TIME IS ON MY SIDE: THE TEMPORAL DISTINCTION IN THE FAILURE TO MITIGATE DAMAGES DEFENSE

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The recent decision in Kocher v. Getz, 787 N.E.2d 418 (Ind. Ct. App. 2003), demonstrates the confusion which surrounds the failure to mitigate damages defense in Indiana. In Kocher, a majority of the Court of Appeals concluded that plaintiff's failure to mitigate damages *after* a tortious event constitutes "fault" under Ind. Code § 34-6-2-45(b), and therefore can be used by a jury to allocate fault between the parties pursuant to Ind. Code § 34-51-2-7. Kocher, 787 N.E.2d at 426. The Supreme Court has granted transfer in Kocher, and ITLA filed an *amicus curiae* brief in support of the appellee Getz, who was represented by ITLA members Mark Guenin and Emily Guenin-Hodson of Wabash.

While awaiting the transfer decision of the Supreme Court, this paper will discuss how the Court of Appeals' decision in Kocher is at odds with the decision of the Supreme Court in Deible v. Poole, 691 N.E.2d 1313 (Ind. Ct. App. 1998), *adopted on transfer*, 702 N.E.2d 1076 (Ind. 1998). In reaching its decision, the majority of the Court of Appeals relies upon § 918 of the Restatement (Second) of Torts. However, § 918 does not apply to considerations of contributory negligence or comparative fault, but rather applies only to the diminution of damages, and therefore the majority's reliance upon § 918 is misplaced. Finally, the decision in Kocher runs afoul of the longstanding common law rule that a party's failure to mitigate damages *after* a tortious event does not go to the ultimate issue of liability, but rather applies only to diminish a party's recoverable damages.

A. THE KOCHER DECISION IS IN DIRECT CONFLICT WITH THE SUPREME COURT'S DECISION IN DEIBLE V. POOLE.

In deciding that a plaintiff's failure to mitigate damages *after* a tortious event constitutes "fault" under Ind. Code § 34-6-2-45(b), and therefore can be used by a jury to allocate fault between the parties pursuant to Ind. Code § 34-51-2-7[1], the Court of Appeals entered a decision in conflict with controlling precedent established by the Supreme Court. In Deible v. Poole, 691 N.E.2d 1313 (Ind. Ct. App. 1998), *adopted on transfer*, 702 N.E.2d 1076 (Ind. 1998), the defendant did not dispute his liability for the collision, but instead challenged the necessity of much of the medical treatments the plaintiff underwent. The defendant did not deny that the plaintiff was entitled to some damages for her initial medical treatments. Id. at 1314. Nonetheless, the jury returned a verdict finding the plaintiff 100% at fault for the collision, and awarding her zero damages. Id.

On appeal, the issue in Deible was whether the defense of failure to mitigate damages may be used as a defense to the ultimate issue of liability, or whether it simply concerns the amount of damages the plaintiff is entitled to recover when liability has been determined. Id. at 1315. In this regard, the Court of Appeals held as follows:

> ***Failure to minimize damages does not bar the remedy, but goes only to the amount of damages recoverable. Otherwise stated, if the act of the injured party does not operate in causing the injury from which all damages ensued, but merely adds to the resulting damages, its only effect is to prevent the recovery of those damages which reasonable care would have prevented.*** 22 AM. JUR. 2D *Damages* § 497 (1988) (footnotes omitted). The evidence at trial showed that Deible's actions did not operate in causing the accident. Deible was simply stopped at a red light when Poole struck her from behind. Poole's mitigation defense concerns Deible's act of continuing to seek allegedly unwarranted medical treatments, not any act contributing to the accident itself. Relying upon Indiana

[1] Kocher v. Getz, 787 N.E.2d 418, 426 (Ind. Ct. App. 2003).

> Code § 34-4-33-2, Poole argues that under Indiana law a failure to mitigate damages is defined as fault and, therefore, the jury's verdict and the trial court's denial of the motion to correct errors were justified.
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> The unreasonable failure to mitigate damages can be apportioned as fault under comparative fault statutes if the statutes provide that contributory negligence only diminishes the damages in proportion to the plaintiff's negligence. 22 AM. JUR. 2D *Damages* § 497 (1988). In this context, fault is used to describe to which party the claimed damages are attributable. That was the issue before the jury. After Poole admitted liability for the accident and also admitted that Deible was entitled to some damages, the jury was required to determine what portion of the claimed damages were attributable to Poole's action and what portion were attributable to Deible's action. The jury appears to have misunderstood this task and instead appears to have relieved Poole of any liability based upon his mitigation defense. ***We hold that mitigation of damages is a defense to the amount of damages a plaintiff is entitled to recover after the defendant has been found to have caused the tort. Mitigation of damages is not a defense to the ultimate issue of liability***. (Emphasis added).

Id. at 1316.

In Kocher, the defendant repeatedly admitted that he was entirely responsible for the collision and that the only issue before the jury was damages. Kocher's sole mitigation defense was that Getz failed to mitigate her damages by taking a part-time job after the accident and making no effort to replace her lost income after she then quit that job. See: Kocher v. Getz, 787 N.E.2d 418, 429 (Ind. Ct. App. 2003) (Vaidik, J. dissenting). Nonetheless, a majority of the Court of Appeals held that Getz' alleged failure to mitigate damages *after* a tortious event could constitute "fault" under I.C. 34-6-2-45(b), and thus it concluded that a new trial was warranted since the jury was not instructed on comparative fault, and since the verdict form did not permit the jury to allocate fault for Getz' alleged failure to mitigate damages. Id. at 426, 429.

The majority's holding in Kocher is in direct conflict with the decision of the Court of Appeals in Deible v. Poole. Moreover, since the Supreme Court adopted the opinion of the

Court of Appeals on transfer, See: Deible v. Poole, 702 N.E.2d 1076 (Ind. 1998), the majority's holding in Kocher is also in conflict with a decision of the Supreme Court. The salient facts in Deible are indistinguishable from those in Kocher, and thus it was error for the Court of Appeals to have refused to follow the precedent established by the Supreme Court in Deible. See: Red Arrow Ventures v. Miller, 692 N.E.2d 939, 946 (Ind. Ct. App. 1999): "The Court of Appeals is obliged to follow the precedents established by the Indiana Supreme Court."

B. SECTION 918 OF THE RESTATEMENT (SECOND) OF TORTS DOES NOT SUPPORT THE DECISION OF THE COURT OF APPEALS IN KOCHER.

The majority of the Court of Appeals in Kocher expressly adopted the Restatement (Second) of Torts, § 918:

> Thus, unlike the court in Deible, 691 N.E.2d at 1316, we are not convinced that the jury in that case "misunderstood its task." Instead, that verdict merely reflects the concepts discussed in § 918 of the Restatement (Second) of Torts. And because § 918, particularly comment b, clarifies the unique relationship between the mitigation of damages defense and allocation of fault under comparative fault law, we expressly adopt that section of the Restatement (Second) of Torts. Thus, where a defendant admits liability but raises a mitigation of damages defense, it may be reasonable under certain circumstances for the jury to find that the plaintiff's failure to avoid the consequences was so substantial that the damages could be reduced to nothing.

Kocher, 787 N.E.2d at 426. Respectfully, the majority in Kocher has misconstrued § 918, which provides in relevant part that "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort." Citing to comment "b," the majority holds that § 918 "clarifies the unique relationship between the mitigation of damages defense and allocation of fault under comparative fault law," and concludes that " it may be reasonable under certain circumstances for the jury to find that the plaintiff's failure to avoid the consequences was so substantial that the

damages could be reduced to nothing." Kocher, 787 N.E.2d at 426. Nonetheless, comment "b" to § 918 and illustration 8 provide as follows:

> . . . a person who fails to avert *the consequences of a tort*, which he could do with slight effort is entitled to no damages *for the consequences*. If harm results because of his careless failure to make substantial efforts or incur expense, ***the damages for the harm suffered are reduced to the value of the efforts he should have made or the amount of expense he should have incurred, in addition to the harm previously caused***. (Emphasis added).
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> **Illustration:**
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> 8. A tortiously destroys B's fence. Although B knows the facts and is able to build a temporary barrier at an expense of $20, he fails to do so and his cattle worth $500 stray from the field and are lost. ***B is entitled to recover only $20 in addition to the value of the destroyed fence***. (Emphasis added).

By its express terms, § 918 only concerns the conduct of a party "after the commission of a tort." However, as comment "b" and illustration 8 demonstrate, where a party fails to mitigate damages, such conduct does not go to the issue of liability under § 918; rather, the party's damages are to be reduced commensurately with his failure to mitigate. Most importantly, comment "a" to § 918 specifically states that this section does not apply to considerations of contributory negligence or comparative fault, but rather applies only to the diminution of damages:

> The rule stated in this Section is to be distinguished from the rules stated in § § 463-496, dealing with contributory negligence, and providing a defense to a negligence action except in states that have adopted a rule for comparative negligence. As there stated, a person threatened with harm from the negligent conduct of another is not entitled to recover for damages from the other if he failed to use reasonable effort or expenditure to avoid the harm, subject to the various qualifications stated in those Sections . . . Hence contributory negligence either precludes recovery or is no defense at all to a claim for compensatory damages. ***On the other hand, the rule stated in this Section applies only to the diminution of damages and not to the existence of a cause of action***. (Emphasis added).

It is respectfully submitted that § 918 does not "clarify the unique relationship between the mitigation of damages defense and allocation of fault under comparative fault law," nor does it support the decision of the majority in Kocher that a plaintiff's failure to mitigate damages *after* a tortious event constitutes "fault" under Ind. Code § 34-6-2-45(b). Rather, § 918 is consistent with the longstanding rule in this State that the failure to mitigate damages *after* a tortious event does not go the ultimate issue of liability, but only serves in diminution of a plaintiff's damages.

C. AT COMMON LAW, THE DEFENSE OF FAILURE TO MITIGATE DAMAGES DID NOT GO TO THE ULTIMATE ISSUE OF LIABILITY, AND THE COMPARATIVE FAULT ACT DID NOT CHANGE THE COMMON LAW IN THIS REGARD, EITHER BY EXPRESS TERMS OR UNMISTAKABLE IMPLICATION.

At common law, a party's failure to mitigate damages *after* a tortious event did not go to the ultimate issue of liability, but rather was applied only to diminish a party's recoverable damages. This rule has been consistently applied both before and after the enactment of the Comparative Fault Act. In Indianapolis Street Railway Company v. Robinson, 157 Ind. 414; 61 N.E. 936, 937 (1901), the Supreme Court held as follows:

> The complaint alleged that the loss of the services, etc., of the wife, and the expenses for care and medical attention were the result of the injury sustained by the wife. If this was not true, or if the effects of the injury were aggravated by the failure of the appellee to use ordinary care to restore the health of his wife, this neglect might be proved under the general denial in mitigation of damages. ***Such neglect would not destroy the right of action, but would affect only the extent of the damages to be recovered.*** (Emphasis added, citations omitted).

See also: Cromer v. City of Logansport, 38 Ind. App. 661; 78 N.E. 1045, 1048 (1906):

> One who has been injured, either in his person or in his property, by the negligence or misconduct of another, is under obligation to do whatever he may do reasonably to prevent the increase of damages. ***His negligence which does not***

> ***operate to cause the injury, but which merely adds to the damage resulting therefrom, is not a bar to the action, but it will have the effect of diminishing the damages, or go in mitigation thereof.*** Only such portion of the damages as may be directly attributable to the plaintiff's failure to perform his duty in the premises should be deducted from the damages as a whole. (Emphasis added).

See also: Grand Trunk Western R.R. v. Hodsden, 54 Ind. App. 175; 101 N.E. 834, 836 (1913):

> ***If appellee was guilty of any act of omission or commission that increased his damage, this was a matter of defense in mitigation of damages, and did not affect the question of his being guilty of negligence*** contributing to the cause of the fire or its escape onto his land. (Emphasis added).

See also: Harris v. Cacdac, 512 N.E.2d 1138, 1139-40 (Ind. Ct. App. 1987):

> ***Negligence on the part of the patient or of those having him in their charge, which occurs wholly subsequently to the physician's malpractice which caused the original injuries sued for, is not a complete defense to any recovery against the physician, but serves to mitigate the damages***, preventing recovery to the extent the patient's injury was aggravated or increased by his own negligence, or those having his custody, although he is entitled to recover for the injuries sustained prior to his contributory negligence. (Emphasis added).

See also: Deible v. Poole, 691 N.E.2d at 1316; and Dado v. Jeeninga, 743 N.E.2d 291, 296 (Ind. Ct. App. 2001) (noting "that mitigation is relevant only to the amount of damages recoverable and is not a defense to liability." (citing to Deible, 691 N.E.2d at 1316)).

The Comparative Fault Act, adopted in derogation of the common law, must be strictly construed. Control Techniques, Inc. v. Johnson, 762 N.E.2d 104, 111 (Ind. 2002). Moreover, "It is well settled that the legislature does not intend by a statute to make any change in the common law beyond what it declares either in express terms or by unmistakable implication." Id. The question, therefore, is whether the legislature has expressly (or by unmistakable implication) changed the common law with the enactment of the Comparative Fault Act with respect to the rule that a party's failure to mitigate damages *after* a tortious event does not go to the ultimate issue of liability, but rather serves to diminish a party's recoverable damages. It is undisputed

that the definition of "fault" now includes the "unreasonable . . . failure to mitigate damages." I.C. 34-6-2-45(b). The inquiry does not end here, however, because a failure to mitigate damages can occur both before and after a tortious event. See: Kocher, 787 N.E.2d at 429-30 (Vaidik, J. dissenting). As noted by Judge Vaidik in her dissent:

> I recognize that there are two definitions of "mitigate damages." The first definition of mitigation deals exclusively with acts or omissions that occur *before* an accident or initial injury. An example of this type of mitigation is a plaintiff's failure to attempt to slow down her car to avert an accident after observing a defendant run a stop sign. A plaintiff's failure to mitigate damages under the first definition goes to the issue of ultimate liability and fault. The second definition of mitigation encompasses acts or omissions that occur *after* an accident or initial injury. A plaintiff who fails to seek adequate medical treatment or continues to seek unwarranted medical treatment after the accident takes place is an example of this type of mitigation. A plaintiff's failure to mitigate damages under the second definition only goes to the amount of damages the plaintiff should receive. In drafting the Indiana Comparative Fault Act, I believe that the intent of the General Assembly was to define "fault" using the first definition of mitigation, that is, an injured party's acts or omissions before an accident that fail to minimize the party's initial injury. (Emphasis original).

The term "failure to mitigate damages" is not defined in either the Comparative Fault Act, Ind. Code 34-51-2 *et seq.* or the general definitions section of Ind. Code 34-6-2 *et seq.* Because there are clearly two distinct definitions of a "failure to mitigate damages," it is respectfully submitted that I.C. 34-6-2-45(b) is ambiguous. A statute is ambiguous when "it is susceptible to more than one interpretation." Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, 746 N.E.2d 941, 947 (Ind. 2001). When construing the meaning of a statute, the primary goal is to determine the legislature's intent. Hinojosa v. State, 781 N.E.2d 677, 680 (Ind. 2003). Undefined words in a statute are given their plain, ordinary, and usual meaning, unless the construction is plainly repugnant to the intent of the legislature or of the context of the statute. Id. The statute is examined as a whole and it is often necessary to avoid excessive reliance on a

strict literal meaning or the selective reading of individual words. Sales v. State, 723 N.E.2d 416, 420 (Ind. 2000). The legislature is presumed to have intended the language used in the statute to be applied logically and not to bring about an unjust or absurd result. Id. Under the rules for statutory construction, the provisions of a statute must be read in context. Yellow Cab Co. v. Williams, 583 N.E.2d 774, 778 (Ind. Ct. App. 1991).

Applying the aforementioned rules of statutory construction, it is submitted that the legislature intended "fault" to include only a failure to mitigate damages which occurs *before* a tortious event. Indeed, when the term "failure to mitigate damages" is examined within the larger context of I.C. 34-6-2-45(b), it becomes evident that the legislature was focused upon the conduct of a party which occurs *before* a tortious event:

> (b) "Fault", for purposes of IC 34-51-2, includes any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.

Excepting the ambiguous "failure to mitigate damages," all of the other actions referenced as "fault" in the second sentence of I.C. 34-6-2-45(b) clearly consist of types of conduct which occur *before* a tortious event, i.e., assumption of risk, incurred risk and the failure to avoid injury. It is therefore logical to assume that when the legislature referred to "failure to mitigate damages" within the same sentence as assumption of risk, incurred risk and the failure to avoid injury, that it intended a "failure to mitigate damages" to be "fault" only when such failure occurred *before* the tortious event. Moreover, as the dissent points out in Kocher, the rationale employed by the majority could result in illogical consequences which are contrary to the purposes for which the Comparative Fault Act was enacted:

> The majority's holding turns on its head case law both before and after the enactment of the Indiana Comparative Fault Act regarding the effect of a plaintiff failing to mitigate her damages. Under the majority's holding, mitigation of damages always becomes a fault issue. Therefore, under the majority's theory, if the plaintiff's failure to mitigate damages constitutes over fifty percent of the total damages, regardless of whether that failure caused the initial injury or merely exacerbated it, then the plaintiff would not recover any award. Ind. Code § 34-51-2-6. Consider the example where a defendant rear-ends a plaintiff and is 100% liable for the accident. If the plaintiff has $ 100,000 in damages but the defendant proves that fifty-one percent of those damages resulted from the plaintiff not returning to work after the accident, then under the majority's interpretation, the plaintiff would be entitled to zero damages, not $ 49,000. This was not the intent of the legislature.

Kocher, 787 N.E.2d at 429-30 (Vaidik, J. dissenting).

It is therefore submitted that the legislature (vis-a-vis the Comparative Fault Act) has not expressly (or by unmistakable implication) changed the common law rule that a party's failure to mitigate damages *after* a tortious event does not go to the ultimate issue of liability, but rather serves to diminish a party's recoverable damages. Such a finding is consistent with the temporal relationship between conduct which proximately *causes* injury, and conduct which only *aggravates* the injury; whereas the former may properly be said to constitute negligence or fault, the later involves only a diminution of damages and has no bearing upon the ultimate issue of liability. See: Deible, 691 N.E.2d at 1316: "if the act of the injured party does not operate in causing the injury from which all damages ensued, but merely adds to the resulting damages, its only effect is to prevent the recovery of those damages which reasonable care would have prevented;" Kavanagh v. Butorac, 140 Ind. App. 139; 221 N.E.2d 824, 830 (1966): "This doctrine [of avoidable consequences] differs from contributory negligence in that the latter comes into action *before* the defendant's wrongdoing has been completed. Thus contributory negligence to bar recovery must be a proximate cause of injury." (Emphasis original); Harris v. Cacdac, 512

N.E.2d at 1139-40: "in order to constitute a bar to recovery, contributory negligence must be a proximate cause of the injury. It must unite in producing the injury, and thus be 'simultaneous and co-operating with the fault of the defendant . . . (and) enter into the creation of the cause of action.' Negligence on the part of the patient . . . which occurs wholly subsequently to the physician's malpractice which caused the original injuries sued for, is not a complete defense to any recovery against the physician, but serves to mitigate the damages;" and Cromer v. City of Logansport, 38 Ind. App. 661; 78 N.E. 1045, 1048 (1906): "As a general rule, when contributory negligence constitutes a defense, it is a complete defense to the action and bars a recovery of any amount; but when the negligence of the plaintiff contributed, not to cause the injury, but only to aggravate it, the injury produced by the plaintiff's negligence being separable from that produced by the defendant's wrong, the defendant should be held liable only for such portion of the entire damage as was produced by his negligence."

The Supreme Court granted transfer in Kocher on December 12, 2003, and oral argument was conducted on January 13, 2004. A decision of the Supreme Court is anticipated soon, which hopefully will affirm the Deible decision, and clarify that the failure to mitigate damages *after* a tortious event does not constitute fault, but rather serves only to diminish a party's recoverable damages.