within the scope of his employment, the *Stropes* court noted that Griffin's duties included feeding, bathing, and changing the bedding and clothing of its residents, including the plaintiff. The court then explained:

> Griffin began the episode by performing a fully authorized act, stripping the sheets from David's bed prior to changing the bedding. He was also authorized to undress David Stropes and to touch his genitals and other parts of his body when bathing him and changing his clothes. Had David been distressed or frightened, the nurse's aide could have appropriately offered comfort and assurance by a pat or a caress; had he been violent or resistant, Griffin could have used appropriate physical force to restrain him. Griffin also ended the episode with a fully authorized act, dressing David for the day.[66]

Reasoning that these facts could be viewed as showing that the employee acted to an appreciable extent to further his employer's business and that the actions were at least for a time authorized by the employer and motivated by the employer's interests, the court noted that these inferences could lead to the conclusion that the "wrongful acts fell within the scope of his employment and Heritage should be accountable."[67] The court then concluded that "[t]he nature of the acts were, at the very least, sufficiently associated with Griffin's authorized duties to escape dismissal on summary judgment."[68]

A rationale similar to that used in *Stropes* fueled the court of appeals' decision in *Southport Little League v. Vaughan*.[69] In that case, the court of appeals affirmed a jury verdict (and denial of summary judgment) against Southport Little League when one of its volunteer officials molested children in a league equipment shed. The court of appeals found that some of the official's acts—such as fitting the children for uniforms—were authorized when he molested the children.[70] The court further observed that "[b]ecause of his position as an official and equipment manager with Little League, [the official] was able to persuade the two youths to accompany him to the equipment shed for the pretextual reason of retrieving equipment," and he was authorized by the Little League to be at the baseball field during games and practice.[71] The court held that because some of the equipment manager's actions were authorized, it was proper to deny summary

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66 *Id.* at 249.

67 *Id.* at 250.

68 *Id.*

69 734 N.E.2d 261, 268 (Ind. Ct. App. 2000).

70 *Id.* at 272.

71 *Id.*

judgment and to permit the jury to determine whether the employee's injurious actions were within the scope of employment.[72]

Needless to say, not all acts of sexual assault by employees have been found to fall within the scope of employment. In *Konkle v. Henson*,[73] the court of appeals affirmed summary judgment and refused to impose vicarious liability upon a church for its minister's acts of child molestation. The court found that the minister's unauthorized acts "are not similar to his duties as a minister," and that he was not engaged in any teaching or in any other pastoral acts when the molestation occurred.[74] Likewise, in *Doe v. Lafayette School Corp.*,[75] the court of appeals concluded that the employer school was not vicariously liable for its teacher's sexual relationship with an underage student; although the teacher used school equipment and facilities to initiate the relationship, the teacher acted "on his own initiative and unrelated to any school function . . . . In addition, we conclude that his actions were not incident to any service provided by LSC, but rather were fueled entirely by self-interest in a romantic relationship with Doe."[76]

Most recently, in *Barnett v. Clark*,[77] the supreme court affirmed a grant of summary judgment to an employer when its employee (a deputy trustee) sexually assaulted an applicant for public assistance. Clarifying the reach of its prior decision in *Stropes*, the court observed that:

> The nature of the deputy trustee's duties and authority differs vastly from the employee in *Stropes*. Other than perhaps a greeting handshake, the employee was not explicitly or impliedly authorized to touch or confine applicants for assistance. His alleged acts of confining, sexually touching, and raping the plaintiff were not an extension of authorized physical contact. Such acts were 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.

B. FINANCIAL AND PROPERTY CRIMES

In several cases, plaintiffs victimized by acts of conversion, forgery, or theft have attempted to impose liability on the perpetrator's employer. As with the sexual assault cases, a close examination of the similarities between the perpetrator's authorized job duties and his wrongful acts seems to dictate the result reached by each court.

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[72] *Id.*

[73] 672 N.E.2d 450 (Ind. Ct. App. 1996).

[74] *Id.* at 457.

[75] 846 N.E.2d 691 (Ind. Ct. App. 2006).

[76] *Id.* at 702.

[77] 889 N.E.2d 281 (Ind. 2008).

In *Gomez v. Adams*,[78] a security officer employed by a private security agency arrested the plaintiff and confiscated his personal identification. The agency's officers were authorized "to request, receive and retain personal identification while investigating disturbances or in effecting arrests" and to retain confiscated items until turning them over to the agency office.[79] After his shift was over, the security officer used the plaintiff's confiscated identification to cash a check to which he had forged the plaintiff's name. The plaintiff sued the security agency under respondeat superior for conversion of his identification and the forgery of his signature. On appeal from a jury verdict in favor of the plaintiff, the court of appeals found that the forgery was, as a matter of law, outside the scope of the officer's employment because it was "divorced in time, place, and purpose from [the officer's] employment duties."[80] The security agency did not escape liability for the conversion, however, because "[t]here was sufficient evidence for the jury to reasonably conclude that [the officer] was within the scope of his employment when he converted the check-cashing card to his own use."[81] In reaching its decision, the court of appeals noted that the security officer's duties included confiscation and retention of property insofar as it was part of the officer's job to take the plaintiff's personal effects for safekeeping during the scuffle and subsequent arrest; therefore, the officer's "actions were, at least for a time, authorized by his employer, related to the service for which he was employed, and motivated to an extent by [the security agency's] interests."[82]

Similarly, in *Tippecanoe Beverages v. S.A. El Aguila Brewing Co.*,[83] the Seventh Circuit affirmed a judgment against the employer based on the conversion by one of its employees of a cashier's check given by the plaintiff in payment for a shipment of beer. The court found that a reasonable jury could find that the employee had acted to further, "to an appreciable extent, . . . his master's business."[84] Specifically, the court concluded that because the employee's job included receiving money given in payment for goods, therefore "whatever [El Aguila's employee] had in mind when he received payment from [Tippecanoe Beverages] for the beer, the transaction . . . was within the scope of [his] authority."[85]

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78 462 N.E.2d 212 (Ind. Ct. App. 1984).

79 *Id.* at 223.

80 *Id.*

81 *Id.* at 225.

82 *Id.* at 224-25.

83 833 F.2d 633 (7th Cir. 1987).

84 *Id.* at 638.

85 *Id.*

Needless to say, this focus on the employee's specific job duties cuts both ways. Thus, in *Eagle Machine Co., Inc. v. American Dist. Telegraph Co.*,[86] a business that sold and provided maintenance service for alarm systems was held not to be liable under respondeat superior for thefts committed by its employees against one of its customers. The court of appeals noted that the employees' duties did not include handling business property or inventory with the exception of the alarm system, and the nature of the employees' wrongful acts were entirely different from the service for which they were employed.

Unfortunately, the court of appeals most recent treatment of a financial crime in this context proves utterly inscrutable. In *Prime Mortgage USA v. Nichols*,[87] the court of appeals addressed a variety of issues arising between two competing shareholders as their business relationship deteriorated. As a fifty percent shareholder, the plaintiff sought dissolution of the corporation and appointment of a receiver. The remaining shareholder disputed that the plaintiff was a fifty percent shareholder, arguing that the plaintiff had authorized issuance of additional stock to two other people (one of whom was the remaining shareholder's daughter), thereby reducing plaintiff's shareholder percentage. The plaintiff countered (and the trial court accepted pursuant to default judgment) that the remaining shareholder had forged the plaintiff's signature on the document authorizing the additional shares. The trial court held a hearing on damages and awarded approximately $8 million to the plaintiff and against the corporation. Without much in the way of analysis or discussion, the court of appeals inter alia concluded that the corporation was liable for the remaining shareholder's act of forgery: "An elaborate discussion on this point is not necessary to explain our conclusion that Law was acting within the scope of his employment when he forged Nichols's name. Although Law forged the SA Document with the intent to benefit himself at the detriment of Nichols, this act also furthered Prime's business."[88]

C. POLICE AND FIRE CASES

One of the more fertile grounds for analysis of scope of employment is misconduct by police officers and firefighters. Court treatment of these cases can be especially illuminating because often, these cases involve *defendants* arguing in favor of scope of employment (so as to enjoy certain statutory protections afforded municipalities and their employees) rather than victim-plaintiffs.

In 1993, both the supreme court and the court of appeals issued opinions highlighting the fact-sensitive nature of the scope of employment inquiry.

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[86] 127 Ind. App. 403, 140 N.E.2d 756 (1957).

[87] 885 N.E.2d 628 (Ind. Ct. App. 2008).

[88] *Id.* at 634.

In *Kemezy v. Peters*,[89] the supreme court held on a certified question from the Seventh Circuit Court of Appeals that the actions of a police officer working as a security guard at a bowling alley might fall within the officer's scope of employment with the city. In that case, the officer—after placing the plaintiff in handcuffs and informing him that he was under arrest—shoved the plaintiff into a bowling ball rack, used a stun gun on the plaintiff on the way to the patrol car, and then struck the plaintiff with either his fist or his nightstick. Shortly thereafter, in *Hollars v. City of Muncie*,[90] the court of appeals reversed a trial court's grant of summary judgment to the defendant city, holding that questions of fact existed as to whether a police officer involved in a motorcycle accident was cruising for drug dealers as part of his job duties or, rather, was joyriding at the time of the accident.

Yet not all decisions by the court of appeals in this context defer so readily to the trier of fact. In *City of Fort Wayne v. Moore*,[91] the court of appeals reversed a jury verdict in favor of the plaintiff and the trial court's denial of judgment on the evidence to the defendant city. In concluding that the tort-feasor police officer was not acting in his scope of employment with the defendant city, the court of appeals observed that city officers were not authorized to make traffic stops outside the city's corporate boundaries, out-of-uniform, or in unmarked police cars. Moreover, such unauthorized stops were a cause for disciplinary action.[92] The court of appeals observed further that the evidence adduced at trial failed to demonstrate that the tort-feasor officer had access to the plaintiff because of his position as a police officer.[93]

In 2000, the supreme court again weighed in on the appropriate scope of employment analysis in *Celebration Fireworks, Inc. v. Smith*.[94] In that case, a fire chief made various defamatory statements about the plaintiff to the plaintiff's prospective landlord while conducting a fire-safety inspection of the landlord's facility. Reversing the trial court's grant of summary judgment to the defendant, the supreme court noted that conduct is within the scope of employment when it is "of the same general nature as that authorized, or incidental to the conduct authorized."[95] From there, the court turned to the defamatory statements, declining to "split[ ] out these sentences" and instead concluding that "the chief's statements were incidental to an activity that was part of the chief's duty, inspecting business

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89 622 N.E.2d 1296 (Ind. 1993).

90 625 N.E.2d 469, 471 (Ind. Ct. App. 1993).

91 706 N.E.2d 604 (Ind. Ct. App. 1999).

92 *Id.* at 607.

93 *Id.*

94 727 N.E.2d 450 (Ind. 2000).

95 *Id.* at 452.

premises."[96] The court further noted that at the time of the defamation, the fire chief "was on public time, performing a function that was central to the position he held."[97]

This focus on similarity between authorized and unauthorized conduct has driven each of the court of appeals' two most recent forays into police and fire cases. Thus in *Wilson v. Isaacs*,[98] a police officer allegedly used excessive force during his arrest of the plaintiff; the officer arrived at the scene in uniform and in response to a dispatch. The court of appeals affirmed summary judgment to the officer under the Tort Claims Act, finding that his alleged use of excessive force "was of the same general nature as that authorized, or incidental to the conduct authorized, and thus it is within the scope of employment."[99] Likewise, in *Ellis v. City of Martinsville*,[100] the court of appeals affirmed summary judgment for a government employer on its immunity defense. According to the court of appeals, the fireman's arrival at the scene and dispute with a competing fire department official "was at least incidental to conduct authorized" in the fireman's employment capacity because "[w]hen 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."[101]

D. DRIVER CASES

As with the police and fire cases, driver cases afford relatively frequent opportunities for courts to examine the outer boundaries of scope of employment. In each of these cases, an employee is involved in a personal injury collision while driving (typically) an employer-owned vehicle. The plaintiff then seeks to impose liability against the employer for the employee's negligent operation of the vehicle.

The Indiana case reporters overflow with decisions holding that an employee travelling to or from work is outside the scope of his employment.[102] As the supreme court decreed in 1959: "an employee on his way to work is normally not in the employment of the corporation."[103] Thus for example,

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[96] *Id.*

[97] *Id.*

[98] 917 N.E.2d 1251 (Ind. Ct. App. 2009), *summarily aff'd in relevant part*, 929 N.E.2d 200, 204 (Ind. 2010).

[99] *Id.* at 1258.

[100] 940 N.E.2d 1197 (Ind. Ct. App. 2011).

[101] *Id.* at 1209.

[102] *See e.g.*, City of Crawfordsville v. Michael, 479 N.E.2d 102 (Ind. Ct. App. 1985); Pursley for Benefit of Clark v. Ford Motor, 462 N.E.2d 247 (Ind. Ct. App. 1984); Pace v. Couture, 150 Ind. App. 220, 276 N.E.2d 213 (1972); Marion Trucking Co. v. Byers, 121 Ind. App. 592, 97 N.E.2d 635 (1951); North Side Chevrolet, Inc. v. Clark, 107 Ind. App. 592, 25 N.E.2d 1011 (1940); Neyenhaus v. Daum, 102 Ind. App. 106, 1 N.E.2d 281 (1936); Haynes v. Stroh, 99 Ind. App. 595, 193 N.E. 721 (1935). *See also* Pace v. Southern Express Co., 409 F.2d 331, 333 (7th Cir.1969).

[103] Biel, Inc. v. Kirsch, 240 Ind. 69, 73, 161 N.E.2d 617, 618 (1959) (*per curiam*).

in *City of Elkhart v. Jackson*,[104] which involved an employee driving a company car while returning to work after lunch, the court of appeals held that the employee's accident was outside the scope of employment. Similarly, in *Biel, Inc. v. Kirsch*,[105] the company's owner was driving a company car to work one morning—using the car for her personal convenience rather than on company business—when she collided with a motorcycle; although the company paid for the oil, gas, taxes, and upkeep on the vehicle, the supreme court held that the accident occurred outside the scope of employment: "She was on no errand for the corporation, but on the contrary was on her way to work. Her employment by the corporation had not yet started for the day . . . ."[106] Likewise, in *City of Crawfordsville v. Michael*,[107] the foreman of the defendant City's landfill was involved in a head-on collision while using a City-owned truck for personal business on his day off; he, too, was held to have been acting outside the scope of his employment. See also *Dillman v. Great Dane Trailers, Inc.*,[108] (although noting that "if there are conflicting facts, or conflicting inferences to be drawn from the facts, regarding why the motorist was on the road at the time of the accident, then the scope of employment determination falls upon the fact-finder," nevertheless holding that Employee Relations Supervisor driving to company banquet on Saturday evening "was still driving to work when the accident occurred" and, therefore, not within scope of employment.).

On the other hand, occasional exceptions to this general rule emerge. For example, in *Gibbs v. Miller*,[109] a salesman was in an accident while returning home for lunch after an appointment with a customer. Although the salesman was driving his own vehicle and was not expected in the office that day, he had another appointment scheduled following lunch, he planned to do some paperwork at home during lunch, and he was being reimbursed for mileage from his home to the morning appointment and back. A jury found the employer liable, and the court of appeals upheld the jury verdict. Similarly, in *State v. Gibbs*,[110] a jury held the state liable for $100,000 following an accident involving a state employee. The employee was driving a state-owned vehicle on his way home from dinner after the conclusion of his work day (although the employee was on-call twenty-four hours per day). Again, the court of appeals declined to reverse the jury verdict.[111]

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104 104 Ind. App. 136, 10 N.E.2d 418 (1937).

105 240 Ind. 69, 161 N.E.2d 617.

106 *Id.* at 73, 618.

107 479 N.E.2d 102 (Ind. Ct. App. 1985).

108 649 N.E.2d 665, 667-68 (Ind. Ct. App. 1995).

109 152 Ind. App. 326, 283 N.E.2d 592 (1972).

110 166 Ind. App. 387, 336 N.E.2d 703 (1975).

111 *See also* Konradi v. United States, 919 F.2d 1207 (7th Cir. 1990) (reversing district court's grant of summary judgement to government defendant where Postal Service employee was involved in fatal colli-

Taking these occasional exceptions to their logical extreme, the supreme court's most recent handling of a driver case illustrates just how far removed from the actual workplace one's scope of employment might fall. In *Warner Trucking, Inc. v. Carolina Casualty Insurance Co.*,[112] the employee driver was scheduled to deliver a truckload of recreational vehicles early in the morning. The night before (and after the employer's office had closed for the day), the driver attended a cookout at a coworker's home where he drank alcohol. He then left the cookout in his own private automobile, drove to the employer's business premises, unhooked the cab from the trailer, and proceeded to drive the cab until he collided with plaintiff's vehicle. Upholding the trial court's denial of summary judgment to the employer defendant, the supreme court held that because the tort-feasor *might* have been taking the cab to fill it with fuel before the morning trip, this was sufficient to preclude summary judgment.[113]

Slightly more confusing, however, are the driver cases in which the tort-feasor's employment is itself in dispute. In these cases, a court first must determine whether agency principles even apply (by examining indicia of a principal's control over an independent contractor or gratuitous servant, for example); only after establishing a master-servant relationship does the court address whether the agent's conduct fell within the scope of the agency. However, on at least three occasions the court of appeals has allowed these two inquiries to overlap, creating a hybrid analysis that can be confusing and difficult to untangle.

For example, in *Eagle Motor Lines, Inc. v. Galloway*,[114] the plaintiff was injured while being run off the road by a truck belonging to the defendant corporation. Not knowing the identity of the truck driver, the plaintiff faced a dual burden of proving both that the driver was an agent or employee of the defendant corporation and that the agent or employee was acting within the scope of his employment at the time of the accident. Upholding the jury verdict in favor of the plaintiff as well as the trial court's denial of judgment on the evidence to the defendant corporation, the court of appeals held that because the truck bore the defendant corporation's insignia, was traveling with a second identical truck, was carrying a product belonging to one of the corporation's customers, and the defendant corporation "had no knowledge of any unauthorized operation of their trucks for the date in question," these facts were sufficient to "support a reasonable inference that the driver was employed by Eagle to deliver U.S. pipe and that he was acting within

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sion while driving his own vehicle to work; finding question of fact as to whether employee was acting within scope of employment at time of collision).

112 686 N.E.2d 102 (Ind. 1997).

113 *Id.* at 105. *But see* Gregg v. Cooper, 812 N.E.2d 210 (Ind. Ct. App. 2004) (reversing denial of summary judgment to defendant employer; although employee was using employer's tractor with employer's permission at time of accident, not within scope of employment because employee was moving bales of hay to his own property for his own purposes).

114 426 N.E.2d 1322 (Ind. Ct. App. 1981).

the scope of this employment at the time of the accident."[115] The court of appeals further noted that the unknown driver's apparent violation of an explicit company rule against driving in inclement weather was insufficient to take the driver's conduct outside the scope of employment.[116]

Just two years later, in *Trinity Lutheran Church, Inc. v. Miller*,[117] the court of appeals did a better job of keeping the control analysis separate from the scope of employment analysis. In that case, the plaintiff was injured when a church volunteer delivering baked goods to church members struck the plaintiff's motorcycle. Upholding a jury verdict against the defendant church, the court of appeals addressed whether the church could be held responsible for the negligence of a nonemployee volunteer driving his own vehicle for a gratuitous purpose. After listing the facts establishing the existence of control over the gratuitous servant, the court of appeals addressed scope of employment separately:

> The facts establish that Goodman was acting within the scope of his employment when the accident occurred. The parties stipulated the cookie bake and delivery are the work of the Guild. Goodman testified his only purpose in driving was to deliver cookies. He was clearly within the scope of the Guild's activity when he struck Miller's motorcycle.[118]

Yet in holding that a defendant health care facility could not be held liable for a musical entertainer's negligent operation of his vehicle while on the defendant's premises, the court of appeals in *Gilbert v. Loogootee Realty, Inc.*[119] combined *Trinity*'s two separate analyses into something indecipherable.[120] This same conflation of control and scope of employment plagued

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115 *Id.* at 1325.

116 *Id.* at 1325 n.3 (citing Pittsburgh, C. & St. L.R. Co. v. Kirk, 102 Ind. 399, 1 N.E. 849 (1885); Mock v. Polley, 116 Ind. App. 580, 66 N.E.2d 78 (1946)).

117 451 N.E.2d 1099 (Ind. Ct. App. 1983).

118 *Id.* at 1103.

119 928 N.E.2d 625 (Ind. Ct. App. 2010).

120 The court [in *Trinity*] focused its analysis on the issue of control and determined that the designated materials established that Goodman was acting within the scope of his gratuitous employment when the accident occurred. The parties stipulated the cookie delivery was the Guild's work. Goodman testified his only purpose in driving at the time of the accident was to deliver cookies. From this, the court concluded, Goodman "was clearly within the scope of the Guild's activity when he struck [the victim's] motorcycle." More importantly, the court determined that "[t]he jury could have easily found from the evidence that the Guild had the right to direct and control Goodman at the time of the accident." In discussing a claim by Goodman that the court erred in giving an instruction on the subject of control, the court concluded that the instruction was correct in that it explained that "the right of control is determinative of a master servant relation, and not merely the exercise of that control."

Id. at 627 (internal citations omitted).

the decision in *Green v. Perry*[121] wherein the court of appeals reversed the trial court's grant of summary judgment to the defendant corporation where the plaintiff passenger had been injured in a collision involving an independent contractor.[122]

E. MISCELLANEOUS CRIMES AND TORTS

Finally, a small number of recent Indiana decisions defy easy categorization. Yet by relying on the same principles espoused in the four prior categories of cases, these cases further illustrate how Indiana's treatment of scope of employment can be translated to almost any context or situation.

Although not explicit in any of these decisions, reviewing courts tend to view acts of horseplay (resulting in injury) through a more stringent, defendant-friendly lens than other types of torts. For example, in *Hurlow v. Managing Partners, Inc.*,[123] the court of appeals affirmed judgment on the evidence to the defendant employer. In that case, the tort-feasor bartender accidentally shot the plaintiff while "joking around" with a pellet gun before the nightclub opened for business. The court of appeals noted that the bartender's

> set-up duties were stocking liquor, napkins, and cups; getting ice; cutting fruit; making popcorn; and generally cleaning the bar. When Mars Nightclub was open for business, Maxwell tended bar by serving drinks and collecting money and performed an occasional impromptu "Macarena." These acts have no close association with "joking around" with a pellet gun. Thus, unlike the unauthorized acts in Stropes and Southport Little League, Maxwell's unauthorized acts did not originate from or bear close association to his authorized duties.[124]

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121 549 N.E.2d 385, 388 (Ind. Ct. App. 1990).

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> Here, there was evidence that Perry moved vans on Explorer's property, at Explorer's direction, and that Perry often picked up lunch for Explorer's employees. Furthermore, Perry drove Green at the request of Explorer. A jury could infer that all of those activities were not within Perry's contractual relationship with Explorer, and, thus, were gratuitous services performed at the direction and control of Explorer.
>
> Explorer argues that Perry was not a gratuitous servant since his act in taking Green home was of no benefit to Explorer. However, even if providing transportation for Green was of no benefit to Explorer, there was other evidence which could establish that Perry was a gratuitous servant. Therefore, there would remain the issue of whether Perry's act was within the scope of his gratuitous servitude to Explorer; that issue should be left up to the jury to decide. *Thus, there were genuine issues of material fact as to* whether Perry was a gratuitous servant of Explorer and *whether Perry's act of driving Charles Green home was within the scope of that gratuitous servitude.*

Id. at 388 (internal footnote omitted) (emphasis added).

123 755 N.E.2d 1158 (Ind. Ct. App. 2001).

124 *Id.* at 1162.

Likewise, in *Shelby v. Truck & Bus Group Division of GMC*,[125] the court of appeals affirmed summary judgment to the defendant employer by holding that an employee's at-work act of sticking a hot metal welding rod into the plaintiff's groin was "not alleged to be part of his duties " and, therefore, was not within the employee's scope of employment.[126]

With the element of horseplay removed, however, reviewing courts tend to focus on whether tortious (or even criminal) conduct occurs in the midst of other, authorized employment duties. Thus, in *Interim Healthcare of Fort Wayne, Inc. v. Moyer*,[127] the court of appeals affirmed the trial court's denial of summary judgment to the defendant health care facility. In that case, the plaintiff suffered injuries from an insulin overdose administered by the defendant facility's employee. The employee—a home health aide—was neither expected nor authorized to administer medication; rather, her duties were restricted to feeding, bathing, and changing the patient. The court of appeals concluded that the trial court was correct to deny summary judgment to the defendant facility because the employee's acts "were committed in the midst of otherwise authorized duties."[128]

But when the wrongful conduct occurs after or is completely removed both in time and space from authorized employment duties, the court of appeals remains steadfast in its refusal to extend vicarious liability to a defendant employer. Thus, in *Sandage v. Board of Commissioners of Vanderburgh County, LLC*,[129] the court of appeals affirmed the entry of summary judgment in favor of the tort-feasor's employer. In that case, the tort-feasor was on work release. After completing his shift at the defendant employer's workplace (cleaning parking lots), rather than returning to the community corrections facility, the tort-feasor drove to the deceased's apartment where he shot and killed three people. The court of appeals concluded that "we cannot say that Moore's actions constituted conduct authorized by Porter's Parking, or were in furtherance of the business or interests of Porter's Parking."[130]

V. SYNTHESIS: READING THE ROADSIGNS

In light of the foregoing precedents, five principles emerge that should guide Indiana litigants (and courts) in assessing whether an employee's tortious (or criminal) acts fall within the scope of his employment.

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[125] 533 N.E.2d 1296 (Ind. Ct. App. 1989).

[126] *Id.* at 1298.

[127] 746 N.E.2d 429 (Ind. Ct. App. 2001).

[128] *Id.* at 431.

[129] 897 N.E.2d 507 (Ind. Ct. App. 2008).

[130] *Id.* at 509.

A. SIMILARITIES BETWEEN THE WRONGFUL ACT AND THE EMPLOYEE'S AUTHORIZED DUTIES WILL QUALIFY

Conduct is within the scope of employment when it is "of the same general nature as that authorized, or incidental to the conduct authorized."[131] The more similarity between the employee's authorized acts and the employee's wrongful acts, the more likely that a court will conclude that the acts were performed within the scope of employment. For example, if the tort-feasor's job duties involve receiving property or money, then theft or conversion of that property or money will be within the scope of employment.[132] But when that same tort-feasor takes the additional step of taking the property home and using it to commit a separate and independent forgery, that additional act (but *only* the additional act) becomes "divorced in time, place, and purpose from [the tort-feasor's] employment duties."[133] Similarly, if the tort-feasor's job duties exclude handling customer property, then theft of customer property probably outside the scope of employment.[134]

This same rationale applies to acts of tortious (or criminal) touching. If the tort-feasor's job duties include undressing, bathing, changing, comforting, and physically restraining a patient, then acts of sexual molestation will fall within the scope of employment.[135] Similarly, if the tort-feasor's job duties include being at the baseball field and fitting players for uniforms, then acts of sexual molestation will fall within the scope of employment.[136] But if the tort-feasor's duties do not include touching or confining, then sexual assaults against applicants for public assistance or against children at a minister's church will be outside the scope of employment.[137] Likewise, where the tort-feasor's duties include "stocking liquor, napkins, and cups; getting ice; cutting fruit; making popcorn; and generally cleaning the bar," the tort-feasor's act of shooting the plaintiff with a gun during nonbusiness hours will not subject the employer to vicarious liability.[138]

B. WRONGFUL ACTS INTERMINGLED WITH AUTHORIZED ACTS WILL QUALIFY

Likewise, the extent to which the employee's wrongful acts are timed within, framed by, or otherwise intertwined with the employee's authorized duties will weigh in favor of vicarious liability. By way of example, if the tort-feasor's acts of defamation occur in the midst of an authorized fire-

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131 *Celebration Fireworks*, 727 N.E.2d at 452; *Ellis*, 940 N.E.2d at 1209; *Wilson*, 917 N.E.2d at 1258.

132 *See Gomez*, 462 N.E.2d at 224-25; *Tippecanoe Beverages*, 833 F.2d at 638.

133 *See Gomez*, 462 N.E.2d at 223.

134 *See Eagle Machine Co.*, 127 Ind. App. 403, 140 N.E.2d 756.

135 *See Stropes*, 547 N.E.2d at 249-50.

136 *See Southport Little League*, 734 N.E.2d at 268.

137 *See Barnett*, 889 N.E.2d 281; *Konkle*, 672 N.E.2d at 457.

138 *See Hurlow*, 755 N.E.2d at 1162.

safety inspection, then the tort-feasor's acts will be within the scope of employment.[139] Similarly, wrongful acts that occur after an authorized arrest but during transport to the police car might be within the scope of employment, as well.[140] As illustration, the supreme court found it significant that a wrongful act (*i.e.*, sexual molestation) was framed by two authorized acts (*i.e.*, stripping the sheets from the victim's bed and afterwards dressing the victim for the day).[141] But the further removed an employee's acts are from the time and space of an employment shift, the less likely that a court will ascribe those acts to an employer.[142]

C. WHETHER THE TORT-FEASOR'S EMPLOYMENT AFFORDS THE OPPORTUNITY TO COMMIT THE WRONGFUL ACT IS A NONDISPOSITIVE FACTOR IN FAVOR OF VICARIOUS LIABILITY

Several Indiana decisions include dicta that respondeat superior will not attach merely because a tort or crime could not have been committed absent facilities afforded by the employee's relation to the employer.[143] Nevertheless, although not a dispositive factor, a tort-feasor being empowered to commit the tort or crime because of his employment weighs in favor of a finding that the tort or crime was within the scope of employment. Thus, for example, where a child molester's position as a league official enabled him to "persuade the two youths to accompany him to the equipment shed for the pretextual reason of retrieving equipment," this weighed in favor of respondeat superior.[144] Likewise, a tort-feasor gaining access to his sexual assault victim because of his employment weighed in favor of respondeat superior.[145]

D. AN EMPLOYEE'S WRONGFUL ACT VIOLATING THE EMPLOYER'S RULES DOES NOT PRECLUDE VICARIOUS LIABILITY

Indiana courts are pellucid that "[e]ven though an employee violates the employer's rules, orders, or instructions, or engages in expressly forbidden actions, an employer may be held accountable for the wrongful act if the

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139 *See Celebration Fireworks*, 727 N.E.2d at 453.

140 *See Kemezy*, 622 N.E.2d 1296; *Wilson*, 917 N.E.2d at 1258.

141 *See Stropes*, 547 N.E.2d at 249.

142 *See Sandage*, 897 N.E.2d at 509.

143 *See, e.g., Moore*, 706 N.E.2d at 607; *Konkle*, 672 N.E.2d at 456; *Gomez*, 462 N.E.2d at 223 (citing Louisville & N.R. Co. v. Gillen, 166 Ind. 321, 76 N.E. 1058 (1906)). *See also Hansen*, 551 F.3d at 614.

144 *See Southport Little League*, 734 N.E.2d at 268.

145 *See Stropes*, 547 N.E.2d at 249-50. *Cf.* City of Fort Wayne v. Moore, 706 N.E.2d 604, 607 (Ind. Ct. App. 1999) ("We also note that unlike the circumstances in Stropes, the evidence here fails to demonstrate that Stanford had access to Moore because of his position as a police officer.").

employee was acting within the scope of employment."[146] Thus by way of example, while courts might note rule violations in their discussions of respondeat superior,[147] violation of an employer's no-drinking rule will not necessarily protect the employer from respondeat superior where the off-the-clock intoxicated employee causes a motor vehicle collision while driving a company truck.[148]

At one time, an employer's promulgation of rules prohibiting certain conduct served to inoculate the employer from respondeat superior; it is virtually impossible to prove that a tort-feasor subjectively intended to further his employer's business while violating the employer's explicit rules. However, with Indiana's creation of a disjunctive standard combined with the removal of any examination of the tort-feasor's subjective motivation, it is uncertain whether an employer's promulgation of rules prohibiting certain conduct any longer plays a role in assessing scope of employment.

E. IF ANY OF THE EMPLOYEE'S ACTS ARE AUTHORIZED OR SIMILAR IN NATURE TO AUTHORIZED CONDUCT, THEN SUMMARY JUDGMENT IS INAPPROPRIATE

The final point to be gleaned from Indiana case law on scope of employment is perhaps the most significant to litigants: the question of whether an employee is acting within the scope of his employment is a question of fact to be determined in light of the evidence of a particular case.[149] "If some of the employee's actions were authorized, the question of whether the unauthorized acts were within the scope of employment is one for the jury."[150] "[T]he matter is a question of law" only "if *none* of the employee's acts were authorized . . . ."[151] In fact, the supreme court in *Stropes* went to great lengths to point out the prevailing trend as illustrated by cases like *Gomez* and *Tippecanoe Beverages*:

> It is significant that neither of these cases was dismissed on summary judgment. Both factual episodes involved authorized acts unquestionably within the scope of employment . . . and unauthorized acts unquestionably outside the scope of employment . . . , yet the employers were not automatically shielded from liability. The plaintiffs sought to impose liability under respondeat superior

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146 *Warner Trucking*, 686 N.E.2d at 103 (citing Eagle Motor Lines, Inc. v. Galloway, 426 N.E.2d 1322, 1325 n.3 (Ind. Ct. App. 1981) (company rules prohibited driving in hazardous conditions and, further, required drivers to keep logs of their routes) and *Mock*, 116 Ind. App. at 586-87, 66 N.E.2d at 81).

147 *See, e.g.*, *Moore*, 706 N.E.2d at 607 ("Moreover, such unauthorized stops were a cause for disciplinary action.")

148 *See Warner Trucking*, 686 N.E.2d at 105.

149 Trinity Lutheran Church, Inc. v. Miller, 451 N.E.2d 1099 (Ind. Ct. App. 1983).

150 *Konkle*, 672 N.E.2d at 457 (citing *Stropes*, 547 N.E.2d at 249-50).

151 *Moore*, 706 N.E.2d at 607 (emphasis added).

> for crimes clearly committed ultimately to benefit the employee rather than the employer, yet the doctrine did not insulate the employer from subjection to trial. Instead, both cases went to the jury. . . .[152]

VI. CONCLUSION

Over the past fifteen years, Indiana law addressing respondeat superior has undergone a silent revolution, one that no court or commentator has recognized (or at least acknowledged). Obscured by a fog of inscrutable case law steeped in acontextual quotations, this revolution has expanded the reach of respondeat superior to parameters never before seen in this or any other jurisdiction. As Indiana litigants attempt to navigate through this fog, these five road signs should help guide the unwary traveler.

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[152] 547 N.E.2d at 249.