

# RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY LAW

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This Article takes a topical approach to the notable real property cases in the courts of the State of Indiana in this survey period, October 1, 2006, through September 20, 2007, and analyzes noteworthy cases in each of the following areas: servitudes; landlord/tenant law; developments in the common law; real estate contracts; tax sales; liens and mortgages. In addition, this Article summarizes new statutes that became effective July 1, 2007.

## I. SERVITUDES

### *A. Restrictive Covenants—Non-Waiver Clause*

*Johnson v. Dawson*<sup>1</sup> is the latest chapter in the Indiana appellate courts' confusing enforcement of restrictive covenants. It presents a question of first impression in Indiana: is a nonwaiver clause in a multi-party restrictive covenant enforceable?<sup>2</sup> The Johnsons owned a home in Meadowbrook Subdivision in Tippecanoe County.<sup>3</sup> The subdivision was subjected to a declaration of covenants, restrictions, and conditions when it was developed in 1956.<sup>4</sup> The Johnsons purchased their home subject to the restrictions.<sup>5</sup> The Johnsons sought to construct an additional detached private garage on their lot, which was in clear violation of one of the restrictive covenants.<sup>6</sup> The homeowners board initially approved the Johnsons' request to construct the garage, then subsequently voted to disapprove of the construction.<sup>7</sup> Dawson, Nelson, Graham, and Kauffman (collectively, "Plaintiffs") filed suit in trial court to enjoin the Johnsons from constructing the garage.<sup>8</sup> The trial court found in favor of the Plaintiffs and issued the injunction, as well as attorneys fees, to the Plaintiffs, and the Johnsons appealed.<sup>9</sup>

The court of appeals agreed with the trial court that some of the language of the restrictive covenant was unambiguous and operated to preclude the Johnsons from building their second garage.<sup>10</sup> The court then turned to the Johnsons' second argument that Dawson "acquiesced in prior restrictive covenant violations

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1. 856 N.E.2d 769 (Ind. Ct. App. 2006).

2. *Id.* at 774.

3. *Id.* at 771.

4. *Id.*

5. *Id.*

6. *Id.* at 771-72.

7. *Id.*

8. *See id.*

9. *Id.* at 769.

10. *Id.* at 774.

of other Meadowbrook landowners and is therefore barred from challenging the Johnsons' building of the additional detached two-car garage."<sup>11</sup> The Meadowbrook covenants contained the following "nonwaiver" clause: "The failure for any period of time to compel compliance with any restrictions, condition or covenant shall in no event be deemed as a waiver of the right to do so thereafter, and shall in no way be construed as a permission to deviate from said restrictions, conditions and covenants."<sup>12</sup> The court noted that while nonwaiver clauses are generally enforced in Indiana, the Johnsons argued that such clauses "have not been enforced [in Indiana law] in the context of a multi-party restrictive covenant. This difference is material."<sup>13</sup> The court agreed that this issue was a question of first impression in Indiana.<sup>14</sup> The Johnsons asserted, apparently on public policy grounds, that a multi-party nonwaiver clause is per se unenforceable because otherwise it "is less likely to have a beneficial effect, and far more likely to have an insidious one" due to the possibility of selective enforcement.<sup>15</sup> The court was unmoved by this argument, noting that the Johnsons agreed to the restrictive covenant and nonwaiver clause by purchasing the home and that "even if violations and selective enforcement are occurring, the Johnsons are bound by the clause."<sup>16</sup>

*Johnson v. Dawson*, with its strict application of the restrictive covenant and apparent lack of concern for public policy arguments, seems out of step with recent appellate jurisprudence in Indiana on the subject of restrictive covenants. For example, although the trial court granted the Plaintiffs' request for equitable relief, there was no discussion by the Indiana Court of Appeals on whether the trial court found that the Plaintiffs had no adequate remedy at law.<sup>17</sup> The court's failure to ask this question is inconsistent with the 2003 *Kesler v. Marshall*<sup>18</sup> decision, in which the court of appeals acknowledged that the trial court has the discretion to award equitable remedies but cautioned that "such judicial discretion is not arbitrary, but is governed by and must conform to the well-settled rules of equity."<sup>19</sup> Those "well-settled rules" include the notions that equitable remedies are "extraordinary" remedies and that they are "not available as a matter of right."<sup>20</sup> Instead, equitable remedies are only available when no adequate remedy at law, i.e. monetary damages, exists: "Where substantial justice can be accomplished by following the law, and the parties' actions are clearly governed by rules of law, equity follows the law."<sup>21</sup> Judge Robb's dissent

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11. *Id.*

12. *Id.*

13. *Id.* (quoting Appellants' Brief at 7, *Johnson*, 856 N.E.2d 769 (No. 79A04-0601-CV-8)).

14. *Id.* (quoting Appellants' Brief, *supra* note 13, at 8).

15. *Id.* at 775.

16. *Id.*

17. *See Johnson v. Dawson*, 856 N.E.2d 769 (Ind. Ct. App. 2006).

18. 792 N.E.2d 893 (Ind. Ct. App. 2003).

19. *Id.* at 896 (citing *Wagner v. Estate of Fox*, 717 N.E.2d 195, 200 (Ind. Ct. App. 1999)).

20. *Id.*

21. *Id.* at 897 (citing *Porter v. Bankers Trust Co.*, 773 N.E.2d 901 (Ind. Ct. App. 2002)).

in *Johnson* is more consistent with recent jurisprudence as it reflects more concern for the Johnsons' free use of their property and the idea that restrictive covenants should be construed against their drafters.<sup>22</sup> Unfortunately for practitioners who rely heavily on restrictive covenants in commercial and residential developments, the court of appeals continues to send mixed messages regarding its application and interpretation of these agreements.

### *B. Breach of Access Easement*

*Drees Co. v. Thompson*<sup>23</sup> addressed the appropriate remedy for the breach of a servitude. Thompson owned one-acre parcel surrounded by twenty-nine acres owned by Drees.<sup>24</sup> An express easement granted by Drees's predecessor in title gave Thompson "a non-exclusive easement for ingress and egress" to the Thompson parcel over a particular strip of real estate located on the Drees parcel.<sup>25</sup> Drees proposed to develop its parcel into a subdivision with fifty homes and submitted its plan to the appropriate governmental body.<sup>26</sup> The plan included the preservation of the ingress/egress easement, with the subdivision residents being permitted to use the path for biking and walking.<sup>27</sup> Thompson filed a complaint for declaratory judgment and injunctive relief and sought a preliminary injunction.<sup>28</sup> The trial court granted both the preliminary injunction and, ultimately, a permanent injunction to prevent Drees from completing its development plan, so Drees appealed.<sup>29</sup>

Drees argued on appeal that the trial court erred in granting the permanent injunction because: (a) the easement was non-exclusive; (b) the Thompsons relied on concerns of vandalism, inconvenience, and possible cancellation of homeowner's insurance, all of which are unrelated to their easement rights; and (c) the necessity of the original easement would no longer exist once the Drees parcel was developed.<sup>30</sup>

The main portion of the court's decision dealt with whether the injunction was appropriate.<sup>31</sup> The court noted that "permanent injunctions are limited to prohibiting injurious interference with rights" and that grant or denial of them is reviewed on an abuse of discretion standard.<sup>32</sup> According to the court, four factors must be considered:

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22. See *Johnson*, 856 N.E.2d at 776-78 (Robb, J., dissenting).

23. 868 N.E.2d 32 (Ind. Ct. App. 2007), *trans. denied*, 878 N.E.2d 220 (Ind. 2007).

24. *Id.* at 35.

25. *Id.* at 37, 39.

26. *Id.* at 36.

27. *Id.* at 37-38.

28. *Id.* at 37.

29. *Id.* at 37-38.

30. *Id.* at 38.

31. See *id.* at 38-45.

32. *Id.* at 41 (citing *Ferrell v. Dunescape Beach Club Condos. Phase I, Inc.*, 751 N.E.2d 702, 712 (Ind. Ct. App. 2001)).

(1) whether the plaintiff has succeeded on the merits; (2) whether plaintiff's remedies at law are adequate; (3) whether the threatened injury to the plaintiff outweighs the threatened harm a grant of relief would occasion upon the defendant; and (4) whether the public interest would be disserved by granting relief.<sup>33</sup>

As to the first prong of the analysis, whether the plaintiff would succeed on the merits, the court of appeals reviewed each of the Thompsons' arguments to determine whether the proposed development would be contrary to its easement rights.<sup>34</sup> The court was not convinced that any of the Thompsons' arguments had merit and concluded that the trial court abused its discretion in granting the injunction because the Thompsons could not prevail on their underlying argument.<sup>35</sup> In so deciding, the court of appeals did not need to address the other factors, and the case was reversed and remanded with instructions.<sup>36</sup>

## II. LANDLORD/TENANT LAW

### A. Subtenant Hold-over

*Fields v. Conforti*<sup>37</sup> presented an issue of first impression in Indiana with respect to a tenant's liability in the event that a subtenant holds over after a lease expires.<sup>38</sup> Conforti owned a home and agreed to lease it to Marlow, with an option to purchase.<sup>39</sup> The lease contained a hold-over clause which read: "Any holding over after the expiration of the term of this lease, with the consent of the Lessor, shall be construed as a month-to-month tenancy in accordance with the terms hereof, as applicable."<sup>40</sup> "Marlow and Conforti also signed a 'Permission to Sublet' form, in which Conforti granted Marlow the right to sublet the residence to the Fieldses."<sup>41</sup> The document expressly did not release Marlow from liability during the sublease.<sup>42</sup> Marlow in turn gave the Fieldses oral permission to occupy the home, but did not execute a written agreement with them.<sup>43</sup> After moving in, the Fieldses made their rental payments directly to Conforti.<sup>44</sup> The Fieldses subsequently provided Conforti with written notice that

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33. *Id.* (citing *Ferrell*, 751 N.E.2d at 712).

34. *Id.* at 42-45.

35. *Id.*

36. *Id.* at 44-45.

37. 868 N.E.2d 507 (Ind. Ct. App. 2007).

38. *See id.* at 514-15.

39. *Id.* at 511.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

they were exercising the option to purchase the property under the lease.<sup>45</sup> The Fieldses scheduled a closing, which Conforti did not attend.<sup>46</sup> The record showed that the Fieldses did not have the economic means to close, even if Conforti had attended.<sup>47</sup> Conforti then provided Marlow and the Fieldses with written notice that the lease had expired, that Marlow and the Fieldses were holdover tenants, and that their rent had been increased.<sup>48</sup> “The Fieldses responded by filing a complaint against Conforti for specific performance.”<sup>49</sup> Conforti gave written notice to Marlow and the Fieldses that they were in default for failing to pay the increased rent. The Fieldses did not vacate the property.<sup>50</sup> After a bench trial,

[t]he trial court concluded that: (1) the Fieldses were not entitled to specific performance because they were not parties to the Lease . . . ; (2) the Fieldses were sublessees pursuant to an oral agreement with Marlow; (3) both Marlow and the Fieldses were in default . . . and were liable to Conforti for the [increased rent]; (4) the Fieldses were liable for Conforti’s attorney fees . . . because the Fieldses ‘continued to litigate the action for specific performance after it should have become clear to them that they had no right to exercise the option to purchase under the Lease’; and (5) Marlow was liable for Conforti’s attorney fees . . . because of the prevailing party clause in the Lease.<sup>51</sup>

With respect to the Fieldses’ liability for the increased rent, the court of appeals found that there was no privity of contract or privity of estate between the Fieldses and Conforti, thus that conclusion by the trial court was clearly erroneous.<sup>52</sup> The fact that the Fieldses paid their rent directly to Conforti did not create privity.<sup>53</sup>

Marlow argued that he should not be liable for the increased rent because the failure to pay the full rental payments occurred after the term of the lease expired.<sup>54</sup> Although the parties did not cite any Indiana cases on point, the court was persuaded by a federal case that held:

[W]here a tenant subleases property, the tenant has a responsibility to see that the subtenant vacates the premises in order to surrender them to the landlord without further liability. If a subtenant holds over, it is effectively a holding over by the tenant, and the landlord can hold the

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45. *Id.*

46. *Id.* at 511-12.

47. *Id.*

48. *Id.* at 512.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 513-14.

53. *Id.* at 514.

54. *Id.*

tenant liable for damages for the holdover period.<sup>55</sup>

Marlow further argued that Conforti could not unilaterally increase the rent amount during the holdover period.<sup>56</sup> The court disagreed, citing precedent for the statement that “a month-to-month tenancy may be terminated *or the rent may be changed* by the landlord giving a one-month notice to the tenant.”<sup>57</sup> The court concluded that when Marlow received notice that the lease had expired, he could have paid the increased rent or vacated, but chose to do neither.<sup>58</sup>

### *B. Material Breach of Lease*

In *Collins v. McKinney*,<sup>59</sup> the court of appeals remanded the matter to the trial court for a determination of whether a sublease without landlord’s required permission was a material breach of the master lease.<sup>60</sup> Collins owned land in Fort Wayne which she leased to McKinney for a period of five years.<sup>61</sup> The lease provided that McKinney could not assign or sublet without Collins’s prior written consent.<sup>62</sup> McKinney sublet to Tomkinson Chrysler Jeep, Inc. (“Tomkinson”) with Collins’s permission.<sup>63</sup> Subsequently, Tomkinson entered into an asset purchase agreement with Glenbrook Dodge, Inc. (“Glenbrook”) whereby Tomkinson agreed to sell Glenbrook the auto dealership that it operated on the property owned by Collins.<sup>64</sup> After closing on the asset purchase agreement, Glenbrook began making the payments pursuant to the sublease between McKinney and Tomkinson, although Tomkinson did not formally assign the sublease to Glenbrook.<sup>65</sup>

Shortly after the asset purchase agreement closed, Collins notified McKinney that she refused to consent to an assignment from Tomkinson to Glenbrook and that McKinney was in default of the master lease.<sup>66</sup> In response, McKinney initiated a declaratory judgment action.<sup>67</sup> Collins counterclaimed that McKinney was in breach of the master lease because Glenbrook was in possession of the property without Collins’s consent.<sup>68</sup> After a jury trial, McKinney filed a motion for a directed verdict, which the trial court granted, reasoning that there was no

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55. *Young v. D.C.*, 752 A.2d 138, 142 (D.C. Cir. 2000) (citations omitted).

56. *Fields*, 868 N.E.2d at 515.

57. *Id.* (emphasis added) (citing *Speiser v. Addis*, 411 N.E.2d 439, 441 (Ind. Ct. App. 1980)).

58. *Id.*

59. 871 N.E.2d 363 (Ind. Ct. App. 2007).

60. *Id.* at 368, 371.

61. *Id.* at 366.

62. *Id.*

63. *Id.* at 366-67.

64. *Id.* at 367.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

breach of contract.<sup>69</sup> Collins appealed and McKinney cross-appealed the trial court's order that Collins's consent was required prior to any assignment or sublease of the sublease.<sup>70</sup>

The court of appeals addressed two issues: whether damages were proper and whether the failure to obtain Collin's consent constituted a breach of the lease.<sup>71</sup> On the damages issue, McKinney argued that because Collins "failed to produce any evidence of damage, devaluation, or waste due to the alleged breach by McKinney," Collins cannot recover for breach of contract.<sup>72</sup> The court of appeals disagreed, finding that Collins was asking for and could receive the remedy of rescission.<sup>73</sup> "Rescission of a contract is not automatically available. However, if a breach of a contract is a material one which goes to the heart of the contract, rescission may be the proper remedy."<sup>74</sup>

The court of appeals then turned to the question of whether there was a breach of the lease.<sup>75</sup> Although the court noted that construction of a written contract is generally a question of law, it concluded by remanding the matter back to the jury for a determination of whether the breach was material.<sup>76</sup>

### III. COMMON LAW

#### *A. Private Owner Liability for Sidewalks*

*Denison Parking, Inc. v. Davis*<sup>77</sup> addressed the liability of a private property owner to an individual who slipped and fell on ice on an adjoining sidewalk.<sup>78</sup> Davis parked her car at a garage managed by Denison Parking.<sup>79</sup> She then fell on a patch of ice located on the sidewalk near to the garage and injured herself.<sup>80</sup> Snow removal in that area was provided by Denison Parking.<sup>81</sup> Denison Parking's policy, and its agreement with the Capital Improvement Board of Managers, stated that Denison Parking should "stay on top of snow removal" and "[r]emove snow and ice build-up that may restrict the safety of pedestrian traffic."<sup>82</sup> Davis filed a complaint against Denison Parking, and Denison Parking

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69. *Id.* at 368-69.

70. *Id.* at 369.

71. *Id.* at 369-76.

72. *Id.* at 370.

73. *Id.* at 370-71.

74. *Id.* (citing *Gabriel v. Windsor, Inc.*, 843 N.E.2d 29, 45 (Ind. Ct. App. 2006)).

75. *Id.* at 371.

76. *Id.* at 372, 376.

77. 861 N.E.2d 1276 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 462 (Ind. 2007).

78. *Id.* at 1277.

79. *Id.* at 1277-78.

80. *Id.*

81. *Id.*

82. *Id.* at 1278.

filed a motion for summary judgment.<sup>83</sup> The trial court denied Denison Parking's motion for summary judgment but granted Denison Parking's subsequent motion for an interlocutory appeal.<sup>84</sup>

Denison Parking argued that the trial court erred in denying its motion for summary judgment because Denison Parking did not, as a matter of law, owe a duty to Davis nor did it assume a duty by creating an artificial condition that increased risk or proximately caused injury to Davis.<sup>85</sup> In order to establish a claim against Denison Parking, Davis had to show "that Denison Parking: (1) owed Davis a duty, (2) that Denison Parking breached its duty, and that (3) the breach proximately caused Davis's injuries."<sup>86</sup> Denison Parking argued that it did not owe Davis a common law or statutory duty to clear the public sidewalks of ice and snow, nor did it assume such a duty.<sup>87</sup> The court of appeals found that Denison Parking did not owe a common law or statutory duty of care to Davis because Denison Parking is a private owner, not a municipality.<sup>88</sup> Although Davis pointed to Indianapolis Municipal Code section 931-102 to show that Denison Parking had a duty to clear the sidewalk,<sup>89</sup> the court noted that ordinances such as this one "are *not* enacted for the protection of individuals using the streets, but rather are for the benefit of the municipality."<sup>90</sup> Finally, the court noted that in Indiana, "persons are held to have assumed a duty to pedestrians on a public sidewalk *only* when they create artificial conditions that increase risk and proximately cause injury to persons using those sidewalks."<sup>91</sup> In this case, the court found no designated evidence that Denison Parking had created such an artificial condition.<sup>92</sup> The court reversed and remanded with instructions to grant Denison Parking's motion for summary judgment.<sup>93</sup>

#### IV. REAL ESTATE CONTRACTS

##### *A. Equity of Forfeiture*

Keene ("Seller") and Armstrong ("Buyer") were parties to a conditional contract for the sale of a restaurant and tavern in Marion.<sup>94</sup> The purchase price

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83. *Id.*

84. *Id.*

85. *Id.* at 1279.

86. *Id.*

87. *Id.*

88. *Id.* at 1280.

89. REV. CODE OF THE CONSOL. CITY AND COUNTY INDIANAPOLIS/MARION, IND. § 931-102 (2007).

90. *Davis*, 861 N.E.2d at 1281.

91. *Id.* at 1280 (citing *Lawson v. Lafayette Home Hosp., Inc.*, 760 N.E.2d 1126, 1130 (Ind. Ct. App. 2002)).

92. *Id.*

93. *Id.* at 1281-82.

94. *Armstrong v. Keene*, 861 N.E.2d 1198 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205



was to be paid in a down payment and monthly payments (including interest) over a period of fifteen years.<sup>95</sup> The contract called for Buyer to pay real estate taxes and insurance and contained a forfeiture clause which provided that if Buyer failed to make the required payments for a period of thirty days after due, then the agreement “shall become null and void, at the option of the SELLER,” whereby Buyer was required to surrender the real estate to Seller.<sup>96</sup> Approximately seven years after the contract was signed, Buyer failed to make the monthly payments and pay the real estate taxes. Seller sent Buyer a letter informing him of the default.<sup>97</sup> “At the time of the default, Buyer had paid approximately \$43,000 in principal.”<sup>98</sup> Several months later, Buyer executed a bill of sale to Seller whereby he granted all of his interest in the real estate, improvements, and personal property to Seller.<sup>99</sup> Buyer also conveyed the liquor license back to Seller.<sup>100</sup> Approximately eighteen months later, a fire destroyed the bar, and Seller allegedly received \$179,000 from insurance proceeds and from the sale of the real estate and liquor license.<sup>101</sup>

Buyer filed a complaint for breach of contract against Seller, alleging that Seller had orally promised to pay him \$25,000 for Buyer’s interest in the bar, but that Seller had not paid him the money.<sup>102</sup> In the alternative, Buyer alleged that he was entitled to foreclosure of the real estate.<sup>103</sup> Seller filed for summary judgment.<sup>104</sup> Buyer filed his own motion for summary judgment, arguing that he was entitled to foreclosure pursuant to *Skendzel v. Marshall*.<sup>105</sup> The trial court ruled that the alleged oral agreement between the parties was unenforceable and that *Skendzel* does not apply where Buyer voluntarily abandoned and relinquished his interest in the property.<sup>106</sup> Buyer appealed.<sup>107</sup>

On appeal, the buyer relied on *Skendzel*, a case in which “the Indiana Supreme Court addressed the equity of forfeiture as a remedy in land contracts.”<sup>108</sup> The court noted that forfeitures are generally disfavored by law because a significant injustice results where the buyer has a substantial interest in the property.<sup>109</sup> The court concluded that land sales contracts are akin to

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(Ind. 2007).

95. *Id.* at 1199.

96. *Id.* at 1199-1200.

97. *Id.* at 1200.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1200 (citing *Skendzel v. Marshall*, 301 N.E.2d 641 (Ind. 1973)).

106. *Id.*

107. *Id.*

108. *Id.* at 1201 (footnote omitted).

109. *Id.*

mortgages, and therefore the remedy of foreclosure is preferred.<sup>110</sup> In *Armstrong*, the court of appeals agreed with Seller that *Skendzel* does not apply because the Buyer signed the bill of sale voluntarily.<sup>111</sup> There was no forfeiture.<sup>112</sup> The court cited Justice Prentice's concurrence in *Skendzel*: "It follows that if the vendee has indicated his willingness to forego his equity, if any, whether by mere abandonment of the premises, *by release or deed* or by failure to make a timely assertion of his claim, he should be barred from thereafter claiming an equity."<sup>113</sup>

### B. Boundary Description

*Schuler v. Graf*<sup>114</sup> addressed an unclear boundary description in a real estate contract.<sup>115</sup> Schuler owned a 149-acre tract of land. Graf expressed interest in purchasing approximately eleven acres of the tract.<sup>116</sup> Schuler and Graf walked the property and discussed the boundaries of the parcel to be sold.<sup>117</sup> During this discussion, a fence post was spray painted to indicate one boundary, and a line was drawn in the dirt to indicate another boundary.<sup>118</sup> Schuler and Graf subsequently entered into a land contract which stated that "[t]he boundaries of the two parcels have been agreed upon by the parties" and that the exact acreage would be determined by a survey.<sup>119</sup> Graf paid the earnest money to Schuler.<sup>120</sup> After Graf's surveyor prepared a survey, Schuler sent notice that the legal description was not accurate and that the contract did not reflect a meeting of the minds.<sup>121</sup> Schuler refused to complete the paperwork required to subdivide the smaller parcel from the larger tract and indicated to Graf that she no longer wished to sell.<sup>122</sup> Graf filed a complaint for specific performance of the contract.<sup>123</sup> Schuler asserted that the contract failed to satisfy the statute of frauds because it did not contain a metes and bounds description of the real estate and that there was no meeting of the minds regarding the boundaries of the parcel.<sup>124</sup> Following testimony by both Schuler and Graf regarding their

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110. *Id.*

111. *Id.* at 1202.

112. *Id.*

113. *Id.* (quoting *Skendzel v. Marshall*, 301 N.E.2d 641, 651 (Ind. 1973) (Prentice, J., concurring) (emphasis added)).

114. 862 N.E.2d 708 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 461 (Ind. 2007).

115. *Id.*

116. *Id.* at 710.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 711.

123. *Id.*

124. *Id.*

discussions of the property lines, the trial court concluded that there was a meeting of the minds and ordered specific performance.<sup>125</sup> Schuler appealed.<sup>126</sup>

On appeal, Schuler argued that the trial court erred in ordering specific performance because the contract did not satisfy the statute of frauds as it did not provide a legal description of the real estate to be sold.<sup>127</sup> The court cited case law for the proposition that an agreement must “‘completely contain the essential terms *without resort to parol evidence* in order to be enforceable.’”<sup>128</sup> Regarding the description of land, the court cited a previous case which held that a description of property “‘may be abstract and of a general nature, if with the assistance of external evidence the description, without being contradicted or added to, can be connected with and applied to the very property intended, *to the exclusion of all other property.*’”<sup>129</sup> The court noted:

In this case, the Contract only describes the property to be sold in terms of acreage, without providing boundaries, making it impossible from the initial description given to determine exactly where in Schuler’s 149 acre property the approximate [eleven] acres to be sold are located. The Contract therefore does not appear to satisfy the Statute where, without more, it only describes the parcels in terms of acreage.<sup>130</sup>

Because the survey referred to in the contract was not completed at the time the contract was signed, the court reasoned that it could not furnish the means of identification necessary to identify the parcel.<sup>131</sup> The court concluded, however, that the contract furnished the means of identification—the agreement of the parties.<sup>132</sup> Accordingly, the court held that the contract did satisfy the statute of frauds.<sup>133</sup> Since the contract was complete, parol evidence was properly admitted to “complete the legal description” of the parcel.<sup>134</sup> The court noted that Schuler and Graf both testified that they “essentially agreed” on the boundaries of the parcel.<sup>135</sup>

In the alternative, Schuler argued that even if the contract did not violate the statute of frauds, there was no meeting of the minds sufficient to order specific performance.<sup>136</sup> Specifically, Schuler argued that there was no meeting of the

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125. *Id.* at 711-12.

126. *Id.* at 712.

127. *Id.*

128. *Id.* at 713 (quoting *Coca-Cola Co. v. Babyback’s Int’l, Inc.*, 841 N.E.2d 557, 565 (Ind. 2006) (emphasis added)).

129. *Id.* (quoting *Cripe v. Coates*, 116 N.E.2d 642, 644-45 (Ind. App. 1954)).

130. *Id.* at 714.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 715.

minds regarding the location of the eastern boundary.<sup>137</sup> The first survey prepared by Graf was later revised by Graf to “correct” the location of the eastern boundary.<sup>138</sup> The court held that the fact “[t]hat the first survey did not accurately reflect the parties’ agreement does not constitute a failure to come to a meeting of the minds at the time the parties entered into the Contract.”<sup>139</sup>

## V. TAX SALES

The Indiana appellate courts issued several opinions regarding tax sales during the survey period, including one opinion by the Indiana Supreme Court.

### *A. Partial Refund Under Indiana Code Section 6-1.1-25-4.6(d)*

In *In re Parcels Sold for Delinquent Taxes*,<sup>140</sup> the Indiana Supreme Court held that “a purchaser at a tax sale who does not seek an order to issue a deed is not entitled to the partial refund of the purchase price provided in Indiana Code section 6-1.1-25-4.6(d).”<sup>141</sup> Michiana Campgrounds, LLC (“Michiana”) bought several properties at a tax sale in 2004.<sup>142</sup> Before the redemption period had expired, Michiana filed motions for refunds of the purchase price, minus a twenty-five percent penalty.<sup>143</sup> Indiana Code section 6-1.1-25-4.6 provided at the relevant time that a petitioner could obtain such a refund “if the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the failure of the petitioner under subsection (a) to fulfill the requirements of this section.”<sup>144</sup> In response to Michiana’s motion, the trial court ordered the Vanderburgh County Auditor (“Auditor”) to refund the purchase price minus the penalty.<sup>145</sup> The appellate court affirmed, and the Indiana Supreme Court accepted the petition to transfer.<sup>146</sup>

The Auditor argued that a petitioner is only entitled to a refund under section 4.6 if it attempts to obtain a deed but the trial court refuses.<sup>147</sup> The Indiana Supreme Court agreed: “We think that the statutory reference to ‘refusal’ purposefully limits refunds to purchasers who go to the time and expense of seeking a deed. Buyer’s remorse is not a basis for a refund.”<sup>148</sup> The court unanimously reversed the decision of the trial court.<sup>149</sup>

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137. *Id.*

138. *Id.*

139. *Id.*

140. 873 N.E.2d 1051 (Ind. 2007).

141. *Id.* at 1051.

142. *Id.* at 1052.

143. *Id.*

144. *Id.* at 1051-52 (citing IND. CODE § 6-1.1-25-4.6(d) (2000)).

145. *Id.* at 1052.

146. *Id.*

147. *Id.*

148. *Id.* at 1054.

149. *Id.* at 1055.

In *Whalen v. M. Doed, LLC*,<sup>150</sup> the Indiana Court of Appeals addressed whether a tax deed should have been set aside following confusion regarding whether the delinquent property taxes at issue were listed as proceeds in a bankruptcy action.<sup>151</sup> Whalen owned property in Muncie upon which he failed to pay property taxes.<sup>152</sup> The property was sold at a tax sale in October 2002 to Doed.<sup>153</sup> The following year, Whalen informed the county treasurer and auditor that he had filed for bankruptcy.<sup>154</sup> The County invalidated the tax sale and returned the proceeds to Doed.<sup>155</sup> Later, the County learned that Whalen never properly listed the delinquent property taxes in the bankruptcy action, and it reinstated the tax sale.<sup>156</sup> Doed repaid the proceeds to the County.<sup>157</sup> Whalen filed an action to re-invalidate the tax sale.<sup>158</sup> Following judgment in favor of Doed at the trial court level, Whalen appealed.<sup>159</sup> The court of appeals found that the tax deed did not suffer from any of the fatal defects set forth in Indiana Code section 6-1.1-25-16<sup>160</sup> and that Whalen was not entitled to have the tax deed set aside.<sup>161</sup> With respect to Whalen's claim of equitable estoppel, the court of appeals agreed with the trial court that although there was confusion in the auditor and treasurer's offices regarding Whalen's claims that the property was included in the bankruptcy action, none of the county officials misled Whalen into believing that he would not have to redeem his property.<sup>162</sup> The decision of the trial court was upheld.<sup>163</sup>

### *B. Priority of Tax Deeds*

In *MJ Acquisitions, Inc. v. Tec Investments, LLC*,<sup>164</sup> the Indiana Court of Appeals addressed a situation in which a county placed the same property on the tax sale list in two consecutive years, even though the entity that purchased the property at the first tax sale overbid in an amount sufficient to pay the later tax debt.<sup>165</sup> Husk owned property that was included in the 2003 tax sale based on

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150. 859 N.E.2d 368 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 454 (Ind. 2007).

151. *Id.*

152. *Id.* at 369.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 370.

157. *Id.*

158. *Id.*

159. *Id.* at 369.

160. IND. CODE § 6-1.1-25-16 (2000).

161. *Whalen*, 859 N.E.2d at 374.

162. *Id.* at 375.

163. *Id.*

164. 863 N.E.2d 379 (Ind. Ct. App. 2007)

165. *Id.*

delinquent 2000 and 2001 taxes.<sup>166</sup> At the start of the sale, the auditor announced that additional taxes would be due and owing shortly after the sale due to the 2002 reassessment.<sup>167</sup> MJ Acquisitions, Inc. (“MJ”) was the highest bidder with an overbid amount of over \$43,000.<sup>168</sup> In 2004, the property was again placed on the delinquent tax list as a result of unpaid taxes accrued in 2002 payable in 2003, as well as those accrued in 2003 and payable in 2004.<sup>169</sup> The property was again sold at a 2004 tax sale.<sup>170</sup> Notice of the 2004 sale was sent to Husk as the record owner.<sup>171</sup> Tec Investments, LLC (“Tec”) was the highest bidder at the sale, purchasing the property for the minimum bid of \$5,292.82.<sup>172</sup> Following the sale, MJ filed a petition for a tax deed.<sup>173</sup> Later, Tec sent notices to Husk and MJ informing them of the 2004 tax sale and the expiration date for the redemption period.<sup>174</sup> Following the expiration of the redemption period, MJ filed its verified objection to Tec’s petition.<sup>175</sup> A few days later, the auditor issued a tax deed to MJ based on the 2003 sale.<sup>176</sup> A few months later, the trial court held a hearing and entered an order directing the auditor to issue a tax deed to Tec for the 2004 tax sale.<sup>177</sup>

On appeal, MJ argued that the property should not have been included in the 2004 tax sale.<sup>178</sup> The court noted that the treasurer was required to have applied a portion of MJ’s surplus from the overbid to the 2002 taxes payable in 2003.<sup>179</sup> In addition, the court noted that the taxes due and owing in 2004 were not grounds for including the property on the delinquency list for the 2004 tax sale.<sup>180</sup> Finally, Tec argued that its 2004 tax deed should have priority over the 2003 tax deed pursuant to Indiana Code section 6-1.1-24-12.<sup>181</sup> However, the court reasoned that, had the treasurer properly applied the surplus to the taxes due in 2003, there would have been no “delinquency” from 2003 to place the property in the 2004 tax sale.<sup>182</sup> Accordingly, the property was not properly placed in the tax sale and the priority set forth with in the Indiana Code does not apply.<sup>183</sup> The

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166. *Id.* at 380.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 380-81.

171. *Id.* at 381.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 384.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 385.

183. *Id.*

court reversed and remanded with instructions to set aside Tec's petition for the issuance of a tax deed.<sup>184</sup>

## VI. LIENS AND MORTGAGES

### *A. Per Diem Late Fees as Unenforceable Penalties*

*Harbours Condominium Ass'n v. Hudson*<sup>185</sup> raises several interesting questions, chiefly whether a set per diem late fee is always an unenforceable penalty.<sup>186</sup> The Declaration of the Harbours Horizontal Property Regime and the Third Amendment to the Declaration provided that if assessments were not paid when due, the delinquent owner would be charged a late fee of at least \$25 plus an additional \$5 per day until paid in full.<sup>187</sup> Additionally, the owner would be required to pay the Harbours Condominium Association's ("Association") attorneys fees if incurred as a result of a delinquency.<sup>188</sup> Furthermore, all late assessments were subject to interest at a rate equal to the lesser of (i) the maximum amount allowed by law or (ii) 18%.<sup>189</sup> All assessments, interest, costs, and expenses constituted a lien on the owner's unit and could be foreclosed upon.<sup>190</sup>

In 2002, the assessment and dues for Hudson's unit were \$323.40 per month.<sup>191</sup> "On October 10, 2002, Hudson paid to the Association \$646.80," a payment that she believed made her current with the Association.<sup>192</sup> However, the Association claimed that this payment only made her current through July 2002.<sup>193</sup> Hudson had a \$10,000 escrow held by the Harbours's attorney from an earlier dispute between the parties.<sup>194</sup> Hudson made no further payments of assessments or dues, believing that the amounts would be deducted from the escrow.<sup>195</sup> In October 2003, the Association's attorney informed Hudson's counsel that the escrow would be disbursed to the Association and deducted from Hudson's accumulated delinquent assessments, which, according to the attached schedule, then totaled over \$16,750.<sup>196</sup> In December 2003, the Association filed a notice of condominium lien and, in January 2004, "filed suit against Hudson, seeking a money judgment in the amount of \$7325.86 plus continuing monthly

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184. *Id.* at 386.

185. 852 N.E.2d 985 (Ind. Ct. App. 2006).

186. *Id.*

187. *Id.* at 987.

188. *Id.*

189. *Id.*

190. *Id.* at 987-88.

191. *Id.* at 988 n.1.

192. *Id.* at 988.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

fees, costs and attorney's fees and also seeking foreclosure of its lien."<sup>197</sup> At trial, the Association claimed that Hudson owed \$26,000 in October 2003 and "that, at the time of the trial, Hudson owed \$74,154.24 in monthly assessments and late fees from December 2003 through February 15, 2005."<sup>198</sup> The trial court denied the Association's attempted foreclosure of the condominium lien, but found that the Association had sustained actual damages in the amount of \$7117.29 and that Hudson owed the Association only \$799.12.<sup>199</sup>

On appeal, the Association claimed *inter alia* that the trial court erred when it denied the Association's request to foreclose on the condominium lien.<sup>200</sup> Hudson argued that the statute does not mandate foreclosure.<sup>201</sup> The court of appeals agreed with the Association that the trial court should have decreed foreclosure of the Association's lien pursuant to the Indiana Horizontal Property Law.<sup>202</sup> The court, however, found that the error was harmless because Hudson immediately paid the amounts awarded to the Association by the trial court.<sup>203</sup> The Association was in the same position as it would have been if the trial court had foreclosed the lien.<sup>204</sup>

The Association also argued that the trial court erred when it found that the late fees charged by the Association constitute an unenforceable penalty.<sup>205</sup> Instead, the Association claimed that the late fees were appropriate liquidated damages.<sup>206</sup> Under the formula contained in the Association's declaration, interest and late fees on the condominium lien amount of \$7,235.80 totaled \$66,828.44.<sup>207</sup> The court of appeals found that these late fees constituted an unenforceable penalty "because they are grossly disproportionate to the actual damages suffered by the Association as a result of Hudson's delinquencies."<sup>208</sup> The trial court found that the Association's actual damages were \$7117.29, which consisted of \$3616.50 in attorney's fees and \$3500.79 in administrative costs of collection.<sup>209</sup> The court of appeals noted that there is some contradiction in the rules that distinguish liquidated damages from an unenforceable penalty.<sup>210</sup> A party seeking to enforce liquidated damages need not prove actual damages, but may be required to show a correlation between the liquidated damages and

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197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 990-91.

201. *Id.* at 991.

202. *Id.* at 990.

203. *Id.* at 990-91.

204. *Id.* at 991.

205. *Id.*

206. *Id.*

207. *Id.* at 992.

208. *Id.*

209. *Id.*

210. *Id.* at 993.



actual damages.<sup>211</sup> Given the disconnect between the Association's actual damages and the late fees, the court of appeals agreed with the trial court that they were much more akin to a penalty.<sup>212</sup>

*B. Judge May Use Personal Experiences*

*Clark v. Hunter*<sup>213</sup> is interesting for two reasons. First, the court of appeals ruled that a judge can use his own personal experience to assess the evidence.<sup>214</sup> Second, the case illustrated a typographical error made during the recodification of Title 32, which has since been fixed by the Indiana General Assembly.<sup>215</sup>

Clark was engaged by Hunter to perform as the electrical subcontractor in the construction of Hunter's home.<sup>216</sup> Payment was to be made in two installments.<sup>217</sup> Hunter made the first payment, but a subsequent dispute arose between Hunter and Clark about the timing and quality of Clark's remaining work.<sup>218</sup> Clark filed a notice of its intent to hold a mechanic's lien and then filed suit to foreclose on its lien.<sup>219</sup> Clark sought to recover the remaining value of the contract, plus attorneys fees and prejudgment interest.<sup>220</sup> At trial, Hunter's expert testified that Clark's work was "inadequate" in several material respects.<sup>221</sup> The trial court issued the following finding: "8. That the Court would note that the Judge of this matter was previously involved in the building business and that as presented, it appears that 80% of the work was completed by and for defendant."<sup>222</sup> The trial court did not foreclose on the mechanic's lien, but awarded Clark 80% of the total value of the contract, minus amounts already paid by Hunter, plus court costs.<sup>223</sup> Clark was not awarded prejudgment interest or attorneys fees.<sup>224</sup>

Clark contended on appeal that the trial court judge committed reversible error by considering his personal experiences in finding that Clark had completed only 80% of the work.<sup>225</sup> The court of appeals disagreed, reasoning that the trial judge is "permitted to utilize his own life experiences" in weighing the evidence

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211. *Id.*

212. *Id.* at 992.

213. 861 N.E.2d 1202 (Ind. Ct. App. 2007).

214. *Id.* at 1206-07.

215. *Id.* at 1210-11.

216. *Id.* at 1205.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 1205-06.

221. *Id.* at 1205.

222. *Id.* at 1206.

223. *Id.*

224. *Id.*

225. *Id.*

and that there was sufficient evidence to support the judgement.<sup>226</sup>

With respect to Clark's claim for prejudgment interest, the court of appeals noted that prejudgment interest is "proper where the trier of fact need not exercise its judgment to assess the amount of damages."<sup>227</sup> On the other hand, "[d]amages that are the subject of a good faith dispute cannot allow for an award of predjudgment interest."<sup>228</sup>

On Clark's third claim, that the trial court erred when it did not order foreclosure of the mechanic's lien, the court of appeals sided with Clark, holding that the trial court was required to foreclose the lien to comply with the statute.<sup>229</sup> Accordingly, the court of appeals reversed and remanded with instructions that the trial court order the sale of the property subject to the lien.<sup>230</sup>

Finally, Clark argued that the mechanic's lien statute mandates the award of attorney's fees upon foreclosure of a lien.<sup>231</sup> Hunter argued that prior to the 2002 recodification of title 32, former Indiana Code section 32-8-3-14 provided that "[i]n all suits brought for the enforcement of any lien under the provisions of this chapter, if the plaintiff or lienholder shall recover judgment in any sum, he *shall* also be entitled to recover reasonable attorney's fees."<sup>232</sup> The recodified section, now found at Indiana Code section 32-28-3-14(a), reads: "in an action to enforce a lien under this chapter, the plaintiff or lienholder *may* recover reasonable attorney's fees as a part of the judgement."<sup>233</sup> Hunter argued that the switch from "shall" to "may" made the award of attorney's fees discretionary rather than mandatory.<sup>234</sup> The court of appeals disagreed, citing Indiana Code section 32-16-1-1, which provides that the intent of the recodification of title 32 was not intended to result in a substantive change in prior property law and that if the literal meaning of a section changed, it should be regarded as a typographical or other clerical error.<sup>235</sup> In other words, the court of appeals reasoned, the discretionary "may" must be read as the mandatory "shall."<sup>236</sup>

The court of appeals remanded to the trial court with instructions that the lien's priority be determined, that a judgment for attorney's fees be entered for Clark in the amount of \$3109.20, and that a decree of foreclosure be entered to

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226. *Id.* at 1206-07.

227. *Id.* at 1208 (quoting *J.S. Sweet Co. v. White County Bridge Comm'n*, 714 N.E.2d 219, 225 (Ind. Ct. App. 1999)).

228. *Id.* (quoting *Bopp v. Brames*, 713 N.E.2d 866, 872 (Ind. Ct. App. 1999) (citations omitted)).

229. *Id.* at 1208-09.

230. *Id.* at 1209.

231. *Id.*

232. *Id.* (quoting IND. CODE § 32-8-3-14 (2002) (emphasis added)).

233. *Id.* (quoting IND. CODE § 32-8-3-14(a) (2004) (emphasis added)).

234. *Id.* at 1210.

235. *Id.* (citing IND. CODE § 32-16-1-1 (2004)).

236. *Id.* In the 2007 Technical Corrections bill, the Indiana General Assembly amended Indiana Code section 32-28-3-14(a) to change the "may" back to "shall." *See* IND. CODE § 32-28-3-14(a) (Supp. 2007); 2007 Ind. Legis. Serv. 1 (West).

satisfy both the \$2952 determined by the trial court and the attorney's fees.<sup>237</sup>

*C. Failure to Process Mortgage Payoff*

In *Dreibelbiss Title Co. v. MorEquity, Inc.*,<sup>238</sup> the court of appeals once again addressed a case in which the title company did not properly process the payoff of a loan before issuing a lender's title policy which purported to assure that a subsequent mortgage had first priority.<sup>239</sup>

The Youngs owned a home subject to two mortgages in favor of KeyBank, securing a fixed sum note and a home equity line of credit.<sup>240</sup> The Youngs sought to refinance with MorEquity, which engaged Dreibelbiss Title Company ("Dreibelbiss") to provide a lender's policy of title insurance.<sup>241</sup> Dreibelbiss obtained a payoff letter from KeyBank for the two mortgages, plus instructions that KeyBank would require written instructions from the Youngs to close the line of credit and release the mortgage securing it.<sup>242</sup> Dreibelbiss arranged for the payoff but did not provide KeyBank with any written instructions from the Youngs.<sup>243</sup> Accordingly, KeyBank released the first mortgage, but not the second.<sup>244</sup> The Youngs drew money on the KeyBank line of credit and defaulted.<sup>245</sup> KeyBank foreclosed on the property, taking the position that it held the first lien.<sup>246</sup> MorEquity did not dispute that it was the junior lienholder.<sup>247</sup> Foreclosure of the Youngs' property did not realize sufficient proceeds to make any payment to MorEquity.<sup>248</sup> Subsequently, MorEquity filed a complaint against Dreibelbiss under the title policy, asking for damages in the amount of MorEquity's lien.<sup>249</sup> The trial court found in favor of MorEquity.<sup>250</sup>

On appeal, the appellate court upheld the trial court decision, including its calculation of damages in the amount of the MorEquity lien.<sup>251</sup> Dreibelbiss argued that the damages should be the amount of the KeyBank lien, but did not specify the value of that lien.<sup>252</sup> Dreibelbiss cited policy language that its liability "shall not exceed the least of . . . the difference between the value of the insured

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237. *Clark*, 861 N.E.2d at 1211.

238. 861 N.E.2d 1218 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 461 (Ind. 2007).

239. *Id.* at 1219-20.

240. *Id.* at 1219.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 1220.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 1219.

251. *Id.* at 1222.

252. *Id.*

estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.”<sup>253</sup> In other words, the damages that a title policyholder was entitled to obtain represent the difference in the value of the property with and without the lien or encumbrance that the title company failed to disclose. For example, if the KeyBank lien was \$100,000 and the net proceeds from foreclosure were \$232,000, a strict application of that language would seem to state that MorEquity would have had no damages, because its \$132,000 lien could have been fully satisfied. However, if the KeyBank lien was \$100,000 and the net proceeds from foreclosure were only \$100,000, MorEquity would have damages equal to \$100,000—the value of the undisclosed lien that took priority over its lien. It is unclear how the court could reason that MorEquity could be entitled to damages of \$132,000 if the property sold for less than that amount, since it could not have been made whole even if it had held the first lien. Nonetheless, the court did not mention the value of the KeyBank lien nor the net proceeds from the sale, except to state that MorEquity received no proceeds.<sup>254</sup> The court’s reasoning here seems dissonant with the popular understanding of the recovery provisions in title insurance policies.

#### *D. Alternation of a Promissory Note*

In *Keesling v. T.E.K. Partners, LLC*,<sup>255</sup> the court of appeals analyzed whether the capitalization of interest was a material alteration of a promissory note that required the consent of the guarantors in order to bind them to a revised note.<sup>256</sup>

Heritage/M.G. executed a promissory note to Henke to partially finance the development of a residential subdivision.<sup>257</sup> The note was signed by four individuals (Green, McMullen, Larry Keesling, and Vivian Keesling), both in their individual capacities and on behalf of Heritage/M.G. and its partners.<sup>258</sup> The note was secured by a mortgage on property in Delaware County.<sup>259</sup> Heritage/M.G. did not fulfill its payment obligations in a timely manner.<sup>260</sup> “Without the Keeslings’ knowledge or consent, R.M.G. Investment Group, L.L.C. (“R.M.G.”) whose principals include Green and McMullen, purchased the note” from Henke, and Henke assigned the note and mortgage to R.M.G.<sup>261</sup> R.M.G. subsequently assigned the note and mortgage back to Henke.<sup>262</sup> In

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253. *Id.*

254. *Id.*

255. 861 N.E.2d 1246 (Ind. Ct. App. 2007), *appeal after remand*, 881 N.E.2d 1025 (Ind. Ct. App. 2008).

256. *Id.* at 1249.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

addition, without the knowledge or consent of the Keeslings or Heritage Land, Heritage/M.G. executed a second note to Henke.<sup>263</sup> The second note provided that it was secured by the original mortgage.<sup>264</sup> “Green and McMullen personally guaranteed the second note. No payments were ever made on the second note.”<sup>265</sup> Henke filed to foreclose the mortgages and for judgment against the Keeslings, Heritage/M.G., Green, and McMullen.<sup>266</sup> Later, Henke assigned the note and mortgage to T.E.K. Partners and released Green and McMullen from any liability.<sup>267</sup> Following a bench trial, the trial court entered judgment for T.E.K. against each of the defendants.<sup>268</sup> The Keeslings and Heritage Land then appealed.<sup>269</sup>

The Keeslings and Heritage Land argued that because they were accommodation parties on the original note and the second note constituted a material alteration of the original note, they were discharged from further personal liability under the original note and had no liability under the second note.<sup>270</sup> The court of appeals explained the black letter law regarding guaranty contracts at length and noted that “[a] guarantor is a favorite in the law and is not bound beyond the strict terms of the engagement. Moreover, a guaranty of a particular debt does not extend to other indebtedness not within the manifest intention of the parties.”<sup>271</sup> Since the Heritage/M.G. was the principal obligor and the Keeslings were guarantors on the original note, they and Heritage Land were accommodation parties.<sup>272</sup> The trial court found that the mortgage provided that Henke could advance additional funds.<sup>273</sup> The court of appeals, however, pointed out that the mortgage was not a negotiable instrument and merely secured the debt under the original debt.<sup>274</sup> It did not constitute a promise to pay and did not serve to authorize Henke to obligate the Keeslings further without their knowledge or consent.<sup>275</sup> Therefore, the court concluded, “the mortgage itself provides no grounds for holding either the Keeslings or Heritage Land liable for funds advanced under the second note.”<sup>276</sup>

T.E.K. argued that the second note was not a material alteration of the original note because it merely restated the original borrowers’ then-current

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263. *Id.*

264. *Id.*

265. *Id.* at 1249-50.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 1251 (quoting *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580, 586 (Ind. Ct. App. 2001) (emphasis added)).

272. *Id.*

273. *Id.* at 1252.

274. *Id.*

275. *Id.*

276. *Id.*

obligation.<sup>277</sup> However, the court noted the second note included additional money to “pay the bills” as well as capitalized interest.<sup>278</sup> This capitalization of interest, the court concluded, was a material alteration of the first note that required the consent of the guarantors in order to bind them.<sup>279</sup> The result was that the court discharged the Keeslings and Heritage Land from their personal liability on the first note and found that they had no liability for the additional sums advanced under the second note.<sup>280</sup>

### *E. Preparation of Loan Documents*

In *Charter One Mortgage Corp. v. Condra*,<sup>281</sup> the Indiana Supreme Court ruled that a bank may charge a fee related to the preparation of legal documents related to a loan and that charging for such a service does not constitute the unauthorized practice of law.<sup>282</sup>

Condra borrowed money from Charter One Mortgage Corporation (“Charter One”), secured by a mortgage on real property.<sup>283</sup> At the closing, “Charter One charged Condra a \$175 fee for the completion of a deed and mortgage. These documents were prepared by Charter One’s agents or employees who were not licensed to practice law.”<sup>284</sup> Condra filed a class action, arguing that Charter One’s document preparation fee was not permitted under Indiana law “because charging a fee for documents prepared by non-lawyers constituted the unauthorized practice of law.”<sup>285</sup> Charter One asked the trial court to dismiss the action under Indiana Trial Rule 12(B)(6).<sup>286</sup> Charter One argued that it was a subsidiary of a national bank and was therefore governed by federal regulations with respect to banking.<sup>287</sup> These regulations include “a provision that allows national banks and their operating subsidiaries to charge incidental fees for legal services provided by non-lawyers in the preparation of real estate loan documents.”<sup>288</sup> Charter One contended that these federal regulations preempted any conflicting state law.<sup>289</sup> “The trial court denied the motion but certified its order for an interlocutory appeal.”<sup>290</sup> The court of appeals affirmed, holding that the Indiana Supreme Court’s “jurisdiction over the unauthorized practice of law

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277. *Id.* at 1253.

278. *Id.*

279. *Id.*

280. *Id.* at 1254.

281. 865 N.E.2d 602 (Ind. 2007).

282. *Id.* at 607.

283. *Id.* at 604.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

is not preempted by the federal regulations.”<sup>291</sup> The Indiana Supreme Court granted transfer.<sup>292</sup>

The court noted that it “has original jurisdiction over ‘the unauthorized practice of law’”<sup>293</sup> and that it is the responsibility of the court to “determine what acts constitute the practice of law.”<sup>294</sup> After discussing the public policy reasons behind confining the practice of law to licensed attorneys, the court concluded that “if the completion of legal documents is ordinarily incident to a lender’s financing activities, it is generally not the practice of law, whether or not a fee is charged.”<sup>295</sup> Further, the court “disapproved” of the case relied upon by *Condra*.<sup>296</sup>

#### *F. Equitable Subrogation*

In *Gibson v. Neu*,<sup>297</sup> the court of appeals analyzed the doctrine of equitable subrogation in Indiana following the Indiana Supreme Court’s 2005 decision in *Bank of New York v. Nally*.<sup>298</sup>

Nowak executed a promissory note to Gibson, secured by mortgages on Nowak’s two residences.<sup>299</sup> The note required Nowak to make monthly payments for several years with a final balloon payment.<sup>300</sup> The mortgage on Nowak’s Indiana property provided that if Nowak sold the property before the note was fully paid, Gibson would release the mortgage if Nowak had not defaulted on his obligations to Gibson and was current in his payments.<sup>301</sup> At the time that Gibson recorded his mortgage on Nowak’s Indiana property, Irwin Mortgage Corporation (“Irwin Mortgage”) held a first mortgage on the property.<sup>302</sup> Nowak made five payments to Gibson, then, without informing Gibson, sold his Indiana property to the Neus.<sup>303</sup> The title company found the Irwin mortgage, but not the Gibson mortgage.<sup>304</sup> The Neus borrowed money to finance the acquisition, and their lender, Washington Mutual Bank (“Washington Mutual”), placed a mortgage on the property at closing.<sup>305</sup> Following the sale, Nowak made four

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291. *Id.*

292. *Id.*

293. *Id.* (quoting IND. CONST. art. 7, § 4).

294. *Id.* at 605 (citing IND. CONST. art. 7, § 4; *Alvarado v. Nagy*, 819 N.E.2d 520, 523 (Ind. Ct. App. 2004)).

295. *Id.* at 607.

296. *Id.* (citing *Miller v. Vance*, 463 N.E.2d 250 (Ind. 1984)).

297. 867 N.E.2d 188 (Ind. Ct. App. 2007).

298. 820 N.E.2d 644 (Ind. 2005).

299. *Gibson*, 867 N.E.2d at 190.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 191.

304. *Id.*

305. *Id.*

more payments to Gibson.<sup>306</sup> Gibson filed a complaint for judgment on the note and for foreclosure of his mortgage against Nowak, the Neus, and Washington Mutual.<sup>307</sup> Nowak subsequently filed for bankruptcy.<sup>308</sup> The Neus filed their own motion for summary judgment, arguing “that Nowak was not in default on the note at the time he sold the property to the Neus or, alternatively, that Nowak was in substantial compliance, and that Gibson would have been required to release his mortgage.”<sup>309</sup> In addition, the Neus “argued that they had priority over Gibson’s mortgage under the doctrine of equitable subrogation.”<sup>310</sup> The trial court denied Gibson’s motion for summary judgment and granted summary judgment to the Neus.<sup>311</sup>

On the Neus’ first argument, the trial court found that Nowak had substantially complied with the payment terms of the mortgage and that Gibson would have been required to release the mortgage if he had been asked to do so.<sup>312</sup> On appeal, Gibson argued that “Nowak was in default under the note and mortgage by his failure to make full and timely payments, that Nowak was not entitled to notice [of his default] under the note and mortgage, and that the doctrine of substantial performance does not apply to a note and mortgage.”<sup>313</sup> The court of appeals noted that the evidence presented to the trial court was that Nowak was in default at the time of the sale to the Neus and that his subsequent payment did not cure that default.<sup>314</sup> In its application of the doctrine of substantial performance, the court reiterated that timely payment of the debt was an “essential condition” of the note and mortgage.<sup>315</sup> Since Nowak was not current in his payments at the time of the sale to the Neus, he was not entitled to a release by Gibson, and the doctrine of substantial performance was inapplicable.<sup>316</sup>

On the issue of equitable subrogation, the trial court found that the Neus would have been entitled to assume the first lien position of Irwin Mortgage because “[t]he Gibson mortgage was always junior to the Irwin Mortgage and “no harm would come to Gibson’s lien position by the Neus (and their lender, Washington Mutual) attaining first lien status.”<sup>317</sup> The court of appeals examined the Indiana Supreme Court’s recent decision in *Bank of New York v. Nally* and

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306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 191-92.

312. *Id.* at 192.

313. *Id.* at 193 (quoting Appellant’s Brief at 18-19, *Gibson*, 867 N.E.2d 188 (No. 49A02-0608-CV-680)).

314. *Id.* at 194.

315. *Id.* at 195.

316. *Id.*

317. *Id.* at 193.



its application of the doctrine of equitable subrogation.<sup>318</sup> Following this comprehensive discussion of *Bank of New York*, the court concluded that the trial court did not err by granting the Neus and Washington Mutual equitable subrogation to the extent of the Irwin mortgage.<sup>319</sup>

### *G. Accord and Satisfaction*

In *Wolfe v. Eagle Ridge Holding Co.*,<sup>320</sup> the court of appeals discussed the rule of accord and satisfaction in connection with a construction contract.<sup>321</sup>

Eagle Ridge Holding Company (“Eagle Ridge”) contracted with Wolfe Construction in June 2004 to construct a building.<sup>322</sup> In October, “after completion of the work, Wolfe sent Eagle Ridge a final invoice for \$27,031.75.”<sup>323</sup> Shortly thereafter, “Eagle Ridge sent Wolfe a check for \$12,000 as partial payment,” leaving a balance of \$15,031.75.<sup>324</sup> A month later, Eagle Ridge sent a check, numbered 1031, to Wolfe in the amount of \$10,461.94.<sup>325</sup> “Written on both the front and back of the check were the words, ‘Full & Final Payment.’”<sup>326</sup> The check was accompanied by a document that listed portions of the invoice that Eagle Ridge believed to be inaccurate and purported to reduce the total invoice by \$4569.81.<sup>327</sup>

Instead of cashing check 1031, Wolfe filed a notice of intention to hold a mechanic’s lien.<sup>328</sup> Six months later, in June 2005, Wolfe attempted to cash the check after endorsing it, “Deposited without prejudice & with full reservation of all rights to balance per [Indiana Code section] 26-1-1-207. It is not an accord or [sic] satisfaction . . . .”<sup>329</sup> Eagle Ridge’s bank refused to cash check 1031 “because it was more than six months old.”<sup>330</sup> A week later, Eagle Ridge sent Wolfe check number 1071, also in the amount of \$10,461.94, with a note that it was intended to replace check 1031.<sup>331</sup> Check 1071 was also marked “Full & Final Payment.”<sup>332</sup> Wolfe cashed check 1071 without the language that it had written on check 1031 regarding a reservation of rights.<sup>333</sup>

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318. *Id.* at 197-99 (citing *Bank of N.Y. v. Nally*, 820 N.E.2d 644 (Ind. 2005)).

319. *Id.* at 202.

320. 869 N.E.2d 521 (Ind. Ct. App. 2007).

321. *Id.* at 523.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

In September 2005, Eagle Ridge attempted to secure financing on its property and demanded that Wolfe release the mechanic's lien.<sup>334</sup> Wolfe entered into agreement with the title company whereby an escrow was established so that Eagle Ridge could close on the loan without a release of the lien.<sup>335</sup> Wolfe then filed a complaint to foreclose the lien.<sup>336</sup> Eagle Ridge "filed a counterclaim, alleging that it suffered damages because of Wolfe's refusal to release the lien and because of Wolfe's poor workmanship."<sup>337</sup> "The trial court entered judgment of \$13,917.14 in favor of Eagle Ridge, and against Wolfe on his foreclosure complaint."<sup>338</sup> This damages award "included \$1,415.00 on Eagle Ridge's poor workmanship claim and \$12,502.14 for Wolfe's refusal to release the mechanic's lien."<sup>339</sup> The trial court refused to award Eagle Ridge attorney's fees based on a frivolous lawsuit. Wolfe appealed, and Eagle Ridge cross-appealed.<sup>340</sup>

On the issue of accord and satisfaction, the court held that Wolfe's act in cashing check 1071 operated as an accord and satisfaction because: (1) the check "was conspicuously marked on the front and back as being for full and final payment"; (2) the check "was accompanied by other correspondence indicating that the check was intended as full and final payment"; (3) the check was "tendered in good faith"; and (4) "[t]here was a bona fide dispute over the amount that Eagle Ridge owed."<sup>341</sup>

With respect to the calculation of damages, the court held that the language of Indiana Code section 32-28-6-1 is clear and that it "requires that a demand for release of a mechanic's lien must be made before damages . . . may begin to accrue to the lienholder for refusal to release the lien."<sup>342</sup>

## VII. TAKINGS

### A. Biddle v. BAA Indianapolis, LLC<sup>343</sup>

Homeowners who live in Hawthorne Ridge subdivision, located within three miles of Indianapolis International Airport ("Airport"), claimed that noise from airplanes amounted to a taking under the Fifth Amendment.<sup>344</sup> The homeowners also argued that the Airport should have been compelled to offer them financial settlements similar to those offered to their neighbors who had earlier sued the

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334. *Id.*

335. *Id.* at 524.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* (footnote omitted).

340. *Id.*

341. *Id.* at 527-28.

342. *Id.* at 528.

343. 860 N.E.2d 570 (Ind. 2007).

344. *Id.* at 572-73.

Airport.<sup>345</sup>

In 1999, some residents of Hawthorne Ridge, not including the present plaintiffs, filed suit against the Airport.<sup>346</sup> At settlement, those plaintiffs received a \$16,000 payment each in exchange for an easement in favor of the Airport.<sup>347</sup> The settlement also included certain price guarantees at the time those homeowners sold their homes.<sup>348</sup> In *Biddle*, the trial court granted summary judgment to the Airport, finding that the plaintiffs “did not suffer a special injury and that the flights were too high to constitute a taking” and “that the flights did not cause practical destruction of the [plaintiffs’] properties.”<sup>349</sup> Regarding the earlier settlement, the trial court found that the plaintiffs could not rely upon a theory of promissory estoppel that the Airport had agreed to “treat all neighbors alike” because they had not attended the meeting in which the promise had allegedly been made.<sup>350</sup> The court of appeals reversed and remanded for trial.<sup>351</sup> The Indiana Supreme Court granted transfer.<sup>352</sup>

Chief Justice Shepard, writing for the court, spent several pages describing the origins of the Fifth Amendment and the rationale behind the line of cases interpreting it.<sup>353</sup> With respect to claims of takings due to airport noise, he noted that while at least one state decision held that airport noise can constitute a taking, the “‘great weight of Federal authority’ is that a taking occurs only when aircraft are present in the ‘superadjacent airspace’ (meaning the air the owner reasonably occupies for his own use).”<sup>354</sup> The court cited the 1963 Court of Federal Claims case of *Aaron v. United States*<sup>355</sup> for the proposition that when an aircraft flies within the navigable airspace above private property, “the court presumes there is no taking unless the effect on private property is ‘so severe as to amount to a practical destruction or a substantial impairment of it.’”<sup>356</sup> In this case, the court concluded that the trial court was “warranted” that the noise from the aircraft over the plaintiffs’ homes was “no doubt considerable,” but did not defeat the *Aaron* presumption.<sup>357</sup>

The plaintiffs also claimed that the Airport was estopped from declining to offer the terms of the previous settlement to all of the homeowners in Hawthorne Ridge, even those who were not litigants in that action.<sup>358</sup> The plaintiffs relied

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345. *Id.* at 573.

346. *Id.* at 574.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* at 575-80.

354. *Id.* at 578 (quoting *Branning v. United States*, 654 F.2d 88, 99 (Ct. Cl. 1981)).

355. 311 F.2d 798 (Ct. Cl. 1963).

356. *Biddle*, 860 N.E.2d at 579 (quoting *Aaron*, 311 F.2d at 801).

357. *Id.* at 580.

358. *Id.*

upon statements made by Airport representatives at a neighborhood meeting prior to the commencement of the first lawsuit, in which the Airport promised to treat all Hawthorne Ridge residents “uniformly and equally.”<sup>359</sup> The plaintiffs alleged that they did not join the previous lawsuit in reliance on that promise.<sup>360</sup> The plaintiffs claimed to be third-party beneficiaries of the alleged promises, even though they did not attend the meetings.<sup>361</sup> The Airport argued that the plaintiffs’ lack of attendance at the meetings prevented them from receiving the promise, and therefore the promissory estoppel claim must fail.<sup>362</sup> The court agreed with the Airport, finding that the plaintiffs failed to demonstrate any evidence that a promise was made.<sup>363</sup> “The public statements made by [the Airport] officials are more akin to a statement of policy than a promise. Even assuming *arguendo* that the statements were promises, it is clear they referred to the operation of [the Airport’s] land use programs, not to settlement of future litigation.”<sup>364</sup> Finally, the court agreed with the trial court that the plaintiffs failed to establish detrimental reliance.<sup>365</sup>

*B. Jensen v. City of New Albany*<sup>366</sup>

Fawcett executed a warranty deed to the City of New Albany in 1935, conveying 5.82 acres to the City “so long as said real estate shall be used as a Municipal Park and Golf course and with the provision that no picnic parties are to be allowed on said real estate.”<sup>367</sup> The deed contained a reversionary clause to Fawcett’s heirs.<sup>368</sup> The property was used for park purposes, except for a small portion that was conveyed to the state in lieu of condemnation for the expansion of I-64, until 2004.<sup>369</sup> The City conveyed the land to the Community Housing Development Organization, Inc. to serve as a place to relocate homes to be moved due to the expansion of Floyd Memorial Hospital.<sup>370</sup> Fawcett’s heirs filed for declaratory judgment and an injunction to enforce the reversionary clause of the 1935 deed.<sup>371</sup>

The court of appeals agreed with the trial court that the case of *Dible v. City*

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359. *Id.* at 580 & n.20.

360. *Id.*

361. *Id.*

362. *Id.* at 580-81.

363. *Id.* at 581.

364. *Id.*

365. *Id.*

366. 868 N.E.2d 525 (Ind. Ct. App. 2007).

367. *Id.* at 526 (quoting Brief of the Appellant at 3, *Jensen*, 868 N.E.2d 525 (No. 22A01-0605-CV-187)).

368. *Id.*

369. *Id.* at 527.

370. *Id.*

371. *Id.* at 527-28.

of *Lafayette*<sup>372</sup> is applicable and dispositive.<sup>373</sup> In particular, both courts noted that while *Dible* stands for the proposition that a restrictive covenant is not enforceable against an entity with the power of eminent domain, the reasoning of the case is consistent with extending that holding to apply to reversionary clauses as well.<sup>374</sup>

C. *Utility Center, Inc. v. City of Fort Wayne*<sup>375</sup>

The City of Fort Wayne (“City”) owns a sewer and water utility.<sup>376</sup> Utility Center, Inc. is a privately owned, for-profit corporation providing identical services in an area around Fort Wayne.<sup>377</sup> Following Fort Wayne’s annexation of certain land served by Utility Center, the City initiated an action pursuant to Indiana’s general eminent domain statute to condemn that portion of Utility Center’s system which serves the annexed area.<sup>378</sup> “Utility Center filed a complaint seeking declaratory and injunctive relief from the condemnation, on the grounds that the City was not following the proper condemnation procedure.”<sup>379</sup> The City filed its own declaratory relief claim, arguing that Utility Center was compelled by law to consent to the sale of its system.<sup>380</sup> “The parties filed cross-motions for summary judgment.”<sup>381</sup> The trial court granted the City’s motion and denied that of Utility Center.<sup>382</sup> The Indiana Court of Appeals reversed and remanded.<sup>383</sup> The Indiana Supreme Court granted the City’s petition to transfer.

Justice Sullivan, writing for the majority, expressed the essence of the case: “Stated simply, the question before the Court is whether this sixth section of chapter 30 ([Indiana Code section] 8-1-30-6) abrogates or restricts the City’s authority to condemn Utility Center’s property pursuant to sections 92 and 93 of chapter 2 ([Indiana Code sections] 8-1-2-92 & 93).”<sup>384</sup> The sixth section reads as follows:

A municipality or other governmental unit may not require a utility company that provides water or sewer service to sell property used in the provision of such service to the municipality or governmental unit under [Indiana Code section] 8-1-2-92, [Indiana Code section] 8-1-2-93, or

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372. 713 N.E.2d 269 (Ind. 1999).

373. *Jensen*, 868 N.E.2d at 529.

374. *Id.* at 529-30.

375. 868 N.E.2d 453 (Ind. 2007).

376. *Id.* at 454.

377. *Id.*

378. *Id.* at 455.

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* at 457.

otherwise, unless the procedures and requirements of this chapter have been complied with and satisfied.<sup>385</sup>

The court of appeals, in its vacated opinion, held that “[t]he Legislature could have limited the circumstances to which section 6 applies . . . , but did not.”<sup>386</sup> The supreme court, however, held that “section 6 must be read in the context of the rest of chapter 30” and therefore “applies only to a utility company that has been the subject of the remedial measures identified in the preceding sections of chapter 30.”<sup>387</sup>

The court wrote that Senator David Long, the author of chapter 30 when it was enacted in 1999, filed an affidavit with the trial court explaining his “intent as the author” of the statute.<sup>388</sup> The trial court and the court of appeals did not consider the affidavit.<sup>389</sup> The supreme court, however, noted that Senator Long’s affidavit stated that “his intent, as the author, was to prevent ‘a municipal utility from using its powers of eminent domain to take over the ownership of a healthy private utility.’”<sup>390</sup> Justice Sullivan wrote that “[w]e respect Senator Long’s work in this field but, for the reasons set forth above, are unable to conclude that his intent in this regard was enacted into law.”<sup>391</sup>

Justice Boehm filed a dissenting opinion in which Justice Dickson concurred.<sup>392</sup> Justice Boehm parsed the language of section 6 in the context of sections 1 through 5 of chapter 30 and suggested that

the majority reads that section in a manner that strips it of any meaning whatever. Section 6 prohibits condemnation of a utility without going through the ‘procedures and requirements’ of Section 5. The majority concludes that Section 6 applies only to utilities that are the subject of a Section 5 order. But those are the very utilities that have gone through the only ‘procedures and requirements’ of Chapter 30. It therefore seems to me that the majority’s reading renders Section 6 wholly empty of content.<sup>393</sup>

#### VIII. MISCELLANEOUS: *RUSSO V. SOUTHERN DEVELOPERS, INC.*<sup>394</sup>

Southern Developers, Inc. created a residential subdivision in Floyd County,

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385. IND. CODE § 8-1-30-6 (2004).

386. *Utility Ctr., Inc.*, 868 N.E.2d at 457.

387. *Id.*

388. *Id.* at 459.

389. *Id.*

390. *Id.* (quoting Brief of Indiana Ass’n of Sewer Cos., Indiana-American Water Co., American Subu at 13, *Utility Ctr., Inc.*, 868 N.E.2d 453 (No. 02A04-0410-CV-576)).

391. *Id.*

392. *Id.* at 461 (Boehm, J., dissenting).

393. *Id.* at 463.

394. 868 N.E.2d 46 (Ind. Ct. App. 2007).

Indiana, and in 1995 built a single-family residence in the subdivision.<sup>395</sup> That home was sold to the Conlees in 1996.<sup>396</sup> The following year the surface water drainage system of the subdivision failed, and the Conlees' home suffered flood damage.<sup>397</sup> The developer attempted to repair the system, but the following year it failed again, and the Conlees notified the developer of the problem.<sup>398</sup> In 2001, the Conlees sold the home to the Russos without informing them of the prior flooding problems.<sup>399</sup> The Russos suffered flood damage in both 2003 and 2004 and notified the developers of the issue and demanded repairs in January 2005.<sup>400</sup> The system was not repaired.<sup>401</sup> The Russos then filed suit against the developers and the Conlees, among others.<sup>402</sup> The developers defended on the grounds that the statute of limitations on the Russos' breach of the implied warranty of habitability claim had run.<sup>403</sup> The trial court agreed, and the Russos appealed. The trial court was affirmed.<sup>404</sup>

The court held that the knowledge of the prior owner of the home is imputed to subsequent owners for purposes of determining when the statute of limitations begins to run with respect to a claim for a breach of the implied warranty of habitability.<sup>405</sup> As such, the six-year statute did not begin to run in 2003 when the Russos first suffered flood damage, but in 1997 when the Conlees first suffered the damage.<sup>406</sup> The holding in this case represents a matter of first impression for the Indiana courts.

#### IX. NEW STATUTES EFFECTIVE JULY 1, 2007

Indiana Code section 32-21-4-1 was amended to provide that if a mortgage is recorded but fails to comply with the requirements of Indiana Code section 32-21-2-3 or Indiana Code section 32-21-2-7 or the technical requirements of Indiana Code section 36-2-11-16(c), the mortgage will still be deemed to be validly recorded and to provide constructive notice as of the date of filing.<sup>407</sup>

Indiana Code section 32-31-5-6 was amended by House Enrolled Act 1214<sup>408</sup> to provide that a residential tenant "may not unreasonably withhold consent" for a landlord to enter upon the tenant's dwelling to inspect; repair; improve;

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395. *Id.* at 47.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.* at 49.

406. *Id.*

407. IND. CODE § 32-21-4-1(c) (Supp. 2007).

408. Rental Property—Storage, 2007 Ind. Legis. Serv. 115 (West).

decorate; supply services; or exhibit to buyers, mortgagees, tenants, workers, or contractors.<sup>409</sup> Indiana Code section 32-31-42 states that a landlord has no liability for the loss or damage to a tenant's personal property if the property has been abandoned.<sup>410</sup> Property is considered abandoned if a reasonable person would conclude that the tenant had vacated the premises and surrendered possession of the personal property.<sup>411</sup> An oral or written rental agreement may not define abandonment differently.<sup>412</sup> The Act also provides that, under certain circumstances, a landlord may remove a tenant's personal property and deliver it to a storage facility approved by the court.<sup>413</sup> This section of the code applies only to "dwelling units" and not to commercial tenants.

Indiana Code section 32-31-9 was created as a new chapter of the Indiana Code by House Enrolled Act 1509<sup>414</sup> entitled "Rights of Tenants Who Are Victims of Certain Crimes." The new chapter provides lease protections for victims of domestic violence and prohibits a landlord from "terminat[ing] a lease, refus[ing] to renew a lease, refus[ing] to enter into a lease, or retaliat[ing] against a tenant solely because: a tenant; an applicant; or a member of the tenant's or applicant's household" is a victim or alleged victim of a sex offense, stalking, or a crime involving domestic violence and has received a restraining order or a criminal no contact order.<sup>415</sup> A tenant who is a victim or an alleged victim of a crime involving domestic or family violence, a sex offense, or stalking may, at tenant's expense, have the locks of the tenant's dwelling unit changed within twenty-four hours of providing the landlord with a copy of a restraining order if the perpetrator is a tenant in the same dwelling unit<sup>416</sup> (within forty-eight hours if the perpetrator is not a tenant in the same dwelling unit).<sup>417</sup> The Act also provides that such a tenant is entitled to terminate the tenant's rights and obligations under the rental agreement if an accredited domestic violence or sexual assault program recommends relocation as a part of its safety plan for the tenant.<sup>418</sup> A landlord is immune from civil liability for excluding the perpetrator from the dwelling unit under court order and for the loss of, use of, or damage to personal property while the personal property is present in the dwelling unit.<sup>419</sup>

Indiana Code section 32-28-14 is a new chapter entitled "Homeowners Association Liens" and was created by Senate Enrolled Act 232.<sup>420</sup> It creates a

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409. IND. CODE § 32-31-5-6(e) (Supp. 2007).

410. *Id.* § 32-31-4-2(a).

411. *Id.* § 32-31-4-2(b).

412. *Id.* § 32-31-4-2(c).

413. *Id.* § 32-31-4-2(e).

414. Crime Victims—Landlord and Tenant, 2007 Ind. Legis. Serv. 22 (West).

415. IND. CODE § 32-31-9-8(a) (Supp. 2007).

416. *Id.* § 32-31-9-10.

417. *Id.* § 32-31-9-9(b).

418. *Id.* § 32-31-9-12.

419. *Id.* § 32-31-9-10(d).

420. Real Estate—Conveyances—Records and Recordation, 2007 Ind. Legis. Serv. 135 (West).



new type of lien that can be levied against the real property of a homeowner who fails to pay for certain common expenses.<sup>421</sup> The process for enforcing the lien is set forth in the new chapter.<sup>422</sup>

Indiana Code section 32-21-2-3 was amended to provide that “a conveyance may not be recorded after June 30, 2007, unless” the conveyance includes “the street address or rural route address of the grantee.”<sup>423</sup>

Indiana Code section 32-21-12 applies to restrictive covenants recorded after June 30, 2007, and states that “[e]xcept as provided in section 4 of this chapter, a deed restriction or restrictive covenant may not prohibit or restrict the erection of an industrialized residential structure on real property.”<sup>424</sup> Section 4 states that “[a] deed restriction, restrictive covenant, or agreement that applies uniformly to all homes and industrialized residential structures in a subdivision may impose the same aesthetic compatibility requirements on an industrialized residential structure in the subdivision that are applicable to all residential structures in the subdivision.”<sup>425</sup>

## X. OTHER CASES

The following cases concern property issues, but were not particularly noteworthy or simply applied accepted common law or statutory tests. Nonetheless, they are listed here as a guide to practitioners who may be interested in a particular area of property law.<sup>426</sup>

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421. IND. CODE § 32-28-14-5(a) (Supp. 2007).

422. *Id.* § 32-28-14-8.

423. *Id.* § 32-21-2-3(b).

424. *Id.* § 32-21-12-3(a).

425. *Id.* § 32-21-12-4.

426. *Cook v. Adams County Plan Comm’n*, 871 N.E.2d 1003, 1004, 1009 (Ind. Ct. App.) (holding that “one-year lease for real estate which contained provisions for annual automatic renewal” did not constitute a “long term lease” under applicable zoning ordinance for intensive livestock operations), *trans. denied*, 878 N.E.2d 220 (Ind. 2007); *Green Tree Servicing, LLC v. Random Antics, LLC*, 869 N.E.2d 464, 468-70 (Ind. Ct. App. 2007) (holding that a mobile home was personal property and should not have been included in the fee interest that passed through a tax deed on the underlying real property); *Green Tree Servicing, LLC v. Auditor & Treasurer of Howard County*, 868 N.E.2d 1, 3-4 (Ind. Ct. App. 2007) (holding that “statute designating claimants of tax sale surplus funds did not unconstitutionally deprive mortgagee of property without due process by failing to designate mortgagee as a claimant”); *State v. Universal Outdoor, Inc.*, 864 N.E.2d 403, 407 (Ind. Ct. App. 2007) (holding that “[t]o harmonize subsections (a) and (c)” of Indiana Code section 32-24-1-11 in the unique facts of this case, “exceptions are timely if filed within twenty days of the filing of the appraisers’ report but no later than twenty days after the clerk sends notice of the appraisers’ report to the parties”), *opinion vacated*, 880 N.E.2d 1188 (Ind. 2008); *Gilpin v. Ivy Tech State College*, 864 N.E.2d 399, 402-03 (Ind. Ct. App. 2007) (holding that Gilpin, the father of an adult child attending Ivy Tech, was a licensee rather than a public invitee when he entered the building to use the restroom because “no reasonable person could conclude Ivy Tech extended an invitation to Gilpin to use its public restrooms under these circumstances”

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and also holding that Gilpin was aware of the loose gravel upon which he slipped, so the gravel cannot be considered to be a latent danger about which Ivy Tech had a duty to warn); *Hodges v. Swafford*, 863 N.E.2d 881, 887-91 (Ind. Ct. App.) (holding, as a matter of first impression, that finance charges paid by a borrower over the entire life of a loan amounted to points and fees “payable” by borrower at or before closing, such that the land contract was a high cost loan subject to the Federal Home Ownership and Equity Protection Act), *amended on reh’g* by 868 N.E.2d 1179 (Ind. Ct. App. 2007); *Huntington v. Riggs*, 862 N.E.2d 1263, 1270 (Ind. Ct. App.) (holding that a property owner acquired title to a disputed strip of land through “acquiescence”), *trans. denied*, 869 N.E.2d 462 (Ind. 2007); *House v. First Am. Title Co.*, 858 N.E.2d 640, 644-45 (Ind. Ct. App. 2006) (holding that an injunction against the previous owner preventing use of a common septic system was not a “title defect” that would permit House to make a claim under his title insurance policy); *Wetherald v. Jackson*, 855 N.E.2d 624, 638-43 (Ind. Ct. App. 2006) (upholding trial court ruling that Jackson had acquired certain waterfront property by adverse possession), *trans. denied*, 869 N.E.2d 456 (Ind. 2007); *Prairie Material Sales, Inc. v. Lake County Council*, 855 N.E.2d 372, 374, 367-77 (Ind. Ct. App. 2006) (holding that a local ordinance that limited the weight of trucks on certain roads and bridges did not violate Indiana Code section 36-7-4-1103(c) which prohibits any action outside urban areas that prevents “the complete use and alienation of any mineral resources or forests by the owner or alienee of them”), *trans. denied*, 869 N.E.2d 458 (Ind. 2007); *St. Charles Tower, Inc. v. Bd. of Zoning Appeals*, 855 N.E.2d 286, 293-94 (Ind. Ct. App. 2006) (reversing trial court’s denial of Appellant-Plaintiff’s petition to reverse the Board of Zoning Appeals’s denial of a special use permit for the construction of a cellular tower), *vacated*, 873 N.E.2d 598 (Ind. 2007).