SURVEY OF RECENTLY REPORTED CASES IN REAL PROPERTY LAW

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INTRODUCTION

This Article examines the reported decisions during the survey period of the Indiana Supreme Court ("Supreme Court"), the Court of Appeals of Indiana ("Court of Appeals"), and the Indiana Tax Court ("Tax Court") concerning real property issues.

I. PROPERTY TAXES AND TAX SALES

A. In re 2014 Johnson County Tax Sale

In *In re 2014 Johnson County Tax Sale*,[1] the Court of Appeals considered whether the trial court's order denying issuance of a tax deed was clearly erroneous.[2] In that case, Patrick Black ("Appellee") owned a parcel of real property in Edinburgh, Johnson County, Indiana (the "Property").[3] The Property was listed for sale at Johnson County's September 12, 2014, tax sale, but the Property did not sell.[4] The Johnson County Auditor (the "Auditor") issued a tax sale certificate to the Johnson County Board of Commissioners (the "Commissioners") on September 13, 2014, and the Commissioners assigned the sale certificate to the Town of Edinburgh ("Appellant").[5] A Notice of Sale and Redemption Period was sent to Appellee, which indicated the date of expiration of the period of redemption was February 25, 2015 and specified the amount required for redemption.[6]

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1. Edinburgh v. Black (*In re* 2014 Johnson Cty. Tax Sale), 48 N.E.3d 340 (Ind. Ct. App. 2015).
2. *Id.* at 341.
3. *Id.*
4. *Id.*
5. *Id.* at 341-42.
6. *Id.* at 342.

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On February 24, 2015, Appellee went to the Auditor's office to redeem the Property.[7] An employee of the Auditor indicated that the total amount required for redemption was $26,557.85, and Appellee paid that amount to the Auditor.[8] On February 26, 2015, Appellant filed a petition for the issuance of a tax deed with the Johnson County Superior Court.[9] Appellant argued the total amount required for redemption had not been paid, and that taxes or penalties of $1575.56 were still due and unpaid.[10] On March 10, 2015, the Commissioners notified Appellee that $1575.56 was still due and Appellee timely paid the amount to Auditor.[11] Appellant filed a Notice of Payments arguing the Property had not been redeemed before the expiration of the redemption period as required by statute and requested an order directing the Auditor to issue a tax deed to Appellant.[12] The Auditor requested a hearing.[13] At the hearing, the trial court entered an Order Denying Issuance of the Tax Deed, concluding the unpaid penalties totaled $210.56 and found Appellee redeemed the Property.[14]

The Court of Appeals affirmed.[15] The Court of Appeals also held, generally, the trial court has full discretion to fashion equitable remedies that are complete and fair to all parties involved and "has power, where necessary, to pierce rigid statutory rules to prevent injustice."[16] In this case, the Court of Appeals reasoned that the trial court found Appellee paid the Auditor $26,557.85 on February 24, 2015, the Auditor did not realize the figure did not include penalties accruing after the tax sale, and Appellee did not have unclean hands that would preclude equitable relief.[17] The Court of Appeals agreed with the trial court that Appellee relied upon the information provided by the Auditor regarding the "amount owed for redemption, that the Auditor represented to all parties that the property had been redeemed, and that the loss to [Appellee] of property assessed at $91,000 for failure to pay penalties of $210.56 is a situation in which equity may act to pierce rigid statutory rules to prevent injustice."[18] Thus, the Court of Appeals concluded: The "facts favorable to the judgment and the reasonable inferences to be drawn therefrom support[ed] the trial court's judgment."[19] The Court of Appeals also concluded that although Indiana Code section 6-1.1-25-4.6 provides "a party may obtain a hearing by filing an objection," the trial court in this case "did hold a

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 343.
13. *Id.*
14. *Id.* at 344-45.
15. *Id.* at 347.
16. *Id.* at 346 (quoting Tajuddin v. Sandhu Petroleum Corp. No. 3, 921 N.E.2d 891, 895 (Ind. Ct. App. 2010)).
17. *Id.* at 347.
18. *Id.*
19. *Id.*

hearing and was not prevented from exercising its equitable power because an objection was not filed."[20]

B. Marion County Assessor v. Simon DeBartolo Group, L.P.

In *Marion County Assessor v. Simon DeBartolo Group, L.P.*,[21] the Tax Court considered a subsequent sale of property, the market in which the property was sold, and the value of the property between the tax years at issue and the year of the sale in determining whether to uphold the decision of the Indiana Board of Tax Review (the "Board") on appeal from the county assessor.[22] The taxpayer ("Taxpayer") challenged the assessed value of the property of $56,341,000 for the 2006 and 2007 tax years by initiating an appeal with the Property Tax Assessment Board of Appeals ("PTABOA").[23] Taxpayer subsequently sold the property for $18,000,000.[24] The PTABOA reduced the assessments, but Taxpayer still believed the assessed value to be too high and pursued an appeal of the assessed value with the Board.[25] Taxpayer presented evidence that the sale was an arm's-length transaction, which the Board relied upon to determine that Taxpayer had established a prima facie case for assessed values below the sales price of the property.[26] Because the assessor did not present evidence sufficient to rebut Taxpayer's prima facie case, the Board found in favor of Taxpayer.[27]

The Tax Court affirmed the Board's decision.[28] The assessor, citing the 2002 Real Property Assessment Manual, argued that the "true tax value" of real property is tied to its current use as reflected by the utility received by the owner or similar user from the property.[29] Because the assessor provided no other authority or legal analysis to support this argument, the Tax Court refused to consider it.[30] The assessor further argued that the Board's decision constituted an abuse of discretion because the 2007 sale was too remote from the 2005 and 2006 valuations, and Taxpayer failed to prove the sale was representative of the market.[31] The Tax Court disagreed, finding "taxpayers can present evidence of present-day property values as long as they attempt to relate that evidence to the appropriate valuation and assessment dates."[32] The assessor's argument that the sale was not representative of the market was contradicted by the Indiana

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20. *Id.*
21. 52 N.E.3d 65 (Ind. T.C. 2016).
22. *Id.* at 66.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 68.
27. *Id.*
28. *Id.* at 73.
29. *Id.* at 69 (citing Brief for Petitioner at 7).
30. *Id.*
31. *Id.*
32. *Id.* at 70.

Property Assessment Manual, and the assessor was required to submit evidence that the sale was not an arm's-length transaction or that other properties were selling for more than $18,000,000, which it did not do.[33]

C. Jones v. Jefferson County Assessor

In *Jones v. Jefferson County Assessor*,[34] the Tax Court considered whether to uphold an assessment of real property on which construction of a residence was alleged to be incomplete.[35] In *Jones*, the homeowners ("Homeowners") challenged the assessments of their real property for the 2008 and 2009 tax years because they believed their property had been assessed based upon the incorrect assumption that construction of the residence was complete as of the assessment date.[36] Homeowners claimed that their residence should not have been assessed during the years at issue; introducing into evidence a letter, prepared by the former township trustee/assessor, stating that the residence was uninhabitable during the years at issue.[37] The assessor ("Assessor") (1) argued that the former trustee/assessors letter was not notarized and contained unexplained handwritten alterations, (2) provided a 2011 appraisal of the property, acknowledging the property was 74.5% complete and valuing it only $5,000 less than the years at issue, and (3) argued that because Homeowners received a homestead deduction in 2008, it was reasonable to conclude that Homeowners lived in the residence.[38] The Board of Tax Review (the "Board") found the residence had been assessed as if it were 100% complete during the years at issue when it was not.[39] However, because the document presented by Homeowners was not reliable, it provided insufficient support for Homeowners' requested valuation of $0.[40]

On appeal, Homeowners argued the Board's determination was erroneous because it was clear that the residence was incomplete in 2008 and 2009; thus, it was ineligible for assessment.[41] The Tax Court disagreed, finding the Assessor "was required to determine the true tax value (*i.e.*, the market value-in-use [defined as the value of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property]) of [Homeowner's] residence."[42] Therefore, the inquiry should focus on the valuation of the

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33. *Id.* at 71. The Tax Court also considered the assessor's argument that the analysis submitted by Taxpayer's consultant was improperly relied upon by the Board but rejected it because the assessor did not submit sufficient evidence to rebut consultant's report. *Id.*

34. 51 N.E.3d 461 (Ind. T.C. 2016).

35. *Id.* at 461-62.

36. *Id.* at 463.

37. *Id.* at 462.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 463.

42. *Id.* (internal citations omitted).

property.[43] Because the Homeowners did not present the Board with any "market-based evidence of their property's market value-in-use," the Tax Court found no basis for reversing the Board's final determination.[44]

D. Gillette v. Brown County Assessor

In *Gillette v. Brown County Assessor*,[45] the Tax Court considered the appropriate approach to challenging the assessed value of real property.[46] The taxpayer ("Taxpayer") owned rental property which Taxpayer believed was assessed in 2009 at a value that was too high.[47] Taxpayer appealed the assessment to the Board of Tax Review ("the Board"), which determined that the assessor ("Assessor") had the burden of proof because the assessment of the property had increased for 2009 by more than five percent from 2008.[48] Assessor argued that Taxpayer was unable to make a prima facie case and asked the Board to reinstate the 2008 assessment.[49] Taxpayer provided her own testimony about the sale and rental values of the property, rental insurance policy declarations showing replacement value for liability limits, and appraisals prepared for mortgage companies.[50] The Board reduced the 2009 assessment to the amount of the 2008 assessment, but it found the evidence presented by Taxpayer was not sufficient to establish a prima facie case for an assessed value less than the 2008 assessment.[51] Taxpayer appealed.[52]

On appeal, Taxpayer presented two arguments: the Board erred by (1) utilizing the cost approach as opposed to the income approach in determining property value and (2) rejecting Taxpayer's presentation of evidence.[53] The Tax Court looked to the market value-in-use method: "the value of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property."[54] In determining the market value-in-use, the cost approach has historically been used most frequently by assessing officials.[55] Taxpayer was required to provide market-based evidence showing the assessment was not accurate with respect to the property's market value-in-use.[56] The Tax Court

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43. *Id.*
44. *Id.* at 464.
45. 54 N.E.3d 454 (Ind. T.C. 2016).
46. *Id.* at 455-56.
47. *Id.* at 454.
48. *Id.* at 455.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 455-56.
54. *Id.* at 456 (quoting McKeeman v. Steuban Cty. Assessor, 10 N.E.3d 612, 614 (Ind. T.C. 2014) (internal quotations omitted)).
55. *Id.*
56. *Id.*

reasoned that Taxpayer's focus on the income approach "attacks merely the methodology used to determine the 2008 assessed value and does not address the key issue—whether [the amount of the 2008 assessment] was a reasonable reflection of the property's market value-in-use."[57] As to Taxpayer's second argument, the Tax Court held Taxpayer was required to relate the evidence to the date of the valuation (i.e., for the 2009 assessment, January 1, 2008), which Taxpayer did not do.[58] Accordingly, the Tax Court affirmed the Board's decision.[59]

E. Schafer v. Borchert

In *Schafer v. Borchert*,[60] the Court of Appeals considered whether the mailing of notice of tax sale of real estate complied with the statutory twenty-one day requirement.[61] Twenty days prior to the tax sale, the auditor's office sent a notice to the last known address of the delinquent owner of the property ("Owner") and published notice in a newspaper.[62] However, the notice sent to Owner was returned to sender because Owner no longer lived at the address on file, and Owner had not notified the auditor's office of his new address.[63] The purchaser ("Purchaser") bought the property at the tax sale.[64] Subsequent notices relating to the tax sale and redemption period sent to Owner were similarly returned to sender.[65] Three years after the tax sale, Owner learned of the tax sale and issuance of the deeds and subsequently attempted to convey the property to another party.[66] Because Purchaser owned the property, the transfer was not effective, but it did cloud Purchaser's title.[67] As a result, Purchaser filed suit to quiet title.[68] Owner filed a counterclaim seeking to set aside the tax deeds.[69] After more than twenty years of stagnation, while Purchaser continued to pay real estate taxes on the property, the trial court awarded Purchaser fee simple ownership of the property, noting that although the notice of the tax sale was sent one day late, it substantially complied with the twenty-one day requirement.[70] Owner appealed.[71]

On appeal, Owner argued that the lower court erred by applying the

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57. *Id.*
58. *Id.* at 457.
59. *Id.*
60. 55 N.E.3d 914 (Ind. Ct. App. 2016).
61. *Id.* at 917.
62. *Id.* at 915.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 916.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 917.
71. *Id.*

substantial compliance doctrine to the statutory notice requirement in Indiana Code section 6-1.1-24-4.[72] The Court of Appeals did not find it necessary to consider the merits of Owner's argument because the notice provided complied with the statute: The auditor is required to mail notice at least twenty-one days before the sale, but "the statute does not require that the sale be held no fewer than twenty-one days after notice is mailed."[73] The Court of Appeals went on to clarify that the proper calculation was not to count forward from the day of mailing but rather to count backward from the date of the tax sale; in doing so, the notice was proper, and no further analysis was required.[74]

II. ZONING

A. MacFadyen v. City of Angola

In *MacFadyen v. City of Angola*,[75] the Court of Appeals considered whether homeowners of adjacent property could petition for judicial review of the city plan commission's decision to vacate an alley running through property owned by a university.[76] The homeowners ("Homeowners") owned property contiguous to property owned by a university ("University"), and an alley ran along the back of Homeowners' property through University's property.[77] The portion of the alley on University's property was unimproved and grass-covered.[78] University petitioned the city plan commission (the "Commission") to vacate the part of the alley on University's property, but the petition did not include the portion located behind Homeowners' property.[79] Homeowners objected to the petition because the vacation would prohibit Homeowners' access to a street via the portion of the alley on University's property.[80] The Commission approved the petition, and Homeowners sought judicial review of the decision.[81]

The Court of Appeals found Homeowners were not aggrieved by the Commission's decision and they therefore did not have standing to seek judicial review.[82] Because decisions of a plan commission "are subject to the same process of review as are local zoning decisions," Homeowners were required to demonstrate they were aggrieved by the decision to have standing to petition for certiorari review by the courts.[83] Quoting the Supreme Court, the Court of

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72. *Id.*
73. *Id.* at 918.
74. *Id.*
75. 51 N.E.3d 322 (Ind. Ct. App. 2016).
76. *Id.* at 324.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 326.
83. *Id.* at 324.

Appeals stated that to be "aggrieved," "the person must experience a 'substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation.'"[84] The Court of Appeals noted that it was not permitted to reweigh the evidence in reviewing a zoning board's decision.[85] Because the Commission received evidence that Homeowners still had access to their property over the remaining portion of the alley and the value of their property was not diminished, the Court of Appeals could not find Homeowners were aggrieved, and it upheld the vacation of the portion of the alley on University's property.[86]

B. Rogers Group, Inc. v. Tippecanoe County

In *Rogers Group, Inc. v. Tippecanoe County*,[87] the Court of Appeals considered the validity of two county zoning ordinances: one prohibiting "new quarries within two miles of residential areas" (the "Prohibition Ordinance") and one requiring "parties seeking to mine in a flood plain to first obtain a special exception from the board of zoning appeals" (the "Flood Plain Ordinance").[88] A developer ("Developer") challenged the two ordinances, arguing: (1) as a zoning ordinance, the Prohibition Ordinance was not enacted according to the proper zoning procedures and thus was illegal and unenforceable, and (2) the Flood Plain Ordinance was invalid under Indiana Code section 36-7-4-1103(c), which "does not authorize" any ordinance that would prevent "the complete use and alienation of any mineral resources or forests by the owner or alienee of them."[89] The trial court found the Prohibition Ordinance was a valid exercise of the county's police power and the Flood Plain Ordinance was permissible based on precedent recognizing a flood plain exception to a previous version of Indiana Code section 36-7-4-1103(c).[90]

On appeal, the Court of Appeals held the Prohibition Ordinance was an impermissibly enacted zoning ordinance but the Flood Plain Ordinance was valid and enforceable.[91] The county maintained that the Prohibition Ordinance was not a zoning ordinance (and acknowledged that if it were, it would have to be invalidated) but rather a licensing ordinance.[92] The Court of Appeals rejected this argument, finding the Prohibition Ordinance met the test set forth in *City of Carmel v. Martin Marietta Materials, Inc.*,[93] as it "confine[d] a certain class of use (quarries) to designated areas (two miles from 'residential areas')," which

84. *Id.* at 325 (quoting Bagnall v. Town of Beverly Shores, 726 N.E.2d 782, 785 (Ind. 2000)).
85. *Id.* at 326.
86. *Id.*
87. 52 N.E.3d 848 (Ind. Ct. App.), *trans. denied*, 57 N.E.3d 819 (Ind. 2016).
88. *Id.* at 849.
89. *Id.* at 849-50 (quoting IND. CODE § 36-7-4-1103(c) (2012)).
90. *Id.* at 850.
91. *Id.* at 854.
92. *Id.* at 850.
93. 883 N.E.2d 781 (Ind. 2008).

constitutes "quintessential zoning."[94] The Prohibition Ordinance was accordingly found to be invalid and unenforceable.[95] The Court of Appeals next addressed Developer's challenge to the Flood Plain Ordinance and reviewed the statute on which Developer's challenge was based.[96] Developer argued that revisions to the statute broadened its application and eliminated the ability of counties to regulate land use in flood plains (the "Flood Plain Exception") under Indiana Code section 36-7-4-1103(c).[97] Because the legislature did not demonstrate an intent to eliminate this exception, the Court of Appeals concluded that it did not abolish or alter the Flood Plain Exception, and the Flood Plain Ordinance was valid and enforceable.[98]

IV. LIENS AND FORECLOSURES

A. Amici Resources, LLC v. Alan D. Nelson Living Trust

In *Amici Resources, LLC v. Alan D. Nelson Living Trust*,[99] the Court of Appeals considered the relative priority of various security interests in the same real estate.[100] A lienholder ("Lienholder") obtained a judgment[101] against the debtor ("Owner") in December 2012.[102] In April, 2013, Owner closed on the purchase of certain real estate (the "Property").[103] Owner financed its acquisition of the Property through a combination of investor equity and a loan from the Alan D. Nelson Living Trust (the "Trust"), secured by a promissory note and a mortgage against the Property.[104] Owner took a second loan from one of its equity investors ("Investor") for Property renovation and secured this second loan with a second mortgage against the Property.[105] Lienholder sought to enforce her judgment lien against the Property, and the court determined that the Trust's lien had first priority, Investor's lien had second priority, and both had priority over Lienholder's lien.[106] Lienholder appealed.[107]

The Court of Appeals affirmed in part and reversed in part, in concluding the Trust's mortgage had priority over Lienholder's lien, but Lienholder's lien had

94. *Rogers Group*, 52 N.E.3d at 851 (quoting *Martin Marietta*, 883 N.E.2d at 787).
95. *Id.* at 852.
96. *Id.* at 852-53.
97. *Id.* at 853.
98. *Id.* at 854.
99. 49 N.E.3d 1046 (Ind. Ct. App. 2016).
100. *Id.* at 1048.
101. *Id.*
102. *Id.*
103. *Id.* at 1049.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*

priority over Investor's lien.[108] The Court of Appeals affirmed that the Trust's mortgage was a purchase-money mortgage, and, as such, the Trust's lien against the Property attached simultaneously with Owner taking title to the Property.[109] For a mortgage to constitute a purchase-money mortgage, the loan the mortgage secures must be used to fund the acquisition of the collateral, and the mortgage documents and purchase documents must be executed as part of the same transaction.[110] Purchase-money mortgages have priority over any mortgage, lien, or other claim that attaches to the real estate but is created prior to the acquisition of title.[111] With respect to judgments rendered prior to the acquisition of property, "a judgment entered against a debtor instantly attaches as a lien to land subsequently acquired by the debtor."[112] However, under the clear language of Indiana Code section 32-29-1-4, a purchase-money mortgage has priority over a prior judgment against the purchaser.[113] By application of these two rules, the Court of Appeals concluded the correct priority of the various liens at issue should have been: Trust, Lienholder, Investors, and reversed with instruction.[114]

B. Samuels v. Garlick

In *Samuels v. Garlick*,[115] the Court of Appeals considered whether a mortgage sufficiently described the premises so as to be enforceable.[116] In *Samuels*, the owners ("Owners") purchased three tracts of land, sold a portion of two of the tracts, combined the remaining land, and recorded a three-lot subdivision plat (the "Property").[117] Owners obtained a loan secured by a mortgage (the "First Mortgage"), which was recorded in August 2007 and contained a legal description encompassing more real property than actually owned by Owners.[118] Three years later, Owners obtained a second loan secured by a second mortgage (the "Second Mortgage"), which was recorded in August 2010 and contained an accurate legal description of the Property.[119] The holder of the Second Mortgage sought to foreclose the Second Mortgage, and the holder of the First Mortgage argued that the First Mortgage was superior to the Second Mortgage.[120] The holder of the Second Mortgage claimed that the First Mortgage was invalid

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108. *Id.* at 1052.
109. *Id.* at 1050-52.
110. *Id.* at 1050-51.
111. *Id.* at 1052 (citing IND. CODE § 32-29-1-4 (2016)).
112. *Id.* at 1053.
113. *Id.* at 1052.
114. *Id.* at 1052-54.
115. 49 N.E.3d 1116 (Ind. Ct. App. 2016).
116. *Id.* at 1117.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

because it did not sufficiently describe the Property.[121] The trial court disagreed, finding the First Mortgage to be prior and superior to the Second Mortgage.[122]

The Court of Appeals affirmed, reasoning that the holder of the Second Mortgage was on notice of the existence of the First Mortgage, as it had been properly recorded.[123] Further, the test for determining the sufficiency of a legal description contained in a mortgage is whether the property "can be located with certainty by referring to the description."[124] The legal description in the First Mortgage identified the common address of the Property and contained a "facially valid legal description" with the same starting point as the plat.[125] The Court of Appeals held the fact that the legal description contained more real estate than owned by Owners was "relevant only to the issue [of] whether there is a valid and enforceable lien on the non-owned premises; it does not impair the validity of the lien on the mortgaged premises[,]" and it therefore did not affect the priority of the two mortgages.[126]

C. R.P. Leasing, LLC v. Chemical Bank

In *R.P. Leasing, LLC v. Chemical Bank*,[127] the Court of Appeals considered whether a self-serving affidavit constituted sufficient evidence to establish a question of material fact as to the fair market value of real estate.[128] Property Owner borrowed money from Bank, secured by a mortgage encumbering real estate located in both Michigan and Indiana.[129] Property Owner defaulted and Bank foreclosed its mortgage on the Michigan property, but the proceeds of the foreclosure sale were insufficient to satisfy the debt in full.[130] Bank then initiated this foreclosure action on its mortgage on the Indiana property to recover the balance of Property Owner's debt.[131] The fair market value of the Michigan property at the time of sale was a material issue in this case because under Michigan law, it is a defense to a deficiency claim that the property sold and applied against the debt was sold for less than fair market value.[132] Bank filed a motion for summary judgment, designating evidence in support of the fair market value of the Michigan property.[133] In its response, Property Owner designated a

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121. *Id.*

122. *Id.*

123. *Id.* at 1120-21.

124. *Id.* at 1121 (quoting Keybank Nat'l Ass'n v. NBD Bank, 699 N.E.2d 322, 326 (Ind. Ct. App. 1998)).

125. *Id.* at 1122.

126. *Id.* (quoting *In re* Estate of Lawrence, 565 N.E.2d 357, 359 (Ind. Ct. App. 1991)).

127. 47 N.E.3d 1211 (Ind. Ct. App. 2015).

128. *Id.* at 1213, 1215.

129. *Id.* at 1213.

130. *Id.*

131. *Id.*

132. *Id.* at 1215.

133. *Id.* at 1214.

self-serving affidavit executed by the managing member of Property Owner (who was not an appraisal professional), simply stating his opinion as to the fair market value of the Michigan property, which opinion conflicted with the evidence of fair market value submitted by Bank.[134] The court granted Bank's motion for summary judgment, and Property Owner appealed.[135]

The Court of Appeals reversed the court's ruling and held there was a genuine issue of material fact as to the fair market value of the Michigan property and thus the deficiency balance owed to Bank.[136] The Court of Appeals explained it is well settled that "[t]he owner of real estate is assumed to possess sufficient acquaintance with it to estimate the value of the [real estate]," and even Property Owner's "perfunctory and self-serving affidavit [was] minimally sufficient to raise a factual issue to be resolved at trial and thus defeat summary judgment."[137]

D. Fish v. 2444 Acquisitions, LLC

In *Fish v. 2444 Acquisitions, LLC*[138] the Court of Appeals considered whether Lender's failure to name an assignee of its interest in a mortgage as a party to a foreclosure suit rendered the foreclosure judgment void.[139] Lender obtained a mortgage on properties owned by Land Owner.[140] Lender subsequently assigned its interests in the mortgage to an LLC in which it held a substantial interest (the "Assignee").[141] Lender subsequently, in its own name, filed an action to foreclose the mortgage.[142]Assignee was not named as a party to the suit, and Lender and Property Owner ultimately entered into an agreed judgment and decree of foreclosure (the "Agreed Judgment").[143] Following entry of the Agreed Judgment, Property Owner discovered Lender's prior assignment of the mortgage and filed a motion for relief from judgment under Trial Rule 60(B)(6), claiming that the Agreed Judgment was void because of Lender's failure to name Assignee, the real party in interest, as a party to the suit.[144] The court granted Property Owner's motion, finding the Agreed Judgment was void.[145] This appeal ensued.[146]

The Court of Appeals reversed the court's ruling and held the Agreed Judgment was not void, explaining that "[a] void judgment is a nullity, and [thus]

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134. *Id.*

135. *Id.*

136. *Id.* at 1215.

137. *Id.* at 1216-17 (citing Jordan v. Talaga, 532 N.E.2d 1174, 1188 (Ind. Ct. App. 1989); Hughley v. State, 15 N.E.3d 1000, 1004 (Ind. 2014)).

138. 46 N.E.3d 1261 (Ind. Ct. App. 2015), *trans. denied*, 46 N.E.3d 1240 (Ind. 2016).

139. *Id.* at 1263.

140. *Id.* at 1262.

141. *Id.* at 1263.

142. *Id.* at 1262.

143. *Id.* at 1262-63.

144. *Id.* at 1263.

145. *Id.*

146. *Id.*

typically occurs where the court lacks subject matter or personal jurisdiction."[147] The Court of Appeals confirmed the trial court clearly had subject matter jurisdiction over the foreclosure action, and personal jurisdiction was not disputed.[148] The Court of Appeals went on to explain that, unlike subject matter jurisdiction, a real party in interest argument can be, and was in this instance, waived.[149]

E. Bayview Loan Servicing, LLC v. Golden Foods, Inc.

In *Bayview Loan Servicing, LLC v. Golden Foods, Inc.*, the Court of Appeals determined whether a mortgage merged into a tax deed, thus extinguishing the borrower's obligations under certain loan documents.[150]

In 2008, a borrower ("Borrower") informed its lender ("Lender") that taxes had become delinquent on certain property (the "Property") owned by Borrower and secured by a mortgage (the "Mortgage") in favor of Lender.[151] Lender drafted a loan adjustment agreement (the "Agreement")—which was eventually signed by Borrower but not Lender—under which Borrower would make certain monthly payments and Lender would agree to redeem the Property.[152] In the meantime, a third party ("Tax Sale Purchaser") purchased the tax sale certificate for the Property and, following the expiration of the redemption period, filed a petition for the issuance of the tax deed.[153] Knowing that issuance of the tax deed would mean that Borrower would lose its interest in the Property, Lender entered into negotiations with Tax Sale Purchaser.[154] Eventually, Lender and Tax Sale Purchaser entered into a settlement agreement that provided that the tax certificate and tax deed would go directly to Lender instead of Tax Sale Purchaser.[155] Borrower was not advised as to Lender's negotiations with Tax Sale Purchaser, nor was Borrower informed of the settlement agreement executed between Lender and Tax Sale Purchaser.[156] Instead, one of Lender's employees informed Borrower that Lender would pay the delinquent taxes on the Property, though the same employee also separately instructed internally that the Property should be secured and the locks changed.[157] Borrower, who in the meantime was under the impression that the Agreement signed by Borrower but not by Lender was in effect and had been making payments under the Agreement, did not learn that

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147. *Id.* at 1265-66 (quoting Seleme v. JP Morgan Chase Bank, 982 N.E.2d 299, 304 (Ind. Ct. App. 2012)).

148. *Id.* at 1266.

149. *Id.*

150. 59 N.E.3d 1056, 1058 (Ind. Ct. App. 2016).

151. *Id.* at 1059.

152. *Id.*

153. *Id.* at 1059-60.

154. *Id.* at 1060.

155. *Id.*

156. *Id.*

157. *Id.* at 1061.

Lender had acquired title to the Property until Lender filed a quiet title action.[158] The trial court, though, found the Mortgage and the underlying note were merged into the tax deed, and thus Borrower was discharged from its obligations.[159]

Lender appealed the trial court's decision with respect to the purported merger of interests.[160] The Court of Appeals noted that the critical factor in determining whether a mortgage lien merges with the legal title to a property is the intent of the parties, primarily that of the mortgagee.[161] In this instance, Lender argued that it did not intend for merger to occur; the court disagreed. [162] The court noted that one of the draft agreements circulated between Lender and Tax Sale Purchaser (and eventually rejected by Lender) would have provided that the tax deed be issued to Tax Sale Purchaser and then the Property subsequently quitclaimed back to Borrower—an arrangement that would have left Borrower and Lender in the same relationship as before the tax sale.[163] Instead, Lender had explained to Tax Sale Purchaser that the transaction contemplated by the settlement agreement the parties eventually executed was "similar to a deed in lieu of foreclosure," which the court noted would extinguish Borrower's underlying debt unless Lender and Borrower contemporaneously executed other documentation establishing a residual financial obligation.[164] The court found Lender's instructions to secure the Property and its filing of a quiet title action—in which Lender claimed that its interests in the Property were superior to all—further demonstrated that Lender intended to acquire title to the Property in an arrangement similar to a deed in lieu of foreclosure and thus was additional evidence supporting the trial court's decision that the Mortgage merged into the tax deed.[165]

F. Broadbent v. Fifth Third Bank

In *Broadbent v. Fifth Third Bank*, the Court of Appeals considered whether a payment guaranty issued in favor of a lender in connection with a construction loan constituted an ambiguous contract.[166]

Fifth Third Bank ("Lender") issued a real estate development loan to Plainfield Village, LP ("Borrower"), secured by a mortgage on certain real estate, a promissory note, and a payment and performance guaranty (the "Guaranty") given by Borrower's president ("Guarantor").[167] The Guaranty provided in

158. *Id.*
159. *Id.* at 1065.
160. *Id.* at 1066-67.
161. *Id.* at 1067.
162. *Id.* at 1067-68.
163. *Id.* at 1060, 1067.
164. *Id.* at 1067.
165. *Id.* at 1067-68.
166. Broadbent v. Fifth Third Bank, 59 N.E.3d 305 (Ind. Ct. App.), *trans. denied*, 64 N.E.3d 1208 (Ind. 2016).
167. *Id.* at 307.

relevant part that, in the event Borrower failed to pay amounts owed under the loan documents, Guarantor would, upon written demand of Lender, pay or perform the obligations guaranteed.[168] The Guaranty further provided that Guarantor's obligations under the Guaranty were limited to fifty percent of the outstanding balance of principal and accrued interest under the promissory note upon extension of the loan, provided that any reduction of the amounts owed by Borrower, whether prior to or after an event of default, were to be applied first to the non-guaranteed portion of Borrower's obligations.[169] Borrower defaulted, and Lender sued both Borrower and Guarantor seeking recovery of approximately $7.5 million.[170] While Lender's suit was pending, Lender and Guarantor agreed to sell the property to a third party that would have reduced the outstanding obligations of Borrower by $4.4 million (the "Credit").[171] The trial court subsequently granted summary judgment in favor of Lender, finding after application of the Credit, Guarantor owed Lender approximately $3.18 million.[172] Guarantor appealed.[173]

The Court of Appeals affirmed.[174] On appeal, Guarantor argued that the provision in the Guaranty limiting his obligations was ambiguous as to the date on which the amount of the obligations owed to Lender were to be calculated, and, consequently, the amount Guarantor owed Lender under the terms of the Guaranty remained in question, and so summary judgment was improper.[175] The Court of Appeals rejected Guarantor's argument, concluding Guarantor's argument required the court to read only certain provisions of the Guaranty and the Guaranty was unambiguous when read as a whole.[176] Consequently, the Court of Appeals affirmed.[177]

V. EASEMENTS, COVENANTS, AND TITLE ISSUES

A. Allen Gray Limited Partnership IV v. Mumford

In *Allen Gray Limited Partnership IV v. Mumford*,[178] the Court of Appeals considered the interpretation of a mineral rights reservation contained in a deed.[179]

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168. *Id.*

169. *Id.* at 308.

170. *Id.* Initially Lender sought recovery of approximately $7.4 million, which amount appears to have increased as a result of additional accrued interest. *See id.* at 310 (identifying the amount sought by Lender as approximately $7.5 million).

171. *Id.* at 309.

172. *Id.* at 310.

173. *Id.*

174. *Id.* at 314.

175. *Id.* at 312.

176. *Id.* at 313.

177. *Id.* at 314.

178. 44 N.E.3d 1255 (Ind. Ct. App. 2015).

179. *Id.* at 1256.

In *Mumford*, a vendor ("Vendor") sold mineral rights to a purchaser ("Purchaser") but reserved oil and gas rights for twenty years from the date of the sale and for "'as long thereafter as oil and gas is being produced' from the property."[180] Following the twenty-year period, the deed specified that Vendor's "reservation would continue as to each well then producing and as to the drilling unit upon which each such producing well is located as evidenced by the drilling permit until production cease[d] and the well [was] plugged."[181] At issue in the trial court was Vendor's attempt, following the expiration of the twenty-year period, to deepen the existing wells.[182] Purchaser contended that the use of the phrase "drilling permit" in the reservation language meant that Vendor's reservation following the twenty-year period would only continue as to any permits that existed at the end of such period.[183] Under Purchaser's interpretation of the language, Vendor's attempt to deepen the new wells—an action that would require an additional permit—would be prohibited.[184] The trial court disagreed with Purchaser, concluding the reservation language included the acreage surrounding each well covered by the permit, and thus Vendor's deepening of the existing wells would be permitted under the deed language.[185]

On appeal, the Court of Appeals affirmed.[186] The Court of Appeals found the key phrase in the reservation language was "drilling unit."[187] Vendor's permit set forth a defined legal description consisting of a certain amount of acres and granted Vendor the right to drill a well on such area.[188] The area in the permit was referred to as a "drilling unit."[189] Consequently, when the deed stated that Vendor's reservation continued as to the "drilling unit upon which each such producing well is located as evidenced by the drilling permit," Vendor's rights were restricted to the particular drilling unit referenced in the existing permit (i.e., the defined area), but were not restricted to any actions permitted pursuant to the existing permit.[190] As a result, the Court of Appeals affirmed the lower court's holding that Vendor was permitted to deepen the existing wells (even though such action would require an additional permit) because the existing wells were located within the existing drilling unit.[191]

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180. *Id.*
181. *Id.* (internal citations and emphasis omitted).
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 1258.
187. *Id.* at 1257-58.
188. *Id.* at 1258.
189. *Id.*
190. *Id.*
191. *Id.*

B. Old Utica School Preservation, Inc. v. Utica Township

In *Old Utica School Preservation, Inc. v. Utica Township*,[192] the Court of Appeals considered whether a township's use of a property violated the language of the quitclaim deed conveying the property.[193] A school corporation conveyed property to the township ("Township") by quitclaim deed, "subject to the conditions set out in IC 20-4-5-8(b) that said property being transferred shall be used by [Township] . . . for park and recreation purposes."[194] Township used the property for various community purposes and leased a portion of the property to a non-profit organization ("Non-Profit") which used the property to provide housing for Non-Profit's clients.[195] A number of citizens ("Citizens") brought suit against Township alleging Township's use of the property violated the restrictive covenant in the quitclaim deed.[196] After a determination that Citizens had standing under the public standing doctrine, the court found: (1) the deed was a fee simple conveyance with a condition subsequent, (2) Township's lease of the property did not violate the language of the deed, and (3) Citizens did not meet the burden of demonstrating irreparable injury warranting an injunction.[197]

On appeal, the Court of Appeals affirmed in part, reversed in part, and remanded to the trial court.[198] It agreed with the court that Township's lease to Non-Profit did not violate the requirement that the property be used for park and recreation purposes, as Township demonstrated that a portion of the property was used for community sports and gatherings on occasion.[199] It also found Citizens had not shown evidence of irreparable injury, as the property had been open for public use, including use by Citizens.[200] The Court of Appeals disagreed with the trial court's conclusion that the conveyance of the property was a fee simple with condition subsequent, finding instead that the property was conveyed with a restrictive covenant.[201] A conveyance by fee simple subject to condition subsequent provides that upon the occurrence of the condition, the conveyor has a right to terminate the estate.[202] In this case, the quitclaim deed did not provide any reversionary language nor did the statute cited provide any guidance, and the Court of Appeals determined the conveyance of the property was a restrictive covenant.[203]

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192. 46 N.E.3d 1252 (Ind. Ct. App. 2015).
193. *Id.* at 1254.
194. *Id.* at 1255 (quoting the deed).
195. *Id.*
196. *Id.* at 1255-56.
197. *Id.* at 1256.
198. *Id.* at 1261.
199. *Id.* at 1257.
200. *Id.* at 1257-58.
201. *Id.* at 1258-60.
202. *Id.* at 1259.
203. *Id.* at 1260.

VI. RESIDENTIAL REAL ESTATE DISCLOSURE FORM

In *Harmon v. Fisher*,[204] the Court of Appeals considered whether a seller ("Seller") of real estate could be liable to the purchaser ("Purchaser") for an erroneous statement on a residential real estate disclosure form regarding the property's connection to the city sewer system.[205] Seller inherited the property and decided to sell it at auction.[206] Seller had the property appraised, which "showed that the house was connected to public water and sewer services."[207] On the residential real estate disclosure form, Seller indicated that the property was connected to the public sewer system and that there was not any type of septic system on the property.[208] Purchaser, after taking possession of the property, learned that the property was not connected to the public sewer system and had a septic system on the premises.[209] Purchaser incurred costs to connect the property to the public sewer system and additional associated costs.[210] Purchaser filed suit in small claims court.[211] The court concluded Seller had no actual knowledge that the real estate was connected to a septic system when he made the disclosure, and the court found in Seller's favor.[212]

The Court of Appeals affirmed.[213] The Court of Appeals examined the real estate sales disclosure statutes and agreed with the lower court's ruling.[214] Reasoning that the information in real estate sales disclosure forms is based on a seller's "current actual knowledge" and is not a warranty by seller, the form "is not to be used as a substitute for any inspections or warranties the buyer or owner may later obtain."[215] Further, "the seller's liability is limited such that the seller 'is not liable for any error, inaccuracy, or omission of any information required to be delivered to the prospective buyer under this chapter if the error, inaccuracy, or omission was not within the *actual knowledge* of the owner.'"[216] The Court of Appeals found Seller was not liable under the disclosure statutes, as there was no evidence to suggest that Seller had actual knowledge of the septic system.[217] Further, the Court of Appeals held Purchaser's constructive fraud claim was similarly precluded by Indiana Code section 31-21-5-11, which, as noted above, is explicit that the owner is not liable for "any error, inaccuracy, or omission"

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204. 56 N.E.3d 95 (Ind. Ct. App. 2016).
205. *Id.* at 96.
206. *Id.* at 96-97.
207. *Id.* at 97.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 98.
213. *Id.* at 100.
214. *Id.* at 98-99.
215. *Id.* (citing IND. CODE § 32-21-5-9 (2016)).
216. *Id.* at 99 (quoting IND. CODE § 32-21-5-11 (2016)).
217. *Id.*

outside the actual knowledge of the owner.[218]

VII. CONTRACTS

A. Ellison v. Town of Yorktown

In *Ellison v. Town of Yorktown*,[219] the Court of Appeals considered whether a contract was properly formed and, if so, whether it satisfied the statute of frauds.[220] The Town of Yorktown ("Plaintiff") initiated condemnation proceedings against Sara Ellison ("Defendant"), attempting to appropriate two permanent easements for a storm sewer and residential hiking trail and one temporary construction easement.[221] Once the parties purportedly reached a settlement agreement, Defendant executed the permanent easement for the storm sewer and the temporary construction easement, but Defendant "did not execute the residential trail easement."[222] Plaintiff argued that Defendant's failure to execute the residential trail easement breached the settlement agreement, and Plaintiff sued to exercise its eminent domain right and enforce the agreement.[223] At trial, Plaintiff moved for summary judgment, and the trial court granted its motion.[224] The Court of Appeals affirmed.[225]

The Court of Appeals first held the settlement agreement amounted to a validly formed contract.[226]

> In Indiana, settlement agreements are strongly favored. . . . If a party agrees to settle a pending action, but then refuses to consummate the settlement agreement, the opposing party may obtain a judgment enforcing the agreement. . . . Settlement agreements are governed by the general principles of contract law and they are generally not required to be in writing.[227]

The Court of Appeals found a contract was formed because there was an offer, acceptance, and consideration—the essential elements of contract formation.[228] The Court of Appeals held Defendant made a "clear and unambiguous final offer" to Plaintiff in a letter dated June 17.[229] The letter provided adequate consideration in the form of Plaintiff paying $15,000 for the storm sewer easement, providing

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218. *Id.* at 99-100.
219. 47 N.E.3d 610 (Ind. Ct. App. 2015).
220. *Id.* at 612-13.
221. *Id.* at 613.
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at 619.
227. *Id.* (citations omitted).
228. *Id.* at 617-19.
229. *Id.* at 617.

to relocate the storm sewer easement, and agreeing to certain assurances during the storm sewer's construction and engineering.[230] In return, Defendant agreed by letter to execute the two permanent easements and the one temporary easement.[231]

The Court of Appeals also held the contract satisfied the statute of frauds.[232] In Indiana, "[a]n easement is an interest in land within the meaning of the Statute of Frauds, and a contract creating such an interest must be in writing."[233] Indiana courts

> have held the agreement or other writing must 1) describe with reasonable certainty each party and the land, and 2) state with reasonable certainty the terms and conditions of the promises and by whom and to whom the promises were made. *Hrezo v. City of Lawrenceburg*, 934 N.E.2d 1221, 1227 (Ind. Ct. App. 2010), *trans. denied*.
> . . . .
> "[T]he 'writing' need not be the contract itself; for example, the terms of a contract can be extracted from written communications between two parties." *Stender v. BAC Home Loans Servicing LP*, No. 2:12–CV–41, 2013 U.S. Dist. LEXIS 30353, 2013 WL 832416, at *3 (N.D. Ind. Mar. 6, 2013) (citing *Highland Inv. Co. v. Kirk Co.*, 96 Ind. App. 5, 184 N.E. 308 (1933)); *see also* IND. CODE § 32–21–1–1(b) (providing an agreement is valid if there is a "memorandum or note describing the promise, contract, or agreement"). Thus, when a series of communications between the parties sufficiently provides the essential terms and conditions of the contract, the Statute of Frauds is satisfied. *See Stender, 2013 U.S. Dist. LEXIS 30353, 2013 WL 832416, at *3 (citing Mason Produce Co. v. Harry C. Gilbert Co.*, 194 Ind. 462, 141 N.E. 613 (1923)).[234]

The Court of Appeals found the letters between the parties stated with reasonable certainty the terms and conditions of the parties' settlement agreement.[235] Thus, the parties' exchange of letters satisfied the Statue of Frauds.[236]

B. 3155 Development Way, LLC v. APM Rental Properties, LLC

In *3155 Development Way, LLC v. APM Rental Properties, LLC*,[237] the Court of Appeals considered whether a purchaser ("Purchaser") could rescind an installment purchase agreement (the "Agreement") for property when the seller

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230. *Id.* at 618.

231. *Id.*

232. *Id.* at 621.

233. *Id.* at 620 (citing One Dupont Ctr., LLC v. Dupont Auburn, LLC, 819 N.E.2d 507, 515 (Ind. Ct. App. 2004)).

234. *Id.*

235. *Id.* at 621.

236. *Id.*

237. 52 N.E.3d 854 (Ind. Ct. App. 2016).

("Seller") had made a misrepresentation regarding access to the property.[238] Purchaser and Seller entered into the Agreement whereby Purchaser would pay the purchase price over thirty-six monthly installments and a balloon payment.[239] In connection with its attempt to secure a loan to finance the balloon payment, Purchaser "learned that the paved access roadway which provided access to [the property] was not a public road" but rather a private road on the neighboring tracts.[240] Purchaser contacted the owners of the neighboring tracts and "request[ed] their cooperation in executing" an access easement to use the private road.[241] Although Purchaser had not previously been prohibited from using the roadway, one of the neighboring owners demanded that Purchaser stop using the road and threatened to erect concrete barriers to prevent Purchaser's access.[242] Purchaser filed its initial complaint seeking to establish an easement and subsequently informed Seller of the access issue, refusing to close until such time as a permanent access easement was executed and recorded.[243] Seller counterclaimed seeking specific performance and breach of contract, and Purchaser filed an amended complaint alleging fraud and seeking rescission of the Agreement.[244] The trial court permitted the rescission on the basis that Seller did not have marketable title to the property due to its lack of a public access road.[245]

The Court of Appeals affirmed.[246] There was no error in rescinding the Agreement because Seller represented that the property had "easy access" to the highway, a misrepresentation that Seller was not able to rectify before the closing date.[247] Because Purchaser relied on this misrepresentation, it was permitted to rescind the Agreement.[248] Seller argued that even if Seller breached the Agreement by failing to obtain the easement, Purchaser first breached the Agreement by failing to make monthly payments required under the Agreement.[249] Rejecting Seller's argument, the Court of Appeals held Purchaser made "a good faith request for assurances" by making the monthly payments to an escrow account rather than withholding payment altogether, and if the easement had been obtained prior to the closing date, Seller would have received the escrow payments.[250] Concluding that Purchaser was induced into the Agreement by Seller's misrepresentation and that Purchaser did not breach the

238. *Id.* at 856.
239. *Id.* at 857.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 857-58.
245. *Id.* at 858.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.* at 859.
250. *Id.*

Agreement, the Court of Appeals affirmed the Agreement's rescission.[251]

C. Kramer v. Focus Realty Group, LLC

In *Kramer v. Focus Realty Group, LLC*,[252] the Court of Appeals considered whether a purchaser ("Purchaser") of property was permitted to rely on the representations of the seller's attorney regarding the calculation of purchase price based on the then-current annual net lease.[253] Purchaser and the seller ("Seller") entered into an agreement for the sale of a restaurant but also provided an option (the "Option") to Purchaser "to purchase the entire parcel of real estate on which the restaurant was located."[254] The price of the Option, if exercised, was to be calculated based, in part, on a percentage of the then-current annual net lease of one of the buildings located on the real estate.[255] Purchaser notified Seller of its intent to exercise the Option and requested the current lease for the building to calculate the purchase price.[256] Seller's attorney responded with a figure, which was Seller's attorney's estimation of "rental value," that was higher than the actual rent being paid by the tenant, upon which Purchaser and Purchaser's attorney relied.[257] Upon realizing that the rent was significantly lower, Purchaser's attorney objected to the previously agreed-upon purchase price, but because of a large financing deal dependent on closing on time, Purchaser moved forward with the closing.[258] Additionally, Seller and Seller's attorney placed an integration clause into the closing documents and required Purchaser to sign a release form purporting to release Seller from any claims.[259] Seller refused to close unless Purchaser signed the documents, and the deal closed.[260] Subsequently, Purchaser filed suit for breach of contract and fraud, seeking to recover the overage paid, and the court awarded Purchaser its damages.[261]

The Court of Appeals affirmed, finding (1) the parol evidence rule did not prohibit the consideration of parol evidence to show that fraud entered into the

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251. *Id.* at 861. The Court of Appeals also addressed and rejected Seller's arguments regarding (1) whether Purchaser was a real party to the Agreement, (2) whether Purchaser had an obligation to investigate defects with the property under a prior agreement not entered into evidence, and (3) whether the court erred in scheduling a hearing to determine damages and fraud. *Id.* at 856.

252. 51 N.E.3d 1240 (Ind. Ct. App. 2016).

253. *Id*. at 1241.

254. *Id.*

255. *Id.*

256. *Id.* The Court of Appeals noted that the formula for calculating the purchase price of the Option was incorrect and that the parties intended to use the capitalization rate, but it was incorrectly written in the agreement. *Id.* at 1243. The parties agreed to substitute the capitalization rate approach for the formula written in the Option. *Id.*

257. *Id.* at 1241-42.

258. *Id.* at 1242.

259. *Id.*

260. *Id.*

261. *Id.*

formation of the contract and (2) the terms of the Option were "completely unambiguous."[262] Under the parol evidence rule, the trial court was not required to ignore the tactics used by Seller and Seller's attorney to negotiate the deal to determine whether the agreement was fraudulent.[263] Seller argued that the phrase "then current annual net lease" was ambiguous; the Court of Appeals disagreed stating that it "clearly refers to the lease then in place—it certainly could not be construed to mean the rental value that could hypothetically be obtained if different or additional tenants were leasing the building."[264]

D. Jernas v. Gumz

In *Jernas v. Gumz*, the Court of Appeals reviewed the validity and enforceability of a real estate contract executed by only one party.[265]

Jernas arose from a real estate purchase agreement (the "Agreement") between a seller ("Seller") and a buyer ("Buyer") based upon a form real estate contract Seller obtained at an office supply store.[266] The Agreement, which was filled out by Seller prior to execution by Buyer, contained numerous errors, such as (I) listing of Buyer in the preamble as "seller," (ii) omitting any specific reference to Seller anywhere in the Agreement, (iii) stating that the Agreement was conditional upon Buyer obtaining financing at least thirty days prior to closing but specifically noting that the financing would be on the following terms: "a mortgage in the amount of 0, payable in 0 monthly payments, with an annual interest rate of 0 percent,"[267] and (iv) failing to provide a legal description for the subject property.[268] In addition, the Agreement was signed by a representative of Buyer—though on the top of the last page of the Agreement rather than on a signature line or at the bottom—but not by Seller.[269] The Agreement further contemplated the Buyer would deposit $25,000 in earnest money with Seller.[270] Ultimately, the sale of the subject property from Seller to Buyer did not occur, and Seller retained the $25,000 earnest money deposit.[271]

Buyer sued Seller to recover the earnest money deposit, claiming the parties had entered into an unenforceable oral contract under the statute of frauds and that it was further unenforceable because it lacked essential terms.[272] Seller

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262. *Id.* at 1242-44.

263. *Id.* at 1243-44.

264. *Id.* at 1244.

265. 53 N.E.3d 434 (Ind. Ct. App.), *trans. denied*, 59 N.E.3d 252 (Ind. 2016).

266. *Id.* at 438.

267. *Id.* The zeroes in this portion of the Agreement were handwritten by Seller into the blanks provided in the form contract. *Id.* at 441.

268. *Id.* at 444.

269. *Id.* at 449.

270. *Id.* at 438.

271. *Id.*

272. *Id.* at 445-46.

counterclaimed, alleging that Buyer had breached the Agreement.[273] The trial court entered both findings of fact and conclusions of law, determining the parties had entered into a contract to buy and sell the subject property, the Agreement provided a sufficient enough description of the land by referring to the location of the land, the Agreement was signed by the party against whom enforcement was sought, and thus the Agreement was a valid contract, permitting Seller to retain the earnest money deposit upon Buyer's failure to close.[274]

On appeal to the Court of Appeals, Buyer argued that all contracts for the sale of real estate must be in writing to be enforceable, and further that the Agreement's defects rendered the Agreement unenforceable.[275] The court dismissed both of these arguments, noting that the Indiana statute of frauds "does not govern the formation of a contract but only the enforceability of contracts that have been formed."[276] The court further noted that oral contracts for the sale of real estate are voidable, rather than void.[277] In this instance, the court determined that the four basic requirements of a contract—offer, acceptance, consideration, and a meeting of the minds—were present.[278] In this instance, a lack of offer, acceptance, or consideration were not at issue, and though Seller did not execute the Agreement, the *Jernas* court determined Seller's purchase of the form real estate contract, his completion of the blank spaces in the Agreement, and his meeting with a representative of Buyer to collect the earnest money check and obtain the representative's signature evidenced Seller's intent to enter into a contract.[279] Similarly, the signature of Buyer's representative on the Agreement—though not at the end of the Agreement—and the fact that Buyer's representative visited the property with Seller on multiple occasions sufficiently demonstrated that the representative had apparent authority to bind Buyer.[280] The numerous other errors in the Agreement—such as identifying Buyer as the "seller" and the lack of a clear legal description—were also not enough to cause the Agreement to be unenforceable, as testimony of all parties indicated enough certainty between the parties for a court to determine that the parties contracted for the purchase and sale of the property.[281]

The Court of Appeals further concluded the statute of frauds did not preclude Seller from enforcing the Agreement,[282] as the statute of frauds provides that a

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273. *Id.* at 448.

274. *Id.* at 450.

275. *Id.* at 443-44.

276. *Id.* at 445 (quoting Schuler v. Graf, 862 N.E.2d 708, 712-13 (Ind. Ct. App. 2007)).

277. *Id.* at 446.

278. *Id.* at 449. The court noted that neither party argued that offer and acceptance were not present. *Id.* at 446.

279. *Id.*

280. *Id.*

281. *Id.* at 444.

282. *Id.* The Court of Appeals also determined that Buyer's answer to Seller's counterclaim did not specifically plead the statute of frauds as an affirmative defense. *Id.* at 448. The statute of frauds is an affirmative defense, and under Indiana Trial Rule 8(C), affirmative defenses must be

person may not bring an action involving an agreement to sell land unless such agreement "is in writing and signed by the party against whom the action is brought or by the party's authorized agent."[283] In this case, Seller and Buyer's representative executed the Agreement.[284] Consequently, Buyer could not use the statute of frauds as a valid defense against Seller's action to enforce the Agreement.[285]

The Court of Appeals also dismissed the Buyer's argument that the financing contingency permitted it to terminate the Agreement for several reasons.[286] First, Seller had testified that Buyer's representative had told him that Buyer did not need financing to purchase the subject property, which was supported by the content of the Agreement.[287] The Court of Appeals also noted that the specific closing date provided in the Agreement was twenty-five days after the effective date of the Agreement, thus making any supposed condition that Buyer obtain financing at least thirty days prior to closing inconsistent with the dates listed in the Agreement.[288] Consequently, the court affirmed the trial court's ruling that Seller was entitled to the earnest money deposit.[289]

E. Wilson v. Huff

In *Wilson v. Huff*, the Court of Appeals discussed whether a purchaser under a land contract had notice that the seller under the contract owned a leasehold interest in, rather than fee simple ownership to, certain property.[290]

In 2012, a seller ("Seller") entered into a land contract (the "Contract") in which Seller agreed to "sell on contract" certain property in Crawford County (the "Property") to purchasers ("Purchasers"), who would make 120 monthly payments to Seller over the term of the Contract.[291] During the first two years of the Contract, Purchasers failed to make numerous monthly payments, and Seller filed a complaint to cancel the Contract and evict Purchasers from the Property.[292] Following notice of the lawsuit, Purchasers for the first time performed a title search on the Property and discovered that Seller was not the fee simple owner of the Property, but rather leased the Property pursuant to the terms of a ninety-

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specifically pled. *Id.* at 447-48.

283. *Id.* at 445-46 (quoting IND. CODE § 32-21-1-1 (2016)).

284. *Id.* at 441, 448.

285. *Id.* at 447-48.

286. *Id.* at 449-50.

287. *Id.* at 441. The court noted the rule of contract construction that specific terms control over general terms. *Id.* at 445. In this instance, the handwritten zeroes—indicating no financing was necessary—were the specific terms controlling over any other general reference in the Agreement to Buyer needing outside financing. *Id.*

288. *Id.* at 449-50.

289. *Id.*

290. 60 N.E.3d 294, 298 (Ind. Ct. App.), *trans. denied*, 59 N.E.3d 252 (Ind. 2016).

291. *Id.* at 296.

292. *Id.* at 296-97.

nine year lease.[293] In turn, Purchasers filed a counterclaim, alleging that Seller committed fraud by misrepresenting itself as the owner of the Property in the Contract.[294]

The trial court entered findings of fact and conclusions of law, determining Seller did not represent in the Contract that it owned fee simple title to the Property.[295] The trial court further found a search of the land records in Crawford County would have disclosed that Seller instead owned a leasehold interest in the Property, and thus Purchasers should have been aware that they were acquiring the same leasehold interest in the Property rather than the underlying fee.[296]

The Court of Appeals concurred with the trial court's findings and conclusions on appeal.[297] For the court, Purchasers were "mistaken in their contention that only the language of the Contract is relevant to what real estate interest would be conveyed by the document."[298] Since Seller's leasehold interest in the Property was duly recorded, Purchasers had constructive notice that they were not purchasing fee simple title to the Property under the Contract, and thus, "as a matter of law" Purchasers could not have been misled by the Contract's language stating that Seller was selling the Property to Purchasers.[299]

IX. PARTITION FENCES

In *Belork v. Latimer*,[300] the Court of Appeals considered the respective responsibilities of adjacent landowners in maintaining a partition fence under Indiana Code section 32-26-9.[301] *Belork* arose from a dispute when a cattle farmer ("Landowner"), whose land was separated from his southern adjoining neighbor and eastern adjoining neighbor (together, "Neighbors"), rebuilt the southern half of his fence on his eastern border and the western half of his fence on his southern border.[302] Neither of the Neighbors—both of which were grain producers—agreed to rebuild their respective halves of the fences following Landowner's efforts.[303]

At issue in this dispute was whether Indiana's partition fence law, codified in Indiana Code section 32-26-9 (the "Partition Fence Law") applied in this case.[304] In general, the Partition Fence Law provides that unless neighboring property owners have agreed otherwise, for any partition fence built along a

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293. *Id.* at 297. At the time the Contract was signed, seventy-three years remained on the lease term. *Id.*

294. *Id.* at 296.

295. *Id.* at 295.

296. *Id.* at 297.

297. *Id.* at 300.

298. *Id.* at 299.

299. *Id.*

300. 54 N.E.3d 388 (Ind. Ct. App. 2016).

301. *Id.* at 390.

302. *Id.* at 391.

303. *Id.*

304. *Id.* at 392.

property line running in a north-south direction, the western owner is responsible for the southern half of the fence, while the eastern owner is responsible for the northern half of the fence.[305] Similarly, for any partition fence built along a property line running in an east-west direction, the northern owner is responsible for the western half of the fence, while the southern owner is responsible for the eastern half of the fence.[306] Neighbors contended that the purpose of the fence was primarily to keep Landowner's cattle from trespassing onto Neighbors' real estate and that as grain producers, neither of them utilized the fence.[307] In response, Landowner argued that the Partition Fence Law does not require that each owner "use" or benefit from the fence, but rather that one of the applicable landowners use his real estate as "agricultural land."[308]

The Court of Appeals decided in favor of Landowner, noting the language of the Partition Fence Law did not exempt a property owner based on a claim that such owner did not benefit from the existence of the fence.[309] The Court of Appeals pointed out that the Partition Fence Law plainly states that it applies so long as at least one of the adjoining parcels is agricultural land.[310] In this instance, the fact that Neighbors did not derive any benefit from the fence at issue was not relevant to the Court of Appeals conclusion, as the language of the Partition Fence Law does not limit its applicability based on this fact.[311]

X. ANNEXATION

In *Town of Reynolds v. Board of Commissioners*,[312] the Court of Appeals considered the validity of a town's annexation ordinance (the "Ordinance") challenged by the county ("County").[313] Town adopted the Ordinance, which annexed property contiguous to a right-of-way and county road, which were open to the public and maintained by County.[314] The right-of-way and county road were not included in the Ordinance.[315] The Court of Appeals held the Ordinance failed to include the right-of-way and county road as required by Indiana Code section 36-4-3-2.5, and the irregular annexation procedure undertaken by Town

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305. IND. CODE § 32-26-2(b)(1) (2016).

306. *Id.* § 32-26-2(b)(2).

307. *Belork*, 54 N.E.3d at 393.

308. *Id.* at 395. According to IND. CODE § 32-26-9-0.5, "agricultural land" is defined as land that is "(1) zoned or otherwise designated as agricultural land; (2) used for growing crops or raising livestock; or (3) reserved for conservation."

309. *Id.* at 399.

310. *Id.* IND. CODE § 32-26-9-2(a) also requires that one of the properties at issue be located outside, abut, or be adjacent to the boundary of the corporate limits of a town or city.

311. *Id.*

312. 62 N.E.3d 394 (Ind. Ct. App. 2016).

313. *Id.* at 396-97.

314. *Id.* at 395.

315. *Id.* at 397.

failed to relieve County of its obligation to maintain the contiguous roadways.[316] The Court of Appeals declared the Ordinance to be void.[317]

Indiana Code section 36-4-3-2.5(b) requires that an annexation of territory include "contiguous areas of: (1) the public highway, and (2) rights-of-way of the public highway" in order to prevent municipalities from avoiding the duty of maintenance of roads contiguous to the annexed area.[318] Town acknowledged that it failed to comply with the statute in enacting the Ordinance but argued that it was a technicality and should be disregarded.[319] Additionally, it maintained that County did not have standing to challenge the Ordinance.[320] The Court of Appeals disagreed, finding County had an interest in protecting its rights with respect to the roadway, and it therefore had standing.[321] This fact combined with Town's acknowledgment of the statutory violation led the Court of Appeals to affirm the lower court's decision upholding the Ordinance.[322]

XI. DUTY OF APPRAISER

In *BSA Construction LLC v. Johnson*,[323] the Court of Appeals considered the duty of an appraiser ("Appraiser"), hired by a bank ("Bank") financing a residential real estate transaction, to the seller ("Seller") of the real estate.[324] Seller was under contract to sell residential real estate to the purchaser ("Purchaser").[325] Purchaser obtained financing from Bank, pending Bank's approval after an appraisal.[326] Based on the appraisal, Bank refused to provide financing, and Seller sued Appraiser for negligence, fraud, and slander of title.[327] The trial court granted summary judgment for Appraiser on all claims.[328]

On appeal, Seller argued that Appraiser owed Seller a duty of care because it was a third-party beneficiary to Appraiser's contract with Bank since Appraiser knew or should have known that Seller would rely on the appraisal.[329] The Court of Appeals disagreed, finding that Appraiser had no duty "to serve two masters with conflicting interests."[330] As an agent of Bank, Appraiser could not also be required to act as an agent of Seller as it would disrupt "the basic purpose of the

316. *Id.*
317. *Id.* at 395.
318. *Id.* at 398 (quoting IND. CODE § 36-4-3-2.5(b) (2016)).
319. *Id.* at 398-99.
320. *Id.*
321. *Id.* at 399.
322. *Id.*
323. 54 N.E.3d 1026 (Ind. Ct. App.), *trans. denied*, 57 N.E.3d 818 (Ind. 2016).
324. *Id.* at 1027-28.
325. *Id.* at 1028.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.* at 1030.
330. *Id.* at 1031.

Bank's contract with the appraiser in derogation of basic contract law principles," and therefore, Seller was not permitted to rely on Appraiser's opinion as a matter of law.[331]

XII. COMMON ENEMY DOCTRINE

In *Liter's of Indiana., Inc. v. Bennett*, the Court of Appeals discussed whether the common enemy doctrine applied in a dispute between two neighboring landowners.[332] In 2006, Earl Bennett and Daniel Bodine (together, "Landowner") owned a tract of land in Hanover ("Landowner's Property"), and Liter's of Indiana, Inc. ("Developer") owned a tract of land ("Developer's Property") directly east of and adjacent to Landowner's Property.[333] Landowner's Property and Developer's Property were bordered on the south by Highway 62.[334] At the time, there was a shallow ditch on the boundary line between the properties and after a rainfall, water would collect in the ditch, run south from Developer's Property to an existing twelve-inch culvert, and flow out through to Highway 62.[335]

Developer planned to develop its real estate into a residential subdivision and applied for a preliminary plat from the City of Madison Plan Commission (the "Commission").[336] As part of their review, the Commission directed Developer to consider constructing a detention basin to relieve "down-stream neighbors" from flooding.[337]

After Developer constructed the detention basin, several disputes arose between Developer and Landowner.[338] Developer filed a complaint, and Landowner counterclaimed to contend that Developer had negligently designed its subdivision and that the post-development surface water runoff from Developer's Property would flood Landowner's Property.[339] The jury found for Landowner and directed Developer to make necessary repairs to the drainage basin, which would prevent future flooding to Landowner's Property.[340] Developer appealed.[341]

At issue on appeal was whether Developer negligently designed the

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331. *Id.* As Seller's claim of negligence failed, its other claims (fraud and slander of title) also failed because Seller's fraud claim failed the elements of misrepresentation of fact and reliance and Seller's slander of title claim failed the test that defendant make false, malicious statements regarding owner's ownership of the land. *Id.* at 1031-32. Disagreement regarding the monetary value of the property was not enough. *Id.*

332. 51 N.E.3d 285, 288-89 (Ind. Ct. App.), *trans. denied*, 57 N.E.3d 819 (Ind. 2016).

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 289.

337. *Id.*

338. *Id.* at 295-96.

339. *Id.* at 290.

340. *Id.* at 294.

341. *Id.* at 285.

subdivision in a manner that runoff water from Developer's Property would discharge and flood Landowner's Property.[342] Under Indiana law, the "common enemy doctrine" provides:

> [S]urface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.[343]

The Indiana Court of Appeals further clarified under the common enemy doctrine of water diversion:

> [I]t is not unlawful for a landlord to improve his land in such a way as to accelerate or increase the flow of surface water by limiting or eliminating ground absorption or changing the grade of the land even where his land is so situated to the land of an adjoining landowner that the improvement will cause water either to stand in unusual quantities on the adjacent land or to pass into or over the adjacent land in greater quantities or in other directions than the waters were accustomed to flow. An owner of land has the right to occupy and improve it in such a manner as for such purposes as he may see fit including changing the surface or by erecting buildings thereon.[344]

However, an exception to the common enemy doctrine exists where an owner of land, by artificial means, "throws or casts water onto his neighbor in unusual quantities so as to amplify the force at a given point or points."[345]

The Indiana Court of Appeals held the common enemy doctrine did not preclude Landowner's claim of negligence against Developer.[346] The court first noted that whether surface water is collected and drained upon neighboring land as a body or diffused before entering the adjoining land is "largely a question of fact."[347] The court reasoned that evidence presented at trial showed that the Developer's Property had a gradual fall of one percent to two percent, and before the basin was installed, water would run through a depression between the two properties and flow into Landowner's existing driveway culvert and flow out to Highway 62.[348] Further, Landowner had argued that before the drainage improvements were constructed on Developer's Property, Landowner's Property had experienced no flooding.[349] Thus, the appellate court found the jury

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342. *Id.* at 294.

343. *Id.* (quoting Argyelan v. Havilard, 435 N.E.2d 973, 975 (Ind. 1982)).

344. *Id.* at 295 (citing Bulldog Battery Corp. v. Pica Invs., Inc. 736 N.E.2d 333, 339 (Ind. Ct. App. 2000)).

345. *Id.*

346. *Id.* at 297.

347. *Id.* at 296 (quoting *Bulldog*, 736 N.E.2d at 340).

348. *Id.* at 297.

349. *Id.*

reasonably determined the construction of Developer's undersized basin led to the casting off of surface water in concentrated volumes onto Landowner's Property, and therefore, the common enemy doctrine did not apply.[350]

XIII. LANDLORD-TENANT

A. BC Osaka, Inc. v. Kainan Investment Groups, Inc.

In *BC Osaka, Inc. v. Kainan Investment Groups, Inc.*, the Court of Appeals reviewed an indemnification clause in a lease to determine whether a landlord could be indemnified for its own negligent acts.[351] This case arose from an incident in which a restaurant patron tripped and fell on a rod protruding from a cement bumper in a parking lot, and injured herself.[352] The patron sued the Kainan Investment Groups, Inc. ("Landlord") and both BC Osaka, Inc. and City Inn, Inc. (collectively "Tenant") on negligence claims.[353] Landlord filed a cross-claim against Tenant, claiming Tenant was responsible for indemnifying Landlord under its lease.[354] The trial court granted Landlord's motion for summary judgment, and Tenant appealed.[355]

The Court of Appeals first discussed the issue of whether the lease's indemnification clause provided Landlord with protection.[356] Under Indiana law, a party may contract to indemnify another party for such other party's own negligence; however, the indemnifying party must do so knowingly and willingly, and the indemnification provisions are strictly construed by courts to avoid the "harsh burden" of indemnifying a party for its own negligent acts.[357] The *BC Osaka* court set forth the two-pronged analysis in determining whether this burden has been met: first, the indemnification clause must "expressly state in clear and unequivocal terms that negligence is an area of application where the indemnitor has agreed to indemnify the indemnitee," and second, the clause must clearly state to "whom the indemnification clause applies."[358] In this instance, although the lease's indemnification clause expressly provided that Tenant would indemnify Landlord for *Tenant's* own negligence, the clause did not include "clear and unequivocal language" obligating Tenant to indemnify Landlord for Landlord's own negligence.[359]

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350. *Id.*

351. 60 N.E.3d 231 (Ind. Ct. App. 2016).

352. *Id.* at 233.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* at 234.

357. *Id.*

358. *Id.*

359. *Id.* at 236. The court contrasted the language in this case with language in *GKN Co. v. Starnes Trucking, Inc.*, 798 N.E.2d 548, 553 (Ind. Ct. App. 2003), in which the indemnifying party's indemnification obligation applied "regardless of whether [the claim, damage, loss, or

Regardless of whether the indemnification provision under the lease was applicable, the Court of Appeals further concluded that a genuine issue of material fact existed as to whether Tenant had "full control and possession of the leased premises."[360] The Court of Appeals first noted the general rule in Indiana is that "in absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property."[361] Under the terms of the lease, Landlord, among other rights, reserved the right to modify the appearance, size, and arrangement of the designated parking areas; establish and enforce rules and regulations related to the use of parking areas; designate specific parking areas for use of Tenant; and remove automobiles of Tenant.[362] For the court, the existence of these rights under the lease created a genuine issue of material fact as to whether the Tenant had exclusive control and possession of the parking area; thus, the trial court's grant of summary judgment in favor of Landlord was reversed.[363]

B. Randy Faulkner & Associates, Inc. v. Restoration Church, Inc.

In *Randy Faulkner & Associates, Inc. v. Restoration Church, Inc.*, the Court of Appeals considered whether a landlord waived a requirement that the tenant provide notice of its intent to renew their lease.[364]

On October 7, 2009, Randy Faulkner & Associates ("Landlord") and the Restoration Church, Inc. ("Tenant") entered into a one-year lease agreement (the "Lease"), which included six one-year options to renew, exercisable by Tenant with at least thirty days' written notice to Landlord prior to the expiration of the then-current term.[365] Tenant failed to provide such notice prior to the expiration of the original one-year term.[366] On September 24, 2010—eighteen days after Tenant's notice to renew would have been due on September 6—Landlord gave Tenant notice that Tenant had not yet provided written notice of renewal. Tenant, in turn, failed to give such notice until October 7, 2010, at which time Tenant also delivered to Landlord the entire amount of annual rent payable during the first one-year extension.[367] Similarly, Tenant delivered the entire amount of annual rent payable during the second one-year extension in October of 2011.[368] In July

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expense was] caused in part by a party indemnified [under the lease]." *Starnes*, 798 N.E.2d at 553.

360. *BC Osaka,* 60 N.E.3d at 238.

361. *Id.* at 237 (citing Pitcock v. Worldwide Recycling, Inc., 582 N.E.2d 412, 414 (Ind. Ct. App. 1991)).

362. *Id.* at 237-38.

363. *Id.* at 238.

364. 60 N.E.3d 274, 275 (Ind. Ct. App.), *reaff'd and reh'g granted*, 62 N.E.3d 1204 (Ind. Ct. App. 2016).

365. *Id.* at 276, 278.

366. *Id.* at 279.

367. *Id.*

368. *Id.*

of 2012, Landlord delivered "written notice [to Tenant] to vacate the premises within sixty days."[369] Tenant complied but also filed suit for breach of contract.[370] The trial court concluded Landlord evidenced its waiver of requiring Tenant's notice as a condition precedent to exercising the option to renew when Landlord accepted Tenant's late notices of its intent to renew, along with Tenant's annual rental payments.[371]

The Court of Appeals disagreed with the trial court, citing prior precedent in *Carsten v. Eickhoff*, that "if notice is stipulated in the lease, . . . the mere holding over and payment of rent [i]s not sufficient notice under the contract."[372] In *Carsten*, the tenant had not provided notice to renew the term of the lease as required, but instead continued to perform under it.[373] Nearly two years after the original lease term would have expired, the landlord demanded the tenant vacate the premises.[374] The *Carsten* court determined the tenant's notice was a condition precedent to exercising the renewal of the lease, and that the landlord's acceptance of rent was not, in and of itself, evidence that the landlord acquiesced to a renewal term.[375]

In *Randy Faulkner & Associates, Inc.*, the court determined the language of the Lease was not favorable to Tenant's claims.[376] According to the Lease, if Tenant did not comply with any conditions of the Lease and such noncompliance continued after seven days' notice from Landlord, then Tenant would be considered in default.[377] Here, Tenant failed to provide notice of its intent to renew.[378] Landlord delivered separate notice to Tenant, reminding Tenant it did not provide evidence of its intent to renew the term, but Tenant failed to respond until nearly two weeks later, thus putting Tenant in default.[379]

Similarly, the court disagreed with Tenant's claim that Landlord's acceptance of rent payments served as Landlord's acquiescence that a default did not occur and that the term would be renewed.[380] The Lease contained explicit language that no acceptance of money from Landlord would serve to "reinstate, continue, or extend the term" of the Lease.[381] Additionally, the court concluded, as a matter of law, Tenant was holding over in the premises and the Lease specifically provided that holding over did not result in a renewal of the Lease.[382]

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369. *Id.*
370. *Id.*
371. *Id.* at 280.
372. *Id.* (quoting Carsten v. Eickhoff, 323 N.E.2d 664, 667-68 (Ind. Ct. App. 1975)).
373. 323 N.E.2d at 668.
374. *Id.*
375. *Id.*
376. 60 N.E.3d at 281.
377. *Id.*
378. *Id.*
379. *Id.* at 281-82.
380. *Id.* at 282.
381. *Id.*
382. *Id.*

The holdover provision of the Lease further provided that all rent payable during the holdover period would be at twice the amount of the rent payable during the previous period.[383] After expiration of the initial one-year term, Tenant had continued to pay the same amount of rent as was originally payable during the initial term; Tenant, then, had argued that Landlord's acceptance of the same rent constituted Landlord's agreement that no holdover period existed and instead that the renewal terms of the Lease were in effect.[384] The court disagreed, again pointing to the plain language of the Lease, which provided that "[t]he failure of [Landlord] to insist on strict performance of any of the terms and conditions of [the Lease] on a specific instance shall be deemed a waiver of the rights or remedies that [Landlord] may have *regarding that specific instance only*."[385] For the court, although Landlord's acceptance of the "normal" rental amount may have constituted a waiver of requiring Tenant to pay increased holdover rent, such acceptance did not then also constitute a waiver of the requirement that Tenant provide thirty days' notice of its intent to renew the term.[386] Consequently, the Court of Appeals found the trial court erred when it concluded Tenant's continued occupancy at the premises, and Landlord's acceptance of rent, constituted Landlord's intent to waive its right to require Tenant to deliver thirty days' notice to renew.[387] Thus, since Tenant was operating as a holdover tenant, Landlord had the right to terminate the month-to-month holdover tenancy, pursuant to the terms of the Lease, with at least thirty days' written notice to Tenant.[388]

XIV. HOMEOWNERS' ASSOCIATIONS

In *Hamilton v. Schaefer Lake Lot Owners Ass'n, Inc.*, the Court of Appeals considered whether certain lot owners were members of a homeowners' association and thus responsible for the payment of assessments.[389]

In the early 1970s, Marvin and Linda Hamilton ("Owners") purchased a lot within Schaefer Lake Addition (the "Subdivision") which was subject to recorded covenants (the "Covenants").[390] The Covenants expressly provided that they could be amended in the future by a recorded instrument signed by the majority of the then-owners of lots within the Subdivision.[391] At the time Owners purchased their lot, the Covenants did not include any provisions related to membership, but in 1976, the owners' association of the Subdivision (the "Association") filed amended articles of incorporation, which provided that a lot

383. *Id.*
384. *Id.*
385. *Id.* at 283.
386. *Id.*
387. *Id.*
388. *Id.*
389. 59 N.E.3d 1051, 1052 (Ind. Ct. App. 2016).
390. *Id.* at 1052.
391. *Id.* at 1052-53.

owner is entitled to membership in the Association upon payment of a fifteen dollar membership fee.[392] Twenty years later, a majority of lot owners in the Subdivision voted to amend the Covenants (the "Amendment") to provide that all owners of lots within the Subdivision would be members of the Association and subject to the Association's rules and regulations.[393] The Association's board subsequently adopted rules and regulations giving the Association the ability to establish annual and special assessments against each lot.[394] When Owners refused to pay the assessments levied by the Association, the Association successfully sued in small claims court.[395]

On appeal, Owners argued that (i) they were not members of the Association, and (ii) in the alternative, the Amendment was outside the scope of the Covenants.[396] The Court of Appeals found the record clear in establishing that the Amendment was authorized by a majority of the lots owners, that it obligated all lot owners to become members, and that the subsequent rules and regulations gave the Association the authority to collect assessments.[397] Owners claimed they had paid no membership fee—required originally under the Association's amended articles of incorporation—but the court rejected this argument, noting the language in the Amendment requiring all lot owners be members in the Amendment did not specify the need for a membership fee, thus superseding the previous requirement in the 1976 amended articles of incorporation.[398] Although Owners also argued the Amendment was outside the scope of the Covenants, the court noted that the original language of the covenants did not specify what revisions could be made in future amendments; since the Amendment met the only requirement for amending the original Covenants (i.e., the consent of a majority of lot owners), the terms of the Amendment were within the Covenants' intended scope.[399]

XV. ENVIRONMENTAL ISSUES

In *Schuchman/Samberg Investments, Inc. v. Hoosier Penn Oil Co.*, the Court of Appeals considered whether a claim under the Indiana Environmental Legal Actions Statute ("ELA") was subject to a six-year statute of limitations applicable to claims for damage to real property, or the catch-all ten-year statute of limitations applicable to claims for contribution.[400] This case arose from a suit filed by the owner ("Owner") of environmentally contaminated real estate against former site operators ("Operators") responsible for the contamination, in which

392. *Id.* at 1053.
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.* at 1054.
397. *Id.*
398. *Id.* at 1055.
399. *Id.* at 1054-55.
400. 58 N.E.3d 241, 247 (Ind. Ct. App.), *trans. denied*, 64 N.E.3d 1207 (Ind. 2016).

the property owner sought reimbursement of costs incurred in connection with environmental remediation efforts.[401] Owner acquired the property in 1998 and used it to operate a scrap metal yard and diesel fuel storage tank.[402] Historically, the property had "been used for bulk storage of oil and other petroleum products" in underground and above ground storage tanks, and as a chemical distribution facility and the storage of large volumes of industrial solvents.[403] Following a series of environmental studies, the Indiana Department of Environmental Management sent Owner a letter directing Owner to implement a remediation plan, which Owner had begun as of the time the decision in this case was handed down.[404] Owner brought suit against Operators to recover some of the extensive costs incurred in connection with Owner's remediation work under several statutes, including the ELA.[405] The trial court granted partial summary judgment in favor of Operators, concluding, inter-alia, the ELA claim was barred by the statute of limitations pertaining to claims for damage to real property set out in Indiana Code section 34-11-2-7.[406] Owner appealed.[407]

The Court of Appeals affirmed.[408] Central to the Court of Appeals' decision was the question of whether Owner's claim constituted a claim for damage to real property subject to a six-year statute of limitations, or a claim for contribution subject to a ten-year statute of limitations.[409] The Court of Appeals concluded the key to distinguishing whether a claim under the ELA is in the nature of a claim for damage to real property or a claim for contribution is whether the claimant holds a proprietary interest in the subject real estate.[410] Here, Owner was seeking to recover costs incurred in connection with the remediation of its own property, as distinguished from a scenario in which a claimant had no claim or interest in the property and was seeking recovery of remediation costs from other responsible parties, its claim under the ELA was properly understood as a claim for damage to real property.[411] Therefore, Owner's claim was subject to a six-year statute of limitations.[412]

XVI. ADVERSE POSSESSION

In *Bonnell v. Cotner*, the Supreme Court granted transfer in a case detailed

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401. *Id.* at 243-46.

402. *Id.* at 244.

403. *Id.* at 243.

404. *Id.* at 245.

405. *Id.* at 246.

406. *Id.* at 246-47.

407. *Id.* at 246. Several issues raised on appeal are not summarized here, because they are beyond the scope of this survey.

408. *Id.* at 253-54.

409. *Id.* at 247.

410. *Id.* at 250.

411. *Id.*

412. *Id.*

in the previous year's version of this Article,[413] and considered when a property owner who holds title through adverse possession may be divested of title in a subsequent property tax sale.[414] The landowners ("Owners") owned two adjacent parcels (the "Property") that were part of a subdivision consisting of several parcels sharing a state highway as its western border.[415] An approximate 0.75-acre strip of land (the "Strip") served as the purported eastern border of each parcel in the subdivision.[416] Notwithstanding the fact the Strip was not the actual eastern border, all owners in the subdivision, including Owners, believed the eastern boundary lines of their parcels extended across the Strip to a farm fence that ran in a north-south direction along the eastern boundary of the Strip.[417] In 1968, Owners' predecessor-in-interest constructed an outbuilding within the portion of the Strip directly east of the Property, and in 2010, Owners built an extension to the outbuilding, such that the outbuilding extended as much as twenty-two feet past the eastern boundary of the Property.[418]

In 1993, the county auditor issued a tax sale deed to the Strip, and in 2011, the auditor again put the Strip up for tax sale.[419] A purchaser ("Purchaser") bought the Strip at the tax sale, believing he purchased 0.75 acres *east* of the farm fence, but realized after surveying the Strip that his newly acquired property was west of the farm fence.[420] Purchaser contacted all landowners of the parcels in the subdivision and offered to divide the Strip to permit each owner to extend his or her eastern boundary to the farm fence.[421] Owners declined and filed suit, claiming they held title to the portion of the Strip directly east of the Property via adverse possession.[422]

The only element of adverse possession that was disputed in *Cotner* was whether Owners complied with Indiana Code section 32-21-7-1, which requires an adverse possessor "pay[] and discharge[] all taxes and special assessments that the adverse possessor or claimant reasonably believes in good faith to be due on land or real estate during the period the adverse possessor or claimant claims to have possessed the land or real estate adversely."[423] The trial court concluded Owners did not comply with this statute, reasoning that Owners could not have had a reasonable, good faith belief they were paying a portion of the taxes on the

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413. *See* Brian C. Crist et al., *Survey of Recent Reported Cases in Real Property Law*, 49 IND. L. REV. 1167, 1210-11 (2016). The facts of this case and the reasoning of the Court of Appeals for *Bonnell v. Cotner* in this Article is reproduced substantially from the 2016 article. *Id.*

414. 35 N.E.3d 275, 276 (Ind. Ct. App.), *vacated*, 37 N.E.3d 493 (Ind. 2015), *aff'd in part, rev'd in part*, 50 N.E.3d 361 (Ind. 2016).

415. *Cotner,* 50 N.E.3d at 363.

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.* at 366.

420. *Id.* at 363.

421. *Id.*

422. *Id.*

423. 35 N.E.3d at 278 (quoting IND. CODE § 32-21-7-1 (2012)).

Strip since the Strip was put up for tax sale by the county on two separate occasions.[424] The trial court further concluded that since the county took possession of the Strip when taxes were not paid, Owners' post-tax sale attempt to establish adverse possession violated state law that prohibited the taking of title from a political subdivision by adverse possession.[425]

On appeal, the Court of Appeals reviewed the Supreme Court's holdings in *Echterling v. Kalvaitis*[426] and *Fraley v. Minger*,[427] which, taken together, provide that Indiana law "permits substantial compliance to satisfy the requirement of the adverse possession tax statute in boundary disputes where the adverse claimant has a reasonable and good faith belief that the claimant is paying the taxes during the period of adverse possession."[428] In this instance, the Court of Appeals concluded substantial compliance with the tax statute had been met, as Owners and their predecessor-in-interest paid the taxes assessed on the Property, as well as the outbuilding, and had a reasonable, good faith belief those taxes also included the portion of the Strip immediately east of the Property.[429] Consequently, title to this area was vested in Owners' predecessor-in-interest in 1978, once the ten-year statutory period for adverse possession had been completed.[430]

Although the trial court earlier concluded any title vesting in the disputed area was subsequently severed by the two tax sales, the Court of Appeals disagreed.[431] The Court of Appeals noted *Echterling* recognized the tax duplicate generated by the county often provides an incomplete legal description of a taxpayer's property, and thus a taxpayer is rarely put on clear notice of the boundaries of his property based on the tax duplicate.[432] Accordingly, since Owners reasonably believed they were paying the proper taxes, the tax duplicate did not provide them with notice to the contrary that a tax sale had occurred.[433] As a result, the tax sales did not divest Owners of the disputed area and they retained title to the disputed area, even after the tax sale purchase of the Strip.[434]

On transfer, the Supreme Court held the trial court's denial of Owners' adverse possession claim was correct, but its grant of a prescriptive easement in favor of Owners was clearly erroneous.[435] Although Owners satisfied the adverse possession tax statute, the subsequent tax sales of the Strip defeated Owners' ownership by adverse possession because Owners were not the legally

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424. *Id.*
425. *Id.* at 278-79.
426. 126 N.E.2d 573 (Ind. 1955).
427. 829 N.E.2d 476 (Ind. 2005).
428. *Cotner*, 35 N.E.3d at 282 (citing *Fraley*, 829 N.E.2d at 493).
429. *Id.* at 283.
430. *Id.*
431. *Id.*
432. *Id.*
433. *Id.*
434. *Id.* at 283-84.
435. 50 N.E.3d 361, 366-67.

acknowledged owner of the Property, as they had not sought to quiet title.[436] Furthermore, Owners, despite their good faith belief that they were paying taxes on the Strip, were not in fact paying such taxes, which meant the Strip was subject to the tax sale by the county.[437] For a period of one year after a tax sale, any person may "redeem" the subject property, but after the expiration of the redemption period, the purchaser may petition the court for a tax deed to the property.[438] Once the purchaser has received the tax deed, title is vested "in fee simple absolute, free and clear of all liens and encumbrances created or suffered before or after the tax sale."[439] Because Owners did not formalize their ownership by quieting title, they were not entitled to any greater notice than by publication in 1993 and 2011, and the Supreme Court concluded the issuance of the tax deeds was "prima facie evidence of the validity of the notice given in those tax sales" and thus, Owners were divested of their ownership interest based on adverse possession.[440] The Supreme Court also found the trial court erroneously granted Owners a prescriptive easement, as Indiana Code section 6-1.1-25-4(f)(1) requires that for prior easements to survive a sale by tax deed, it must be recorded, and because the easement over the Strip was never recorded, it would have been extinguished by the first tax sale in 1993.[441]

436. *Id.* at 364-65.
437. *Id.* at 365.
438. *Id.* (citing IND. CODE §§ 6-1.1-25-1, -4(a), -4.6(a) (2016)).
439. *Id.* (quoting IND. CODE § 6-1.1-25-4(f), 4.6(g) (2016)).
440. *Id.* at 365-66.
441. *Id.* at 367.