be on how the employment relates to the context in which the commission of the wrongful act arose.[64]

Though all Indiana cases on scope of employment parrot the dicta surrounding the "further the employer's business" prong, the fact remains that almost every case decided within the past thirty years has been based on an analysis of the "incidental/closely associated" prong, that is, the extent to which the act originated in or was incidental to actual employment functions. To that end, the easiest way to understand what does and does not satisfy the "incidental/closely associated" prong is to compare and contrast the various situations in which this prong has been applied.

Generally speaking, the various situations under which Indiana courts have examined scope of employment fall into five distinct categories: (1) sexual assault cases; (2) financial and property crimes; (3) cases examining whether the tortious actions of police officers or firefighters are attributable to the city or municipality for which they work; (4) driver cases in which a tort-feasor is operating an employer-owned vehicle at the time of a collision; and (5) miscellaneous crimes and torts. By examining each of these categories separately, it is easier to track how the scope of employment inquiry has evolved along each of these distinct yet intertwined branches.

A. SEXUAL ASSAULT CASES

As the source of two separate opinions by the supreme court—including its most recent pronouncement on scope of employment—the sexual assault cases tend to serve as the starting point for most analyses. As one of the more heinous acts for which plaintiffs have sought to impose liability on an employer, the courts' treatment of scope of employment under such circumstances is instructive in highlighting the relative importance of various factors to the analysis.

Beginning with *Stropes by Taylor v. Heritage House Children's Center of Shelbyville, Inc.*,[65] the supreme court reversed a grant of summary judgment to the defendant facility where the plaintiff had been placed as a ward of the Marion County Welfare Department. In the course of changing the plaintiff's bed linens, the employee (Griffin) sexually assaulted the plaintiff and then completed changing the bed. In evaluating whether Griffin acted

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64 *Stropes*, 547 N.E.2d at 249.

65 547 N.E.2d 244 (Ind. 1989).