ATTORNEYS FOR APPELLANTS

Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Supervising Deputy Attorney General

Natalie F. Weiss
Deputy Attorney General
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

David S. Gladish
Mark J. Schocke
Law Office of David Gladish, P.C.
Highland, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Indiana State Police and
State of Indiana,

Appellants-Defendants,

v.

The Estate of Michael M.
Damore,

Appellee-Plaintiff.

August 26, 2022

Court of Appeals Case No.
21A-CT-2536

Appeal from the Lake Superior
Court

The Honorable Calvin D.
Hawkins, Judge

Trial Court Cause No.
45D02-1610-CT-97

Tavitas, Judge.

Case Summary

[1] Denise Damore ("Denise"), as personal representative of the Estate of Michael Damore ("the Estate"), brought a claim for wrongful death against the Indiana State Police ("ISP") and the State of Indiana (collectively "the Defendants") after Michael Damore ("Michael") was fatally injured following a vehicle accident involving an ISP trooper. The jury found in favor of the Estate. The Defendants appeal and claim that: (1) the trial court abused its discretion by excluding evidence of Michael's driving behavior in the minutes before the accident; (2) the trial court abused its discretion by excluding the testimony of the Defendants' expert witness due to an alleged violation of the court's order granting the Estate's motion in limine; (3) the trial court abused its discretion by failing to give two of the Defendants' proposed jury instructions; and (4) the Estate failed to present evidence sufficient to establish that Michael's mother, Denise, was Michael's dependent, thereby requiring the damages award to be reduced to the maximum permitted by the Adult Wrongful Death Statute. We conclude that the trial court abused its discretion with regard to its evidentiary rulings and by failing to give the proposed jury instructions. We also conclude that the evidence does not support a finding that Denise was Michael's dependent. Accordingly, we reverse and remand.

Issues

[2] The Defendants present four issues on appeal, which we restate as:

I. Whether the trial court abused its discretion by excluding evidence of Michael's driving behavior in the minutes before the accident that resulted in his death.

II. Whether the trial court abused its discretion by excluding the testimony of the Defendants' expert witness based on an alleged violation of the court's order granting the Estate's motion in limine.

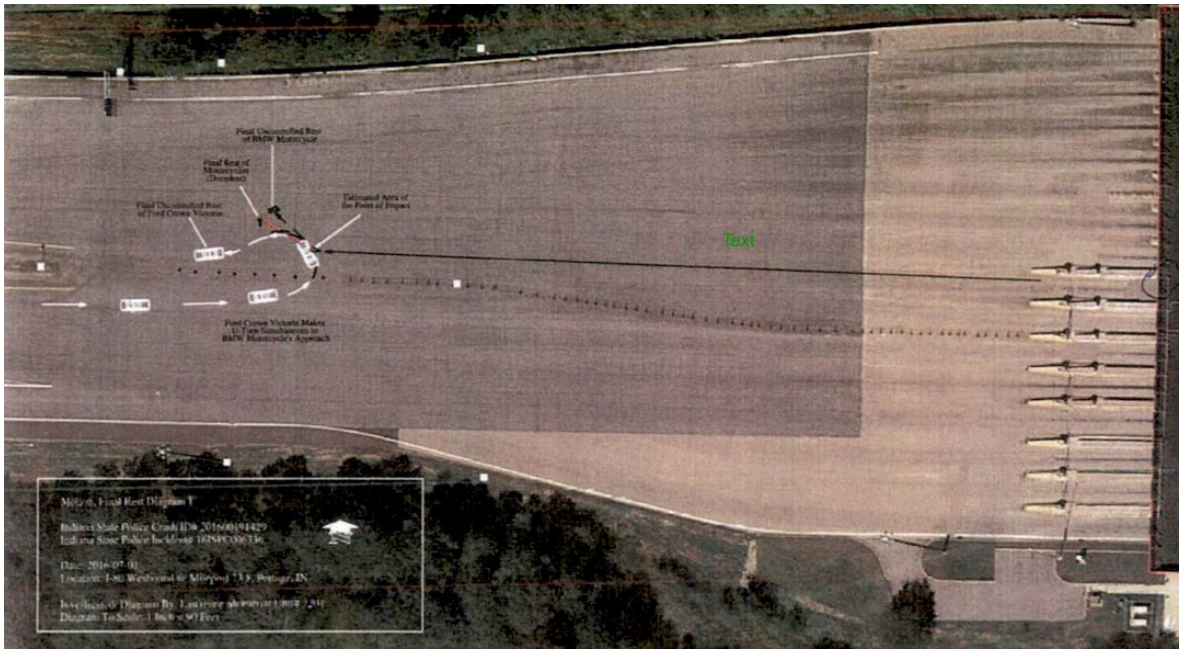
III. Whether the trial court abused its discretion by failing to give two of the Defendants' proposed jury instructions.

IV. Whether the Estate failed to prove that Denise was Michael's dependent, thereby limiting the Estate's damages to that permitted by the Adult Wrongful Death Statute.

Facts

[3] At 9:27 p.m. on July 1, 2016, Michael was driving his motorcycle in the westbound lanes of the Indiana Toll Road when he collided with a patrol car driven by Indiana State Police Trooper Jathan Rose. Michael had just exited the tollbooth at Portage, Indiana. Trooper Rose had just conducted a traffic stop on the eastbound lanes and made a U-turn through traffic cones to enter the westbound side of the highway. Although it was a dark night, the weather was clear, and the road was well illuminated. Upon exiting the tollbooth, Michael moved his motorcycle to the right of the multiple lanes and accelerated in between two cars, thereby passing them. Michael's motorcycle struck the passenger-side door of Trooper Rose's patrol car, throwing Michael from the motorcycle. Michael suffered fatal injuries as a result of the accident.

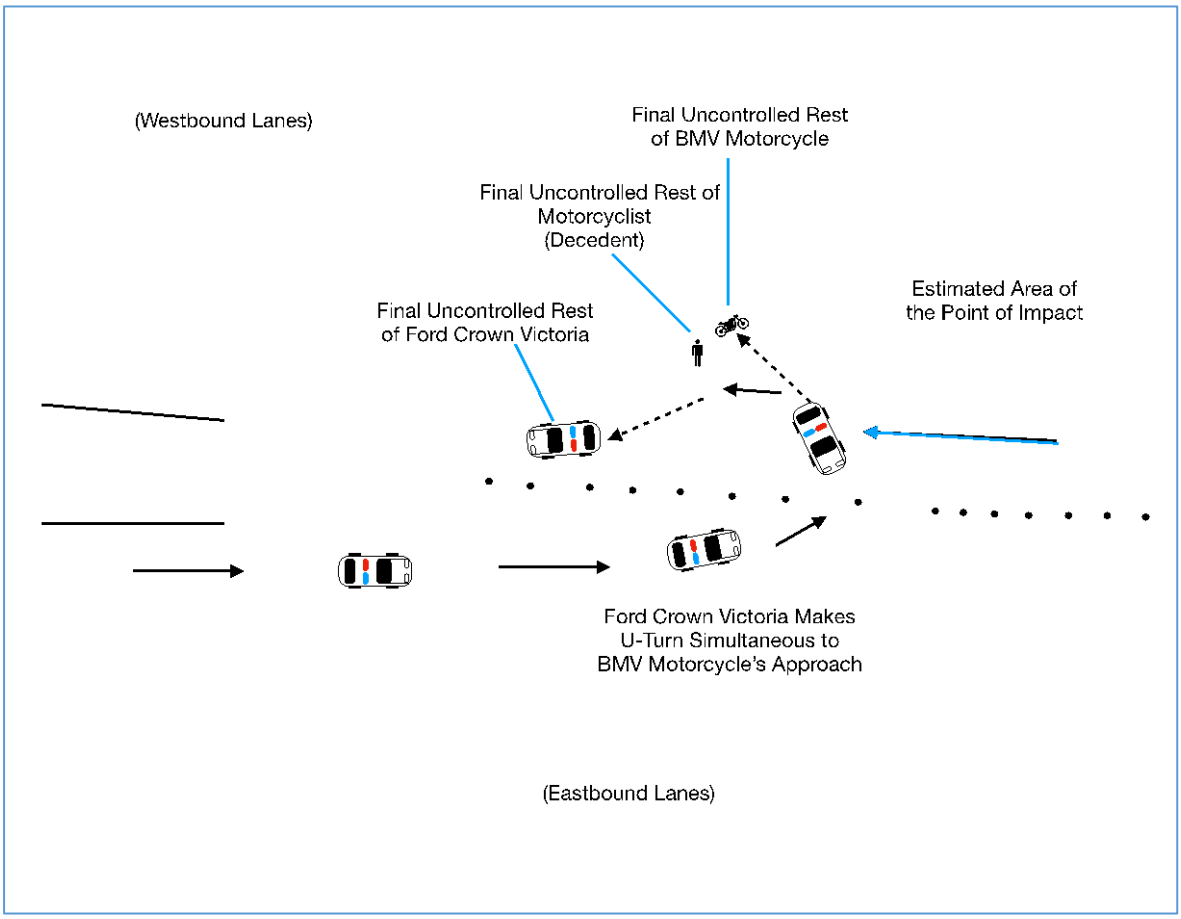
[4] The following image, entered into evidence at trial, shows the location of the road, the tollbooth, and the vehicles involved in the accident:



Plaintiff's Ex. 2.

[5] The following diagram, based on a photograph[1] admitted into evidence at trial, depicts the accident site in greater detail:

[1] *See* Plaintiff's Ex. 3. The diagram below is based on a photograph that was not reproduced clearly enough to allow us to include them in this opinion. This diagram is included only as a visual aid to the reader. *See Altevogt v. Brand*, 963 N.E.2d 1146, 1148 (Ind. Ct. App. 2012) (including, as an aid to the reader, a map that was based on materials in the record).



[6] ISP Trooper Paul Arnold, an accident reconstruction expert, investigated the crash and determined that, from the tollbooth to the point of impact with Trooper Rose's patrol car, Michael traveled 350 feet in approximately four seconds, for an average speed of 59.65 mph.[2] The posted speed limit prior to entering the tollbooth was 45 mph, and the posted speed after exiting the booth was 55 mph. Trooper Arnold determined that both Trooper Rose and Michael

[2] Trooper Arnold also determined that, if an average perception-reaction time of one second were factored into his calculations, then Michael's speed could have been as high as 79 mph. Trooper Arnold explained that "the average healthy person's perceived-reaction time is roughly 1.5 seconds, meaning that once you perceive a threat, that's about how long it takes your brain to process and then send a message for you to react." Tr. Vol. II p. 189.

were at fault for the accident—Trooper Rose for failing to yield the right-of-way to oncoming traffic, and Michael for speeding, following too closely, and making unsafe lane movements.

[7] The Estate's accident reconstruction expert, Stephen Neese, determined that Michael's maximum speed after exiting the tollbooth was only 43 mph. Neese concluded that, based on the timing of Trooper Rose's U-turn, Michael had insufficient perception-reaction time to avoid the collision and that Michael's speed was, therefore, not a contributing factor to the accident.

[8] On October 5, 2016, the Estate filed a complaint against the Defendants under the General Wrongful Death Statute ("GWDS"). The Defendants filed an answer that asserted the affirmative defense of contributory negligence. The Estate subsequently filed a motion in limine that sought to prevent the Defendants from introducing numerous pieces of evidence. The Estate sought to prevent the Defendants from referencing Michael's actions in driving his motorcycle just prior to reaching the tollbooth immediately before the accident.

[9] Specifically, the evidence the Estate sought to exclude was as follows. In the minutes preceding the accident, Westville Police Officer Ian Nelson observed a motorcycle, later determined to be driven by Michael, going 78 mph in a 55-mph zone. Officer Nelson attempted to pull the motorcycle over and activated his emergency lights, but Michael fled at a high speed and weaved in and out of traffic. Another witness, motorist David Griffin, saw Michael's motorcycle drive up behind him at a high rate of speed at the Michigan City tollbooth with

a police car in pursuit. Griffin observed Michael "sh[o]ot out like a rocket" from the toll both. Tr. Vol. III p. 3-4. Griffin estimated that Michael was traveling in excess of 100 mph.

[10] Video from the Michigan City tollbooth depicted a motorcycle, indistinguishable from the one driven by Michael, pass through that tollbooth at 9:17:40 p.m.[3] Video from the Portage tollbooth showed that Michael arrived at that booth at 9:27:31 p.m., nine minutes and fifty-one seconds later. Given the 14.8 miles between the Michigan City booth and the Portage booth, Michael necessarily traveled an average speed of 90.24 mph. Michael, however, came to a stop at the Portage tollbooth gate before accelerating and colliding with Trooper Rose's vehicle. The Estate argued, therefore, that "the speed and manner in which [Michael] was driving in the intervals before coming to a complete stop at the Portage Toll Plaza gate do not have any bearing on the eventual collision that costs [Michael] his life." Appellant's App. Vol. II p. 63. The Estate argued that this evidence was irrelevant and, even if relevant, unduly prejudicial. The Estate's motion in limine also sought to prevent any mention of the motion in limine itself. The trial court granted the Estate's motion in limine in relevant part following a hearing on June 17, 2021. The Defendants subsequently filed a motion to reconsider, which the trial court denied.

[3] Shortly after the motorcycle passed through the tollbooth, Officer Nelson ended his pursuit.

[11] A three-day jury trial commenced on August 11, 2021. The Estate presented evidence that Michael, who was twenty-eight years of age at the time of his death, lived with his mother, Denise, who was the personal representative of the Estate. The Estate also presented evidence that Trooper Rose made the U-turn in an unsafe manner and that Michael was not driving in an unsafe manner.

[12] The only witness called by the Defendants was accident reconstruction expert Kevin Johnson, whose testimony was later stricken. Johnson opined that Michael had been following the car ahead of him too closely, which impaired Trooper Rose's ability to see Michael. Johnson testified that Michael quickly accelerated between two cars, which was an unsafe lane movement and further estimated that Michael was traveling at a speed of between 75 and 78 mph at the moment of the collision. Johnson thus concluded that Michael was partially at fault for the accident.

[13] The Estate's counsel cross-examined Johnson about Trooper Rose's decision to make the U-turn, and the following exchange occurred:

> Q. And I think you said earlier, just to make sure we're on the same page, all of those vehicles as they're exiting [the tollbooth] presented a potential hazard to Trooper Rose in conducting this U-turn at that location?
>
> A. Yes.
>
> Q. That's what makes it a very bad location to do a U-turn?
>
> A. Yes. You have a high volume of traffic coming toward you, yes.

*****

> Q. . . . Would [you] agree night driving makes it more difficult – I asked you that question.
>
> Would you agree night driving is more difficult due to glare from roadside lighting and headlights of oncoming vehicles which may impair visibility?
>
> A. Yes, sir.
>
> Q. Based upon the problems with traffic at night on the toll way, [Trooper] Rose had the option of doing a U-turn at a different location. Isn't that true?
>
> A. **I don't want to infringe on your motion in limine.** So I don't know as far as what his options were and –

Tr. Vol. III pp. 54-56 (emphasis added).

[14] At this point, the Estate's counsel asked to approach the bench and requested that the trial court impose monetary sanctions against Johnson. The trial court excused the jury and held a brief conference outside the presence of the jury, at which the following occurred:

> THE COURT: I will initiate this. Be seated.
>
> Sir, state your name for the record.
>
> THE WITNESS: Kevin Johnson.
>
> THE COURT: Mr. Johnson, we're taking this break because of you.
>
> THE WITNESS: Okay.
>
> THE COURT: Your last statement was totally inappropriate.

THE WITNESS: Okay.

THE COURT: Totally and unequivocally inappropriate.

THE WITNESS: I am sorry.

THE COURT: Sorry is not enough. We have guidelines that govern the conduct of this trial. I'm assuming you were aware of a motion because you articulated it.

THE WITNESS: That's correct.

THE COURT: Obviously I would assume that you understand the nature of that type of a motion and why a court would order it. It's not to be transcended at all nor mentioned in testimony, especially from you as a witness.

I'm at a point that I feel like I should sanction you for doing it, because you're not a novice to testifying.

THE WITNESS: Yes, sir.

THE COURT: You are not a novice. You are a former police officer. Let me calm down a bit. Mr. Gladish [the Estate's attorney], Mr. Norris [the Defendants' attorney], you may want to say something, but I have to calm down a bit. I have never had this type of conduct by a schooled witness since I've been in this position as a judge and I've never had it as a trial attorney.

MR. GLADISH: Your Honor, I brought this to the Court's attention early on that I've dealt with him before. He does this on purpose. I'm going to make a motion -- I don't want a mistrial because -- I don't know if he's trying to get a mistrial here. I think we should move to strike his testimony. This was an intentional act. He knew better. He said it on purpose. He knew he was on the line before this. And I think that is a fair and adequate remedy for that conduct, because mentioning even saying the motion, any verbiage to that is highly offensive to the case. How do you go forward -- now they're going to say, "What's the motion in limine?" He just put something in their

minds that we cannot remove and it's not fair to the plaintiff now. So based upon -- and they know this is his conduct, this is his MO. He wants to get out what he wants to say. He knows this.

Judge, as you said earlier, he testifies weekly. I've never heard -- I don't have the experience you do, Your Honor, but I'm going on 26 years in October. I've never heard a witness ever say, "I don't want to violate your motion in limine." And that's part of the instruction we give to all of our clients. You can't even mention any rulings of the Court and he did it intentionally. This is not like, I'm going to slip up. He says it to me and put something in their minds that you cannot remove now. I don't think it's fair.

I don't want a mistrial. I think an adequate sanction is to have his testimony stricken, and the jury told that.

THE COURT: Mr. Norris, your response.

MR. MARTIN [Defense Counsel]: Your Honor, I guess, it was not intentional. He can't say it was intentional.

MR. GLADISH: Oh, God.

MR. MARTIN: He slipped up. He said it. I don't think the jury knows what it means. I think it would be a great, great -- going that high to strike his entire testimony would be just over the top, Your Honor.

THE COURT: Anything else?

MR. MARTIN: No, Your Honor.

MR. GLADISH: If I can have a brief rebuttal.

THE COURT: Go ahead.

MR. GLADISH: That was over the top. I'm going to -- this is my 82nd or 83rd or 84th, whatever the number is, never

happened. And, you know, we had some arguments early on about playing some gamesmanship and this is a continuation, Your Honor. This is not the first time we've had to bring things to the Court's attention about violations of the motion in limine and so forth. I brought this up earlier and said these gentlemen over here need to abide by their ethical standards and they weren't doing it early on in the trial. It stopped. But now, they put this witness on who is -- I don't know how many times he's testified in court, hundreds if not maybe a thousand. I don't know how long he's testified in court.

He intentionally -- they call that an "evidentiary harpoon". That's the terminology. That's when you put something into evidence and just the statement is sufficient to sink what you're doing. So[,] his evidentiary harpoon in this case cannot be cured by, "Ladies and gentlemen, disregard he's mentioned motion in limine."

He knew better. They should pay the penalty for it.

THE COURT: Let me just say this, the first time I've really exploded, I mean, I've had some problems with lawyers, and but, you know, we know how to deal with lawyers, especially lawyers that I've known. I can't -- I don't know you, gentlemen. And, essentially, you've been professional, but I just can't -- this can't go unpunished. This man is a tenured expert witness. The fact that he would articulate what he said, obviously, meant he knew what that was. And to say it in a setting like this, I mean it's just despicable, utterly despicable.

I'm granting your motion.

MR. GLADISH: Thank you, Your Honor.

THE COURT: I'm granting your motion. That's just how I feel about what this experienced witness did in this trial.

Id. at 57-59.

[15] At the close of the evidence, the Defendants tendered several proposed jury instructions, including Defendant's Proposed Instruction No. 14, which stated:

> When the events in this case happened, Indiana Code § 9-21-8-14 provided, in part, as follows:
>
> > A person who drives a motor vehicle may not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of both vehicles, the time interval between vehicles, and the condition of the highway.
>
> If you decide from the greater weight of the evidence that Michael Damore violated Indiana Code § 9-21-8-14, and that the violation was not excused, then you must decide that Michael Damore was at fault.

Appellant's App. Vol. IV p. 97. The trial court refused this instruction.

[16] The Defendants also tendered Defendant's Proposed Instruction No. 18, which stated:

> When the events in this case happened, Indiana Code § 9-21-8-6 provided as follows:
>
> > (a) A person who drives a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:
> >
> > > (1) When the vehicle overtaken is making or about to make a left turn.
> >
> > > (2) Upon a roadway with unobstructed pavement of sufficient width for two (2) or more lanes of vehicles moving lawfully in the direction being traveled by the overtaken vehicle.

> (b) A person who drives a vehicle may overtake and pass another vehicle upon the right only under conditions that permit overtaking upon the right in safety. Overtaking upon the right may not be made by driving off the roadway.
>
> If you decide from the greater weight of the evidence that Michael Damore violated Indiana Code § 9-21-8-6, and that the violation was not excused, then you must decide that Michael Damore was at fault.

Id. at 101. The trial court also refused this instruction. The jury found in favor of the Estate and awarded the Estate $4,000,000 in damages, and the trial court entered judgment accordingly.

[17] On September 10, 2021, the Defendants filed a motion to correct error, arguing that Denise was not a dependent next of kin who could recover under the GWDS and that the damages should, therefore, be reduced to $300,000—the maximum permitted under the Adult Wrongful Death Statute ("AWDS"). In the alternative, the Defendants argued that the damages should be reduced to $700,000—the maximum permitted against a governmental entity under the Indiana Tort Claims Act ("ITCA"). The trial court held a hearing on the Defendants' motion on October 19, 2021, and, on October 20, 2021, denied the motion in part and granted the motion in part, which reduced the judgment to $700,000 under the ITCA, plus costs. The Defendants now appeal.

Discussion and Decision

I. Exclusion of Pre-Accident Driving Behavior

[18] The Defendants first argue that the trial court erred when it excluded evidence regarding Michael's pre-accident driving behavior. We afford a trial court broad discretion in ruling on the admissibility of evidence. *Sims v. Pappas*, 73 N.E.3d 700, 705 (Ind. 2017). We will disturb the trial court's ruling only where the trial court has abused its discretion. *Id.* "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it," *id.,* or if the trial court misinterprets the law. *Smith v. Franklin Twp. Cmty. Sch. Corp.*, 151 N.E.3d 271, 273 (Ind. 2020).

[19] If a plaintiff brings a claim of negligence against a governmental entity—such as the State and ISP—under the ITCA, the Indiana Comparative Fault Act does not apply. *Kader v. State, Dep't of Correction*, 1 N.E.3d 717, 728 (Ind. Ct. App. 2013) (citing Ind. Code § 34-51-2-2). Instead, in such cases, contributory negligence on the part of a plaintiff provides a complete defense to liability for the Defendants and other government actors who fall within the scope of the ITCA. *Id*. (citing *Shand Min., Inc. v. Clay Cnty. Bd. of Comm'rs*, 671 N.E.2d 477, 479 (Ind. Ct. App. 1996)). In other words, under contributory negligence, a plaintiff is wholly barred from recovery "when he or she is negligent and this negligence is even slightly the cause of the alleged damages." *Murray v. Indianapolis Pub. Sch.*, 128 N.E.3d 450, 453 (Ind. 2019). The existence of contributory negligence is generally an issue of fact for the jury. *Id*. at 453. "It may be a question of law appropriate for summary judgment 'if the facts are

undisputed and only a single inference can be drawn therefrom.'" *Id*. (quoting *Hill v. Gephart,* N.E.3d 402, 406 (Ind. Ct. App. 2016), *clarified on reh'g, trans. denied*). Accordingly, under the law of contributory negligence, the Defendants needed to prove only that Michael was partially negligent in order to avoid liability.

[20] The Defendants contend that evidence regarding Michael's driving behavior in the minutes prior to the accident, i.e., his fleeing from the police at high speeds before reaching the Portage tollbooth, was relevant to the issue of his contributory negligence. The Estate counters that, because it is undisputed that Michael came to a stop at the Portage tollbooth, only his driving *after* leaving the tollbooth up to the time of the collision with Rose's patrol car is relevant.

[21] Indiana Evidence Rule 401 provides that evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence," and "(b) the fact is of consequence in determining the action." Under Evidence Rule 402, relevant evidence is admissible unless such admission is prohibited by: "(a) the United States Constitution; (b) the Indiana constitution; (c) a statute not in conflict with these rules; (d) these rules; or (e) other rules applicable in the courts of this state." Irrelevant evidence is inadmissible. *Id*.

[22] Here, evidence showing that Michael had recently been in a high-speed chase with the police and drove well in excess of the posted speed limit minutes before reaching the Portage tollbooth was relevant. That is, evidence that

Michael was fleeing from police and was driving unsafely in the minutes prior to the collision tends to make it more probable that he drove his motorcycle in an unsafe manner to allude police after he exited the Portage tollbooth. And Michael's driving was clearly of consequence in the action, because any negligence on his part that contributed even slightly to the accident would bar recovery by the Estate.

[23] We reached a similar conclusion in *Wages v. State*, 863 N.E.2d 408 (Ind. Ct. App. 2007), a case involving a defendant charged with reckless homicide. The defendant in *Wages* attempted to pass a car when he struck an oncoming vehicle head on, killing the three occupants of the oncoming vehicle. After seeing a news report regarding the crash, a witness reported to the police that she had seen a vehicle matching that of Wages' vehicle being driven "erratically" shortly before the accident. *Id*. at 410. This witness gave a taped statement in which she indicated she had noticed a truck "'zipping in and out of traffic, that it appeared to be traveling at an excess rate of speed, and that it passed in a no-passing zone a line of three cars, including [the witness]'s that were traveling at the speed limit." *Id*. Shortly after the truck passed her, the witness came upon the aftermath of the fatal collision and recognized Wages' truck. *Id*.

[24] Prior to trial, Wages moved to exclude the eyewitness's testimony as irrelevant, unfairly prejudicial, and as impermissible evidence of prior bad acts. The trial court denied the motion but certified its order for interlocutory appeal. On appeal, this Court affirmed the trial court, noting:

> In determining whether a defendant's driving was reckless as opposed to merely negligent, courts have considered evidence of erratic driving by the defendant *immediately preceding a wreck*[.] In other words, it is not necessary to view a fatal accident strictly in isolation, and the defendant's final driving maneuver that caused the accident is not the only relevant piece of evidence in determining whether he or she was driving recklessly.

Id. at 411 (citations omitted) (citing *Warner v. State*, 577 N.E.2d 267, 269 (Ind. Ct. App. 1991) (holding that evidence supported defendant's conviction for reckless homicide where defendant was driving at excessive speeds on snowy street, swerving through traffic, and fish-tailing his vehicle immediately before fatal collision).

[25] From this, we conclude that evidence of a motorist's driving behavior immediately before the accident[4] is relevant to the issue of whether the driver acted recklessly—or, in the present case, merely negligently. The contrary position, taken to its logical conclusion, would mean that only the driver's final driving maneuver was relevant to whether the driver contributed to the accident. We rejected this reasoning in *Wages* and see no reason to deviate from our holding in *Wages* now.

[26] We acknowledge that *Wages* and *Warner* were criminal cases, whereas the present case is civil in nature, but the question is the same: whether the driving

[4] The police called off the high-speed pursuit of Michael's motorcycle after he went through the Michigan City tollbooth at 9:17:40 p.m. Michael arrived at the Portage tollbooth at 9:27:31 p.m., and he collided with Trooper Rose's car between 9:27:37 or 9:27:38.

behavior of a motorist immediately prior to the accident is relevant in determining the fault of the driver. The Defendants sought to present evidence that Michael had been driving at an excessive speed, fled from the police, and had been seen weaving in and out of traffic only minutes before the fatal collision. This evidence was clearly relevant, as it made it more likely that Michael was also operating his vehicle in an unsafe manner when the collision occurred. The trial court's decision to exclude such evidence was contrary to our holding in *Wages* and *Warner*. But this does not end our analysis.

[27] Evidence Rule 403 provides that a trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." The Estate claims that evidence of Michael's driving before he approached the Portage tollbooth, even if relevant, was unfairly prejudicial. Again, we disagree.

[28] The manner in which Michael operated his motorcycle in the minutes prior to the accident may be prejudicial to the Estate's claim of negligence on the part of Trooper Rose. But it is not merely the danger of prejudice with which we are concerned; instead, we are concerned about the danger of *unfair* prejudice. "[U]nfair prejudice "looks to the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence to suggest decision on an improper basis." *Escamilla v. Shiel Sexton Co., Inc.*, 73 N.E.3d 663, 670 (Ind. 2017) (quoting *Camm v. State*, 908 N.E.2d 215, 224 (Ind. 2009)). Allowing the jury to hear evidence that Michael was fleeing from police and was driving his

motorcycle in a reckless or negligent manner in the minutes before the accident poses no such concerns. Moreover, the probative value of this evidence was relatively high, especially as any negligence on Michael's part would bar recovery by the Estate under a theory of contributory negligence. Evidence of Michael's driving in the minutes before the accident is relevant and, under the facts of this case, is not unduly prejudicial. Thus, the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice.

[29] We, therefore, conclude that the trial court abused its discretion to the extent that it concluded that Evidence Rule 403 required exclusion of evidence regarding how Michael was driving in the minutes prior to the accident.[5]

II. Striking the Testimony of the Defendants' Expert

[30] The Defendants next contend that the trial court erred by striking the entire testimony of the Defendants' expert witness, Johnson, based on a violation of the trial court's order granting the Estate's motion in limine. As detailed above, during cross-examination of Johnson, the Estate's counsel asked Johnson: "Based upon the problems with traffic at night on the toll way, Rose had the option of doing a U-turn at a different location. Isn't that true?" Tr. Vol. III p. 56. Johnson responded: "I don't want to infringe on your motion in limine. So

---

[5] The Estate briefly argues that "evidence of a prior wrongful act is not admissible if its sole apparent purpose is to show that Michael acted in conformity with that character." Appellee's Br. p. 23 (citing Ind. Evidence Rule 404(b)). Evidence Rule 404(b) is not applicable here because the evidence of Michael's driving behavior in the minutes before the collision was not a prior act; it was part of one continuous action that ended with the collision. *See Wages*, 863 N.E.2d at 410 (holding that evidence of motorist's driving behavior in the moments before a fatal collision was not prohibited by Rule 404(b) because it was intrinsic to the charged crime of reckless homicide).

I don't know as far as what his options were[.]" *Id*. The Estate then requested that the trial court impose sanctions on Johnson, and the trial court ultimately struck the entirety of his testimony, the only testimony the Defendants presented.

[31] It is well settled that a trial court's ruling on a motion in limine is not a final decision on the admissibility of evidence; instead, it is designed to prevent mention of prejudicial material to the jury before the trial court has had the opportunity to consider its admissibility. *Allied Prop. & Cas. Ins. Co. v. Good*, 919 N.E.2d 144, 151 (Ind. Ct. App. 2009) (citing *Brown v. Terre Haute Reg'l Hosp.*, 537 N.E.2d 54, 59 (Ind. Ct. App. 1989)). "That is not to say that a party who violates an order in limine may do so with impunity." *Id*. (citing *Brown*, 537 N.E.2d at 59). Indiana trial courts possess the inherent power to sanction both parties and attorneys for violating orders in limine. *Id*. at 154. "The trial court has the power to impose sanctions against a party or attorney who engages in egregious misconduct that causes a mistrial. Egregious misconduct consists of intentional, reckless, or negligent conduct by the party or attorney." *Id*. This power is designed to protect the integrity of the judicial system and to secure compliance with the court's rules and orders. *Id*. The sanction to be imposed for the violation of an order in limine is within the discretion of the trial court, and includes "declaration of a mistrial and/or punishment for contempt." *Id*. at 151. Accordingly, on appeal, we review the trial court's choice of sanction for an abuse of discretion. *Id*. at 154.

[32] In the present case, the Defendants do not deny that Johnson violated the motion in limine. Indeed, the motion in limine prohibits any mention of the motion in limine itself.[6] Appellant's App. Vol. II p. 57, Vol. IV p. 53. Specifically, the motion in limine prohibited the parties from making "mention of Plaintiffs' Motion in Limine or Plaintiff's attempts to bar certain evidence being admitted or arguments being advanced." Appellant's App. Vol. II. p. 57. Johnson's testimony did mention the motion in limine and was, therefore, a violation of the order granting the motion in limine.

[33] We do not, however, see how the Estate was harmed by this brief, one-time mention of the motion in limine, with no discussion of the prohibited evidence. Johnson's testimony did not mention any of the actual evidence covered by the motion in limine. To the contrary, he was, however inartfully, attempting to **avoid** violating the motion in limine. Even assuming that the jury knew what a motion in limine is—a dubious proposition at best—we fail to see how merely mentioning the motion in limine prejudiced or harmed the Estate.

[34] It is common knowledge that attorneys make objections to exclude certain evidence. Here, the trial court instructed the jury not to consider evidence that was excluded. Appellant's App. Vol. IV p. 69. We are unable to discern how the Estate was prejudiced in any appreciable way by the jury simply hearing of

---

[6] Otherwise, we fail to see how the mere mention of a motion in limine constitutes a violation of the motion. The purpose of a motion in limine is to prevent the mention of prejudicial material to the jury prior to the trial court making a final ruling on its admissibility at trial. *Good*, 919 N.E.2d at 151. We have found no case where the mere mention of a motion in limine was considered to be a violation of the motion in limine.

the existence of a "motion in limine" without any reference to the actual evidence prohibited by that motion. At most, Johnson's violation of the motion in limine was brief and harmless. Under these facts and circumstances, excluding the entirety of Johnson's testimony was overly severe.

[35] We must balance the prejudice from the violation of the motion in limine with the available sanctions. The sanctions must be proportional to the harm or prejudice. *See Prime Mortgage USA, Inc. v. Nichols*, 885 N.E.2d 628, 651 (Ind. Ct. App. 2008) ("'In general the severity of a sanction should be proportioned to the gravity of the offense.'") (quoting *Allen v. Chicago Transit Auth.*, 317 F.3d 696, 703 (7th Cir. 2003)).

[36] In the context of discovery violations, Indiana trial courts have the same inherent authority to maintain their dignity, secure obedience to their process and rules, rebuke interreference with the conduct of court business, and punish unseemly behavior. *Wright v. Miller*, 989 N.E.2d 324, 331 (Ind. 2013) (citing *City of Gary v. Major*, 822 N.E.2d 165, 169 (Ind. 2005)). When exercising this inherent power, trial courts should seek to apply sanctions which have a minimal effect on the evidence presented at trial and the merits of the case and keep in mind that sanctions should not be imposed when circumstances make sanctions unjust. *Id*. (citing *Wiseheart v. State*, 491 N.E.2d 985, 990 (Ind. 1986); *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 77 (Ind. 2006)).

[37] In *Wright*, the plaintiffs filed a medical malpractice claim against certain medical providers. The medical review panel found in favor of the defendants,

who then moved for summary judgment based on the opinion of the medical review panel. When the plaintiffs responded with an affidavit of a medical expert witness, the defendants withdrew their motion for summary judgment. Although the plaintiffs failed to include their expert witness on their witness list, the filings clearly showed that the defendants were aware of the expert witness and that the plaintiffs intended for him to testify at trial. The plaintiffs also failed to abide by other orders by belatedly filing the preliminary and final witness lists, the statement of contentions, and proposed jury instructions. The plaintiffs then moved to continue the trial because their expert witness fell ill and was hospitalized. The trial court granted the motion and reset the trial date. The plaintiffs were subsequently unable to secure a replacement expert witness until well after the discovery deadline. Accordingly, the defendants moved to exclude the testimony of the belatedly-disclosed expert witness and to dismiss the case due to a lack of evidence. The trial court granted the motion, and this court reversed. *Wright v. Miller*, 965 N.E.2d 135 (Ind. Ct. App. 2012), *trans. granted*.

[38] On transfer, our Supreme Court also determined that the trial court abused its discretion by excluding the belatedly-disclosed expert witness, writing:

> While we critically view counsel's haphazard and disrespectful pattern of inattention to or disregard of the trial court's management and discovery orders and deadlines, *the prejudice to the defendants was minimal*. They were well aware that the plaintiffs were attempting to secure a new expert witness and that the witness would need to be deposed. As of the date of the status conference, when the plaintiffs' new expert witness was

> disclosed, no new trial date had been set. Certainly the trial court would have provided the defendants time to prepare to confront the plaintiffs' new witness at trial. The late disclosure was thus neither a surprise nor would it have had a deleterious or significantly prejudicial effect on the defendants' case. The prejudice to the defendants was little greater than that which is to be expected in suits of this nature. In contrast, as demonstrated by the trial court's conclusion that the exclusion required dismissal, the exclusion of the plaintiffs' expert would have had a substantial effect on their ability to present the merits of their case. . . .
>
> [*T*]*he circumstances of the present case warranted some lesser, preliminary, or more pointed sanction fashioned to address counsel's unsatisfactory conduct in this case without depriving the plaintiffs of their ability to present the merits of their case at trial*.

Wright, 989 N.E.2d at 331 (emphases added). We believe similar concerns apply when a trial court sanctions a party for the violation of a motion in limine.

[39] Here, the trial court did not take any less-drastic measures to sanction Johnson for his violation of the motion in limine. It did not fine Johnson, threaten him with contempt, or even strike just the portion of his testimony where he mentioned the motion in limine. Instead, the trial court struck the entirety of Johnson's testimony. Johnson was the Defendants' only witness. Thus, the trial court's sanction essentially deprived the Defendants of their defense.[7]

[7] The Estate argues that the exclusion of Johnson's testimony was harmless because similar testimony was elicited from Trooper Arnold. Although there was some overlap between their testimonies, we cannot say that Johnson's testimony was merely cumulative. Johnson was the only witness who critiqued the

Given the minor nature of the violation of the motion in limine, the fact that no prejudicial information was presented to the jury, and the draconian nature of the sanction imposed by the trial court, we conclude that the trial court's sanction—striking the entirety of Johnson's testimony—was an abuse of discretion.

[40] Moreover, any violation of the motion in limine was not attributable to the Defendants' trial counsel, who had informed Johnson not to mention the motion in limine. Although the trial court would have been within its discretion to sanction Johnson, excluding Johnson's testimony in its entirety punished the Defendants, not Johnson. *Cf. Dumont v. Davis*, 992 N.E.2d 795, 809 (Ind. Ct. App. 2013) (holding that trial court abused its discretion by excluding testimony of defense's expert witness as a sanction for discovery violation where any prejudice that arose was attributable to defendant's counsel, not the defendant himself), *trans. denied*.

[41] The Estate claims that there were other attempts to violate the motion in limine and that Johnson's violation was not an isolated incident. All but one of the examples referred to by the Estate, however, involved other witnesses, not

---

methodology used by the Estate's expert witness Stephen Neese. Furthermore, although Trooper Arnold testified that Michael could have been traveling as fast as 79.58 mph, he testified that Michael's average speed was 59.65 mph. In contrast, Johnson testified that Michael was traveling between 75 to 78 mph at the time of the crash. Nor can we overlook that Trooper Arnold and Trooper Rose were fellow ISP employees, whereas Johnson was not.

Johnson.[8] The one incident that did involve Johnson occurred when the Estate cross-examined Johnson, during which the following exchange occurred:

> Q. Do you agree based upon where the impact happened, Michael did not move to the right all that much?
>
> A. Correct. It does not appear that he was making a lane change to get to the right lane. It looks like he was just making a lane maneuver around a vehicle.
>
> Q. So if there's been statements he's weaving in [and] out of traffic, that's not correct, is it?
>
> A. There were a lot of statements where he was weaving in and out of traffic, but that was before this.

Tr. Vol. III p. 51. At this point, the Estate's counsel argued that Johnson had violated the motion in limine: "He just violated the motion in limine. He is attempting to get into things before this. I said if there is any evidence *at the scene*[9] about him weaving in traffic. You know, this individual [Johnson] will go out of his way to say whatever he wants." *Id*. The trial court stated that, "from what I think[,] the way you posed the question opened the door for him

---

[8] The instances involving the other witness, ISP Trooper Lawrence McFarrin, appear to have little to do with the motion in limine. Indeed, the motion in limine referred to Johnson's testimony, not Trooper McFarrin. More importantly, the trial court *granted* the Estate's objections to Trooper McFarrin's testimony on grounds that the questions went beyond the scope of the direct examination and because the questions posed would elicit an opinion that was not disclosed during discovery. *See* Tr. Vol. I pp. 79-90. The fact that the Defendants' counsel may have attempted to elicit non-admissible testimony from Trooper McFarrin is unrelated to whether the Defendants' counsel was to blame for Johnson's violation of the motion in limine.

[9] This is an inaccurate characterization of the question the Estate's counsel posed to the witness. The question was not whether there had been any evidence of Damore weaving in traffic "at the scene." The question was: "So if there's been statements he's weaving in [and] out of traffic, that's not correct, is it?" Tr. Vol. III p. 51.

to say that. I think you've got to be careful with it. I don't know if he intentional [sic] said it." *Id*.

[42] As noted by the trial court, it was the Estate's own questioning on cross-examination that opened the door to Johnson's response, and the trial court did not find this to be a violation of the motion in limine. Thus, this other incident with Johnson does not support the Estate's claims that Johnson repeatedly violated the motion in limine. Nor may we give much consideration to the Estate's claims that Johnson had misbehaved in earlier trials involving the Estate's counsel. None of these alleged incidents are in the record before us, and the arguments of the Estate's counsel at trial are, by definition, not evidence. *Krampen v. Krampen*, 997 N.E.2d 73, 81 (Ind. Ct. App. 2013) (noting that, other than a clear and unequivocal admission of fact by an attorney, unsworn statements of counsel are not evidence) (citing *In re K.H.*, 838 N.E.2d 477, 480 (Ind. Ct. App. 2005)).

[43] Moreover, here, the trial court specifically noted that the Defendants' counsel was not at fault for Johnson's violation of the motion in limine. *See* Tr. Vol. III p. 60 ("I could be wrong, but my impression is that this was not contrived by [the Defendant's] counsel. From what I've seen, perceive, opposing counsel have conducted themselves professionally."). In fact, it was in response to a question from the Estate's counsel that Johnson made his statement referencing the motion in limine. Thus, we cannot fault the Defendants' counsel for Johnson's misstep.

[44] Considering the facts and circumstances before the trial court, we can understand its frustration with Johnson's statement that referenced the motion in limine. The violation was, however, relatively minor in that no prohibited evidence was presented to the jury. Accordingly, we conclude that the trial court abused its discretion when it struck Johnson's testimony in its entirety.

III. Jury Instructions

[45] The Defendants next contend that the trial court abused its discretion by refusing to give the jury certain instructions tendered by the Defendants. "Trial courts generally enjoy considerable discretion when instructing a jury." *Humphrey v. Tuck*, 151 N.E.3d 1203, 1207 (Ind. 2020) (*Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891, 893 (Ind. 2002)). When a party challenges a trial court's decision to either give or refuse a proposed jury instruction, we consider three things: (1) whether the instruction correctly states the law (2) whether the instruction is supported by evidence in the record; and (3) whether the instruction's substance is covered by other instructions. *Id*. The first of these considerations is a legal question on which the trial court receives no deference; the other two are reviewed for an abuse of discretion. *Id*.

Proposed Instruction No. 14

[46] In the case at bar, the Defendants tendered Proposed Instruction No. 14, which stated:

> When the events in this case happened, Indiana Code § 9-21-8-14 provided, in part, as follows:

> A person who drives a motor vehicle may not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of both vehicles, the time interval between vehicles, and the condition of the highway.
>
> If you decide from the greater weight of the evidence that Michael Damore violated Indiana Code § 9-21-8-14, and that the violation was not excused, then you must decide that Michael Damore was at fault.

Appellant's App. Vol. IV p. 97.

[47] The Estate does not argue that Proposed Instruction No. 14 is an incorrect statement of the law, and we conclude that it is a correct statement of the law. At the time of the accident, Indiana Code Section 9-21-8-14 provided exactly what was quoted in the Proposed Instruction No. 14. Proposed Instruction No. 14 also tracked the applicable Indiana Model Jury Instruction.[10] Moreover, it is well settled that the unexcused or unjustified violation of a duty prescribed by statute is negligence per se. *Brown v. City of Valparaiso*, 67 N.E.3d 652, 656 (Ind. Ct. App. 2016) (citing *City of Fort Wayne v. Parrish*, 32 N.E.3d 275, 277 (Ind. Ct. App. 2015), *trans. denied*).[11] Accordingly, the only question is whether the

---

[10] This statute was amended effective July 1, 2018, to add the following provision as subsection (a): "This section does not apply to a person who drives a motor vehicle platoon with respect to another motor vehicle in the same vehicle platoon." I.C. § 9-21-8-14(a). The above-quoted portion is now designated as subsection (b).

[11] *See* Ind. Model Jury Instruction (Civil) No. 327. Model and pattern jury instructions have not been formally approved by our Supreme Court, and "certain pattern instructions have even been held to not be a correct statement of the law." *Harrison v. State*, 32 N.E.3d 240, 252 (Ind. Ct. App. 2015) (citing *Clay City Consol. School Corp. v. Timberman*, 918 N.E.2d 292, 295 (Ind. 2009); *Boney v. State*, 880 N.E.2d 279, 294 (Ind. Ct. App. 2008)). Still, "pattern jury instructions are given preferential treatment during litigation, and the

instruction was supported by the evidence and whether the substance of the instruction was covered by other instructions.

[48] In determining whether there is evidence to support an instruction, our Supreme Court has "set the evidentiary bar deliberately low because our constitution guarantees the right to a jury trial in both criminal and civil cases." *Humphrey*, 151 N.E.3d at 1207 (citing Ind. Const. art. 1, §§ 13(a), 20). "Consistent with these rights, '[a] party who makes a proper request is entitled to have an instruction based upon his own theory of the case if within the issues and there is any evidence fairly tending to support it.'" *Id*. (quoting *Lavengood v. Lavengood*, 225 Ind. 206, 211, 73 N.E.2d 685, 687 (1947). "This 'any evidence' standard applies to instructions for both claims and defenses." *Id*. (citing *Lavengood*, 225 Ind. at 210-12, 73 N.E.2d at 687; *Indianapolis Horse Patrol, Inc. v. Ward*, 247 Ind. 519, 525, 217 N.E.2d 626, 629 (1966)).

[49] A trial court should give a tendered instruction "if the record, though 'meager', contains 'any facts or circumstances' pertinent to the case." *Id*. (quoting *Reed v. State*, 141 Ind. 116, 122-23, 40 N.E. 525, 527 (1895)). A trial court may refuse a jury instruction only when none of the facts in the record would support the legal theory offered in the instruction. *Id*. (citing *Sims v. Huntington*, 271 Ind. 368, 373, 393 N.E.2d 135, 139 (1979)).

> Thus, under Indiana law, the party seeking an instruction need only produce some evidence—a "scintilla"—of each element of

---

preferred practice is to use the pattern instructions." *Id*. (citing *Timberman*, 918 N.E.2d at 295; *Boney*, 880 N.E.2d at 294).

> the underlying claim or defense. There is an important symmetry here. No party—neither plaintiff nor defendant—need affirmatively prove its claim or defense before the trial court instructs the jury on the issue. The party need only point to some evidence in the record that when viewed most favorably would suffice for a reasonable juror to decide the issue in the party's favor.

Id. (citing *Sims*, 271 N.E.2d at 373, 393 Ind. at 139). Applying this deliberately low bar, we conclude that there was evidence supporting the Defendants' Proposed Instruction No. 14.

[50] As noted by the Defendants, the video from the Portage tollbooth shows that Michael was closely following the car immediately in front of him as they passed through the tollbooth. Defendant's Exs. 24A at 01:17 – 01:26,[12] 24B at 0:47 – 0:55.[13] Trooper Arnold testified[14] that, in his opinion, Michael was following the car in front of him too closely as they exited the tollbooth, thereby making it difficult for Trooper Rose to observe and yield to Michael's motorcycle. Tr. Vol. II p. 192-93. Although the Estate's expert, Neese, testified that Michael was not following too closely, he did admit that, generally, one should maintain a three-second distance between one's own vehicle and any

[12] We refer to the time of the video admitted into evidence at trial. This portion of the video is time-stamped as 21:27:28 – 21:27:37.

[13] This portion of the video is time-stamped 21:27:27 – 21:27:35.

[14] A video recording of Trooper Arnold's deposition was played to the jury during the Estate's case-in-chief. See Tr. Vol. II pp. 121-205.

vehicle in front of one's vehicle and that the video showed that Michael was "probably not" three seconds behind the car in front of him. *Id*. at 60.

[51] Thus, there was evidence before the jury that clearly supported the Defendants' Proposed Instruction No. 14. That is, the jury could conclude that Michael was following too closely to the vehicle in front of him, contrary to Indiana Code Section 9-21-8-14. If he did so without excuse, Michael would have been negligent per se, which would bar recovery by the Estate under the doctrine of contributory negligence.

[52] This leaves us with the question of whether the substance of Proposed Instruction No. 14 was covered by other instructions. We conclude that it was not. No other instruction informed the jury regarding the statutory requirement that a person driving a motor vehicle may not follow another vehicle more closely than is reasonable and prudent under the circumstances. The other instructions focused on speed, unsafe lane changes, driving on medians, U-Turns, and approaching emergency vehicles.

[53] Proposed Jury Instruction No. 14 was a correct statement of the law, it was supported by the evidence, and the substance of the instruction was not covered by any other instruction. The trial court, therefore, abused its discretion by failing to give the proposed instruction.

Proposed Instruction No. 18

[54] The Defendants also claim that the trial court erred by refusing to give their Proposed Instruction No. 18, which provided:

> When the events in this case happened, Indiana Code § 9-21-8-6 provided as follows:
>
> > (a) A person who drives a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:
> >
> > > (1) When the vehicle overtaken is making or about to make a left turn.
> > >
> > > (2) Upon a roadway with unobstructed pavement of sufficient width for two (2) or more lanes of vehicles moving lawfully in the direction being traveled by the overtaken vehicle.
> >
> > (b) A person who drives a vehicle may overtake and pass another vehicle upon the right only under conditions that permit overtaking upon the right in safety. Overtaking upon the right may not be made by driving off the roadway.
>
> If you decide from the greater weight of the evidence that Michael Damore violated Indiana Code § 9-21-8-6, and that the violation was not excused, then you must decide that Michael Damore was at fault.

Appellant's App. Vol. IV p. 101.

[55] Again, the Estate does not argue that this instruction was an incorrect statement of the law, and, again, we conclude that the instruction was a correct statement of the law. It accurately quotes Indiana Code Section 9-21-8-6, and it accurately explains that, if Michael violated that statute without excuse, he was to be considered at fault. *See Brown*, 67 N.E.3d at 656 (explaining negligence

per se).[15] Proposed Instruction No. 18 also tracked the applicable Indiana Model Jury Instruction.

[56] The Defendants argue that there was evidence to support giving Proposed Instruction No. 18; the Estate claims there was no such evidence. Considering the low bar set by our Supreme Court, we agree that there was evidence that supported giving the instruction. Specifically, the video from the Portage tollbooth shows that, after exiting the tollbooth, Michael drove between the cars in front of him, thereby passing one of the cars on the right. Defendant's Exs. 24A at 01:17 – 01:26, 24B at 0:47 – 0:55. Nixon, the driver of that car, also testified that Michael passed him on the right. *See* Tr. Vol. II pp. 104-05 ("I seen [sic] a motorcycle to my right as I was exiting the tollbooth at the Portage exit, or the Portage toll plaza . . . . The motorcycle passed me."); *id*. at 112 ("[Michael] was moving faster than my vehicle because he came up around me. When he passed my car, he was accelerating . . . . It was my passenger's side that that happened."). There was also evidence presented that this occurred at night at a tollbooth where traffic from eight lanes was converging down to two or three highway lanes. Trooper Arnold testified that, by passing between two cars that were themselves accelerating, Michael made it harder for Trooper Rose to see Michael. *Id*. at 192-93. Thus, there was some evidence that Michael passed Nixon's car on the right under conditions that did **not** "permit

[15] *See* Ind. Model Jury Instruction (Civil) No. 327.

overtaking upon the right in safety" as required by Indiana Code Section 9-21-8-6(b).

[57] There were also no other instructions that covered the substance of this instruction. The trial court did instruct the jury with regard to unsafe lane changes, but this does not cover the substance of passing on the right. Because this instruction was a correct statement of the law, was supported by the evidence, and its substance was not covered by any other instruction, we must conclude that the trial court abused its discretion by failing to give to the jury Proposed Instruction No. 18.

Harmless Error

[58] Error in instructing the jury does not necessarily require reversal for a new trial. *LaPorte Cmty. Sch. Corp. v. Rosale*s, 963 N.E.2d 520, 525 (Ind. 2012). "[A]n error in the trial court does not warrant reversal on appeal 'where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.'" *Id*. (quoting Ind. Appellate Rule 66(A)). "Applying this rule in the context of erroneous jury instructions, we presume that such an instruction 'influenced the verdict and will reverse unless the verdict would have been the same under a proper instruction.'" *Id*. (quoting *Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891, 895 (Ind. 2002)).

[59] Here, both of the Defendants' proposed instructions explained that, if Michael violated the traffic laws set forth in those instructions without excuse, he was negligent per se. We are mindful that, due to the defense of contributory

negligence, any negligence on the part of Michael would act as a complete bar to recovery by the Estate. Under these facts and circumstances, we cannot say that the failure to give these instructions was harmless, i.e., that the verdict would have been the same under the proper instructions. *See Rosales*, 963 N.E.2d at 525.

IV. Motion to Correct Error

[60] After the jury returned a verdict in favor of the Estate, the Defendants filed a motion to correct error in which they sought to reduce the Estate's damages to $300,000 plus funeral and burial expenses—the maximum permitted under the AWDS, or, in the alternative, to $700,000—the maximum permitted for a tort claim against a governmental entity under the ITCA. The trial court granted the motion in part, reducing the Estate's award to $700,000 as required by the ITCA, but the trial court denied the request to reduce the award under the AWDS.

[61] We review the trial court's ruling on a motion to correct error for an abuse of discretion. *Bruder v. Seneca Mortgage Servs., LLC*, 188 N.E.3d 469, 471 (Ind. 2022) (citing *Renner v. Shepard-Bazant*, 172 N.E.3d 1208, 1212 (Ind. 2021)). A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before it or if the court has misinterpreted the law. *Id*. (citing *Berg v. Berg*, 170 N.E.3d 224, 227 (Ind. 2021)). We review questions of law de novo. *Id*. (citing *Community Health Network, Inc. v. McKenzie*, 185 N.E.3d 368, 375 (Ind. 2022)).

[62] "At common law, there was no tort liability for wrongful death because personal injury actions did not survive the injured party's death." *Bush v. State Farm Mut. Auto. Ins. Co.*, 905 N.E.2d 1003, 1008 (Ind. 2009). Thus, "wrongful death actions are purely statutory." *Id*. "In Indiana, claims for the death of a person must be brought under either the Child Wrongful Death Act, the Adult Wrongful Death Act, or the general Wrongful Death Act." *Id*. [16]

[63] Indiana Code Section 34-23-1-1,[17] the GWDS, allows a personal representative of a decedent's estates to recover damages on behalf of a surviving spouse, any dependent children, or dependent next of kin, and service providers such as funeral homes. *Estate of Sears ex rel. Sears v. Griffin*, 771 N.E.2d 1136, 1138 (Ind. 2002).

[64] In contrast, the AWDS creates a wrongful death action for the death of an adult who is unmarried and without dependents and allows for the recovery of specified damages—including reasonable medical, hospital, funeral and burial expenses—plus no more than $300,000 for loss of love and companionship.

---

[16] We refer to what the *Bush* Court called the "general Wrongful Death Act" as the General Wrongful Death Statute ("GWDS"), and to what the *Bush* Court called the "Adult Wrongful Death Act" as the Adult Wrongful Death Statute ("AWDS"). *Bush, 905 N.E.2d at 1008.* The Child Wrongful Death Act has no bearing to the present case.

[17] The GWDS provides in relevant part:

> That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof. The remainder of the damages, if any, shall, subject to the provisions of this article, inure to the exclusive benefit of the widow or widower, as the case may be, and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased. . . .

I.C. § 34-23-1-1.

Franciscan ACO, Inc. v. Newman, 154 N.E.3d 841, 848 (Ind. Ct. App. 2020) (citing Ind. Code § 34-23-1-2; *McCabe v. Comm'r, Ind. Dep't of Ins.*, 949 N.E.2d 816, 818 (Ind. 2011)), *trans. denied*.

[65] Thus, the difference between the GWDS and AWDS is whether the adult decedent is survived by a spouse or dependents. If so, the GWDS applies; if not, the AWDS applies, and the recovery is limited to reasonable expenses relating to the death plus $300,000.

[66] Here, the Estate brought its claim for wrongful death under the GWDS, alleging that Denise was a dependent next of kin. The Defendants contend that the Estate failed to prove that Denise was Michael's dependent and that any claim she has for wrongful death must, therefore, fall under the AWDS and limited to reasonable expenses plus no more than $300,000. The Estate counters that it presented sufficient evidence to prove that Denise was a dependent of Michael and that the trial court properly denied the Defendants' motion to correct error on those grounds.

[67] "[T]he purpose of the GWDS is to benefit survivors by providing compensation for the loss of the decedent's life." *Lomax v. Michael*, 45 N.E.3d 467, 470 (Ind. Ct. App. 2015) (citing *Luider v. Skaggs*, 693 N.E.2d 593, 596 (Ind. Ct. App. 1998), *trans. denied*). "Pecuniary loss is the foundation of a wrongful death action," and this loss "can be determined in part from the assistance the decedent would have provided through money, services, and other material

benefits. *Id*. (citing *Southlake Limousine & Coach, Inc. v. Brock*, 578 N.E.2d 677, 679 (Ind. Ct. App. 1991), *trans. denied*).

[68] "[P]roof of dependency must show a need or necessity of support on the person alleged to be dependent . . . coupled with the contribution to such support by the deceased.'" *Id*. (quoting *New York Cent. R.R. Co. v. Johnson*, 234 Ind. 457, 127 N.E.2d 603, 607 (1955)). Or, as this Court explained in *Deaconess Hosp., Inc. v. Gruber*, 791 N.E.2d 841, 845 (Ind. Ct. App. 2003), there is a two-part test that must be met to prove dependency: (1) a need or necessity of support on the part of the alleged dependent; and (2) actual contribution to such support by the deceased.

[69] We explained in *Wolf v. Boren* that:

> Dependency is based on a condition and not a promise, and such dependency must be actual, amounting to a necessitous want on the part of the beneficiary and a recognition of that necessity on the part of decedent, an actual dependence coupled with a reasonable expectation of support or with some reasonable claim to support from decedent. The mere fact that deceased occasionally contributed to the support of the beneficiary in an irregular way, is not sufficient to support the action. . . .

685 N.E.2d 86, 88 (Ind. Ct. App. 1997) (quoting *Kirkpatrick v. Bowyer*, 131 Ind. App. 86, 169 N.E.2d 409, 412 (1960)), *trans. denied*). Total dependency upon the decedent is not required, and a plaintiff may be partially dependent even if she could survive without the contributions made by the decedent. *Lomax*, 45 N.E.3d at 470 (citing *Deaconess Hosp.*, 791 N.E.2d at 846).

[70] Here, the record reveals that Denise purchased her house in 2003, when Michael was still in high school. Denise was employed for thirty years as a paramedic. Michael and Denise lived together as a family. Michael gave Denise $100 per month, and occasionally $200 per month, to help pay for utilities. Michael also did yard work, shoveled snow, made repairs to the home, and worked on home-improvement projects with Denise. This included installing a new roof, repairing the chimney, and installing siding and flooring. Michael also did car maintenance and repair for Denise. After Michael's death, Denise was unable to afford the costs of owning the home and was forced to sell.

[71] The Defendants argue that all of this evidence is insufficient to establish that Denise was Michaels' dependent, citing *Longest ex rel. Longest v. Sledge*, 992 N.E.2d 221 (Ind. Ct. App. 2013), *trans. denied*. In that case, the decedent was living in his parents' home at the time of his death. Both of the decedent's parents were able-bodied and gainfully employed. They were, therefore, not totally dependent upon the decedent. Still, the parents argued that they were partially dependent upon the decedent because he paid his mother between $50 to $100 per month for "rent, food, laundry, and to offset the expenses of him living there." *Id*. at 229. In total, the decedent's contributions to his parents totaled approximately $5,000 to $6,000 per year. The decedent's parents brought a wrongful death action, and the trial court granted summary judgment against the parents on the issue of whether the parents were dependents of the decedent.

[72] On appeal, this Court affirmed. We noted that "our supreme court has held that '[p]ayments for board, lodging or other accommodations . . . are not sufficient to establish dependency on the part of the recipient.'" *Id.* at 230 (quoting *New York Cent. R.R. Co. v. Johnson*, 234 Ind. 457, 465, 127 N.E.2d 603, 607 (1955)). Because the decedent's payments to the parents were "in the nature of payments for room, board, and laundry services," we concluded that the payments were "insufficient to create a genuine issue of material fact with respect to dependency for the purposes of the GWDS." *Id.*

[73] The Court in *Longest* acknowledged the decedent also helped out around the house regularly and that his mother had come to expect and rely on those services to some extent. Still, it concluded that "[the decedent]'s actions amounted to no more than the sort of gifts, acts of generosity, and kindness to be expected of a son still living under his parents' roof. More is required to establish dependency for the purposes of the GWDS." *Id.* (citing *Estate of Sears ex rel. Sears v. Griffin*, 771 N.E.2d 1136, 1139 (Ind. 2002) ("Services must go beyond merely helping other family members, even those who have relied on that assistance.")). *See also Chamberlain v. Parks*, 692 N.E.2d 1380 (Ind. Ct. App. 1998) (affirming grant of summary judgment in favor of defendants on issue of whether decedent's parents were dependent next of kin where decedent assisted his parents in household tasks, painted the bedroom, and ran errands for his parents).

[74] The Estate claims that the facts of the present case are more akin to those present in *Lomax, supra*, a case in which the decedent's nephew brought a claim

for the wrongful death of his uncle. The uncle had lived in the same home as his nephew since the nephew was a child, and the uncle lived with the nephew and the nephew's wife in the five years preceding the uncle's death. The uncle contributed financially to the household by regularly giving $400 of his $700 monthly government assistance checks to the nephew; this money went toward rent, which was $600 per month, and utility bills. During the time his uncle lived with him, the nephew operated a local bar but had to close the bar because it was not financially viable. The uncle also made financial contributions to help cover grocery and other miscellaneous expenses, especially when the nephew was having financial issues. The uncle also contributed to the household by helping to take care of his nephew's dogs and with household chores. The trial court granted summary judgment in favor of the defendant on the issue of whether the nephew was a dependent next of kin of the uncle.

[75] On appeal, this Court noted:

> [Uncle] regularly contributed a significant portion of his monthly government benefits to help cover household expenses. [Uncle]was also helpful with household chores and on occasion would make additional financial contributions to pay for other types of expenses. And, even though [Nephew] never asked [Uncle]to contribute, it remains that [Uncle]'s contribution was significant in terms of the costs associated with maintaining [Nephew]'s household. Moreover, during the time [Uncle] lived with [Nephew]and his wife, [Nephew]and his wife struggled financially in that they were dealing with a failing business and then a period of non-payment of earned wages.

Lomax, 45 N.E.3d at 471. Given these facts, the Court determined that "a reasonable trier of fact could conclude that [Nephew] was dependent on [Uncle], at least in part, or that [Nephew] was not, in fact, a dependent next of kin to [Uncle]." *Id*. Accordingly, we reversed the grant of summary judgment in favor of the defendant. *Id*. *See also Necessary v. Inter-State Towing*, 697 N.E.2d 73 (Ind. Ct. App. 1998) (concluding that decedent's son presented sufficient evidence that he was dependent on his mother where decedent lived with son and grandson for several years preceding her death, they shared household expenses, and decedent made regular financial and non-financial contributions to the household).

[76] We see little light between the facts of this case and those present in *Longest*. In both cases, the decedent lived with his parent or parents; in both cases, the parent or parents were able-bodied and gainfully employed and, therefore, not totally dependent upon their deceased son; and in both cases, the decedent paid their parent(s) regularly—either $50 to $100 in *Longest*, or $100 to $200 here; in both cases, the decedents helped out around the house with chores and repairs. In both cases, the decedent's actions amounted to no more than the gifts, acts of generosity, and kindness expected of a son living under the roof of his parent(s). The only difference between these cases is that, here, following Michael's death, Denise had to sell the home due to financial pressure, whereas in *Longest* there was no such evidence. Still, Denise bought the home when Michael was in high school and not fully financially contributing to the household; there was

no evidence that Michael paid anything toward the mortgage payment; and the money he paid to Denise went toward utilities.

[77] The facts of this case differ from those present in *Lomax*, where the decedent paid $400 per month—over half of his assistance check—to his nephew for rent and utilities. Here, Michael's $100 to $200 monthly payments, while not insignificant, were a mere fraction of his monthly income of $5,833.[18] And in *Lomax*, the surviving nephew struggled financially with a failing business, whereas Denise has always been gainfully employed.

[78] Based on our holding in *Longest*, we conclude that the Estate did not present evidence sufficient to show that Denise was Michael's dependent next of kin. *Wolf*, 685 N.E.2d at 88. Because Denise was not a dependent next of kin, she cannot recover under the GWDS, and the Estate's recovery must be limited to reasonable medical, hospital, funeral and burial expenses, plus no more than $300,000 for loss of love and companionship pursuant to the AWDS.[19]

Conclusion

[79] The trial court abused its discretion by excluding evidence of Michael's driving behavior in the minutes before the collision. The trial court also abused its

---

[18] The record reveals that Michael earned approximately $70,000 per year, which comes to $5,833,33 per month gross income.

[19] Both parties also agree that the trial court erred by awarding costs in addition to damages because the defendants are the State and a State agency. *See* Ind. Trial Rule 54(D) (providing that "absent specific statutory authority, the State is not liable for ordinary court costs."). There is no such specific authority here. Thus, the trial court erred in awarding costs.

discretion by striking the entirety of Johnson's testimony based on a minor violation of the motion in limine that posed no serious risk of prejudice to the Estate. The trial court further erred by failing to give the Defendants' Proposed Instructions No. 14 and No. 18, as those instructions were correct statements of the law, were supported by the evidence, and the substance of these instructions was not covered by other instructions. Lastly, the evidence was insufficient to establish that Denise was Michael's dependent for purposes of the GWDS, and her recovery must therefore be limited to the amounts permitted by the AWDS. Accordingly, we reverse the judgment of the trial court and remand for proceedings consistent with this opinion.

[80] Reversed and remanded.

Riley, J., and May, J., concur.