

AN OVERVIEW OF INDIANA'S EVOLUTION FOR ASSESSING CONTRACTOR LIABILITY TO THIRD PARTIES AFTER COMPLETION OF WORK

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Over the past century, Indiana law has changed significantly when assessing the scope of a contractor's liability to third parties after completion of its work. Essential to this assessment is the privity of contract doctrine, requiring courts and practitioners to analyze the relationship between the injured party and contractor. Indiana has evolved considerably in how it assesses a contractor's liability for third party claims. Indiana's initial adoption of the acceptance rule provided a complete immunity to contractors from parties outside the contractual relationship. Over time, it developed exceptions to the strict privity requirements for dangerous work and eventually adopted the modern rule known as the foreseeability doctrine. In 2023, the Indiana Supreme Court continues to provide clarification on this still developing doctrine and area of law. Understanding the context and rationale of Indiana's precedent cases on this issue is helpful to parties and practitioners alike when assessing claims.

I. INDIANA ADOPTS THE ACCEPTANCE RULE—*DAUGHTERY V. HERZOG*

For most of the twentieth century, Indiana jurisprudence followed the rule that contractors do not owe a duty of care to third parties after the owner has accepted the work.¹ This rule, commonly referred to as the “acceptance rule” or the “completed and accepted rule,” has its origins in English common law under which architects and builders were immune from civil liability to third persons who were injured as a result of their negligence in design or construction.² Immunity was based on privity of contract and without this relationship one could not sue.³

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¹ *Peters v. Forster*, 804 N.E.2d 736, 738 (Ind. 2004) (quoting *Citizens Gas & Coke Util. v. American Econ. Ins. Co.*, 486 N.E.2d 998, 1000 (Ind.1985)).

² *Id.* at 738 (quoting George Anthony Smith, *Recent Statutory Developments Concerning the Limitations of Actions against Architects, Engineers, and Builders*, 60 Ky. L.J. 462, 463 (1972)).

³ *Id.*

The authority most often cited for injecting a privity requirement into what was otherwise a negligence claim is *Winterbottom v. Wright*.⁴ In that case, a plaintiff proved he was injured as a result of a defective mail coach constructed pursuant to a contract between the postmaster general and a contractor.⁵ However, the Court of Exchequer's opinion denied plaintiff a recovery and ruled that "unless we confine the operation of such contracts as this to the parties who entered into it, the most absurd and outrageous consequences, to which I can see no limit, would ensue."⁶

The Indiana Supreme Court first discussed and adopted the acceptance rule when it decided *Daugherty v. Herzog* in 1896.⁷ The plaintiff's daughter was killed after the front wall of a building fell while walking along a sidewalk on Main Street in Lafayette.⁸ The building included two ground floor business rooms divided by a wall.⁹ Its longtime owner and tenant hired an independent contractor to remove the interior wall and remodel the building to the tenant's wishes.¹⁰ The contractor completed the work and returned the building to the tenant who reoccupied the building for approximately two years before the accident occurred.¹¹

The plaintiff brought an action against the contractor alleging that the work was done unskillfully and defectively and that because of the negligent and imperfect reconstruction the building fell.¹² The contractor filed a demurrer arguing it owed no duty to the plaintiff because the complaint fails to state a contractual relationship. After the trial court sustained the demurrer, it was appealed.¹³

The central question before the Indiana Supreme Court was whether the contractor was liable to plaintiff and his daughter for the defective construction despite the lack of privity among the parties.¹⁴ The rule outlined by the court was that an action for negligence will not lie unless the defendant was under a duty to the injured party that he has failed to perform at the time and place of the injury.¹⁵ Here, the court found that the contractor was not in possession of the building and his repairs were completed and accepted long before the plaintiff's daughter was injured.¹⁶ Thus, the court reasoned,

⁴ *Id.*

⁵ *Daugherty v. Herzog*, 145 Ind. 255, 44 N.E. 457, 458 (1896).

⁶ *Id.* at 458 (quoting *Winterbottom v. Wright*, 10 Mees. & W. 109 (1842)).

⁷ *Id.* at 457.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* (quoting *City of Indianapolis v. Emmelman*, 108 Ind. 530, 532, 9 N.E. 155 (1886)).

¹⁶ *Id.*

“there must be some casual connection between the negligence and the hurt, and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency”.¹⁷

To illustrate its reasoning, the court described this scenario:

[A] contractor is employed by a city to build a bridge in a workmanlike manner, and after he has finished his work, and it has been accepted by the city, a traveler is hurt, when passing over it, by a defect caused by the contractor’s negligence. Now, the contractor may be liable to the city for his negligence, but he is not liable in an action on the case for damages. The reason sometimes given to sustain such conclusion is that otherwise there would be no end to suits.¹⁸

Beyond the court’s fear of endless litigation by imposing a duty on the contractor, the court also provided a lack of proximate cause rationale.

[A] better ground is that there is no causal connection, as we have seen, between the traveler’s hurt and the contractor’s negligence. The traveler reposed no confidence in the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence in the city, that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent, responsible agent, breaking the causal connection.¹⁹

Grounded in endless litigation concerns and the absence of proximate case, the court in *Daughtery* adopted the acceptance rule holding that the only party to whom the contractor owed any particular duty was the one with whom he contracted.²⁰

II. EXCEPTIONS TO THE PRIVACY REQUIREMENT

In the following decades, many jurisdictions outside Indiana have created and applied exceptions to the privity requirements of the acceptance rule—exceptions often built on complex factual analysis on a case-by-case basis.²¹ Some of those exceptions include: when the contractor creates a situation that it knows or should know is inherently dangerous; when the contractor’s conduct may be regarded as an implied invitation to third persons to come

¹⁷ *Id.*

¹⁸ *Id.* at 457–58.

¹⁹ *Id.* at 458.

²⁰ *Id.*

²¹ *Peters v. Forster*, 804 N.E.2d 736, 741 (Ind. 2004) (quoting *Lynch v. Norton Constr., Inc.*, 861 P.2d 1095, 1099 (Wyo.1993)).

into contact with the defective work; and when the finished work constitutes a nuisance per se.²²

Indiana courts also began carving out exceptions to the strict privity requirements of the acceptance rule, but Indiana's efforts have been limited to two exceptions.

A. EXCEPTION TO THE PRIVITY REQUIREMENT FOR IMMINENTLY DANGEROUS WORK—*HOLLAND FURNACE CO. V. NAURACAJ*

One of Indiana's early cases recognizing an exception to the privity requirement of the acceptance rule involving a contractor came in *Holland Furnace Co. v. Nauracaj*, decided in 1938. The plaintiff was a landlord who owned a building in East Chicago that was leased to a tenant.²³ The tenant retained a contractor to install a furnace in the building. The contractor installed a metal furnace less than ten inches from the building's unprotected woodwork.²⁴ The contractor's installation was in violation of the applicable building code.²⁵ After installation, the woodwork and building caught fire, causing significant damage.²⁶

After the fire, the landlord demanded that the furnace be removed from the building. Instead, the tenant and contractor installed another furnace—again in violation of the applicable building code and still posing a fire risk.²⁷ The reinstalled furnace also caused a fire, this time destroying the entire building.²⁸ The landlord filed suit against the tenant and contractor, arguing in part that the contractor's negligent work was the cause of her damages.

The contractor furnace company filed a demurrer and, relying on *Daughter*, argued that the complaint failed because it alleged no contractual relationship with landlord and therefore did not allege a breach of any duty owed.²⁹ In addition (and much like the rationale relied on by the court in *Daughter*), the contractor asserted that the complaint failed to show that its negligence was the proximate cause of the landlord's injury.³⁰ After denial of the demurrer, the cause was tried before a jury, which found in favor of the landlord. The contractor subsequently appealed.³¹

Acknowledging the well-supported rule in both Indiana and other jurisdictions, the Indiana Supreme Court stated that a negligence cause of action

²² *Id.* at 740–41.

²³ *Holland Furnace Co. v. Nauracaj*, 105 Ind. App. 574, 14 N.E.2d 339, 341 (1938).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 342.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 341.

based on a breach of duty arising out of contractual relations usually requires privity of contract.³² However, the court went on to identify a number of recognized exceptions to this rule, specifically as it relates to products sold or put into circulation that are imminently dangerous and likely to cause serious personal injury.³³

These exceptions, the court noted, apply not only to the sale of products but also to the construction of structures imminently dangerous to human life while such structure is within the possession and control of the wrongdoer.³⁴ If the thing sold or constructed be not imminently dangerous to human life, but may become such by reason of some concealed defect, then a liability may arise against such vendor or constructor if he knew of the defect and fraudulently concealed it.³⁵

The court in *Holland Furnace* adopted a further exception to the privity requirement. “A contractor continues to be liable where the work is turned over by him in a manner so negligently defective as to be imminently dangerous to third persons.”³⁶ Applying this exception to the facts at hand, the court concluded that the contractor owed a duty not only to the tenant, but also to the landlord as owner of the property. That duty required it to use care commensurate with the danger that risked injury to the person or property of both tenant and landlord.³⁷

The court further found that the evidence presented at trial supported a jury’s finding that the negligent work was the proximate cause of landlord’s injury.³⁸ “We think that there was evidence before the jury, from which it could reasonably find that the furnace was installed in such a place and manner that the person or persons installing it would have anticipated that it might become dangerous to those who were to use it.”³⁹ By affirming the judgment and holding the contractor liable for the landlord’s damages despite the lack of privity, the court established an exception to the strict privity requirements of the acceptance rule in a case involving a contractor’s defective work.

B. LIMITING EXCEPTIONS BASED ON HUMANITARIAN PRINCIPLES—*CITIZENS GAS & COKE UTILITY V. AMERICAN ECONOMIC INSURANCE CO.*

After exceptions to the privity requirement that began eroding the unqualified defense of the acceptance rule, Indiana was reminded of the principles behind such exceptions in *Citizens Gas & Coke Utility v. American Economic*

³² *Id.* at 342.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* (quoting *Travis, Adm’x v. Rochester Bridge Co.*, 188 Ind. 79, 122 N.E. 1 (1919)).

³⁶ *Id.* (quoting *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 P. 832 (1926)).

³⁷ *Id.* at 345.

³⁸ *Id.*

³⁹ *Id.* at 345.

Insurance Co. In 1985, the Indiana Supreme Court decided *Citizens Gas*, limiting the scope of the privity exceptions to cases involving personal injury only and explaining the general justifications behind their creation.

In *Citizens Gas*, the plaintiff, a property insurance carrier, brought suit for property damages after the residence of its insured was flooded from a malfunctioning water heater.⁴⁰ Some years earlier, the previous homeowners contracted with the defendant, Citizens, for the purchase and installation of a water heater at the residence.⁴¹ The water heater included a pressure relief valve and under the uniform plumbing code, required a drain to extend outside the residence.⁴² However, in this instance, the residence lacked the necessary drain, and installing one would have required significant costs.⁴³

The contractor explained the necessity for the drain and potential danger of flooding to the residence associated with installing the water heater without one.⁴⁴ Despite these warnings, the previous homeowners insisted on installation of the water heater without the drain and executed a waiver assuming any damages from a malfunction.⁴⁵ Years after the work was completed, the plaintiff's insured purchased the residence and sometime later the pressure valve malfunctioned.⁴⁶ Due to the absence of a drain, the property was significantly damaged by flood, the costs of which were paid for by the plaintiff.⁴⁷

The plaintiff filed a subrogation action against the contractor alleging the water heater was installed in violation of the plumbing code, and the matter was tried at the trial court level on stipulated facts.⁴⁸ Most important, the parties stipulated that the installation of the water heater without the drain was in violation of the plumbing code, but *the violation did not pose any threat of personal injury*.⁴⁹ At trial, judgment was entered in favor of the plaintiff and an award made for its property damages, which was upheld by the court of appeals.⁵⁰

Before the Indiana Supreme Court, the contractor did not challenge the trial court's determination of negligence but instead asserted that the lack of privity between the parties shielded it from liability.⁵¹ Acknowledging both the acceptance rule adopted in *Daughtery* and the exceptions devel-

⁴⁰ *Citizens Gas & Coke Utility v. American Econ. Ins. Co.*, 486 N.E.2d 998, 999 (Ind.1985).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* (emphasis added).

⁵⁰ *Id.*

⁵¹ *Id.*

oped in *Holland Furnace*, the court reversed the judgment, finding that the exception to the privity requirement where negligence created an imminent danger only to property is inconsistent with Indiana precedent.⁵²

Along with *Holland Furnace*, the court noted other additional cases in which an exception to a privity of contract requirement was applied. In one example, an exception was applied to a product liability action where the product was dangerous to the health and safety of the public when placed on the market.⁵³ The court in that matter ruled that the plaintiff need not show privity of contract to bring a negligence claim.⁵⁴ Another example involved a negligence claim made against an architect after the plaintiff was seriously injured at the Indianapolis Airport.⁵⁵ In that case, the plaintiff was blown off a ramp designed by the architect by the blast of a jet engine.⁵⁶ The architect allegedly failed to study information on jet blasts and did not follow ordinary architectural standards.⁵⁷ Summary judgment entered in favor of the architect based on a lack of privity was then set aside on appeal.⁵⁸

Classifying the examples of cases in which an exception was applied to the privity requirement, the court concluded that

[t]he reasoning behind all of these cases that has created the exception to the general requirement of privity is apparent and is based on humanitarian principles. One who sells a product or does construction work pursuant to a contract with the owner of a building or premises which presents imminent danger to the health and safety of not only the party he contracts with but to other members of the public, can be held liable for resulting injuries even though the third party injured is not privity to the contract.⁵⁹

However, the court distinguished those cases and their underlying rationale from the facts in *Citizens Gas*.

It does not follow that the same exception would be applied where the risk is only that of property damage No such humanitarian principle exists for the recovery of loss of property and we see no reason to extend the exception to the privity rule any further in this case or others not involving personal injury.⁶⁰

⁵² *Id.* at 1000.

⁵³ *Id.* (citing *J.I. Case v. Sandefur Co.*, 245 Ind. 213, 197 N.E.2d 519 (1965)).

⁵⁴ *Id.*

⁵⁵ *Id.* (citing *Hiatt v. Brown*, Ind. App., 422 N.E.2d 736 (1981)).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1000–1001.

⁶⁰ *Id.* at 1001.

The decision in *Citizens Gas* serves as a reminder of Indiana's lasting adherence to the privity requirements of the acceptance rule. Despite exceptions developed in Indiana and other jurisdictions that weakened the privity requirement, the court in *Citizens Gas* limited the scope of these exceptions to defective work causing personal injury. In cases where the contractor's negligent work created an imminent risk of injury only to property, the privity requirement remained operative, barring a third party's claims for any property damage.

III. ABROGATION OF THE ACCEPTANCE RULE AND ADOPTION OF THE FORESEEABILITY DOCTRINE—*PETERS V. FORSTER*

After a century of balancing the acceptance rule and its limited exceptions, the Indiana Supreme Court moved away from this once majority rule, describing it in 2004 as an “outmoded relic.”⁶¹ Instead, the court adopted the modern rule known as the foreseeability doctrine in *Peters v. Forster*.⁶² In its decision to abandon the acceptance rule, the court makes a point to examine the logic associated with other jurisdictions' support of the foreseeability doctrine. It found that the strict privity requirements were outdated in some respects, and it instead offered a more straightforward analysis using traditional negligence principles.⁶³

In *Peters*, the owners of a home decided to install a ramp on the front of their residence to accommodate their declining health.⁶⁴ They purchased a previously used ramp and hired an independent contractor to transport and install the ramp.⁶⁵ The contractor transported the ramp from its original location and had his employees attach the ramp to the owners' residence with “a couple of screws,” fully aware that the ramp failed to meet building code requirements.⁶⁶

Sometime after installation, the plaintiff was delivering a meal to the owners' residence where he fell on the ramp, sustaining serious physical injuries.⁶⁷ The plaintiff filed suit against the owners, later amending his complaint to add the contractor as a party defendant.⁶⁸ The contractor was granted summary judgment after arguing that he owed no duty to the plaintiff pursuant to the acceptance rule.⁶⁹ The court of appeals reversed, applying

⁶¹ *Peters v. Forster*, 804 N.E.2d 736, 737 (Ind. 2004).

⁶² *Id.* at 741.

⁶³ *Id.* at 743.

⁶⁴ *Id.* at 737.

⁶⁵ *Id.*

⁶⁶ *Id.* at 737–38.

⁶⁷ *Id.* at 738.

⁶⁸ *Id.*

⁶⁹ *Id.*

an exception to the rule's privity requirement. Transfer was granted to the Indiana Supreme Court.⁷⁰

Discussing *Daughtery*, the court notes two primary reasons supporting the acceptance rule: (1) the application of the doctrine of privity cases involving negligence and (2) the owner's control of the entity when the injury occurred.⁷¹ However, in Indiana and other jurisdictions, the privity of contract requirement in the law of negligence had been largely eroded in other areas, especially in products liability.⁷² Still, as for contractors and builders, Indiana and other jurisdictions required privity to attach liability after completion of the work, with the limited exceptions discussed in *Holland Furnace* and *Citizens Gas*.⁷³

Surveying other jurisdictions, the court notes, "the declining role of privity, along with the growing list of exceptions to the privity requirement, has contributed to the increasing number of jurisdictions that have abandoned the acceptance rule."⁷⁴ For example, Texas abandoned these requirements, finding that the rule as "oft-repudiated and [an] emasculated doctrine" because of the numerous exceptions developed.⁷⁵ In addition, the Wyoming Supreme Court reasoned that "the [acceptance rule] with its many exceptions is more cumbersome than traditional negligence analysis, while leading to the same conclusion in most cases."⁷⁶

Similar to the declining privity requirements in most jurisdictions, the importance of "control" in support of the acceptance rule also waned as an exculpatory factor.⁷⁷ A Montana court explained:

[The acceptance rule] has the undesirable effect of shifting responsibility for negligent acts or omissions from the negligent party to an innocent person who paid for the negligent party's services. The shifting of responsibility is based on the legal fiction that by accepting a contractor's work, the owner of the property fully appreciates the nature of any defect or dangerous condition and assumes responsibility for it. In reality, the opposite is usually true. Contractors, whether they be building contractors, or architects, are hired for their expertise and knowledge. The reason they are paid for their services is that the average property owner does not have sufficient knowledge or expertise to design or construct

⁷⁰ *Id.*

⁷¹ *Id.* at 739–40.

⁷² *Id.* at 740.

⁷³ *Id.* at 740–41.

⁷⁴ *Id.* at 741.

⁷⁵ *Id.* (quoting *Strakos v. Gehring*, 360 S.W.2d 787, 791 (Tex. 1962)).

⁷⁶ *Id.* (quoting *Lynch v. Norton Constr., Inc.*, 861 P.2d 1095, 1099 (Wyo. 1993)).

⁷⁷ *Id.*

real property improvements safely and soundly.⁷⁸

Based on the significant changes of jurisprudence, the initial purposes of the rule became outdated and led a number of jurisdictions to abandon the acceptance rule in favor of what has been described as the “modern rule” or “foreseeability doctrine.”⁷⁹ Citing Professor Prosser, “it is now the almost universal rule that the contractor is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done.”⁸⁰

Instead of applying the acceptance rule, a number of jurisdictions embraced the rule that a contractor is liable for injuries or death of third persons after acceptance by the owner where the work is reasonably certain to endanger third parties if negligently completed.⁸¹ This view adopts the rationale that there are insufficient grounds to differentiate between liability of a manufacturer of goods and that of a building contractor.⁸²

The court supported the foreseeability doctrine and held:

A rule that provides that a builder or contractor is liable for injury or damage to a third person as a result of the condition of the work, even after completion of the work and acceptance by the owner, where it was reasonably foreseeable that a third party would be injured by such work due to the contractor’s negligence, is consistent with traditional principles of negligence upon which Indiana’s scheme of negligence law is based.⁸³

Thus, with the acceptance rule abandoned, the contractor’s liability was evaluated by the court under a traditional negligence analysis.⁸⁴

Notwithstanding the new framework for analysis, the contractor in *Peters* argued its judgment should be affirmed because the plaintiff’s injury was unforeseeable.⁸⁵ He claimed the chain of causation was broken between his actions and the plaintiff’s injury. Specifically, the causal break was caused by several factors: the owners’ control of the ramp at the time of the plaintiff’s injury; the owners installation of carpet on the ramp; and the lack of evidence showing that the ramp was likely to cause injury.⁸⁶

⁷⁸ *Id.* (quoting *Pierce v. ALSC Architects, P.S.*, 270 Mont. 97, 890 P.2d 1254, 1262 (1995)).

⁷⁹ *Id.*

⁸⁰ *Id.* at 741–42 (quoting *W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS* § 104A, at 723–24 (5th ed.1984)).

⁸¹ *Id.* at 742 (quoting *RESTATEMENT (SECOND) OF TORTS* § 385 (1965)).

⁸² *Id.* (quoting *RESTATEMENT (SECOND) OF TORTS* § 385 (1965)).

⁸³ *Id.*

⁸⁴ *Id.* at 743.

⁸⁵ *Id.*

⁸⁶ *Id.*

Categorizing the contractor's position as an argument for lack of proximate cause, the court held that foreseeability of harm from a defendant's conduct is a question of fact, and thus, one for the jury to decide.⁸⁷ The trial court's entering summary judgment was inappropriate, and the plaintiff was not barred from recovery against the contractor.⁸⁸

However, as the court would later clarify, the operation of the privity requirement still remained operable in certain instances.

IV. CLARIFYING THE FORESEEABILITY DOCTRINE—*U.S. AUTOMATIC SPRINKLER CORP. V. ERIE INSURANCE EXCHANGE*

In 2023, the Indiana Supreme Court provided further clarification on the foreseeability doctrine and interplay of Indiana's longstanding precedent requiring privity of contract. Picking up where *Peters* left off, the court reiterated the operation of the privity requirement in cases where a contractor's alleged negligent work posed risk only of property damage.

In *U.S. Automatic Sprinkler Corp.*, a commercial landlord leased office space to four commercial tenants, one of which requested permission to install a sprinkler system at the office complex.⁸⁹ The landlord agreed but amended the lease to require that the tenant was solely responsible for maintenance of the sprinkler system.⁹⁰ The tenant retained a contractor, U.S. Automatic Sprinkler, to both install the sprinkler system and perform periodic inspections and testing.⁹¹

After installation, the landlord's maintenance crew noticed water leaking from the sprinkler system and contacted the contractor.⁹² The contractor's employee came to the property, "messed with some valves" connected to the sprinkler system and said that the pressure levels appeared normal.⁹³ Within a week, water in the sprinkler system froze and ruptured the pipes causing property damage to all four commercial tenants.⁹⁴

The noncontract tenants filed suit to recover their property damage losses, alleging that the contractor was negligent in its work.⁹⁵ The contractor, relying on *Citizens Gas*, moved for summary judgment, arguing that it owned no duty to the noncontract tenants based on the lack of privity and was not liable for their damages.⁹⁶ The trial court denied both motions, but the court

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *U.S. Automatic Sprinkler Corp. v. Erie Ins. Exch.*, 204 N.E.3d 215, 219 (Ind. 2023).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 219–20.

⁹⁵ *Id.* at 220.

⁹⁶ *Id.*

of appeals agreed with the contractor, reversing the denial and reasoning that the lack of contractual privity barred the noncontract tenants' claims.⁹⁷

On transfer, the noncontract defendants argued the foreseeability doctrine adopted in *Peters* allows them to recover against the contractor.⁹⁸ Seeking to extend the foreseeability doctrine, they argued that the phrase *damage to a third person* means that a contractor may also be liable when its allegedly negligent work presents a risk of harm *only* to a third party's property.⁹⁹ They further asserted that no meaningful distinction exists between personal injury and property damage, and the privity requirement should not bar recovery under these circumstances.¹⁰⁰

Yet again the court reviewed the context surrounding *Peters* to discuss the reasons for adopting the foreseeability doctrine. The court explained that, when the foreseeability doctrine was adopted, the privity requirement functioned differently. Then, the requirement depended upon the condition of the completed work, the event that caused the third party's damages, and the nature of those damages.¹⁰¹ For example, lack of privity no longer shielded manufacturers from liability when their defective products personally injured a third party.¹⁰² But the absence of privity continued to insulate contractors and builders from third party liability unless the work was so "dangerously defective, inherently dangerous, or imminently dangerous" such that it produced a "risk of imminent personal injury."¹⁰³ And drawing from *Citizens Gas*, the court noted that the privity requirement was subject to exception when third party personal injury was within the realm of risk, not when a contractor's negligent work produced "an imminent danger of property damage *only*."¹⁰⁴

After describing *Peters* and its interplay with *Citizens Gas*, the court clarified the foreseeability doctrine's scope in two ways. First, in harmony with *Peters*, "the foreseeability doctrine applies when a third party seeks recovery for personal injury that was a foreseeable consequence of a contractor's allegedly negligent work."¹⁰⁵ The court noted that owners now relinquish some of their control by hiring contractors that are required for their skill, expertise, and knowledge.¹⁰⁶ An "increasing number of jurisdictions" had similarly equalized the liability field in this way.¹⁰⁷

⁹⁷ *Id.*

⁹⁸ *Id.* at 225.

⁹⁹ *Id.* (original emphasis).

¹⁰⁰ *Id.* at 227.

¹⁰¹ *Id.* at 225.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 225–26.

¹⁰⁵ *Id.* at 226.

¹⁰⁶ *Id.* at 226 (citing *Peters v. Forster*, 804 N.E.2d 736, 741 (Ind. 2004)).

¹⁰⁷ *Id.* (citing *Peters*, 804 N.E. 2d at 741–42)).

Second, the foreseeability doctrine applies when a third party seeks recovery for property damage if personal injury—although not sustained—is a foreseeable consequence of a contractor’s allegedly negligent work.¹⁰⁸ This clarification is in harmony with *Citizens Gas*, which *Peters* did not undermine, let alone overrule.¹⁰⁹ Instead, to recover for damage under the foreseeability doctrine, it must be “reasonably foreseeable that a third party would be *injured* by such work.”¹¹⁰ The court found this additional clarification meshed with the existing exceptions as set forth in *Holland Furnace* and *Citizens Gas*. Thus, incorporating *Citizens Gas*, “when a contractor’s allegedly negligent work poses a risk to *only* property—not persons—the privity requirement remains operative and precludes recovery for property damages in a negligence action.”¹¹¹

Applying foreseeability doctrine with these clarifications in mind, the court found that the contractor’s alleged negligence posed a risk only of property damage and not of personal injury.¹¹² Thus, *Citizens Gas* was the controlling precedent and the privity requirement remained operative and barred the noncontract tenant’s claims.¹¹³ The court also refused the noncontract tenant’s argument that no meaningful distinction existed between personal injury and property damage.¹¹⁴ To the contrary, “commercial tenants can—and do—exercise control over their risk of [property] loss by procuring insurance.”¹¹⁵

The court found that imposing third party liability for events causing only property damage would force contractors to “insure against a risk the amount of which they may not know and cannot control.”¹¹⁶ Furthermore, the court refused to reallocate this risk and abandon the privity requirement when the allegedly negligent work created a risk only to property and the third parties suffered only property damage.¹¹⁷ Therefore, the court held, as a matter of law the contractor owed no duty to the noncontract tenants.¹¹⁸

V. CONCLUSION

Indiana’s analysis of a contractor’s liability has evolved drastically since its initial adoption of the acceptance rule in *Daughtery*. Along with many other jurisdictions, Indiana adapted to the changing context and rationale

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citing *Peters*, 804 N.E.2d at 742)).

¹¹¹ *Id.* at 227 (original emphasis).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* (quoting *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 557 N.Y.S. 2d 286, 556 N.E.2d 1093, 1096 (1990)).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

supporting the immunity protections for contractors and builders against third parties. Justified by humanitarian principles, the Indiana Supreme Court elected to ease the privity requirements opting to apply exceptions that allow physically injured third parties the opportunity to recover for a contractor's negligent work. However, the court stopped short of eliminating the privity requirements altogether. Instead, Indiana jurisprudence has harmonized its prior precedent allowing the privity of contract requirement to remain operative in cases where a contractor's work creates a risk only of property damage. The current state of the foreseeability doctrine requires courts and practitioners to analyze the potential risk associated with a contractor's defective work in order to assess the scope of liability on a case-by-case basis. Understanding the context and rationale behind the decisions that have shaped the scope of a contractor's liability is necessary to properly evaluate negligence claims.