Survey of Recent Developments in Property Law

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I. BROKERS: COMMISSION ON EXERCISE OF OPTION TO PURCHASE

In a case of first impression, the Indiana Court of Appeals, in *Estate of Saemann v. Tucker Realty*,[1] held that a real estate broker was not entitled to a commission on a sale of land which results from the exercise of an option to purchase agreement negotiated during the period of the listing agreement, but exercised after the time for performance under the listing agreement had expired. In *Saemann*, Tucker Realty had entered into an exclusive listing agreement to sell Saemann's 202.5 acre farm in Kosciusko County, Indiana, known as "City Edge Farm." The period of the exclusive listing agreement was from April 30, 1977 to October 30, 1977, and Tucker Realty was to receive a 6% commission if it found a ready, willing, and able purchaser for the farm.[2]

On June 21, 1977, Tucker Realty presented to Saemann a written offer from a group of individuals interested in purchasing the west acreage of City Edge Farm, a total of 120 acres, for $2500 an acre, conditioned upon the grant of a five year option to purchase the remaining 82.5 acres for $2500 an acre. Saemann accepted the offer. The acceptance contained a provision for a broker's commission which read: "[seller agrees] to pay to Tucker Realty licensed broker, the sum of eighteen thousand Dollars ($18,000.00) commission for his services rendered in this transaction."[3]

In February 1982, purchasers exercised their option to purchase the remaining portion of the farm for $206,250 and Tucker Realty demanded a six percent commission ($12,375.00) on the sale. Saemann denied owing a commission and Tucker Realty filed suit.[4]

The trial court granted Tucker Realty's motion for summary judgment. In so doing, the trial court, based upon a review of decisions from other jurisdictions contained in an American Law Reports annotation, concluded that, in general, even though the broker is not

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1. 529 N.E.2d 126 (Ind. Ct. App. 1988).
2. *Id.* at 127.
3. *Id.*
4. *Id.* at 127-28.

entitled to a commission for procuring an option to purchase, once the option is exercised and the sale completed, the broker's right to a commission accrues.[5] The trial court further determined that the language in the written acceptance, which provided for the payment of an eighteen thousand dollar commission to Tucker Realty for services rendered in connection with "this transaction" related solely to the immediate purchase of the land and not to the five year option. Thus, the trial court found that the purchase agreement was silent as to the rights of the broker to a commission upon the exercise of the option to purchase and that the general rule stated above should apply.[6] Saemann appealed.[7]

The court of appeals first observed that, under Indiana caselaw, in order to recover a commission under a written listing agreement, the broker must prove:

> (1) That an actual sale or transfer of the realty occurred;
> (2) That the broker procured a purchaser, who was ready, willing an able to purchase the realty on terms specified in the contract and the seller refuses to complete the transaction; or
> (3) That a third party entered into a valid executory contract with the vendor for the purchase of the realty through the broker's procurement of such third party.[8]

The court agreed with Saemann's contention that Tucker Realty met none of these requirements within the terms of the listing agreement. The broker's right to a commission is to be determined from the terms of the contract of employment. In this case, the broker was employed to locate a ready, willing and able buyer during the six month term of the listing agreement. Obtaining a five year option to purchase was outside the terms of the listing agreement.[9]

The court rejected Tucker Realty's argument that, by accepting the option to purchase agreement, Seamann ratified their performance and waived the original terms of the listing agreement. Indiana law, however, requires that a listing agreement be in writing before a broker may

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5. *Id.* at 128. The trial court relied heavily upon the general rule set forth in Annotation, *Broker's Right to Commission from Principal upon Procuring Third Party Taking an Option*, 32 A.L.R. 3d 321 (1970).

6. *Id.*

7. The personal representative of Saemann's estate was substituted as a party, following the death of F.I. Seamann. *Id.*

8. *Id.* at 129, citing Wilson v. Upchurch, 425 N.E.2d 236, 238 (Ind. Ct. App. 1981).

9. 529 N.E.2d at 129.

recover any commission on the sale of land.[10] As the court noted, this statute was enacted "for the specific purpose of preventing disputes over terms of the commission contracts."[11] Furthermore, written agreements are required to define the essential terms of the relationship between the broker and the seller, which have been found to include: "[A]n extension of time for performance; . . . a description of the performance required of the broker; . . . the length of time to be allowed the broker to perform; . . . and the amount of commission or fee to be paid to the broker for his performance."[12] The court then concluded "that commissions to be paid upon either the grant or execution of an option to purchase is another such essential element where a broker has failed to provide for an extension of time for performance."[13] While the exercise of the option to purchase did result in a sale, there was no extension of time for performance and the option was exercised more than four years after the time period in the listing agreement had expired. Thus, the time limitation in the agreement controls regardless of the construction given to the words "this transaction" in the acceptance of the offer to purchase.[14] The failure to provide a contractual provision specifically describing the rights of the parties in the event of a grant of an option to purchase or for a written extension of time was fatal to Tucker Realty's case.[15] As the court remarked, its holding "will lead to more definitive listing agreements which accurately and completely describe the intentions of the parties."[16]

II. Joint Tenancy: Multiple-party Bank Accounts

Indiana's multiple-party accounts statute[17] provides that sums remaining on deposit at the death of a party to a joint accounts[18] belong

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10. "No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring by one (1) person of a purchaser for the real estate of another, shall be valid unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative. . . ." Ind. Code § 32-2-2-1 (1988).

11. *Saemann*, 529 N.E.2d at 130 (citing Gerardot v. Emenhiser, 173 Ind. App. 353, 363 N.E.2d 1072 (1977)).

12. *Id.* (citations omitted).

13. *Id.*

14. *Id.* at 129-30.

15. *Id.*

16. *Id.* at 130-31.

17. Ind. Code §§ 32-4-1.5-1 to -15 (1988).

18. The statute defines a joint account as "an account payable on request to one or more of two (2) or more parties whether or not mention is made of any right of survivorship. . . ." *Id.* § 32-4-1.5-1(4). A "party" is defined as "a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account. . . ." *Id.* § 32-4-1.5-1(7).

to the surviving party or parties as against the estate of the deceased party.[19] Normally, a joint account is opened in the names of all the parties to the account. In *Rubsam v. Estate of Pressler*,[20] an account was opened in the name of only one person, but that person and another both signed the signature card without indicating whether or not a right of survivorship was intended. Upon the death of the party in whose name the account was opened, the question became whether the surviving signatory to the account was entitled to the funds on deposit.

In *Rubsam*, Maedean Rubsam, the surviving signatory on the bank account, and Viva Pressler, in whose name the account was opened, had been close friends for many years.[21] In February 1983, Rubsam and the deceased went to the Hancock Bank & Trust. Rubsam went into the bank alone and instructed the officer responsible for opening and closing accounts to close the decedent's saving account and to open a new checking account.[22] Rubsam took the signature card to the car where it was signed by the deceased. The new account was opened in the name of the deceased only, but both the deceased and Rubsam were named as signatories to the account, and both were permitted to make deposits and unlimited withdrawals from the account. Decedent made all deposits to the account over the next five years. There were two boxes on the signature card, one indicating a joint account with right of survivorship, and the other indicating no right of survivorship was intended. Neither box was marked.[23]

At Pressler's death, the bank informed Rubsam that the funds in the checking account would be turned over to the executor of Pressler's estate.[24] Rubsam filed a claim against the estate for the funds in the account. The executor disallowed the claim, and Rubsam brought this action. The trial court found for the estate and Rubsam appealed.[25]

On appeal, the court began by observing that Indiana's multiple-party accounts statute defines an account as "joint" whether or not a right of survivorship is expressed,[26] and that a "party" is defined as

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19. *Id.* § 32-4-1.5-4.

20. 537 N.E.2d 520 (Ind. Ct. App. 1989).

21. *Id.* at 521. In addition to the account in question, Pressler had purchased four certificates of deposit with right of survivorship with Rubsam and had opened a saving account with Rubsam jointly with right of survivorship. Rubsam was also the income beneficiary of a trust funded by the residuary of Pressler's estate. *Id.*

22. *Id.* The court observed that even if Rubsam had no authority to open the account, the decedent by making deposits into the account for five years had ratified the act of opening the account. *Id.* at 522 n.1

23. *Id.* at 521-22.

24. *Id.* at 522. Four certificates of deposit and a bank account owned jointly by Pressler with Rubsam were immediately transferred to Rubsam by the bank. *Id.*

25. *Id.*

26. IND. CODE § 32-4-1.5-1(4) (1988).

one with a present right to request payment from the multiple-party account.[27] Upon the death of a party, the statute provides that sums remaining on deposit in a multiple-party account belong to the surviving party or parties as against the estate of the decedent. . . .''[28]

Rubsam claimed that she was a ''party'' to the account and entitled to the funds remaining on deposit at Pressler's death. The estate, on the other hand, argued that Rubsam was merely an ''agent'' of the deceased.[29] In finding that Rubsam was a party to the account, the court noted the lack of any evidence suggesting that Rubsam was an agent, other than for the limited purpose of closing the savings account and opening the checking account. No one at the bank spoke to the deceased at the time the account was opened and nothing on the signature card suggested that Rubsam was an agent.[30]

Next the estate attempted to rebut the presumption that the account was intended to be a survivorship account by pointing out that the account was opened in the name of the decedent only and not jointly with Rubsam. The court concluded, however, that the name on the account had no legal significance: ''Rubsam could have named the account 'Mickey Mouse;' such a name would not make Disney's character the owner of the account.'' The ''ownership'' of the account is evidenced by the 'present right to withdraw' the funds or other contractual agreements.[31] In the present case, the court found that Rubsam had proved she had a present right to withdraw funds from the account and therefore was entitled to the sums remaining in the account at the decedent's death.[32]

The estate also argued that, in order to file a claim against the estate, Rubsam must be the owner of a debt or demand of a pecuniary nature which could have been enforced against the decedent during her lifetime and which could have been reduced to a simple money judgment.[33] In rejecting this contention, the court observed that, as a signatory to the account agreement, Rubsam had obligated herself jointly and severally with the decedent to pay any amounts chargeable to the account for which there were not sufficient funds in the account, and

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27. *Id.* § 32-4-1.5-1(7) (One who is merely authorized to make a request for payment as agent of the other is not a ''party'' to the account).

28. *Id.* § 32-4-1.5-4.

29. 537 N.E.2d at 522. The statute expressly excludes from the definition of a party ''a person who is merely authorized to make a request (for payment from a multiple-party account) as the agent of another.'' IND. CODE § 32-4-1.5-1(7) (1988).

30. 537 N.E.2d 522-24.

31. *Id.* at 524.

32. *Id.* at 523.

33. *Id.* at 524.

that this was sufficient consideration to make her a party to the account agreement with the bank and with the decedent. Rubsam and the decedent each impliedly obligated themself, on behalf of their estate, to pay any sums left in the account at their death, should they be the first to die, to the survivor and not to make any claim to such funds. Even though this latter obligation of the deceased could not be breached until after her death, it was an outgrowth of a contractual obligation entered into by the deceased during her lifetime. While Rubsam had no demand of a pecuniary nature prior to the decedent's death, the court concluded that it was a claim properly made against the estate, particularly since the breach could only occur after death.[34]

Finally, the estate argued that Rubsam was suing the wrong party since the funds were still being held by the bank, or, alternatively, that the bank was an indispensable party.[35] The court rejected both theories. While it was true that the bank was still in possession of the funds, the court noted that a bank official had indicated he would turn the funds over to the executor upon his request, and the executor had included the funds in the inventory of estate assets. While Rubsam could have brought the action against the bank for breach of contract or joined the bank as a party, the bank was not an indispensable party, and Rubsam could elect to sue the decedent's estate for breach of the bank account agreement. The court noted that the multiple liability portion of Indiana Trial Rule 19(A)(2)(b) only applies to those already parties and not to those sought to be joined.[36] In a concurring opinion, Judge Staton expressed concern that the bank might be subject to multiple liability as trustee of the trust established in the residuary clause of Pressler's will.[37] The case was reversed and remanded with instructions to enter judgment in favor of Rubsam.[38]

III. Landlord and Tenant

A. Breach of Rental Agreement by Tenant: Landlord's Remedies

In *Nylen v. Park Doral Apartments*,[39] three Indiana University students entered into a lease at Park Doral Apartments in Bloomington, Indiana, for a term beginning August 26, 1986, and ending August 19, 1987. At the end of the fall semester, one of the students moved out

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34. *Id.* at 524-25.
35. *Id.* at 525.
36. *Id.*
37. *Id.* at 526 (Staton, J., concurring).
38. *Id.* at 525.
39. 535 N.E.2d 178 (Ind. Ct. App. 1989).

and refused to pay any further rent. When the remaining two students paid only two-thirds of the rent for the month of February 1987, Park Doral brought an action for ejectment and for damages. While the ejectment action was pending, the students paid an additional $280 for the rent due in March. The trial court ordered the two students to pay the full rent or vacate the premises. The students vacated the apartment on March 13, 1987. A final hearing was held in September, 1987, and the trial court awarded Park Doral the balance of the rent due under the lease, $140 per month for February and March and $420 per month for April through July. A $420 security deposit was used to pay the last month's rent. The court also awarded late fees, attorney fees and consequential damages for a total of $2,577.24 plus costs.[40]

On appeal, the appellants argued that the award of future rents was contrary to law because the eviction terminated the lease and all obligations under it, including the obligation to pay rent. A second, closely related argument, was that the court had permitted the landlord to pursue inconsistent remedies of eviction and recovery of post-ejectment rents. In answering these arguments, the court observed that the rental agreement contained a "saving clause" which provided: "Eviction of tenant for a breach of lease agreement shall not release tenant from liability for rent payment for the balance of the term of the lease."[41] Where the lease contains such a clause the court concluded that eviction does not affect liability for future rents.[42] The court examined a number of earlier Indiana cases and concluded that "[c]ontrary to appellants' contention there is case law in Indiana recognizing and enforcing saving clauses."[43] Thus, the saving clause obligated the tenants to pay the rent to the end of the term notwithstanding an order of eviction. With regard to the second issue, the court found that the remedy of eviction for non-payment of rent was not inconsistent with an action for future rents under the saving clause.[44]

Appellants next claimed that the judgment of the trial court was inconsistent with the landlord's duty under Indiana law to mitigate

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40. *Id.* at 180.

41. *Id.* at 181.

42. *Id.* The court noted that without a saving or indemnity clause the exercise of a power of termination ends the landlord-tenant relationship and the duty to pay rent. *Id. See also* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 6.1 (1980) [hereinafter SCHOSHINSKI].

43. *Nylen*, 535 N.E.2d at 181.

44. *Id.* at 182-83. The court concluded that where the lease provides that the landlord may re-enter for the non-payment of rent or other breach, the suit for ejectment is merely a means of enforcing the lease and "did not preclude recovery of future rents under the saving clause." *Id.* at 183.

damages.[45] By the eviction, the landlord lost the two-thirds of the rent being paid by the remaining two students and, since he was unable to relet the apartment for the remainder of the term, the damages were exacerbated. The court, however, rejected this argument because, if accepted, it would mean the landlord would be forced to tolerate a breach in order to mitigate its damages.[46] The court found that the landlord attempted to relet the apartment by placing an advertisement in the Indiana Daily Student newspaper and subsequently even reduced the rent in an effort to find a tenant.[47] In a related argument, appellants claimed that enforcement of the saving clause worked a forfeiture which is not permitted under *Skendzel v. Marshall*.[48] In *Skendzel*, the Indiana Supreme Court prohibited a forfeiture of a purchaser's equity under a land contract.[49] The court in *Nylen*, however, refused to extend *Skendzel* to cases not involving a purchase equity.[50]

The appellants also challenged the trial court's award of late fees. The lease contained a provision authorizing the landlord to charge a late fee of $2 per day per person if the rent was not paid on the first day of each month. The court found that the fee was liquidated damages and not a penalty. The management testified that failure to pay rent on time resulted in extra work and loss of interest income. Since the duty to pay rent continued to the end of the term the late payments could be extended beyond the time of ejectment.[51]

Finally, the appellants argued that the rental agreement was unconscionable. While admitting that there may have been a disparity in bargaining power between the parties, the court found that the disparity had not led the appellants to sign the lease unwillingly or unaware of its terms. For, as the court stated, "[c]ontracts are not unenforceable simply because one party enjoys an advantage over the other."[52] The

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45. *Id.* Indiana requires the landlord to mitigate damages where the tenant has breached the lease. *See* State v. Boyle, 168 Ind. App. 643, 344 N.E.2d 302 (1976); Hirsch v. Merchants Nat'l Bank, 166 Ind. App. 497, 336 N.E.2d 833 (1975).

46. *Nylen*, 535 N.E.2d at 183.

47. *Id.* While it is clear that the landlord made an effort to relet the apartment once it had evicted the two students, was it reasonable to evict students in the middle of a school term in a university town and expect to be able to relet the apartment? If the landlord would be required to relet the apartment for two-thirds the amount of rent stated in the rental agreement in order to mitigate damages, why should it be permitted to evict the tenants already paying this amount and allow the apartment to remain vacant for the remainder of the term?

48. 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974).

49. *Id.*

50. *Nylen*, 535 N.E.2d at 183.

51. *Id.* at 184.

52. *Id.* at 185 (quoting Hovin v. Bremen, 495 N.E.2d 753, 758 (Ind. Ct. App. 1986)).

students had neither objected to the lease or sought modification.[53] The appellants had relied heavily upon *Weaver v. American Oil Co.*,[54] but as the court noted, *Weaver* indicates that to be unconscionable, the contract must be one "such as no sensible man not under delusion, duress or in distress would make, and such as no honest and fair man would accept."[55]

On appeal, Park Doral claimed that it was entitled to appellate attorney fees based upon Paragraph 3 of the Rental Agreement:

> If the tenant(s) defaults in the performance of any of the covenants of this lease agreement and by reason thereof the Landlord employs the services of an attorney to enforce performance of the covenants by the tenant . . . then, in any of said events the tenant does agree to pay a reasonable attorney's fee and all expenses and costs incurred by the landlord pertaining thereto. . . .[56]

The court acknowledged that in the past, landlords had been denied appellate attorney fees under the theory that the award of attorney fees at the trial level was deemed to have been merged into the judgment and the contractual authorization no longer existed. Recently, however, Indiana courts have excepted appellate attorney fees from the general rule of merger. Thus, the doctrine no longer precludes the award of appellate attorney fees.[57] The court did not appear concerned over the "chilling effect" the award of appellate attorney fees would have on future appeals by individual tenants: "This court is not persuaded that disparity in bargaining power necessitates a departure from precedent allowing the recovery of reasonable attorney fees incurred in defending an appeal." [58] The judgment of the trial courts was affirmed but the case was remanded for a hearing on reasonable appellate attorney fees.[59]

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53. *Id.* at 184-85. When one examines the case closely, it becomes obvious that well over half the amount recovered by the landlord came from "standard" provisions in the rental agreement. The tenants agreed to remain liable for the rent for the remainder of the term even if evicted, the tenants agreed to pay a $2 per day per person late fee until any rent due and owing was paid, and they agreed to pay the landlord's attorney fees if the landlord should be forced to bring suit to enforce the rental agreement (including appellate attorney fees should they appeal a lower court decision in favor of the landlord). The court points out that the tenants did not "sign the lease unwillingly and unaware of its terms." *Id.* at 184. But did these young students really believe that in a university town with a limited supply of decent housing the lease was negotiable?

54. 257 Ind. 458, 276 N.E.2d 144 (1971).

55. 257 Ind. at 462, 276 N.E.2d at 146.

56. 535 N.E.2d at 185.

57. *Id.*

58. *Id.*

59. *Id.*

B. Covenant Against Assignment: Landlord's Right of Refusal in Commercial Leases

A leasehold interest is freely transferable by the tenant unless there is a covenant in the lease prohibiting an assignment or sublease either absolutely or without the consent of the landlord.[60] However, covenants prohibiting the tenant from transferring his leasehold estate without the consent of the landlord are standard "boilerplate" in many leases.[61] Where a covenant in the lease requires the consent of the landlord to an assignment or sublease by the tenant, the courts have traditionally held the landlord can withhold his consent arbitrarily or capriciously, unless there is language in the covenant providing that such consent shall not be unreasonably withheld.[62] Recently, however, courts have begun to move away from the arbitrary and capricious right of refusal rule, and have held that the withholding of consent by the landlord should be governed by the principles of good faith and commercial reasonableness.[63]

In *First Federal Savings Bank v. Key Markets, Inc.*,[64] a trust purchased a one acre tract in Sheffield Commons Shopping Center from the developer, Joseph McLaughlin, to construct a supermarket to be operated by Burger's Supermarkets, Inc.. McLaughlin retained title to the adjoining real estate, but agreed to lease additional space to Burger's for access and parking. A parking lot lease and a common area easement agreement were subsequently entered into by Burger's and McLaughlin.[65] The parking lot lease contained a "consent clause," requiring the tenant to obtain the consent of the landlord to an assignment of the lease,[66] and a "cancellation clause," permitting the landlord to cancel the lease under certain conditions.[67] Burger's constructed the supermarket and parking lot and McLaughlin constructed the remainder of the shopping center. In January 1985, following a series of assignments, consented to by McLaughlin, Key Markets, Inc. succeeded to Burger's interest in

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60. SCHOSHINSKI, *supra* note 42, § 8:10 (1980); J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 219 (2d ed. 1975) [hereinafter CRIBBET].

61. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY 386 (1984) [hereinafter CUNNINGHAM].

62. *Id.* at 387-88; CRIBBET, *supra* note 54, at 223.

63. *See* Annotation, *Withholding Consent—Assignment of Leases*, 21 A.L.R. 4th 188 (1983).

64. 532 N.E.2d 18 (Ind. Ct. App. 1988).

65. *Id.* at 19.

66. Section 10.01(a) of the parking lot lease provides: "Except for an assignment to a "Corporate Affiliate" of Tenant, Tenant shall not assign this lease or sublet all or a portion of the Demised Premises without the consent of Landlord." *Id.* at 20.

67. *See infra* notes 77-81 and accompanying text for a discussion of the cancellation clause.

the supermarket lease, the parking lot lease, and the common area easement agreement. In October 1985, First Federal Saving Bank of Indiana succeeded to McLaughlin's interest through a mortgage foreclosure.[68]

In the fall of 1987, Key Markets entered into negotiations with Babincsak Enterprises, Inc. for the purchase of its supermarket business in Sheffield Commons. Key Markets sent a letter to First Federal requesting its consent to the assignment of its parking lot lease and common area easement agreement to Certified Grocer's, Inc., who would then sublet to Babincsak. Negotiations between Key Markets and First Federal failed to reach agreement regarding the assignment and on December 11, 1987, First Federal notified Key Markets that it was cancelling the parking lot lease by reason of the proposed assignment.[69]

Because of First Federal's refusal to consent to the assignment of the parking lot lease, the closing of the sale to Babincsak was never completed. On December 12, 1987, Key Markets filed a complaint against First Federal seeking declaratory and injunctive relief and damages for cancellation of the lease. After a hearing on the refusal to consent to the assignment and the cancellation issues, the trial court concluded that First Federal had a legal duty not to unreasonably withhold consent to the assignment and that it had no right to cancel the lease. The court permanently enjoined First Federal from enforcement of its cancellation of the lease on the sole motivation of a requested assignment in connection with the sale of the supermarket business.[70]

On appeal, First Federal argued that, absent limiting language providing that such consent shall not be unreasonably withheld, it could refuse consent for any reason.[71] As authority for its position, First Federal initially claimed that *F.W. Woolworth Co. v. Plaza North, Inc.*,[72] which appears to hold that the landlord can arbitrarily and capriciously withhold consent to an assignment, was dispositive of the issue. In *Woolworth*, however, the lease contained specific language requiring reasonable consent to a subletting while in the same paragraph failing to include similar language in the portion prohibiting assignments. This, the *First Federal Savings* court concluded, showed an express agreement by the parties to allow unreasonable withholding of consent to an assignment.[73] Both the trial court and Key Markets relied heavily

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68. 432 N.E.2d at 19-20.
69. *Id.* at 20.
70. *Id.*
71. *Id.*
72. 493 N.E.2d 1304 (Ind. Ct. App.), *trans. denied* (1986).
73. *First Federal Savings*, 532 N.E.2d at 21.

on *Sandor Development Co. v. Reitmeyer*.[74] In *Sandor*, the court held that the landlord had a duty to mitigate damages when the tenant abandons the premises and rejected the position that the landlord's right to refuse assignments under a "use" clause was unconditional. The court, however, also rejected *Sandor* as determinative of the issue since no mitigation question was present.[75] Instead, the court observed that there is a continuing erosion of the arbitrary and capricious right of refusal rule based on the recognition that a lease is a contract, and, as such, should be governed by the general principles of good faith and commercial reasonableness. The court cited decisions from other jurisdictions adopting a "commercial reasonableness" test, and concluded that the requirement of reasonableness on the part of the lessor is "no more than a means of ensuring good faith, and is in keeping with the overall preference in Indiana for free alienation of land."[76]

The court's adoption of a commercial reasonableness test would have been a hollow victory for Key Markets had the court accepted First Federal's interpretation of the cancellation clause. First Federal argued that Article X, Section 10.01(b) of the parking lot lease gave it the right to cancel the lease upon the attempted assignment. This subsection provides:

> Except for an assignment to a "Corporate Affiliate" of Tenant or an assignment *in connection with the sale of the business of Tenant*, Landlord shall have the option to cancel this Lease by giving notice thereof to Tenant within thirty days after Tenant notifies Landlord of the proposed assignment. If Landlord cancels this Lease in accordance with this Section, both parties shall be relieved of liability under this Lease.[77]

It might appear at first that there is no problem since the proposed assignment is in connection with Key Markets' sale of its business. However, subsection 10.01(c), which contains a glossary of terms relevant to Section 10.01, defines the term "sale of the entire business of Tenant," as "the sale of all of the stock of the Tenant and all of the stock of more than 75% of Tenant's Corporate Affiliates to a single person . . . ."[78] Key Markets' assignment does not fall within the definition of this term. First Federal argued that although the word "entire" was omitted from subsection (b), this was the only subsection to which the term could apply. Therefore, a patent ambiguity existed, and the court

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74. 498 N.E.2d 1020 (Ind. Ct. App.), *trans. denied* (1986).
75. 532 N.E.2d at 22.
76. *Id.* at 22-23.
77. *Id.* at 23 (emphasis added).
78. *Id.*

should insert the word "entire" in the cancellation clause.[79] The court rejected this position for several reasons. First, it found that the supermarket lease, the common area easement agreement, and the parking lot lease were all part of an interrelated whole. First Federal's interpretation would render the documents internally inconsistent, since it would allow the Landlord to render the supermarket lease commercially worthless in all but two situations should an assignment be attempted. Likewise, it would render the assignment clause meaningless. Burger's owner testified that "he would not have proceeded to build the supermarket unless parking was assured."[80] Finally, the court noted that the thirty page parking lot lease contained many unused subsections and appeared to be based on a form. Thus, there was a serious question as to whether the word "entire" was unintentionally left out of subsection (b) or whether the term was mistakenly retained as a definition of a stricken subsection. Based upon extrinsic evidence, the court concluded that the cancellation clause did not apply to a request for an assignment. It could, however, be used should the lessee assign after a reasonable refusal of consent by the landlord.[81]

This case is important because it is the first Indiana decision to reject the common law rule that the landlord can arbitrarily and capriciously refuse to allow an assignment of commercial leases unless the covenant against assignments contains the phrase "which consent will not be unreasonably withheld." However, it should be noted that the court limits its holding to assignments of "commercial leases." Whether reasonable grounds for the refusal to consent to an assignment will be required in residential leases remains unanswered.

C. Landlord's Liability for Criminal Acts of Third Parties

In *Center Management Corp. v. Bowman*,[82] Kim Bowman, a tenant in an apartment owned by Center City Housing, sued to recover for the loss of four items of jewelry stolen from her apartment. On February 20, 1986, Bowman discovered the loss of a $50 bill from her apartment and reported the loss to Center Management Corporation, the managing company of the apartment building, and to the South Bend police. On February 27, 1986, Bowman discovered the loss of four items of jewelry from the apartment. A subsequent police investigation concluded that entry to the apartment had been gained by the use of a key. Following

79. *Id.* at 23-24.
80. *Id.* at 25.
81. *Id.*
82. 526 N.E.2d 228 (Ind. Ct. App. 1988).

a trial, the court held Center City and Center Management jointly and severally liable for the loss.[83]

On appeal, the court noted that, while the parties and the amicus did not refer the court to any Indiana decisions "Many courts have abrogated or softened the common-law rule that a landlord is not under a duty to protect a tenant from loss or injury due to criminal conduct by a third party."[84] After examining decisions from other jurisdictions holding that the landlord is under a duty to protect the tenant from the reasonably foreseeable criminal acts of third persons, the court adopted the three considerations expressed in *Morgan v. Dalton Management Co.* as a practical method of determining when such a duty would exist.[85] Under *Morgan*, whether such a duty exists depends upon: (1) the foreseeability of the injury; (2) the magnitude of the burden of guarding against the injury; and (3) the consequences of placing that burden upon the landlord.[86]

In the present case, the court found that the second burglary was reasonably foreseeable. The landlord was made aware of the first burglary and the probable method of entry. The court also rejected the defendants argument that the magnitude of the burden of guarding against another such occurrence was prohibitive. The defendants had, by allowing twelve of their employees and an unknown number of employees of a carpet cleaning company access to master keys, "effectively thwarted any attempt to determine who perpetrated the first burglary and to reduce the risk of further burglaries."[87] The court found that the evidence supported the conclusion that the breach of the duty to protect the tenant against loss or injury due to the criminal conduct of third parties was the proximate cause of the injury to the tenant. The tenant had always locked her door and had not given her key to anyone, similar burglaries had occurred in the apartment complex, part of the missing jewelry was discovered in a pawn shop frequented by one of the defendant's employees, and there were no signs of forced entry. The judgment was affirmed.[88]

D. Landlord's Liability for Personal Injuries Caused by Defective Condition of Leased Premises

Traditionally, the landlord has not been held liable for personal injuries resulting from defective conditions on the leased premises.[89]

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83. *Id.* at 229.
84. *Id.* at 229-30.
85. 117 Ill. App. 3d 815, ____, 454 N.E.2d 57, 60 (1983).
86. 526 N.E.2d at 230.
87. *Id.*
88. *Id.* at 230-31.
89. SCHOSHINSKI, *supra* note 42, § 4:1 at 186-87; Browder, *The Taming of a*

This tort immunity is based in part upon the theory that once the landlord has given up possession and control of the premises to the tenant, he is without authority to reenter to make repairs and should not be held responsible for defective conditions which he has no power to correct.[90] While the tort immunity of the landlord was the general rule, there soon developed a series of exceptions.[91] Indiana decisions have held the landlord liable for personal injuries caused by: (1) latent defects known to the landlord but unknown to the tenant, which the landlord fails to disclose to the tenant;[92] (2) defects in premises leased for admission of the public;[93] (3) breach of a covenant to repair;[94] (4) negligent repairs;[95] (5) defects in areas used in common by the tenants, and over which the landlord retains control[96]; and (6) an unexcused or unjustified violation of a duty prescribed by an applicable statute or ordinance.[97]

Recently, with the recognition of an implied warranty of habitability in residential leases, the general tort immunity of the landlord for injuries arising out of defective conditions of the leased premises has been seriously questioned.[98] If the landlord can be held liable for failure

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Duty—The Tort Liability of Landlords, 81 MICH. L. REV. 99, 101-02 (1982) [hereafter *Browder*].

90. Great Atl. & Pac. Tea Co. v. Wilson, 408 N.E.2d 144 (Ind. Ct. App. 1980); Zimmerman v. Moore, 441 N.E.2d 690, 694 (Ind. Ct. App. 1982).

91. For a detailed discussion of these exceptions to the landlord's common law tort immunity, see Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1075 WISC. L. REV. 19, 50-78 (1975); and SCHOSHINSKI, *supra* note 42, §§ 4:2 - 4:9.

92. *See, e.g.*, Eggers v. Wright, 143 Ind. App. 275, 240 N.E.2d 79 (1968); Guenther v. Jackson, 79 Ind. App. 127, 137 N.E. 528 (1922).

93. Chrysler Corp. v. M. Present Co., 491 F.2d 320 (7th Cir. 1974) (where property leased for a "public purpose" lessor is under duty to use reasonable care to inspect and repair premises before transferring possession); Walker v. Ellis, 126 Ind. App. 353, 129 N.E.2d 65 (1955) (landlord liable where he leases premises for a public purpose which he knows are unfit and dangerous).

94. Hunter v. Cook, 149 Ind. App. 657, 274 N.E. 550 (1971); Robertson Music House v. Wm. H. Armstrong Co., 90 Ind. App. 413, 63 N.E. 839 (1928).

95. *See, e.g.*, Hunter v. Cook, 149 Ind. App. 657, 274 N.E.2d 550 (1971); Robertson Music House v. Wm. H. Armstrong Co., 90 Ind. App. 413, 63 N.E. 839 (1928).

96. *See, e.g.*, Flott v. Cates, 528 N.E.2d 847 (Ind. Ct. App. 1988); Slusher v. State, 437 N.E.2d 97, *transfer denied* (Ind. Ct. App. 1982); Coleman v. DeMoss, 144 Ind. App. 408, 246 N.E.2d 483 (1969). One could argue that the landlord's liability for injuries caused by defective conditions in common areas is really not an exception to the rule since the landlord still retains possession and control over these areas.

97. Zimmerman v. Moore, 441 N.E.2d 690, 696 (Ind. Ct. App. 1982); Rimco Realty & Investment Corp. v. La Vigne, 114 Ind. App. 211, 50 N.E.2d 953 (1943).

98. *Browder*, *supra* note 89, at 116-41; SCHOSHINSKI, *supra* note 38, § 4:9 at 203-

to repair when there is an express covenant to repair, then why should the landlord not be held liable where a *duty* to repair is created in a residential lease by an implied warranty of habitability?[99] Several interesting cases decided during this survey period touch upon the liability of the landlord for injuries resulting from the condition of the leased premises.

1. Covenant to Repair.—In *Childress v. Bowser*,[100] Richard and Donna Childress and their four children rented a house from Carl Bowser on an oral month-to-month lease. At the inception of the lease, Bowser instructed Richard that he was not to do anything to the house. In May or June 1985, Richard requested that Bowser repair leaking faucets and the rear door of the house. Although Bowser promised that he would take care of the problems, the back door was not fixed and Donna suffered injuries to her arm as she was leaving the house through the rear door. Donna sued Bowser for her injuries and the trial court granted a summary judgment in favor of the landlord.[101]

In reversing the judgment, the court of appeals noted that normally the landlord is not liable for personal injuries to the tenant caused by defective conditions on the premises, but that there is an exception to this rule where the landlord "expressly agrees to repair and is negligent in doing so."[102] The court concluded that the landlord's remark "Don't

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06, For a collection of recent decisions addressing the landlord's liability for personal injuries resulting from breach of an implied warranty of habitability *see* SCHOSHINSKI, *supra* note 42, at § 4:9 (1989 Supp.).

99. Despite the apparent logic of this argument a number of jurisdictions have refused to change the traditional tort immunity of the landlord because of the recognition of an implied warranty of habitability in residential leases. A few states have imposed strict tort liability on the landlord for breach of the implied warranty of habitability by analogy to the RESTATEMENT (SECOND) OF TORTS § 402A (1965), and others have imposed tort liability on the landlord under a negligence theory for failure to repair. *See generally Browder*, *supra* note 89, at 116-41.

100. 526 N.E.2d 1209 (Ind. Ct. App. 1988). After the survey period, the Indiana Supreme Court granted transfer and affirmed the decision of the court of appeals. Childress v. Bowser, 546 N.E.2d 1221 (Ind. 1989). In an opinion by Chief Justice Shepard, the court held that a binding covenant to repair could reasonably be inferred from the landlord's admonition to the tenant to do nothing to the leased premises and by his later promises to make a specific repair.

101. *Id.* at 1210.

102. *Id.* at 1210. The wording used by the court is identical to that used in Zimmerman v. Moore, 441 N.E.2d 690 (Ind. App. 1982), cited in the opinion. However, another case cited by the court in support of the exception to the rule, Hunter v Cook, 149 Ind. App. 657, 274 N.E.2d 550 (1971), states the exception differently: "a tenant cannot recover for personal injuries . . . caused by defective condition of the leased premises unless the landlord either agrees to repair, *or* in doing so is negligent." (emphasis added). This language suggests the landlord not only will be liable where he covenants to repair *and* does so in a negligent manner, but also where he (1) agrees to repair and

change nothing, don't nail a lot of nails in, don't do nothing to the house," created a promise on the part of the landlord to make repairs on the premises.[103] There was also further evidence of a promise to repair when the landlord, upon being told that the back door was inoperative, replied that one of his employees would "take care of it."[104]

The court rejected the landlord's argument that because the tenant had taken possession of the premises before the promise to repair was made, there was no consideration to support the covenant to repair. In the case of a month-to-month tenancy, the court concluded that the tenancy recommences at the expiration of each month and thus the decision to continue the tenancy constitutes consideration for the promise to repair.[105] The granting of the landlord's motion for summary judgment was reversed and the case remanded to the trial court.[106]

The plaintiff sued on a theory of negligence and the question of an implied warranty of habitability was not raised. Nevertheless, the court's remark that "[i]t is well established in this state that a landlord is not liable for personal injuries to a tenant for defective premises unless he *expressly agrees* to repair,"[107] would appear to reject liability for such injuries under a theory of implied warranty of habitability.

2. Violation of Statute or Ordinance.—In *Hodge v. Nor-Cen, Inc.*,[108] tenants, occupant, and guests in front upstairs apartment sued the landlord (Nor-Cen, Inc.) for personal injuries resulting from lack of workable windows and a second means of egress from two-story apartment building. There was only one stairway exit from the front upstairs apartment leading to the ground level. Martha Short rented both the front downstairs apartment (where she had been living with her grandchild, Misty Cornette) and the front upstairs apartment, where she subsequently moved so that her daughter, Teresa Cornette, and Teresa's three children, Daniel Hodge, Tiffany Cornette and Shaya Cornette,

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fails to do so, or (2) voluntarily makes repairs and does so in a negligent manner. *See* Robertson Music House v. Wm H. Armstrong Co., 90 Ind. App. 413, 415-16, 163 N.E. 839 (1928); Stover v. Fechtman, 140 Ind. App. 62, 64-65, 222 N.E.2d 281, 283 (1966).

Despite the use of the phrase "and is negligent in so doing," the court of appeals reversed the trial court's granting of the landlord's motion for a summary judgment even though no repairs had been made by the landlord. This indicates that the "negligence in so doing" includes failure to repair as well as making the repairs in a negligent manner.

103. 526 N.E.2d at 1211.

104. *Id.*

105. *Id.* at 1211-12.

106. *Id.* at 1212.

107. *Id.* at 1210 (emphasis added).

108. 527 N.E.2d 1157 (Ind. Ct. App. 1988).

could live in the downstairs apartment. Teresa and her three children were living in the front upstairs apartment with Nor-Cen's consent pending their move into the downstairs apartment. In addition, another occupant, Marilyn Gallion, was apparently subletting a room from Short in the upstairs apartment without Nor-Cen's knowledge. On the night of May 24, 1982, Teresa returned to the apartment with a friend, Marshall King. Short left for work just as Teresa and King arrived. Teresa admits she may have failed to lock the storm door and a sturdy wooden door with an inside deadbolt lock at the ground level entrance to the upstairs apartment. In the early morning hours, an unknown individual entered the building, spread an accelerant in the upstairs hallway, on the stairway, and in the lower foyer and started a fire trapping the persons in the front upstairs apartment.[109]

After discovering the fire, the persons in the apartment began searching for a means of escape. They found that some of the windows would not open properly and they were forced to break them to provide a means of escape. Gallion and Teresa jumped out a window they broke in the master bedroom, King broke a living room window and was able to save Tiffany and Daniel. Shaya and Misty died in the fire.[110] The plaintiffs (Martha Short, Teresa Cornette, Marshall King and Marilyn Gallion) brought an action against Nor-Cen for personal injuries based on negligence, strict liability and breach of warranty of habitability.[111] The plaintiffs appealed a summary judgment granted Nor-Cen by the trial court.[112]

Two issues were raised on appeal. The first issue was whether the trial court was in error in concluding that Nor-Cen's violation of a city ordinance could not support appellants' negligence claim. The court began its discussion of this issue by observing that ordinarily a landlord is not liable for injuries caused by the defective condition of the leased premises once possession and control of the premises has been surrendered.[113] However, the court noted four exceptions to this general rule: (l) where the landlord covenants to repair or is negligent in making repairs; (2) where the injury is caused by a latent defect known to the landlord and unknown to the tenant which the landlord fails to disclose; (3) where the injuries occur in a common area over which the landlord retains control; and (4) where there is an unexcused or unjustified violation of a duty prescribed by statute or ordinance if the statute is

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109. *Id.* at 1158-59.

110. *Id.* at 1159.

111. *Id.* The basis of Short's claim is not clear since the facts indicate she was at work at the time of the fire. *Id.*

112. *Id.*

113. *Id.* at 1159.

intended to protect the class of persons in which plaintiff is included and against the risk of the type of harm which has occurred as result of its violation.[114] While there was no indication from the facts that the first three exception applied, the court observed that, in this case, there was a violation of a Marion City Ordinance which provides: "Every dwelling unit shall have a minimum of two safe, unobstructed means of egress leading to safe and open space at ground level."[115]

The trial court, based upon a reading of other provisions of the ordinance, concluded that the ordinance was promulgated only to assure adequate light and ventilation.[116] While conceding that not all of the sections of the ordinance are safety measures, the court of appeals concluded that "Section 4.9 clearly anticipates the increased risk of injury to a dwelling's occupants if they have but one route of egress in case of fire or other disasters necessitating rescue or escape."[117] The court also rejected Nor-Cen's argument that the acts of the arsonist, and not the failure to provide a second means of egress, was the proximate cause of the injury:

> Here, the landlord's act of failing to provide a second means of egress is an act which generates an unreasonable amount of risk when there is a disaster necessitating escape or rescue. Fire, whether by accident or design, is not an intervening event which breaks the causal connection between the act of failing to provide a second means of egress and the injury occasioned by the inability to escape; it is merely an event in the chain of causation.[118]

Judge Buchanan, in a dissenting opinion, did not agree with the majority on the causation issue. In his view, the criminal act of arson was not a reasonably foreseeable consequence of Nor-Cen's violation of the ordinance. Nor-Cen had no knowledge of criminal activities in the neighborhood, and had provided locks for the front door, which apparently had been left open by the Tenants allowing access to the building.[119]

The second issue raised on appeal was whether the trial court had erred in determining that personal injuries were not recoverable under

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114. *Id.* at 1160.

115. *Id.* (quoting Marion, Indiana, Ordinance 11-1960 § 4.9).

116. 527 N.E.2d at 1160. In a footnote the court of appeals noted that the violation of an administrative regulation has been held to be only evidence of negligence and could not survive a motion for summary judgment if the element of duty rested solely on the existence of such an administrative regulation. *Id.* at n.3.

117. *Id.* at 1161.

118. *Id.*

119. *Id.* at 1162-63 (Buchanan, J., dissenting).

a breach of an implied warranty of habitability theory. The court observed that while Indiana has recognized an implied warranty of habitability in residential leases, it has not considered whether the warranty provides a basis for relief on claims of personal injury.[120] The court decided "because appellants fail to present a compelling argument for the extension of the warranty of habitability to personal injury claims, we leave the issue to another time."[121] The judgment on the negligence claim was reversed and remanded for further proceedings.[122]

E. Legislation: Security Deposits

The 1989, Indiana General Assembly enacted legislation regulating security deposits in residential leases.[123] The statute provides that within forty-five days after termination of the rental agreement and delivery of possession, all of the security deposit held by the landlord must be returned to the tenant except for any amount applied to the payment of accrued rent, damages which the landlord has suffered or will suffer as a result of the tenant's noncompliance with the law or the rental agreement, and unpaid utility or sewer charges which the tenant is obligated to pay under the rental agreement.[124] Any amount applied by the landlord for damages or other obligations of the tenant against the security deposit must be itemized, "including the estimated cost of repair for each damaged item and the amounts and lease on which the landlord intends to assess the tenant."[125] The itemized list of damages, together with a check or money order for the difference between the damages claimed and the security deposit held by the landlord, shall

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120. *Id.* at 1161.

121. *Id.* at 1162.

122. *Id.*

123. Pub. L. No. 277-1989, 1989 Ind. Acts 1954 (codified at IND. CODE ANN. § 32-7-5 (Burns Supp. 1989)). The statute applies to all rental agreements for dwelling units located in Indiana entered into on or after July 1, 1989. 1989 Ind. Acts 1959, Pub. L. No. 277, § 2. The statute defines a security deposit as:

> [A] deposit paid by a tenant to the landlord or the landlord's agent to be held for the term of the rental agreement, or any part of the term, and includes:
> (1) A required prepayment of rent other than the first full rental payment period of the lease agreement;
> (2) A sum required to be paid as rent in any rental period in excess of the average rent for the term; and
> (3) Any other amount of money or property returnable to the tenant on condition of return of the rental unit by the tenant in condition as required by the rental agreement.

IND. CODE ANN. § 32-7-5-9(a) (Burns Supp. 1989).

124. *Id.* § 32-7-5-12(a).

125. *Id.* § 32-7-5-14.

be mailed by the landlord to the tenant within forty-five (45) days after termination of occupancy.[126] Failure to comply with the written notice of damages requirement within forty-five days after termination of occupancy constitutes an agreement by the landlord that no damages are due and the landlord must return the full security deposit to the tenant.[127] In addition, where the landlord "fails to provide a written statement within forty-five (45) days of termination of the tenancy or the return of the appropriate security deposit" the tenant may recover the part of the security deposit held by the landlord plus reasonable attorney's fees and court costs.[128]

Other provisions of the statute place limits on the purposes for which the security deposit may be used by the landlord,[129] and prohibit any waiver of the tenant's rights under this statute by contract.[130] Furthermore, the statute requires the landlord, or any person authorized by the landlord to enter into a rental agreement, to disclose to the tenant in writing, at or before the commencement of the rental agreement, the following names and addresses: "(1) a person residing in Indiana authorized to manage the dwelling unit; (2) a person residing

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126. *Id.* However, subsection 12(a)(3) indicates that the landlord is not liable "under this subsection (section 12)" until supplied by the tenant with a mailing address to which the notice and refund may be delivered. *Id.* § 32-7-5-12(a)(3). Since the duty of the landlord to provide an itemized written notice of damages and to return that portion of the security deposit due the tenant is contained in section 12 as well as sections 14-16, it would appear that the requirement that the tenant provide a mailing address to the landlord would apply equally to all the provisions.

127. IND. CODE ANN. § 32-7-5-15 (Burns Supp. 1989).

128. *Id.* § 32-7-5-16. A similar provision is contained in § 32-7-5-12(b) which states that where "the landlord fails to comply with subsection [12](a), the tenant may recover all of the security deposit due the tenant and reasonable attorney's fees." *Id.*

129. *Id.* § 32-7-5-13. The security deposit may be used only for the following purposes:

> (1) To reimburse the landlord for actual damages to the rental unit or ancillary facility not the result of ordinary wear and tear expected in the normal course of habitation of a dwelling.
> (2) To pay the landlord for all rent in arrearage under the rental agreement and rent due for premature termination of the rental agreement, by the tenant.
> (3) To pay for the last payment period of a residential rental agreement where there is a written agreement between the landlord and the tenant that stipulates the security deposit will serve as the last payment of rent due.
> (4) To reimburse the landlord for utility or sewer charges paid by the landlord that:
> (A) are the obligation of the tenant under the rental agreement; and
> (B) are unpaid by the tenant.

Id.

130. *Id.* § 32-7-5-17.

in Indiana reasonably accessible to the tenant who is authorized to act as agent for the owner for the purpose of service of process and for the purpose of receiving and receipting for notices and demands."[131] If the information is not furnished to the tenant at or before the commencement of the rental agreement, the tenant may recover any expenses reasonably incurred in discovering such names and addresses.[132]

Finally, the statute attempts to define the liability of the original landlord and the new owner for the return of the tenant's security deposit where the landlord in good faith conveys the property including the dwelling unit to a bona fide purchaser. The statute provides that the landlord shall remain liable to the tenant for the security deposit to which the tenant is entitled for one (1) year after giving written notice to the tenant of the conveyance unless:

(1) the purchaser acknowledges that the purchaser has assumed the liability of the seller by giving notice to the tenant; and
(2) upon conveyance the seller transfers the security deposit to the purchaser.[133]

The literal wording of the statute suggests that the liability of the original landlord for the return of the security deposit terminates at the end of one year following notice to the tenant of the sale. Where the landlord has not transferred the security deposit to the purchaser there does not appear to be any justification for the release of the landlord from his personal covenant to return the security deposit to the tenant. Perhaps the drafters assumed that the new owner would become liable for the return of the security deposit. Subsection 12(d) makes the owner of the dwelling unit at the time of the termination of the rental agreement bound by the provisions of section 12.[134] However, the language of subsection 12(a) raises a serious question regarding the new owner's liability for the return of the security deposit. It requires a return of "all of the security deposit *held by the landlord.*"[135] It does not appear from this wording that the purchaser would be liable for the return of the tenant's security deposit where the landlord/seller had failed to transfer the security deposit to him.

IV. Recording Act: Chain of Title

Each year, the number of documents filed in the public records continues to grow, making the examination of titles to land extremely

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131. *Id.* § 32-7-5-18(a). The person authorized to manage the dwelling unit may also be authorized to act as agent.
132. *Id.* § 32-7-5-18(d).
133. *Id.* § 32-7-5-19(a).
134. *Id.* § 32-7-5-12(d).
135. *Id.* § 32-7-5-12(a) (emphasis added).

time consuming and costly. To reduce the burden on the abstractor and the cost to the purchaser, courts have developed a concept referred to as the "chain of title" which permits the search under the name of each grantor in the grantor-grantee index to be limited to the period of time which appears relevant to the title being searched.[136] This avoids a general search of the records. Occasionally, however, courts have required a more expansive search of the records before the purchaser will be protected by the recording act.

In *Szakaly v. Smith*,[137] Andrew and Nancy Szakaly Jr. brought suit to determine whether they had an easement over the land of Ron and Linda Smith. The facts indicate that Sherrill and Isabelle Arvin, owned a 195 acre tract of land in Brown County, Indiana. In 1956 the Arvins conveyed 190 acres to the Ransburgs, the Szakalys' predecessors in title. The deed granted an easement of way over the remaining 5 acres still owned by the Arvins, but the deed was not recorded until nine years later in August 1965. The Szakalys derive their title to the dominant estate from two deeds executed and delivered in 1982 and 1983, both recorded in 1983.[138]

In March 1957, the Arvins conveyed the remaining 5 acres to Arressia Allender, trustee, who the same day reconveyed the land to Isabelle Arvin. Neither of these deeds mentioned the easement. Title to the servient estate was deeded to Ron Smith in December 1979 and recorded on December 11, 1979, fourteen years and four months after the Arvin-Ransburg deed conveying the easement was recorded.[139]

The Bartholomew Circuit Court determined that no easement existed because "the deed describing an easement in favor of plaintiffs' predecessors in title was outside the defendants' chain of title."[140] The Szakalys appealed.

The Smiths argue that in a state such as Indiana, where a grantor-grantee index system is used, a deed conveying an easement over land retained by the grantor, which is not recorded until after the recording of a deed out of the servient estate by the grantor, is outside the chain of title. Abstractors searching under a grantor-grantee system start their search in the grantor index with the person to whom the land was conveyed by the United States and continue to search under that person's

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136. *See* CUNNINGHAM, *supra* note 61, § 11.11 at 796-802 for a more detailed discussion of the chain of title concept.

137. 525 N.E.2d 343 (Ind. Ct. App. 1988). After the survey period, the Indiana Supreme Court granted transfer. Szakaly v. Smith, 544 N.E.2d 490 (Ind. 1989). For a brief discussion of the supreme court opinion, see *infra* note 148.

138. 525 N.E.2d at 344.

139. *Id.*

140. *Id.*

name in the grantor index until a conveyance out from him is recorded. Any interests recorded during this period is within the chain of title. When the deed out is recorded, the abstractor stops the search under the name of the former owner and continues his search in the grantor index under the name of the new owner from the date he purchased the land to the date of the recording of a deed out from him. Only if the Arvin-Ransburg deed had been recorded promptly, before the Arvin-Allender deed, would the conveyance have been within the chain of title.[141] As an aside, it should be noted that since Allender reconveyed to Isabelle Arvin the same day, a title searcher would have found the Arvin-Ransburg deed if it was recorded prior to a conveyance out by Isabelle Arvin.[142] The Smiths argued that once out always out and that they had no constructive notice of the deed even though it was recorded fourteen years before they acquired title.[143]

The court disagreed with the Smiths' chain of title argument, observing that by Indiana statute: [e]very conveyance . . . shall take priority *according to the time of the filing thereof*, and such conveyance . . . shall be fraudulent and void as against any subsequent purchaser . . . in good faith and for a valuable consideration, having his deed . . . first recorded."[144]

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141. *Id.* at 344-45.

142. Another interesting point, not addressed by the court, is raised by the fact that nowhere in the opinion is it stated when Isabella Arvin subsequently conveyed the title to the servient estate to a predecessor in the Smiths' chain of title. All that is indicated is that the Smiths acquired title to the servient estate in 1979 "after mesne conveyances." *Id.* at 344. Had Isabella Arvin conveyed the property prior to August 1965, when the Ransburg deed was recorded, the purchaser, assuming he or she paid value and was without actual notice of the easement, would have been a bona fide purchaser in good faith. Under the shelter principle, once title has passed to a bona fide purchaser in good faith, the bona fide purchaser can pass title to a subsequent grantee (other than the original grantor of the interest) even though the grantee has actual or constructive notice of an adverse interest purged by the operation of the recording act. *See* CUNNINGHAM, *supra* note 61, § 11.10 at 794; 4 AMERICAN LAW OF PROPERTY § 17.11, at 567-68 (Casner ed. 1952). Thus even though the easement was recorded prior to the conveyance to the Smiths, and even though its subsequent recordation would have been constructive notice to the Smiths, the conveyance to the bona fide purchaser would have cleared the title by operation of the recording act. CUNNINGHAM, *supra* note 61, § 11.10 at 794. Since this issue was not addressed by the court it must be assumed that Isabella Arvin was still the owner of the servient estate in August 1965 when the Ransburgs deed was recorded and thus all of the Smiths' predecessors in title would have been charged with constructive notice of the easement. The conveyance from the Arvins to Allender in 1957 would not pass title to the servient estate free of the easement even if Allender was a bona fide purchaser in good faith. The shelter rule, would not apply because the conveyance back was to one of the original grantors, Isabella Arvin, who had conveyed the easement to the Ransburgs.

143. 525 N.E.2d at 345.

144. *Id.* (emphasis supplied by the court) (quoting IND. CODE § 32-1-2-16 (1988)).

The court then cited *Hazlett v. Sinclair*,[145] for the position that a purchaser "is chargeable with knowledge of all information supplied by deeds either of his immediate or remote grantors" and concluded:

> Indiana is one of the jurisdictions which recognize an exception to the rule that the record of a conveyance out of the line of title does not give constructive notice of its contents to innocent purchasers for value without notice.
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> . . . .
>
> . . . The holding in *Hazlett* has the effect of charging grantees of servient tenements with knowledge of all the information supplied by the recorded conveyances of the common grantor.[146]

In the context of the opinion, this quotation implies that the subsequent purchaser is on constructive notice of all deeds from a common grantor even if recorded after the conveyance out. This, however, may be a misreading of the scope of the *Hazlett* decision. In *Hazlett*, the easement was recorded during the time the grantor owned the land whose title was being searched. It involved a totally different issue: Whether the grant of an easement over tract A in a deed conveying tract B by a common grantor is notice to a subsequent purchaser of tract A? There is a split of authority as to whether a purchaser of tract A must examine the conveyances out of other tracts of land owned by a common grantor to ascertain whether or not the grantor may have given an interest in tract A in the conveyance of tract B.[147] *Hazlett* was merely indicating that in Indiana the purchaser of tract A is on notice of any interest in tract A transferred by a recorded conveyance from a common grantor. This does not, however, suggest that a subsequent purchaser of tract A would have to search under the name of a remote grantor of tract A after the deed out of tract A is recorded to see if a deed of tract B was subsequently recorded which granted an interest in tract A. Nevertheless, while the court may have misread *Hazlett*, there is substantial authority in states with a notice-race statute, such as Indiana,[148] holding that a subsequent purchaser takes subject to an interest in a deed recorded after the recording of a conveyance out by his grantor but before the recording by the subsequent pur-

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145. 76 Ind. 488 (1881).

146. 525 N.E.2d at 346.

147. The decisions are about equally divided. *See* 4 AMERICAN LAW OF PROPERTY § 17.24, at 602 (Casner ed. 1952).

148. IND. CODE § 32-1-2-16 (1988) is a notice-race statute in that it requires not only that the subsequent purchaser be acting in good faith (without notice of the claim) and have paid valuable consideration, but further that his deed be first recorded.

chaser.[149] The argument is that the grantee must "record first" to win in a notice-race jurisdiction and the Arvin-Ransburg deed was recorded first.[150] The practical problem with this line of authority from an abstractor's point of view is that it requires a title search under the name of each grantor to continue down to the present in order to protect the purchaser against a prior interest recorded outside the chain of title. The time and cost involved in such a lengthy search of the records creates a heavy burden on purchasers when the loss could have been easily avoided by the prompt recording of all deeds.[151]

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149. *See* CUNNINGHAM, *supra* note 61, § 11.11, at 800, which suggests that the decisions are about equally divided with more than half requiring a more detailed search. For an analysis of the cases under both notice and notice-race type statutes, see Philbrick, *Limits of Record Search and Therefor of Notice*, 93 U. PA. L. REV 125, 307-440 (1944) [article in 3 parts] [hereinafter *Philbrick*].

150. 4 AMERICAN LAW OF PROPERTY § 17.22, at 597-98 (Casner ed. 1952) (suggesting that even though the subsequent purchaser may be without notice he fails to meet the requirement of recording first under a notice-race statute). According to Professor Philbrick a purchaser who purchases after a claim is recorded (even after a deed out from the grantor) can never satisfy the requirement of recording first in a notice-race jurisdiction. *Philbrick*, *supra* note 149, at 391. Professors Dukeminier and Krier seem to question whether recording outside the chain of title is "recording" within the meaning of a recording statute. J. DUKEMINIER & J. KRIER, PROPERTY 734 (2d ed. 1988). In *Sabo v. Horvath*, 559 P.2d 1038 (Alaska 1976), a deed was recorded before a patent from the United States was issued to the grantor. In holding that the subsequent grantee was without notice of the prior recording and recorded first under Alaska's notice-race statute, the court remarked:

> Because we want to promote simplicity and certainty in title transactions, we choose to follow the majority rule and hold that the [first] deed, recorded outside the chain of title, does not give constructive notice to the [second grantee] and is not duly recorded under the Alaskan Recording Act. Since [the second grantee's] interest is the first duly recorded interest . . . [second grantee] must prevail.

559 P.2d at 1044.

Thus, even under a notice-race statute a court can conclude that a recording outside the chain of title is not a recording within the meaning of the statute.

151. After the survey period, the Indiana supreme court granted transfer. Szakaly v. Smith, 544 N.E.2d 490 (Ind. 1989). In a thoughtful opinion by Justice Dickson, the court observed that since the servient estate had been reconveyed to Isabell Arvin and she was still the owner in 1965, when the deed to the dominant estate was recorded, subsequent purchasers taking from her were charged with notice of the easement, as the deed containing the easement would have been discovered in searching the grantor index under the name of Isabell Arvin. Thus, there was no need for the court of appeals to resort to the hypothesis that under Hazlett v. Sinclar, 76 Ind. 288 (1881) the Smiths were charged with constructive notice of all recorded deeds of their remote grantors. *See* discussion notes 142-47 *supra* and accompanying text. In fact, the supreme court rejected this interpretation of the *Hazlett* opinion: ". . . Hazlett does not establish that a grantor is charged with constructive knowledge of conveyances from a remote grantor that are outside of his chair of title. In light of *Rogers* and *Residence of Green Springs*

V. Vendor and Purchaser: Implied Warranty of Habitability Extended to Non-builder Developer of Land

Traditionally, the purchaser of property was subject to the doctrine of *caveat emptor*.[152] In 1972, Indiana recognized that a purchaser of a new home from a builder/vendor was entitled to rely upon an implied warranty of habitability.[153] By 1980 a substantial majority of jurisdictions had come to recognize an implied warranty of habitability in the sale of a new home by a builder/vendor.[154]

In a number of jurisdictions, the warranty extends only to the first purchaser of the new home from the builder/vendor,[155] but in several jurisdictions, including Indiana, the builder/vendor's warranty has been extended to second or subsequent purchasers.[156] Similarly, the scope of the warranty of quality by the builder/vendor has been extended in many states beyond defects in the structure to defects in the land.[157] In states which have rejected the requirement of privity of estate for an action based on breach of the implied warranty of habitability, and which hold the scope of the warranty extends to defects in the land as well as the structure, the next logical step would be to extend the implied warranty to a developer, who knowing of a defect in the land making it unsuitable for homebuilding, sells the land to the builder-vendee.[158] Just such a situation arose in *Jordan v. Talaga*.[159]

Valley Subdivision, we view the language in *Hazlett* as limited by the chain of title requirement." 544 N.E.2d at 492. The supreme court opinion eliminates the concerns expressed by this reviewer with regard to the court of appeals opinion and clarifies several areas of the law pertaining to title searches.

152. Haskell, *The Case For an Implied Warranty of Quality in Sales of Real Property*, 53 Geo. L.J. 633 (1965).

153. Theis v. Heuer, 264 Ind. 1, 280 N.E.2d 300 (1972).

154. Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 Real Est. L.J. 291, 302 (1980). A table of states and major court decisions at the end of the article indicates that by 1980 thirty-six (36) states and the District of Columbia had recognized an implied warranty of habitability in the sale of new homes by a builder/vendor, and of the remaining jurisdictions most had simply not addressed the issue. Only three states had directly or indirectly rejected an implied warranty of habitability in the sale of a new home. *Id.* at 303-06.

155. *See, e.g.*, Oliver v. City Builders, Inc., 303 So. 2d 466 (Miss. 1974); Brown v. Fowler, 279 N.W.2d 907 (S.D. 1979).

156. *See* Barnes v. Mac Brown & Co., 264 Ind. 227, 342 N.E.2d 619. *See also* Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 441 N.E.2d 324 (1982).

157. *See, e.g.*, Hessen v. Walmsley Constr. Co. 422 So. 2d 943 (Fla. Dist. Ct. App. 1982); Lehmann v. Arnold, 137 Ill. App. 3d 412, 484 N.E.2d 473 (appeal denied) (1985); Banville v. Huckins, 407 A.2d 294 (Me. 1979); ABC Builders Inc. v. Phillips, 632 P.2d 925 (Wyo. 1981).

158. A few decisions have held the developer liable to the subsequent purchaser

In *Jordan*, the homeowners, Thomas and Rebecca Talaga, brought suit against Daniel Jordan and Allie Baker, the developers of Sandridge Estates, a subdivision in Schererville, Indiana, for property damage caused by water and drainage problems under alternative theories of negligence and breach of implied warranty of habitability. The jury returned a general verdict in favor of the Talagas.[160]

The developers platted, subdivided, and improved Sandridge Estates for the purpose of facilitating the building of homes. They rough graded the lots, put in sanitary sewers, storm sewers and streets.[161] Although a natural watercourse ran along the border of the lot eventually purchased by the Talagas, the developers and an engineer employed by them concluded that enlarging an existing swale on the edge of the Talagas' lot would adequately handle the drainage problem and direct the flow of water into the street's storm sewers. A ten foot drainage easement, the only easement in the subdivision, was provided for in the plat to accommodate the swale.[162] In June 1975, the lot in question was sold by the developers to Bruce Piper of Piper Enterprises, Inc., who built a tri-level home on the lot and sold it to the Talagas for $42,000. Piper was aware of the drainage easement but did not know that the watercourse periodically swelled into a stream and did not experience any water problems during construction of the house. In February, 1976, the Talagas experienced water problems described by Piper as "Bad." Despite repeated efforts to correct the situation, the flooding problem continued.[163] A civil engineer testified that the water flowed from a pond on land owned by Britton over the Talagas' lot and a reasonable prudent developer would not have allowed a house to be built on such a lot.[164]

On appeal, the developers raised nine issues, seven of which were addressed by the court.[165] The first issue raised was whether the Talagas

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from the builder-vendor for defects in the land. *See, e.g.*, Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969); Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102(1975); Rusch v. Lincoln-Devore Testing Laboratory, Inc., 698 P.2d 832 (Colo. Ct. App. 1984).

159. 532 N.E.2d 1174 (Ind. Ct. App. 1989).

160. *Id.* at 1177.

161. *Id.* at 1178.

162. *Id.* The evidence was conflicting as to whether or not the swale was ever enlarged. *Id.*

163. *Id.* at 1178-79. The extent of the flooding problem and efforts to correct it are set forth in considerable detail throughout the opinion.

164. *Id.* at 1179.

165. Two issues pertaining to negligence were rendered moot when the court determined economic damages could not be recovered under a negligence theory. *Id.* at 1177. Several of the issues addressed by the court are not discussed in this review.

could recover economic damages under a negligence theory. After observing that the theory of negligence was designed to protect interests related to safety or freedom from harm, the court concluded that where there has been no accident and no physical damage, economic interests are not entitled to be protected against mere negligence: "to recover in negligence there must be a showing of harm above and beyond disappointed expectations."[166] Having said this, however, the court then determined that recovery could be allowed under an implied warranty of habitability theory.[167]

The court next addressed the question of "[w]hether a *professional developer*, who *improves land* for the *express purpose* of *residential homebuilding* with *knowledge but without disclosure* of a *latent defect* in the real estate that renders the land *unsuitable* for the purpose of residential homebuilding, breaches an implied warranty of habitability."[168]

The court observed that this was a question of first impression in Indiana, but noted that the neighboring state of Illinois had developed a line of cases addressing this issue. From an examination of these decisions, the court determined that although Illinois has held a builder/vendor liable for defects in the land as well as in the construction of the building,[169] it has refused to extend the implied warranty of habitability beyond the builder of a new home to one who sells the land to the builder.[170] The Illinois court reasoned that the subsequent purchaser of a home does not rely upon the expertise of the seller of the

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166. *Id.* at 1181 (quoting Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 411 N.E.2d 324 (1982)).

167. *Id.* at 1182.

168. *Id.* at 1182 (emphasis added).

169. *Id.* at 1183. In *Briarcliffe West Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 118 Ill. App. 3d 163, 454 N.E.2d 363 (1983), the court held that defects in common land could affect the habitability of townhouses. The court concluded that there is no real distinction between defects in the building and defects in the land because in either case the purchaser must rely upon the expertise of the builder-vendor.

170. 532 N.E.2d 1174 at 1183-84. In *Lehmann v. Arnold*, 137 Ill. App. 3d 412, 484 N.E.2d 473 (appeal denied) (1985), under a similar factual situation, the Illinois court refused to extend the implied warranty of habitability to the developer who sold the unimproved land subject to periodic flooding to the builder/vendor. The court relied in part on an earlier Illinois appellate decision, *Kramp v. Showcase Builders*, 97 Ill. App. 3d 17, 422 N.E.2d 958 (1981), which dismissed a suit against the non-builder developer of the subdivision (soil conditions were inadequate for installation and operation of their septic systems). While a subsequent Illinois supreme court decision, *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982), extended the warranty to allow subsequent purchasers of the home to recover against the builder/vendor for latent defects, the *Lehmann* court did not believe the *Redarowicz* decision,doing away with the privity of estate requirement, extended the class of defendants beyond the builder/vendor.

land, but instead relies upon the skill of the builder to insure that the home built on the property will be habitable.[171] While impressed with the rationale of the Illinois decisions, the Indiana Court of Appeals concluded that the application of the doctrine of *caveat emptor* would work "a manifest injustice" in this case.[172] The developers had done more than sell raw land. They had improved the land for development of a subdivision. They were aware of the water problem and were in the best position to leave the lot undeveloped.[173] To apply the doctrine of *caveat emptor* would vest "unscrupulous developers . . . with impunity to develop marginal and unsuitable land." [174] Thus the court of appeals affirmed the verdict upon the theory that a developer who improves land for the express purpose of residential homebuilding with knowledge of a latent defect in the real estate which renders it unsuitable for the purpose of residential homebuilding breaches an implied warranty of habitability.[175]

The developers next argued that the buyers had failed to give them timely notice and a reasonable opportunity to cure the defect. The court agreed that, before a purchaser can recover for breach of an implied warranty of habitability, he must at least inform the vendor of the problem and give him an opportunity to correct it, but the court determined that in this case the Talagas had informed Jordan immediately after the problem revealed itself.[176] Likewise, the Talagas appealed to the town of Schererville regarding the problem at a time when Baker was an official of the town. [177]

The developers also claimed that the award of $74,000 damages was excessive. Since the Talagas had paid only $42,500 for the house, the jury's award was based on the market value at the time of trial and not the purchase price. The court observed that:

> [T]he measure of damages appropriate for recovery under an implied warranty of habitability should be analogous to the measure of damages recoverable under an implied warranty of merchantability, that is the difference between the value as warranted less the value at the time of acceptance plus incidental and consequential damages. [178]

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171. 532 N.E.2d at 1184 (quoting *Lehmann*, 484 N.E.2d at 477).

172. 532 N.E.2d at 1184.

173. *Id.* at 1185.

174. *Id.* at 1186.

175. *Id.* at 1186.

176. In *Wagner Constr. Co. v Noonan*, 403 N.E.2d 1144 (Ind. Ct. App. 1980), the Indiana court of appeals held that the purchaser must inform the vendor of the problem and give him a reasonable opportunity to correct it. *Id.* at 1150.

177. *Jordan*, 532 N.E.2d at 1186-87.

178. *Id.* at 1187.

While the instruction to the jury set forth an inappropriate tort theory of damages,[179] the error had not been preserved because the developers failed to object to the instruction.[180] The court also concluded that an award of prejudgment interest was appropriate because the deprivation of one's home is similar to the deprivation of the use of money.[181]

This case should not be read too broadly. It does not suggest that a seller of unimproved land warrants that it is fit for any intended use by the purchaser absent misrepresentation or fraud. The case appears to limit the implied warranty to situations where a developer has improved the land for residential homebuilding and is aware of a latent defect which renders the land unsuitable for such purpose.[182]

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179. The instruction to the jury with regard to damages stated:
Where real property is destroyed or the enjoyment of the use of said property significantly impaired, the measure of damages is the difference in the fair market value of the real estate before and after the destruction or damage. The measure of damages for nonpermanent injury to real estate equals the cost of restoration. *Id.* at 1187.

180. *Id.* at 1188.

181. *Id.* at 1187 (citing Fort Wayne Nat'l Bank v. Scher, 419 N.E.2d 1308 (Ind. Ct. App. 1981)).

182. 532 N.E.2d at 1184-85. The court noted that in *Witty v. Schramm*, 62 Ill. App. 3d 185, 379 N.E.2d 333 (1978), the developers of the unimproved lot were not charged with knowledge of the defective condition (excessive subsurface water). The court concluded that: "Apparently, special knowledge of the defect would have imposed a duty upon the developer to repair or correct." 532 N.E.2d at 1185. Likewise, the court found a similar lack of knowledge in *Cook v. Salishan Properties, Inc.*, 279 Or. 333, 569 P.2d 1033 (1977), where the court refused to impose an implied warranty of habitability upon the lessor/developers of unimproved seaside lots. Finally, the court suggested that knowledge of the conditions of the land was a factor in imposing an implied warranty of habitability upon the seller of unimproved land in *Rusch v. Lincoln-Devore Testing Laboratory, Inc.*, 698 P.2d 832 (Colo. App. 1984) (unimproved lot on the site of a manmade fill).