Recent Developments in Property Law

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I. ADVERSE POSSESSION

A. Background

To defeat the title of an owner of record, an adverse claimant's possession must be actual, visible, notorious, exclusive, under a claim of ownership, hostile to the true owner, and continuous for the ten-year statutory period.[1] Additionally, Indiana Code section 32-1-20-1 requires that the adverse claimant pay all taxes and special assessments on the land during the statutory period of his adverse possession.[2]

B. Hostile and Under Claim of Right

In *Estate of Mark v. H.H. Smith Co.*,[3] two brothers, Jeffrey and Martin Mark, formed a partnership, H.H. Smith Company, to sell barber and beauty shop equipment. In 1956, Martin purchased the real estate at issue. The same year, H.H. Smith moved into the building located on the property and Jeffrey, the sole acting partner, had the locks changed. Martin was not given a key. Jeffrey has been in possession of the building since 1957 and has made significant improvements. Title to the real estate was still in Martin's name at the time of his death in 1983. H.H. Smith and Jeffrey Mark brought this action to determine the interest of Martin Mark's estate in the property and the improvements. After a trial, the court ruled that the estate had

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1. Estate of Mark v. H.H. Smith Co., 547 N.E.2d 796, 799 (Ind. 1989); Smith v. Brown, 126 Ind. App. 545, 552, 134 N.E.2d 823, 826 (1956). The Indiana courts frequently vary the wording slightly in describing the elements of adverse possession. *See, e.g.*, McCarty v. Sheets, 423 N.E.2d 297, 300 (Ind. 1981) (open, continuous, exclusive, adverse, and notorious); Worthley v. Burbank, 146 Ind. 534, 539, 45 N.E. 779, 781 (1897) (hostile and under claim of right, actual, open and notorious, exclusive and continuous).

2. IND. CODE § 32-1-20-1 (1988). In boundary line disputes, however, Indiana courts have held that the statutory requirement that the claimant pay taxes is inapplicable because both parties believe they are paying taxes on the disputed portion. *See, e.g.*, Echerling v. Kalvatis, 235 Ind. 141, 146, 126 N.E.2d 573, 575 (1955); Kline v. Kramer, 179 Ind. App. 592, 386 N.E.2d 982 (1979).

3. 547 N.E.2d 796 (Ind. 1989).

no interest in the property and that Jeffrey had acquired title by adverse possession.[4] The court of appeals affirmed the judgment, holding that the trial court's findings of fact were sufficient to establish that Jeffrey's possession was hostile and exclusive.[5]

On petition to transfer, the Indiana Supreme Court observed that record title is the highest evidence of ownership, and that mere possession, regardless of the length of time, will not defeat the title.[6] In order for possession to defeat record title, a plaintiff must prove every element of adverse possession.[7]

In discussing the requirement that adverse possession must be hostile and under a claim of ownership the court remarked:

> Possession must be accompanied by a claim of ownership adverse to the true owner. It is not enough that the occupier feels or thinks he is the owner or even declares he is the owner. *His claim of ownership must be based on some ground justifying that conclusion* and it must be communicated to the true owner that the occupier makes such a claim that is adverse or hostile to his ownership.[8]

The court also indicated that the possession must be of such a nature that a reasonable owner would be aware that a claim is being made against his title. "It must be proven that adverse possession, that is, possession with a claim of ownership exclusive of everyone including the true owner is open and notorious to the extent that the true owner is, or should be aware of it."[9] When the entry upon the

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4. *Id.* at 797-98.

5. *Id.* at 799.

6. *Id.* at 800. Indiana courts have often remarked that "record title is the highest form of ownership," whereas "mere possession is the lowest evidence of ownership." McCarty v. Sheets, 423 N.E.2d 297, 300 (Ind. 1981); Carter v. Malone, 545 N.E.2d 5, 6 (Ind. Ct. App. 1989); Philbin v. Carr, 75 Ind. App. 560, 582, 129 N.E. 19, 27 (1920).

7. *Estate of Mark*, 547 N.E.2d at 799-800.

8. *Id.* at 800 (emphasis added). This language appears to require that the claimant's possession be based on a good faith belief that he or she is the owner of the land. Most Indiana decisions have not inquired as to the claimant's state of mind and several decisions have concluded that the terms "under claim of right" or "under claim of ownership" mean only that the possession must be hostile or adverse and do not create an additional element of adverse possession. Poole v. Corwin, 447 N.E.2d 1150, 1152 n.1 (Ind. Ct. App. 1983); Kline v. Kramer, 179 Ind. App. 592, 599, 386 N.E.2d 982, 988 (1979). The few cases addressing the issue of good faith are not in agreement. *Compare* Pennington v. Flock, 93 Ind. 378, 382-83 (1883) (in making his entry upon the land the claimant must act bona fide, believing that the land is his and that he has title) *with* May v. Dobbins, 166 Ind. 331, 333, 77 N.E. 353, 354 (1905) (title by adverse possession is predicated upon the statute of limitations without reference to the good or bad faith of the adverse claimant; good faith may accord with good morals but it is not the law).

9. *Estate of Mark*, 547 N.E.2d at 800.

land is permissive and subordinate to the title of the record owner, the statutory period does not begin to run until the occupant clearly and unequivocally disclaims and disavows the title of the true owner.[10]

The supreme court disagreed with the court of appeals and found that the trial court's findings of fact were not sufficient to establish that Jeffrey's possession was hostile and exclusive. Instead, the court found that the findings of the trial court were both contradictory and in conflict with the evidence.[11] In Finding 4, the trial court found that the insurance, taxes, and depreciation on the building were taken as expenses and deductions on the partnership tax returns, while in Findings 13 and 14 the trial court indicated that Jeffrey had insured the building since 1956 and had paid all taxes since 1970.[12] The trial court's Finding 10 stated that the partnership tax returns reflected a 100% ownership of H.H. Smith by Jeffrey.[13] However, the returns actually reflected that Martin and Jeffrey were still partners, but that Jeffrey was entitled to 100% of the profits.[14] Finding 12 stated that after the locks were changed, Martin never possessed a key and "thereby was denied access to the building."[15] In the court's opinion this conclusion was unwarranted.[16] The evidence simply indicated that the locks were changed because there was a problem with the locks, and that after they were changed Jeffrey did not give Martin a key. No evidence suggested that the locks were changed with an intent to exclude Martin or that Jeffrey's occupancy had changed from permissive to adverse.[17]

Furthermore, the supreme court found no evidence to support the conclusion in Finding 16 that Jeffrey considered himself the owner of the building. Instead, Jeffrey testified that he never told his brother that he was the owner of the property or that he was making a claim to the title.[18] Jeffrey admitted that his possession in 1956 was permissive,

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10. *Id.* (citing Poole v. Corwin, 447 N.E.2d 1150 (Ind. Ct. App. 1983)).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 800-01. Although the court did not believe the fact that Jeffrey was entitled to 100% of the profits prevented the existence of a partnership, numerous cases have held that the sharing of profits and losses is an essential element of a partnership. *E.g.*, Watson v. Watson, 331 Ind. 893, 108 N.E.2d 893 (1952) (a partnership is a community of interests in both the property and profits of a common business); Kopka v. Yockey, 76 Ind. App. 218, 131 N.E. 828 (1921) (the ultimate test of a partnership is the co-ownership of the profits of a business); Breinig v. Sparrow, 39 Ind. App. 455, 80 N.E. 37 (1907) (a partnership is the sharing, as common owners, of the profits of a business).
15. *Estate of Mark*, 547 N.E.2d at 801.
16. *Id.*
17. *Id.*
18. *Id.*

and he attempted to introduce evidence that he was purchasing the building from Martin under an oral contract; however, the trial court excluded this testimony under the Dead Man's Statute.[19]

The opinion of the court of appeals was vacated, and the judgment of the trial court reversed with directions to enter judgment for the estate.[20]

C. Exclusive

In *Marathon Petroleum Co. v. Colonial Motel Properties, Inc.*,[21] the Colonial Corporation conveyed a .867 acre tract of land to Marathon Petroleum Company's predecessor, the Ohio Oil Company. Six years later, in 1968, the Colonial Corporation conveyed an adjacent 7.746 acre tract to the Perrys, who then operated a motel on the property. In 1977, the Perrys transferred the title to the property to their newly formed corporation, United Family Properties, Inc., and in 1986, the Perrys formed Colonial Motel Properties, Inc. (Colonial), which acquired the title to the property from United.[22]

At the time the Perrys purchased the land, they decided to expand their motel business by appealing to trailer truck drivers. To accommodate the trucks, the Perrys constructed a parking lot on the southern portion of their property, by filling a .27 acre portion of Marathon's property (the disputed area) with rock and dirt. A sign, visible from the Marathon property, read: "Free Parking for Colonial Inn Motel Guests Only. All Others $20.00 per night. Violators impounded at owner's expense! All vehicles must register."[23]

The Perrys employed a security guard to protect the trucks and to insure that all trucks were properly registered. On occasion, truck drivers using a nearby motel would park in the lot, and when it was discovered that they were not registered they were asked to leave.[24]

In April 1986, the Perry's attorney wrote a letter to Marathon stating that Colonial was not claiming title to the disputed area and wished to continue the use of the land with Marathon's permission.[25] In September 1987, Marathon initiated an action to quiet title to the disputed area and for ejectment. The court denied Marathon's motions

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19. *Id.*
20. *Id.* at 802.
21. 550 N.E.2d 778 (Ind. Ct. App. 1990).
22. *Id.* at 780.
23. *Id.*
24. *Id.*
25. *Id.*

for a summary judgment and directed verdict.[26] The jury found in favor of Colonial and Marathon appealed.[27]

On appeal, Marathon argued that its motion for summary judgment should have been granted because the use of the disputed area by Colonial customers was insufficient as a matter of law to establish title by adverse possession. As authority for its position, Marathon cited *Greenco, Inc. v. May*.[28] In *Greenco*, customers of May's restaurant, located adjacent to the Greenco parking lot, and members of the general public had used the lot for parking for more than thirty years. May leveled and graded the lot but did not claim an exclusive right for her customers to park in the lot. The court in *Greenco* found that routine and regular use by members of the general public cannot create a prescriptive easement.[29] In distinguishing *Greenco*, the court of appeals noted that neither May nor the prior owners of the restaurant had ever claimed an exclusive right to use the lot, and that Greenco customers and members of the general public also used the lot.[30] On the other hand, Colonial claimed an exclusive right to use the lot and posted signs indicating the parking lot was for use by its customers only.[31] In addition, it employed a security guard to ensure that all trucks using the lot were registered. These acts of ownership clearly distinguished this case from *Greenco*.[32] Thus, the trial court properly refused to give Marathon's tendered instruction that "[m]embers of the general public cannot, by routine and regular use, confer adverse possession rights on Colonial."[33]

Marathon also claimed that the standard of proof required to demonstrate title by adverse possession is higher when a grantor or one in privity with a grantor claims title by adverse possession against a grantee. The court acknowledged the general rule that when a grantor or one in privity with a grantor remains in possession of land, the law will presume it is with the grantee's permission.[34] But, the court noted that in this case the deeds from the Colonial Corporation did not convey the same tract of land to Marathon and the Perrys. In

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26. *Id.*
27. *Id.*
28. *Id.* at 782 (citing Greenco Inc. v. May, 506 N.E.2d 42 (Ind. Ct. App. 1987)).
29. Although *Greenco* involved a prescriptive easement, the court found that the elements required to establish a prescriptive easement are essentially the same as those needed to establish adverse possession. *Marathon*, 550 N.E.2d at 782 n.2.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 784.
34. *Id.* at 782-83.

fact, the Perrys' deed explicitly excluded from the conveyance the .867 acre tract previously conveyed to Marathon.[35]

Finally, Marathon contended that the letter written by the Perrys' attorney, admitting that the use of the property was with Marathon's permission, estopped the Perrys' adverse possession claim. In rejecting this argument, the court noted that once the Perrys had satisfied the elements of adverse possession for the statutory period, title to the disputed tract vested in them by operation of law, and any subsequent admission or offer to purchase the land from the record owner could not divest them of the title.[36]

The court concluded that Colonial had presented sufficient evidence of adverse use for the statutory period to submit the case to the jury and that the trial court had properly denied Marathon's motions for summary judgment and for a directed verdict.[37]

D. Periodic or Sporadic Acts of Ownership: Requirement of Established Use Line

In *Beaver v. Vandall*,[38] William and Darlene Beaver owned a five-acre tract of land. In February 1974, they sold a house and a lot to John and Elaine Vandall (the Vandalls). After the sale, the Vandalls asked William Beaver to clear the strip along the northern boundary of their lot. Beaver claimed he cleared the trees and brush some distance beyond the northern boundary of the lot to make the boundary line clear to both parties. The Vandalls contended that by clearing the area beyond the boundary line in the deed he indicated an intent for them to have the entire area cleared.[39]

John Vandall leveled and seeded the cleared area. He also replaced a propane gas tank located on the disputed area and built a fence around it. Later, after natural gas service was provided to the house, the tank was removed, and in the summer of 1977, Vandall built a small utility shed on the site where the tank had stood. The parties did not consider the propane gas tank nor the utility shed to be permanent improvements. Evidence existed that at one time, a fence

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35. *Id.*

36. *Id.* at 783 (citing Kline v. Kramer, 179 Ind. App. 592, 597, 386 N.E.2d 982, 987 (1979)). There was conflicting evidence as to whether the attorney in fact had either actual or implied authority to write the letter, but the court found this issue was not dispositive because once title had vested in the occupant at the conclusion of the statutory period for adverse possession, title could not be lost by an admission or an offer to buy the property. *Marathon*, 550 N.E.2d at 783 n.4.

37. *Id.* at 783-84.

38. 547 N.E.2d 802 (Ind. 1989).

39. *Id.* at 802-03.

on the Vandalls' property encroached upon the disputed area but it did not extend to or from the northern boundary of the disputed area.[40]

The Beavers testified that between 1979 and 1981, they noticed the Vandalls were encroaching further and further onto their property. A survey conducted by the Beavers located the northern boundary of the Vandalls' lot, and stakes were placed evidencing the boundaries. The stakes were subsequently removed. In 1985, the Beavers brought an action to quiet title to the disputed area.[41] The trial court found that the Vandalls had acquired title to the disputed strip by adverse possession.[42] The court of appeals affirmed.[43] However, in a dissenting opinion, Judge Hoffman concluded that plowing, grading, seeding, mowing, fertilizing, planting a small tree, and placing a water meter in the disputed area was not sufficient to establish adverse possession.[44] No fence was ever built or maintained on the disputed area, no permanent structures were erected, and no temporary structure existed on the disputed area for the required ten-year period.[45]

The Indiana Supreme Court granted transfer and indicated its agreement with Judge Hoffman's dissent.[46] The court cited *McCarty v. Sheets*[47] and *Greene v. Jones*[48] as authority for the position that casual maintenance activities in a residential area, standing alone, are insufficient to support a claim of adverse possession.

The court was concerned that sporadic and casual acts of possession might fail to inform the record owner that a claim was being made: "Where there has been no actual notice, the possession must have been so notorious as to warrant the inference that the owner ought to have known that a stranger was asserting dominion over his land."[49] The Beavers admitted that in 1979 they became aware that an adverse claim was being made, but that because this action was brought in

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40. *Id.* at 803.
41. *Id.*
42. *Id.* at 802.
43. Beaver v. Vandall, 532 N.E.2d 627 (Ind. Ct. App. 1988) (unpublished opinion).
44. *Beaver*, 547 N.E.2d at 803.
45. *Id.*
46. *Id.*
47. 423 N.E.2d 297 (Ind. 1981). In *McCarty*, a unanimous court concluded that mowing, weeding, and fertilizing a strip of land was not sufficient to establish title by adverse possession and that only the area actually encroached upon by a garage had been acquired by adverse possession. *Id.* at 300. To adversely establish possession, a plaintiff must show "palpable and continuing" acts of ownership claimed for the statutory period. *Id.*
48. 490 N.E.2d 776 (Ind. Ct. App. 1986). In *Greene*, the court of appeals held that casual maintenance involving maintenance tasks are not sufficient to establish title by adverse possession. *Id.* at 779.
49. *Beaver*, 547 N.E.2d at 804 (citing Philbin v. Carr, 75 Ind. App. 560, 584-85, 129 N.E. 19, 28 (1920)).

1985, it was well within the statutory ten-year period for the recovery of possession of property. The case was remanded with directions that the trial court enter judgment for the Beavers.[50]

The question of sporadic acts of ownership was also presented in *Carter v. Malone*.[51] In 1971, the Malones built a garage that encroached 1.2 feet onto an adjoining vacant lot. In 1981, the Carters purchased the adjoining vacant lot. Before surveying their lot in 1984, the Carters offered to purchase a four foot strip of the disputed area from the Malones. In refusing the Carters' offer to purchase, Edward Malone stated, "No, because we own out to the hedges and we have been taking care of 'em."[52] The subsequent survey revealed the encroachment of the Malones' garage and that the Malones' house was less than four feet from their property line.[53]

In 1987, the Malones filed a complaint for adverse possession of a seven-foot-wide strip of property on the Carters' lot.[54] The evidence showed a row of trees and bushes existed on the Carters' lot and that since 1970 the Malones had trimmed the trees and hedges and mowed the grass around the trees. The trial court awarded the Malones title to the mid-line of the tree and hedge row, concluding that there were sufficient acts of adverse possession in the disputed area since 1970.[55] The trial court also indicated that the plaintiffs' claim was substantiated by the Carters' offer to purchase a portion of the disputed area and by the encroachment of the Malones' garage.[56]

On appeal the court observed that the adverse possessor's claim must be limited to that portion over which he exercises palpable and continuing acts of ownership.[57] The court relied on *McCarty*. In *McCarty*, the court remarked that "where the quantity of land involved is small, the rule as to the location of the line is exacting; possession to the line during all the (statutory) period must be definitely shown."[58]

Here, the court found that the activities in the disputed area were not sufficient to establish adverse possession:

> The Malones' claim to the strip of land was based on sporadic acts of maintenance and a verbal response to the Carters'

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50. *Id.* at 805.
51. 545 N.E.2d 5 (Ind. Ct. App. 1989).
52. *Id.* at 7.
53. *Id.* at 6-7.
54. *Id.* at 6.
55. *Id.*
56. *Id.*
57. *Id.*
58. *McCarty*, 423 N.E.2d at 300 (citing Baxter v. Girard Trust Co., 288 Pa 256, 260, 135 A. 620, 621 (1927)).

> mistaken offer to purchase. Periodic acts of yard-work and a verbal claim in response to a mistaken offer to purchase do not establish palpable, continuing or exacting acts of ownership sufficient to constitute adverse possession.[59]

The Malones argued that the row of trees and bushes established a possession or use line that supported their claim of open and continuous use of the disputed strip. The court acknowledged that a possession or a use line is a factor in determining adverse possession,[60] citing *Oswald v. Paston*.[61] In *Oswald*, a surveyor testified that he noticed a use line and that there was evidence that the adverse possessor had mowed, fertilized, and planted flowers and a tree in the disputed strip. In addition, in *Oswald* the adverse possessor had trucks drive onto the disputed area to deliver fill dirt, maintained a seawall in the disputed area, and ordered a worker for the record titleholder off the disputed land. The court in *Carter* went to some length to distinguish *Oswald*:

> In contrast, the Malones did not have a surveyor testify that a use or possession line existed. The row of trees and bushes grew wild, were noncontinuous and had gaps where people could walk back and forth. When the Carters cut down trees, planted grass, trimmed bushes, built a partial fence and cement stoop in the disputed area the Malones did not protest. [62]

The Indiana Supreme Court reversed the trial court and held that there was sufficient evidence of adverse possession of the area occupied by the garage, but that the trial court erred in awarding the Malones more land than was actually occupied by the garage.[63]

II. Concurrent Estates

In Indiana, a conveyance of real property to a husband and wife, without indication of a contrary intent, creates a tenancy by the entirety.[64] A tenancy by the entirety, unlike a joint tenancy or a tenancy in common, is owned by a husband and wife as one (*pur tout et non pur my*) and neither spouse has an individual interest in the property

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59. *Carter*, 545 N.E.2d at 7.
60. *Id.*
61. 509 N.E.2d 217, 220 (Ind. Ct. App. 1987).
62. *Carter*, 545 N.E.2d at 7.
63. *Id.*
64. *See* Dotson v. Faulkenburg, 186 Ind. 417, 116 N.E. 577 (1917); Arnold v. Arnold, 30 Ind. 305 (1868); Richards v. Richards, 60 Ind. App. 34, 110 N.E. 103 (1915).

that a creditor of only one of the spouses may attach.[65] In general, Indiana does not recognize tenancy by the entirety as to personalty,[66] but Indiana has made an exception with the proceeds from the sale of land held by the entirety.[67] During this survey period, two cases touched upon the nature of the tenancy by the entirety. In *In re Guardianship of Bramblett*,[68] the court held that the surviving spouse was entitled to the proceeds from the sale of entirety property sold by court order; and in *Rhodes v. Indiana National Bank*,[69] the court held that a creditor of the husband could reach one-half the rental income received from property held by the entirety.

Prior to enactment of the multiple-party account statute,[70] survivorship rights in joint bank accounts were complicated by the law of gifts. Often the circumstances suggested that the person placing the property into a joint account intended only to part with dominion and control of the property at death and failed to meet the requirement of present transfer necessary to establish an inter vivos gift.[71] Although this problem has been eliminated in multiple-party bank accounts by the statute, which creates a contractual right of survivorship, the problem may still arise in other types of jointly owned property. In *In re Estate of Langley*,[72] the Indiana Court of Appeals, using a contractual theory, found a right of survivorship in the contents of a jointly owned safe deposit box.

A. Proceeds From Sale of Entirety Property Sold Under Court Order in Guardianship Proceeding

In *In re Guardianship of Bramblett*,[73] James and Mary Bramblett owned real estate in tenancy by the entirety. In 1988, James's health began to fail and before he entered a nursing home in the spring of that year, James and Mary signed a listing agreement to sell their real

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65. *See* Patton v. Rankin, 68 Ind. 245 (1879); Mercer v. Coomler, 32 Ind. App. 533, 69 N.E. 202 (1903).

66. *See* Koehring v. Bowman, 194 Ind. 433, 142 N.E. 117 (1924); Schoon v. Van Diest Supply Co., 511 N.E.2d 12 (Ind. Ct. App. 1987).

67. *See* Whitlock v. Public Service Co., 239 Ind. 680, 159 N.E.2d 280 (1959), *reh'g denied*, 239 Ind. 694, 161 N.E.2d 169 (1959); Abshire v. State, 53 Ind. 64 (1876); Anuszkiewicz v. Anuszkiewicz, 172 Ind. App. 279, 360 N.E.2d 230 (1977).

68. 549 N.E.2d 56 (Ind. Ct. App. 1990).

69. 544 N.E.2d 179 (Ind. Ct. App. 1989).

70. IND. CODE §§ 32-4-1.5-1 to -15 (1988).

71. Poland, *1975 Indiana Survey of Trusts and Decedents' Estates*, 10 IND. L. REV. 392, 399-400 (1976).

72. 546 N.E.2d 1287 (Ind. Ct. App. 1989).

73. 549 N.E.2d 56 (Ind. Ct. App. 1990).

estate.[74] In May 1988, Mary was appointed guardian of the person and estate of James, and she petitioned the court for permission to complete the sale of the real estate. The court approved the sale and, upon the filing of a "Petition to Withhold and Disburse Funds" by Mary, the court directed that the proceeds of the sale be distributed to Mary in her individual capacity as the spouse of the ward, subject to monthly disbursements to the guardianship account for James's care and maintenance.[75] James died intestate one month later, survived by Mary and three children from a prior marriage. One of the children, Mark, was appointed administrator of the estate. Mary filed a guardian's final report and a petition to terminate the guardianship. The court approved the final accounting and terminated the guardianship *ex parte*.[76] No formal notice was given to Mark or the other children. On petition by the children to reconsider its order approving the final report, the court vacated its order and directed that the proceeds from the sale of the real estate be allocated one-half to the guardianship estate and one-half to Mary.[77] The court specifically held that the proceeds from the sale of the entirety property were not imprinted with the same right of survivorship as was the real estate itself.[78]

On appeal, the Indiana Court of Appeals observed that in *Whitlock v. Public Service Company of Indiana*,[79] the Indiana Supreme Court held that "Indiana law impresses the proceeds from property held by the entireties with the rights of survivorship, the same as the original property from which it came."[80] *Whitlock* indicated, however, that the proceeds will be considered held by the entirety

> only so long as the proceeds are intact and have not been divided or disbursed. Once the proceeds have lost their identity as a separate res held by the entireties, certainly the principles of tenancy by entireties can no longer apply, any more than they can apply to the real estate which has been sold or transferred.[81]

The children argued[82] that one-half of the proceeds should be

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74. *Id.* at 57.
75. *Id.* at 57-58.
76. *Id.* at 58.
77. *Id.*
78. *Id.*
79. 239 Ind. 680, 159 N.E.2d 280 (1959).
80. *Bramblett*, 549 N.E.2d at 59 (quoting *Whitlock*, 239 Ind. at 690, 159 N.E.2d at 285).
81. *Whitlock*, 239 Ind. at 691, 159 N.E.2d at 285.
82. The children cited Anuszkiewicz v. Anuszkiewicz, 172 Ind. App. 279, 360 N.E.2d

allocated to James's estate.[83] In reversing the trial court, the court held that the children were not entitled to one-half of the proceeds because Mary had kept the funds intact for the care and maintenance of James and herself.[84] Thus, Mary was entitled to all of the proceeds.[85]

B. Rental Income From Entirety Property: Creditors' Rights

In *Rhodes v. Indiana National Bank*,[86] Harold and Betty Rhodes owned rental property as tenants by the entirety. A judgment creditor of the husband sought to garnish his half of the rental income due both spouses from the tenancy by the entirety real estate. The trial court held that one-half of the rent could be attached for the individual debt of the husband.[87]

On appeal, the Rhodeses argued that the rent retained the characteristic of the entirety property and could not be attached by a creditor of only one of the spouses. The Court of Appeals, however, refused to extend the entirety exemption to rental income from the real property.[88] The court recognized:

> Estates by entireties do not exist as to personal property except when such property is directly derived from real estate held by that title, as crops produced by the cultivation of lands owned by the entireties or proceeds arising from the sale of property [i.e., real estate] so held.[89]

The court also noted that the recent decision of *Schoon v. Van Diest Supply Co.*,[90] held that proceeds from the sale of crops grown on entirety real estate were not protected from the claims of a creditor of one of the spouses.[91] In affirming the lower court, the *Rhodes* court concluded that profits derived from the ownership of entirety property are subject to the claims of a creditor of either spouse.[92]

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230 (1977), to support their position. In *Anuszkiewicz*, the husband deposited one-half of the proceeds from the sale of the entirety property into a joint account with his son. The court held that this action changed the character of the proceed from entirety property to personalty and that, at her husband's death, the wife was not entitled to the one-half of the proceeds in the joint account. *Id.* at 283, 360 N.E.2d at 233.

83. *Bramblett*, 549 N.E.2d at 59-60.
84. *Id.* at 60.
85. *Id.*
86. 544 N.E.2d 179 (Ind. Ct. App. 1989).
87. *Id.* at 180.
88. *Id.*
89. *Id.* (quoting Koehring v. Bowman, 194 Ind. 433, 437, 142 N.E. 117, 118 (1924)).
90. 511 N.E.2d 12 (Ind. Ct. App. 1987).
91. *Rhodes*, 544 N.E.2d at 180.
92. *Id.*

C. Joint Rental of Safe-Deposit Box: Right of Survivorship

In *In re Estate of Langley*,[93] Cecilia Highman, the surviving co-lessee of a safe deposit box sued the estate of the deceased co-lessee, Bessie Langley, to recover the contents of the box at the time of Langley's death. In 1974, Highman and Langley, who had been friends for nearly forty years, jointly rented a safe deposit box at a bank. Both parties signed a contract that contained the following language:

> [S]aid Safe and its contents during their joint lives shall be held and owned by them jointly and severally, and either of them without the other may have access to, and may surrender said Safe, and *upon the death of either*, the Safe, *its entire contents*, and all right of access thereto, *shall belong exclusively to the survivor or survivors*.[94]

Langley entered the box nineteen times before her death in 1986. She placed various items in the box including abstracts, deeds, and $7,500 in cash. Highman entered the box only twice during Langley's lifetime, once when the box was originally opened and once when she placed $2,500 in the box. Langley died on October 26, 1988, and Sherry Schafer, the personal representative of Langley's estate, obtained a restraining order against Highman, preventing her from removing the contents of the safe deposit box. Highman filed a motion to compel Schafer to surrender the funds, but the trial court held that Highman was entitled only to $2,500 and that the estate was entitled to the other items in the box.[95]

On appeal, Highman claimed the right to the contents of the box under a contractual theory, although prior Indiana decisions had used a gift theory to decide the right of a surviving co-lessee to the contents of a safe deposit box. Finding no Indiana decisions addressing a contractual theory of survivorship rights, the Indiana Court of Appeals turned to authority from other jurisdictions. The court observed that the majority of jurisdictions has held that a joint lease of a safe deposit box does not create a per se right of survivorship in the contents of the box unless the lease agreement contains specific language indicating joint tenancy or right of survivorship.[96] Here, the parties signed a lease agreement specifically stating that the safe and its entire contents shall

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93. 546 N.E.2d 1287 (Ind. Ct. App. 1989).

94. *Id.* at 1288 (emphasis added).

95. *Id.* at 1288-89.

96. *Id.* (citing Annotation, *Survivor's Rights to Contents of Safe-Deposit Box Leased or Used Jointly with Another*, 14 A.L.R.2D 948, 954 (1950)).

belong to the survivor. The court found that the agreement sufficiently established intent to create a joint tenancy with right of survivorship, and thus passed the contents of the safe to Highman at Langley's death.[97]

III. Covenants of Title

In *McClaskey v. Bumb & Mueller Farms, Inc.*,[98] the Hudsons conveyed a tract of land to McClaskey by warranty deed. The State of Indiana had acquired a 125-foot highway easement over the tract of land. Subsequently, as part of a project to make U.S. 41 a limited access highway, the State began proceedings to condemn the portion of McClaskey's real estate that abutted U.S. 41, excluding the easement. Upon discovery of the exclusion of the easement, McClaskey cross-claimed against the Hudsons for breach of their warranty of title in the deed. Both parties moved for summary judgment, and the trial court granted the Hudsons' motion.[99] McClaskey appealed.[100]

In an unusual argument, the Hudsons contended they had not breached their warranty of title because they had produced a "marketable record title" under the Indiana Marketable Title Act.[101] The Act provides as follows:

> Any person who has an unbroken chain of title of record to any interest in land for fifty [50] years or more shall be deemed to have a marketable record title to such interest as defined in section 8 [32-1-5-8], *subject only to the matters stated in section 2 [32-1-5-2] hereof.*[102]

Even a cursory glance at the interests exempted by Indiana Code section 32-1-5-2 from the operation of the Marketable Title Act indicates that a "marketable record title" is not the equivalent of a "marketable title" guaranteed by a warranty deed. The ability to trace an unbroken chain of title back to a title transaction at least fifty years old does

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97. *Langley*, 546 N.E.2d at 1290. One unanticipated problem that might arise from this decision is when a husband and wife place their separately owned property in a jointly owned safe deposit box. The individual property of each might be intended for inclusion in a by-pass or shelter trust but, under the ruling in this case, it would pass to the surviving spouse under the contract unless a different intent could be established.

98. 547 N.E.2d 302 (Ind. Ct. App. 1989).

99. *Id.* at 303.

100. *Id.*

101. *Id.* at 304 (citing Ind. Code §§ 32-1-5-1 to -10 (1988)).

102. Ind. Code § 32-1-5-1 (1988) (emphasis added).

not insure that the title is free and clear of all claims and interests.[103] In order to harmonize the Marketable Title Act with the warranties contained in the statutory form warranty deed,[104] the court concluded that "the Marketable Title Act relieves the covenants imposed by a warranty deed only to the extent that a claim or interest is extinguished by the Marketable Title Act."[105]

Finally, the Hudsons claimed that because U.S. 41 was in existence at the time of the conveyance, McClaskey had an obligation to make a reasonable inquiry concerning the extent of the easement before he purchased the property.[106] The court did not directly address the issue of inquiry notice, but instead observed that "McClaskey did not have actual knowledge of the easement and the existence of the easement was not disclosed in his abstract of title."[107] Even if McClaskey was charged with inquiry notice of the easement, Indiana courts have held that knowledge of an existing defect in the title at the time of purchase does not estop the grantee from suing under a covenant against encumbrances contained in the warranty deed.[108]

The court of appeals indicated that the transferor under a warranty deed guarantees that the property is "free from all encumbrances and that he will warrant and defend the title to the same against all lawful claims."[109] An existing highway easement is a breach of the covenant against encumbrances.[110] Thus, the court reversed the trial court with instructions to enter summary judgment for McClaskey.[111]

IV. Damages to Real Estate

In *Neal v. Bullock*,[112] Edward Bullock owned two mature apple trees in his backyard, which provided shade and fruit, and which were aesthetically pleasing to him. The trees died after Bullock's neighbor, Eddie Neal, burned some trash in his own backyard. Bullock brought suit in a small claims court for the replacement value of the trees.

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103. Arguably, under the Marketable Title Act an easement of record, even though recorded prior to the root of title, would not be destroyed.

104. Ind. Code § 32-1-2-12 (1988).

105. *McClaskey*, 547 N.E.2d at 304.

106. *Id.*

107. *Id.* at 304-05.

108. *E.g.*, Watts v. Fletcher, 107 Ind. 391, 8 N.E. 111 (1886); Burk v. Hill, 48 Ind. 52 (1874); Whittern v. Kirck, 31 Ind. App. 577, 68 N.E. 694 (1903); Teague v. Whaley, 20 Ind. App. 26, 50 N.E. 41 (1898).

109. *McClaskey*, 547 N.E.2d at 304. The court took this language from the statutory form warranty deed contained in Ind. Code § 32-1-2-12.

110. *McClaskey*, 547 N.E.2d at 304 (citing Burke v. Hill, 48 Ind. 52 (1874)).

111. *Id.* at 305.

112. 538 N.E.2d 308 (Ind. Ct. App. 1989).

After a hearing, in which evidence was introduced as to the cost of replacing the trees, the court awarded Bullock $3000, the jurisdictional limit of the small claims court at that time, plus costs.[113]

On appeal, Neal argued that the proper measure of damages was the difference between the market value of the real estate before and after the injury, not the replacement value of the trees. The court of appeals agreed that after trees are planted, they are part of the real estate and are not personal.[114] However, the court observed that in *General Outdoor Advertising Co. v. La Salle Realty Corp.*,[115] the court of appeals held that the measure of damages for an injury to real estate depends upon a determination of whether the injury is permanent or temporary.[116] The court in *Neal* stated that "[a] permanent injury is one in which the cost of restoration of the property to its pre-injury condition exceeds the market value of the real estate prior to injury. A temporary injury is one which is not permanent."[117] The court reasoned that because the owner in this case sought to recover the replacement value of the trees, the owner did not consider the damages permanent.[118] The burden of establishing that the damage is permanent is on the party seeking to invoke a market value formulation of damages.[119] Because Neal did not introduce any evidence of market values, he failed to carry his burden of proof; therefore, the court affirmed the trial court's judgment for Bullock.[120]

V. Landlord and Tenant

A. Percentage Rental Agreement

In *Casa D'Angelo, Inc. v. A & R Realty Co.*,[121] Casa D'Angelo, Inc., an Italian restaurant business, sublet a building owned by A & R Realty Company (A & R) in Fort Wayne, Indiana. The sublease provided for a base rent of $825 per month and an additional rent in the amount of five percent of the gross sales over $200,000 a year. In 1978, Casa D'Angelo agreed to lease the building directly from A & R. The new lease was from July 5, 1978 to November 1, 1982, with

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113. *Id.* at 308-09.
114. *Id.* at 309.
115. 141 Ind. App. 247, 218 N.E.2d 141 (1966).
116. *Neal*, 538 N.E.2d at 309.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. 553 N.E.2d 515 (Ind. Ct. App. 1990).

an option to renew for an additional five-year term. Although the owners of Casa D'Angelo had no experience in the restaurant business, they exceeded $200,000 in gross sales every year from 1978 through 1986 and paid approximately $161,000 in percentage rent to A & R.[122]

In 1982, Casa D'Angelo opened a second restaurant in Fort Wayne. In 1985, the owners of Casa D'Angelo agreed to take over a third restaurant operated by the son of one of the partners of A & R. This restaurant, located within one mile of the A & R facility, re-opened under the name T.J. Pasta's. In August 1986, Casa D'Angelo entered into a lease for a fourth restaurant, also located within one mile of the A & R facility. The fourth restaurant was larger and had better parking facilities than the A & R facility. When the new restaurant was opened in December 1986, Casa D'Angelo changed its operations at the A & R facility. Casa D'Angelo moved its banquet and carry-out service, which constituted only a small part of its business, to the A & R facility, and ceased offering a full dinner menu to walk in customers. Those who came to the A & R facility seeking a full meal were directed to one of the other Casa D'Angelo restaurants.[123] Both the business hours and staff at the A & R facility were reduced. As a result of these changes, gross sales at the A & R facility decreased dramatically.[124] Casa D'Angelo continued to phase out its business at the A & R facility and permanently closed the restaurant in July 1987. In 1987, the A & R facility gross sales did not exceed $200,000, and no percentage rent was paid by Casa D'Angelo, although it did continue to pay the base rent of $825 per month until the lease terminated on November 1, 1987.[125]

On July 1, 1987, A & R filed suit claiming that Casa D'Angelo had breached the express terms of the lease as well as an implied covenant of good faith to continue operating the restaurant in the same manner and during the same business hours as it had during the earlier years of the lease. Casa D'Angelo moved for summary judgment claiming that the undisputed facts failed to show any breach of an express or implied covenant in the lease.[126] The trial court denied the motion and the jury returned a verdict for A & R.[127]

On appeal, Casa D'Angelo claimed that as a matter of law it did not violate any express or implied covenant in the lease and that the

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122. *Id.* at 516-17.

123. *Id.* at 517. The menu to the walk-in customers at the A & R facility was limited to soup, salads, sandwiches, and full bar service. *Id.*

124. *Id.* Gross sales dropped from $88,547.17 in November 1986 to $15,355.77 in December 1986 and continued to decline in 1987. *Id.* at 517-18.

125. *Id.* at 518.

126. *Id.*

127. *Id.* at 516, 518.

substance of A & R's complaint was an alleged violation of an implied-in-fact covenant to generate a percentage rent. A & R argued that its complaint alleged a violation of an implied-in-law covenant of good faith. The court agreed with Casa D'Angelo and held that damages could be awarded only if Casa D'Angelo had a duty to operate the business in a manner so as to generate a percentage rent. Casa D'Angelo had continued to pay the base rent for the term of the lease. The only other tenant on the A & R property was a fabric store that competed with Casa D'Angelo for parking space and whose business was not enhanced by the continued operation of the restaurant.[128]

The court observed that although a breach of an implied covenant of good faith may occur without the violation of an implied-in-fact covenant or express covenant, the breach of such a covenant requires "bad faith."[129] The court defined "bad faith" as the conscious doing of a wrong that "contemplates a state of mind affirmatively operating with furtive design or ill will."[130] No evidence existed that Casa D'Angelo changed its operation for a dishonest purpose or attempted to damage A & R by depriving it of its percentage rent.[131]

The court compared *F.W. Woolworth Co. v. Plaza North, Inc.*[132] with *Casa D'Angelo, Inc.* In *F.W. Woolworth*, Plaza North claimed that the lessee had impliedly agreed to act in good faith not to deprive the lessor of its percentage rent. The court agreed, but found that Woolworth's decision to close its Woolco stores was based on economic considerations and was not done to deprive Plaza North of its percentage rent.[133] In *Casa D'Angelo, Inc.*, the court found that the operation was changed because Casa D'Angelo lacked sufficiently trained personnel and resources to continue operating the restaurant.[134] Casa D'Angelo did nothing more than exercise sound business judgment.[135]

Before discussing the alleged breach of an implied covenant to generate percentage rent, the court first addressed A & R's claim that Casa D'Angelo had violated two express covenants in the lease. The provision read:

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128. *Id.* at 518. The court seemed to suggest that if Casa D'Angelo had been an anchor or magnet tenant in a shopping center whose continuous operation was necessary to attract customers to other A & R tenants, then perhaps a duty to continue the business for the benefit of the other tenants could be implied. *Id.* at 521-22.

129. *Id.* at 519.

130. *Id.* (quoting Vickers v. Motte, 109 Ga. App. 615, 137 S.E.2d 77 (1964)).

131. *Id.*

132. 493 N.E.2d 1304 (Ind. Ct. App. 1986).

133. *Id.* at 1311.

134. *Casa D'Angelo, Inc.*, 553 N.E.2d at 519.

135. *Id.*

> Use. Lessee shall use the premises for the operation of a restaurant facility and for no other purpose without first obtaining the written consent of Lessor thereof . . . .
> Business Hours. Lessee shall keep the leased premises open for business during normal business hours for a restaurant.

A & R argued that the two provisions when read together required Casa D'Angelo to continuously operate the restaurant during normal business hours through the term of the lease. Casa D'Angelo contended that the use provision merely restricted the use of the premises and did not require it to operate a restaurant on the premises. The court agreed with Casa D'Angelo, concluding that generally a provision in a lease restricting the use of the premises to certain prescribed purposes does not create an affirmative duty to use the premises for such purposes.[136] The court further noted that the provision requiring the lessee to keep the premises open during "normal business hours" was not defined in the lease and that restaurants observe a wide variety of business hours.[137] Finally, the court concluded that even if the two provisions read together could be construed as creating an implied duty to continue to operate the restaurant throughout the term of the lease, damages would not exist unless Casa D'Angelo also had a duty to generate a percentage rent.[138]

The court, having determined that no breach of an express provision existed, questioned whether there was an implied-in-fact covenant to generate a percentage rent.[139] The court remarked that covenants implied-in-fact are not favored by the law,[140] and quoted with approval the Oklahoma Supreme Court in *Mercury Investment Co. v. F.W. Woolworth Co.*:[141]

> (1) [T]he obligation must arise from the presumed intention of the parties as gathered from the language used in the written instrument itself or it must appear from the contract as a whole that the obligation is indispensable in order to give effect to

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136. *Id.* at 520.

137. *Id.* at 520 n.5.

138. *Id.* at 520.

139. *Id.* The court observed that a distinction exists between covenants implied-in-fact and those implied-in-law. The latter are implied from the relation of the parties and the objective of the agreement. Covenants implied-in-law are founded on public policy without regard to the intent of the parties. Covenants implied-in-fact are raised by inference from the words used in the agreement and are based on the intent of the parties. *Id.* at 520-21 (citing Mercury Investment Co. v. F.W. Woolworth Co., 706 P.2d 523, 529 n.14 (Okla. 1985)).

140. *Casa D'Angelo, Inc.*, 553 N.E.2d at 521.

141. 706 P.2d 523 (Okla. 1985).

> the intent of the parties; and (2) it must have been so clear with the contemplation of the parties that they deemed it unnecessary to express it.[142]

The court examined decisions from other jurisdictions and concluded that generally when the base rent is substantial, courts have refused to find an implied covenant to generate percentage rent or to continuously operate a business.[143] Here, no evidence suggested that the base rent was not substantial.[144]

A & R agreed that the base rent was substantial, but argued that the percentage rent was also substantial. The court acknowledged that:

> [A] few courts have found an implied covenant to generate a percentage rent or to continue operation, even when the base rent is substantial, where the provisions of the lease and the surrounding circumstances at the time of its execution show that the parties intended the payment of a percentage rent or the continuous operation of the tenant's business to have been a substantial consideration for the lease.[145]

However, the court found that Casa D'Angelo was a new venture and that the owners had no experience in operating a restaurant.[146] A good chance existed that the venture might fail and there was no reasonable basis for an expectation of a percentage rent. The substantial percentage rent generated by Casa D'Angelo was nothing more than a windfall to A & R. Likewise, no evidence showed that A & R relied upon the continued operation of the restaurant to enhance the operation of its surrounding property. The restaurant was not a magnet tenant in an integrated shopping center; it did not draw customers to A & R's other tenant nor did it encourage other tenants to lease the property. Thus, the provision for a percentage rent was not a substantial consideration of the lease agreement.[147] The court of appeals reversed the trial court and entered summary judgment in favor of Casa D'Angelo.[148]

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142. *Casa D'Angelo, Inc.*, 553 N.E.2d at 521 (quoting *Mercury Investment Co.*, 706 F.2d at 530).

143. *Id.*

144. *Id.* The court remarked that the current trend is to define substantial rent as a fair rental value. *Id.*

145. *Id.* The cited cases involved magnet tenants in shopping centers, economic interdependence between lessor's and lessee's business operations, and cases in which the base rent was determined in part on past performance of business operation. *Id.*

146. *Id.* at 522.

147. *Id.*

148. *Id.*

B. Landlord's Liability for Personal Injuries Caused by Defective Conditions on Leased Premises

Traditionally, the landlord has not been held liable for personal injuries caused by defective conditions on the leased premises.[149] Although the landlord's tort immunity is still generally recognized in Indiana, a number of exceptions have developed over the years. Indiana decisions have held the landlord liable for personal injuries resulting from defective conditions on the leased premises when (1) the condition is a latent defect known to the landlord but unknown to the tenant, and the landlord has failed to disclose the condition to the tenant;[150] (2) the premises are leased for admission of the public;[151] (3) there is an express covenant to repair and the landlord either fails to repair or does so in a negligent manner;[152] (4) the landlord voluntarily makes repairs and does so in a negligent manner;[153] (5) the defective condition is in an area under the control of the landlord and used in common by the tenants;[154] or (6) there is an unexcused or unjustified violation of a duty prescribed by an applicable statute or ordinance.[155] Two decisions decided during the survey period raised two of the exceptions to the landlord's general tort immunity.

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149. *See generally* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 4:1, at 186-87 (1980); Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 101-02 (1982).

150. *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).

151. *See, e.g.*, Chrysler Corp. v. M. Present Co., 491 F.2d 320, 323 (7th Cir. 1974) (when property is leased for a "public purpose," lessor is under duty to use reasonable care to inspect and repair the premises before transferring possession); Walker v. Ellis, 126 Ind. App. 353, 129 N.E.2d 65 (1955) (lessor liable when he leases premises known to be unfit and dangerous for a public purpose).

152. *See, e.g.*, Childress v. Bowser, 546 N.E.2d 1221, 1222-23 (Ind. 1989) (lessor liable for negligence in failing to make repairs as promised); Hunter v. Cook, 149 Ind. App. 657, 662, 274 N.E.2d 550, 552 (1971); Stover v. Fechtman, 140 Ind. App. 62, 64-65, 222 N.E.2d 281, 283 (1966); Robertson Music House, Inc. v. Wm H. Armstrong Co., 90 Ind. App. 413, 416-18, 63 N.E. 839, 840 (1928).

153. *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).

154. *See, e.g.*, Flott v. Cates, 528 N.E.2d 847, 848 (Ind. Ct. App. 1988); Slusher v. State, 437 N.E.2d 97, 99 (Ind. Ct. App. 1982); Coleman v. DeMoss, 144 Ind. App. 408, 416, 246 N.E.2d 483, 489 (1969). Arguably, this is not really an exception to the landlord's general immunity from liability for injuries caused by conditions on the leased premises, because the common areas are still under the control of the landlord and are not part of the demised premises occupied by the tenant.

155. *See, e.g.*, Hodge v. Nor-Cen, Inc., 527 N.E.2d 1157, 1160 (Ind. Ct. App. 1988); Zimmerman v. Moore, 441 N.E.2d 690, 696 (Ind. Ct. App. 1982); Rimco Realty & Invest. Corp v. La Vigne, 114 Ind. App. 211, 218-19, 50 N.E.2d 953, 956 (1943).

1. Common areas.—In *Frost v. Phenix*,[156] Bruce and Susan Phenix orally leased an apartment under a month-to-month agreement from the Frosts. The apartment was on the upper floor of a house that had been divided into three units. At the front of the house was a large porch that extended around the sides of the house. Two sets of concrete steps led to the porch, one on the south side and the main set of steps on the west side. The tenants had to cross the porch to reach the entryway leading to their apartments. After ascending the west steps leading to the porch, Susan stepped on the wood floor and the porch collapsed, throwing her forward and injuring to her elbow and leg.[157]

The Phenixes knew that a portion of the cement steps had crumbled, that the wood floor creaked in places, and that there was a small hole in the floor to the left of where Susan fell. Several weeks before the injury, Bruce had stepped through a portion of the porch without injury. The Phenixes did not consider the porch hazardous. Rather, they considered the portion of the porch where Susan fell to be strong because it was just above the concrete steps and there were no signs of rotting or decayed wood in that area. At the time of the injury, a carpenter hired by the Frosts was repairing damage to the concrete steps and the wooden floor of the porch on the south side of the house, which had been caused by standing water from a leaky deteriorated gutter.[158]

The Phenixes sued the Frosts for Susan's injuries. After granting the Frosts' motion for summary judgment, the trial court granted the Phenixes' motion to correct errors, and the Frosts appealed. The Frosts raised the following three issues on appeal: (1) did the Frosts owe any duty to the Phenixes; (2) was there a material question of fact regarding whether the Frosts had breached a duty of care; and (3) was there a material issue of fact as to whether Susan Phenix was contributorily negligent.[159]

In addressing the first issue of duty, the court observed:

> [C]aselaw supports Frosts' theory that a landlord is not liable where he is without knowledge of a latent defect, and is not liable for a tenant's personal injuries stemming from defective premises unless he expressly agrees to repair and is negligent in doing so.[160]

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156. 539 N.E.2d 45 (Ind. Ct. App. 1989).
157. *Id.* at 46.
158. *Id.* at 46-47.
159. *Id.* at 47.
160. *Id.*

However, the court stated that this general immunity applies only when the tenant leases the entire premises, such as a single family dwelling, and the injury occurs on the demised premises.[161] Because Susan's injury occurred in a common area, a different rule applied. A landlord has a duty to use reasonable care to inspect and repair common areas, such as the porch used by all the tenants to reach their apartments, for the protection of the lessees.[162] The Frosts had a duty to maintain the porch in a reasonably fit and safe condition for the benefit of the Phenixes.[163] The court concluded that the testimony of the Phenixes and the Frosts raised a material factual issue as to whether the Frosts breached their duty of care.[164]

The Frosts had observed the decay on the south side of the porch at the time they purchased the house and had hired the carpenter to repair it. William Frost had visited the property about a week before the Phenixes moved in but denied seeing any holes or other damage in the wooden floor. Thus, a material question of fact existed which precluded the granting of the summary judgment.[165]

The Frosts also argued that Susan's knowledge of the weak areas of the porch was equal or superior to their own and thus she was contributorily negligent as a matter of law. Some earlier cases held that equal or superior knowledge of a dangerous condition constituted contributory negligence as a matter of law. However, the court concluded that in this case a jury could reasonably find that although Susan knew of weaknesses elsewhere on the porch, she was not aware of the weakness in the area where she fell.[166] In addition, the court noted that "a reasonable jury could find that Susan did not fail to exercise reasonable care for her own safety under the circumstances *because she had to transverse the porch in order to enter her apartment.*"[167]

Although the court did not elaborate on this observation, two of the cases cited by the court concerning the duty of a landlord with respect to common areas, *Coleman v. DeMoss*[168] and *Rossow v. Jones*,[169]

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161. *Id.*

162. *Id.* (citing W. PROSSER & W. KEETON, THE LAW ON TORTS § 63, at 441-442 (5th ed. 1984)).

163. *Id.* at 48.

164. *Id.*

165. *Id.* This obligation, however, is one of reasonable care only, and the landlord will not be liable for conditions not discoverable by reasonable inspection. W. PROSSER AND W. KEETON, THE LAW ON TORTS § 63, at 442 (5th ed. 1984).

166. *Frost*, 539 N.E.2d at 48.

167. *Id.* at 49 (emphasis added).

168. 144 Ind. App. 408, 246 N.E.2d 483 (1969).

169. 404 N.E.2d 12 (Ind. Ct. App. 1980).

indicate that the landlord has a duty to provide the tenant with a safe means to and from the leased premises. If the landlord fails to do so, the tenant would not be required to abandon the premises in order to avoid the defense of contributory negligence. Otherwise, the landlord would be permitted to constructively evict the tenant by breaching his duty to provide a safe means of ingress and egress.

2. Violation of Statute or Ordinance.—In *Dawson v. Long*,[170] Almedia McLayea took her one-month old nephew, Garfield Dawson, to visit a friend, Marvin Tardy, who rented a second story duplex apartment in a building owned by William Long. Tardy leased the apartment on a month-to-month basis with no agreement regarding repairs. During the first months of the lease, Tardy informed Long that there was no handrail along the stairway and that the wooden stairs were slippery and needed rubber or other nonslip material on them. However, Long took no action to correct these conditions until after the injury to Dawson had occurred.[171]

As McLayea left the apartment, carrying her nephew in an infant seat, she slipped and fell down a stairway. The stairway was not a common area but was part of the premises leased to Tardy.[172] Because there was no handrail along the stairway, McLayea could not break her fall. Her shoulder struck a window on the landing, breaking the window and its screen. The infant fell through the opening to the ground below, suffering severe and permanent injuries, including brain damage. The window was unprotected by a guard rail. Tanya Dawson, the infant's mother, brought suit against Long claiming negligence and breach of an implied warranty of habitability.[173] After a hearing, the trial court granted Long's motion for summary judgement and Dawson appealed.[174]

Dawson claimed that Long had violated several provisions of the Marion County Health Code,[175] and introduced into evidence copies of notices sent to Long by the Marion County Health Department indicating violations of the Health Code, including one pertaining to Tardy's dwelling.[176] The court noted that a non-excused or non-justified

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170. 546 N.E.2d 1265 (Ind. Ct. App. 1989).

171. *Id.* at 1266. Long denied that any complaints had been made by Tardy before the date of Dawson's injury. *Id.* at 1267.

172. *Id.* at 1266.

173. *Id.* at 1265-66.

174. *Id.* at 1266.

175. MARION COUNTY, IND., THE HEALTH AND HOSPITAL CORP. GEN. ORDINANCE No. 2-1980, ch. 10, art 1, § 10-102 (1982).

176. *Dawson*, 546 N.E.2d at 1266-68.

violation of a duty imposed by statute or ordinance is negligence per se,[177] but that

> [i]n order for the violation of a statute or ordinance to be held as negligence per se, a trier of fact must determine whether the statute is applicable. It must decide whether the statute was designed to protect the class of persons in which the plaintiff is included against the risk of the type of harm which has occurred as a result of its violation.[178]

The court then observed that the Health Code officially announced that it was enacted "to protect, preserve and promote the physical and mental health and social well-being of the people" and to "insure that the quality of housing is adequate for protection of public health, safety and general welfare." [179] Thus, the plaintiff Dawson was clearly within the class of persons intended to be protected by the ordinance.[180]

Having determined that the Health Code applied, the court next addressed the question of whether the Code was violated and whether the violation was the proximate cause of the plaintiff's injury.[181] The Health Code specifically imposed duties to provide handrails on any steps containing at least four risers, to install uniform risers and treads on all inside or outside stairs or steps, and to maintain windows in sound condition and good repair.[182] The undisputed evidence demonstrated that there was no handrail along the top four stairs leading to Tardy's apartment; there were no treads on the wood stairs; the window was loose; the screen outside the window was rotten; and there was no guard rail in front of the large window on the landing. Sufficient evidence existed from which a fact finder could conclude that Long had violated one or more provisions of the Health Code and that these violations were the proximate cause of the injury. Therefore, the court reversed the trial court's grant of the motion for summary judgment on the issue of Long's negligence.[183]

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177. *Id.* at 1266-67 (citing Ray v. Goldsmith, 400 N.E.2d 176 (Ind. Ct. App. 1980)). *See also* Hodge v. Nor-Cen, Inc., 527 N.E.2d 1157 (Ind. Ct. App. 1988).

178. *Dawson*, 546 N.E.2d at 1268 (citing Ray v. Goldsmith, 400 N.E.2d 176 (Ind. Ct App 1980); and W. PROSSER & W. KEETON, THE LAW ON TORTS § 36, at 229-30 (5th ed. 1984)).

179. *Id.* (citing MARION COUNTY, IND., THE HEALTH AND HOSPITAL CORP. GEN. ORDINANCE No. 2-1980, ch. 10, art 1, § 10-102).

180. *Id.* at 1269.

181. *Id.* For a fact finder to determine there was negligence per se, there must be evidence that there was a violation of the statute or ordinance, and that the violation proximately caused the injury complained of. *Id.* at 1268.

182. *Id.* (citing MARION COUNTY, IND., THE HEALTH AND HOSPITAL CORP. GEN. ORDINANCE No. 2-1980, ch. 10, art 1, § 10-301).

183. *Dawson*, 546 N.E.2d at 1269.

Finally, Dawson alleged that a material issue of fact existed regarding Long's liability under breach of an implied warranty of habitability.[184] Although Indiana has recognized an action by tenants for economic damages resulting from breach of the implied warranty, Indiana courts have never allowed recovery for personal injuries to tenants or their guests. Dawson cited *Zimmerman v. Moore*[185] for the proposition that a tenant may recover for personal injuries under an implied warranty of habitability theory.[186] The court, however, distinguished *Zimmerman*, which denied recovery to the tenant under a warranty of habitability theory because Zimmerman was not a professional landlord. Here, Dawson attempted to extend the landlord's duty to the tenant under an implied warranty to an injured guest. The court refused to extend the landlord's duty under the warranty beyond the tenant.[187]

C. Warehouseman's Liens on Tenant's Property Placed in Storage Following Eviction

In *Moore v. Republic Moving and Storage, Inc.*,[188] the landlord, Braeburn Apartments, obtained a default judgment for $457 plus court costs in a Marion County small claims court against Ronald Moore and Rita Green because they failed to make rental payments.[189] The court issued a writ of restitution and order of eviction, and on December 10, 1985, the constable removed the tenants' property from their apartment and placed it in storage at Republic Moving and Storage, Inc. (Republic). The writ of restitution advised the tenants that their property would be removed, placed in storage, and levied upon for the judgment, plus costs and interests.[190]

On March 27, 1986, Republic published a notice in the *Indianapolis Commercial* newspaper claiming that Moore and Green were liable for $580 to satisfy a warehouseman's lien and that an auction would take place in Indianapolis after April 10, 1986. In July 1986, Moore and Green filed a complaint against Republic seeking the return of their property or damages if the property had been sold. In September 1986, Republic filed a motion to dismiss. Republic sold the property, valued at $2000, at a public auction in November 1986 to satisfy their handling,

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184. *Id.*
185. 441 N.E.2d 690 (Ind. Ct. App. 1982).
186. *Dawson*, 546 N.E.2d at 1269.
187. *Id.* at 1269-70.
188. 548 N.E.2d 1211 (Ind. Ct. App. 1990).
189. *Id.* at 1212.
190. *Id.*

storage, and newspaper advertising charges totaling $980. The tenants did not receive notice of the sale nor did the company make a specific demand on them for payment. Republic's motion to dismiss was granted in February 1987.[191]

Indiana law provides that "a warehouseman has a lien against the bailor on goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation . . . ."[192] Furthermore, a warehouseman's lien is effective only "against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid."[193] Thus, a lien is created against the owner only if he acts as a bailor or authorizes another to act as a bailor. Therefore, the tenants argued that Republic did not possess a valid warehouseman's lien because a small claims court constable is not a bailor and because they did not authorize or consent to the storage of their property with Republic.[194]

The court was unable to find any Indiana authority directly on point, but decisions from other jurisdictions held that a warehouseman does not have a lien on property turned over to it by a constable who had removed property pursuant to an order of restitution.[195] Although the court concluded that Republic did not have a valid lien, it recognized Republic's right to terminate the storage when the agreed storage period ended or, if no period was fixed, within a stated period not less than thirty days after notification to interested parties.[196] Also, unless the goods have been removed by the owner before the end of the stated period, the warehouseman could sell the goods under the provisions of Indiana law.[197] However, the court found the sale of the tenants'

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191. *Id.*

192. IND. CODE § 26-1-7-209(1) (1988), *cited in Moore*, 548 N.E.2d at 1212.

193. *Moore*, 548 N.E.2d at 1212.

194. *Id.* at 1213.

195. *Id.*

196. *Id.* at 1214-15. *See also* IND. CODE § 26-1-7-206 (1988), which provides:

> A warehouseman may, on notifying the person on whose account the goods are held and any other person known to claim an interest in the goods require payment of any charges and removal of the goods from the warehouse at the termination of the period . . ., or, if no period is fixed, within a stated period not less than thirty (30) days after the notification. If the goods are not removed before the date specified in the notification, the warehouseman may sell them in accordance with the provisions of the section on enforcement of a warehouseman's lien.

Id.

197. *See* IND. CODE § 26-1-7-210 (1988), which requires that notification be given to all persons known to claim an interest in the goods and that the notification include a description of the goods, a statement of the amount due, a demand for payment, the nature of the proposed sale, and the time and place of any public sale.

property was improper because the notice of sale did not comply with the provisions of Indiana Code section 26-1-7-210.[198]

The court also rejected Republic's claim that a lien arose by operation of law and that a warehouseman's lien was not necessary to sell the tenants' property to satisfy the storage fees.[199] Republic argued that it had acquired a lien under Indiana Code section 32-7-3-6 which provides:

> The justice shall issue a writ, directed to some constable of the county, commanding him to deliver said premises to said plaintiff, by removing the defendant and his goods therefrom, or otherwise, so that the plaintiff has complete possession thereof, and also to levy such damages and costs, of the goods of said defendant as might be done by virtue of a writ of fieri facias.[200]

The court observed that the statute was clearly designed for the benefit of the party awarded the judgment, the landlord.[201] Republic was not a party to the action nor had it established that it was acting as an agent for the landlord. Rather, Republic was acting solely on its own behalf. In addition, the statute indicates that the sheriff, not the landlord, is to levy upon the goods and chattels of the judgment debtor.[202] Because Republic did not have a warehouseman's lien, the court determined that the sale of tenant's property was improper and that their complaint should not have been dismissed.[203]

Several interesting issues were only indirectly addressed by the court because Republic never sought payment of the storage or transportation charges from Moore and Green. Had Moore or Green attempted to remove their goods from storage could they have done so without payment of the storage fees? One of the cases the court cited with apparent approval, *Young v. Warehouse No. 2, Inc.*,[204] held that when

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198. *Moore*, 548 N.E.2d at 1215. The published notice did not contain the exact date of the sale nor did it provide Moore or Green with notice of the date or time of the sale. In addition, Republic did not make a specific demand for payment. *Id.*

199. *Id.* at 1215-16.

200. *Id.* at 1215. All of chapter 3 of title 32, article 7 of the Indiana Code was repealed by the Indiana Legislature in 1990. This chapter included not only the provision for the issuance of a writ of restitution, but also Indiana's forcible detainer and unlawful entry statute. IND. CODE § 32-7-3-12 (1988). The legislature did not enact any laws to replace the repealed chapter.

201. *Moore*, 548 N.E.2d at 1216.

202. *Id.* at 1215-16. *See also* Schuler v. Langdon, 433 N.E.2d 841, 845-46 (Ind. Ct. App. 1982) (Staton, J., dissenting). The sale of the judgment debtors' goods under a writ of execution is governed by IND. CODE §§ 34-1-36-1 to -12 and 34-1-37-1 to -12.

203. *Moore*, 548 N.E.2d at 1217.

204. 540 N.Y.S.2d 654 (1989).

a landlord delivers a tenant's goods to a warehouseman for storage, the tenant may recover possession of the goods from the warehouse at any time without payment of the storage fee.[205] If the tenant does claim the goods within the thirty-day period, the goods may be sold under U.C.C. § 7-210. However, the warehouseman must hold the proceeds for the benefit of the tenant and must look to the landlord for payment of the storage charges.[206]

The court also appeared to question whether the owners of the goods were liable for the contract amount of the storage charges. The court suggested that Republic might have pursued an action against the owners in quantum meruit, obtained judgment, then executed upon the judgment.[207] This suggestion implies that the warehouseman could not withhold the goods from the owner, nor could he convert any of the proceeds from the sale of the goods for payment of the storage charges.

VI. Occupying Claimant Statute

In 1970, the City of Gary purchased property for $30,000 but failed to record the deed in the Lake County Recorder's office. Three years later, the city constructed Fire Station 7 on the property at a cost of $300,000. Because the deed was not recorded, the county continued to bill the former owner for the taxes on the land. Feeling no obligation to continue paying taxes on the property, the former owner allowed the assessed taxes to become delinquent and the property was sold at a tax sale in 1984 for $2,272. The purchasers, Joseph and Bernice Belovich, obtained a tax deed and brought an action to evict the City from the property, now estimated to be worth $600,000.[208] In a prior appeal, the court had determined that the Beloviches had acquired title to the property as a result of the tax deed.[209] After remand, the city recorded its deed and continued to use the property as a fire station.

In *City of Gary v. Belovich*,[210] the court concluded that the city's continued use of the property as a fire station constituted inverse condemnation and issued an order appointing appraisers.[211] The court dismissed the City's counterclaim that it was entitled to the value of

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205. *Id.* at 655-56.
206. *Id.*
207. *Moore*, 548 N.E.2d at 1217 n.6.
208. *Dirt Cheap: Fire Station Bought for $2,272, Thanks to Blunder*, Indianapolis Star, Aug. 28, 1986, at A2.
209. City of Gary v. Belovich, 504 N.E.2d 286 (Ind. Ct. App. 1987).
210. 544 N.E.2d 178 (Ind. Ct. App. 1989).
211. *Id.* at 178-79.

the improvements made to the property under the Occupying Claimant Statute.[212]

On appeal, the court of appeals affirmed the trial court's granting of summary judgment on the issue of inverse condemnation and the trial court's dismissal of the city's counterclaim.[213] The court concluded that the Occupying Claimant Statute was designed to afford relief to an occupant who made improvements on the land in good faith and under color of title. The Statute was never intended to apply when the true owner makes improvements to his property and then loses his title through operation of law.[214] When the city lost its title to the Beloviches as the result of the tax sale, the city lost title to both the real estate and the improvements.[215]

VII. Recording Act: The Chain of Title

During the last survey period, the court of appeals extended the search of the public records required to determine the title to real estate. The court held that a purchaser has constructive notice of interests recorded outside the chain of title.[216] In *Szakaly v. Smith*,[217] Sherrill and Isabelle Arvin, owners of a 195-acre tract of land, conveyed a 190-acre portion of the tract in 1956 to the Ransburgs, the Szakalys' predecessor in title. The deed, which was not recorded until 1965, granted a right-of-way easement over the five-acre tract retained by the Arvins. In 1957, the Arvins conveyed the five-acre tract to a trustee who, on the same day, reconveyed the land to Isabelle Arvin alone. Both deeds were promptly recorded and neither deed referred to the easement granted in the 1956 deed. In 1979, the five-acre tract was conveyed to Ronald Smith. Ronald and Linda Smith are the current

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212. *Id.* at 178 (citing Ind. Code § 34-1-49-1) (1988)).

213. *Id.* at 178-79.

214. *Id.* at 179. A similar claim was made in Kolley v. Harris, 553 N.E.2d 164 (Ind. Ct. App. 1990). The Harrises defaulted on a conditional sales contract after making substantial improvements to the property. In an action for damages by the vendors, the Harrises counterclaimed for the value of improvements made to the property under the Occupying Claimant Act. On an appeal by the vendors from a summary judgment awarding the Harrises $16,040 on their counterclaim, the court concluded that the Occupying Claimant Act was intended to protect an occupant "found not to be the rightful owner" who had made improvements to the land of another in good faith and under color of title. *Id.* The act was not intended to compensate an equitable owner who made improvements to the land under a contract for sale and who subsequently loses the land by failure to perform the terms of the contract. *Id.*

215. *Belovich*, 544 N.E.2d at 179.

216. Szakaly v. Smith, 525 N.E.2d 343, 346 (Ind. Ct. App. 1988), *superceded by* Szakaly v. Smith, 544 N.E.2d 490 (Ind. 1989).

217. *Id.*

owners of the five-acre tract. The Szakalys, the owners of the 190-acre tract, claimed a right of way easement across the Smiths' property.[218]

The single issue raised was whether the recording of the 1956 deed in 1965 operated as record notice of the easement at the time Ronald Smith purchased the property in 1979, and thus prevented him from taking the title free and clear of the easement as a bona fide purchaser in good faith and for value.[219] The Smiths argued that once the deed from the Arvins to the trustee and the deed back to Isabelle Arvin were recorded, the easement was outside the chain of title.[220] To understand this argument, it is necessary to first briefly explain the chain of title concept.

In most states, the public records affecting title to real property are indexed under the names of the parties involved. This name index is commonly referred to as the grantor-grantee index system.[221] In examining the title to property, the title searcher begins with the present owner in the grantee index and works backward until he finds a conveyance to the present owner from his grantor. He then searches under the name of his grantor in the grantee index until he finds a conveyance to him, and so on, until he traces the title back to a patent from the state or federal government. The title searcher then turns to the grantor index and begins his search forward, starting with the name of the party who acquired title from the state or federal government. He continues to search under the name of this party from the date he acquired title until he finds a recorded deed out from that party conveying the land in question to another. He then stops his search under the name of the former owner and continues the search under the name of the new owner (the grantee in the deed out) from the date he acquired title until a deed out from him is recorded. He continues the search under the new owner. A title searcher would have no reason to continue his search under the name of the former owner once his deed out is recorded. This search in the grantor index is continued to the present time. The documents discovered by this method of searching the public records are referred to as "the chain of title."[222]

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218. *Id.* at 344.

219. *Id.*

220. *Id.* at 344-45.

221. The term "grantor-grantee" index system is a misnomer. Although the index to the deed books is alphabetized under the names of grantors and grantees, the indexes to other records such as the *lis pendens* notice, probate docket, judgment docket, and mortgage books, while containing the name of the persons involved are not truly grantor-grantee indexes. Because these transactions may affect title to the property, they must also be examined by the title searcher under the name of each owner during the ownership period.

222. For a more detailed discussion of the chain of title concept, see generally R. CUNNINGHAM, W. STOEBUCK & D. WHITEMAN, THE LAW OF PROPERTY § 11, at 796-802 (1984); and Cross, *The Record "Chain of Title" Hypocrisy*, 57 COL. L. REV. 787 (1957).

The court of appeals rejected the Smiths' argument that once the 1957 conveyance from the Arvins to the trustee for reconveyance was recorded, the easement was outside the chain of title.[223] Instead, the court concluded that a subsequent purchaser is charged with notice of an interest contained in any instrument from a common grantor even if the instrument is recorded after the recording of the deed out from the common grantor.[224]

Thus, the court, relying heavily on *Hazlett v. Sinclair*,[225] held that Indiana "recognizes 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."[226] The court reached this holding by reading *Hazlett* as "charging grantees of servient tenements with knowledge of all the information supplied by the recorded conveyances of the common grantor."[227]

However, as was suggested in last year's survey, the court may have read too much into the *Hazlett* decision.[228] In fact, the *Hazlett* court may have been addressing an entirely different issue. In some states, the title searcher examining the instruments within the chain of title is not required to examine deeds out from the common grantor involving other tracts of land that were recorded during the time the common grantor held title to the land in question.[229] In Indiana, the title searcher is required to examine *all* deeds out from the common grantor, even deeds to other tracts of land.[230] These deeds would be discovered during the title search because they were recorded during the period of time the searcher is searching the title to the land under the name of the common grantor.

The Indiana rule is equitable because a deed to one tract of land often contains an easement or restrictive covenant burdening another tract of land owned by the common grantor. If the title searcher could safely ignore such instruments, the purchaser would not be protected unless he recorded the deed under the legal descriptions of all the lands burdened by the conveyance. It is far different, however, to require the title searcher to continue searching the record under the

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223. *Szakaly*, 525 N.E.2d at 344.

224. *Id.* at 346.

225. 76 Ind. 488 (1881).

226. *Szakaly*, 525 N.E.2d at 346.

227. *Id.*

228. *See* Krieger, *Survey of Recent Developments in Indiana Property Law*, 23 IND. L. REV. 485, 509 (1989).

229. *See* 4 AMERICAN LAW OF PROPERTY § 17.24, at 602 (Casner ed. 1952).

230. *E.g.*, Hazlett v. Sinclair, 76 Ind. 488, 493-494 (1881); Howard D. Johnson Co. v. Parkside Dev. Corp., 169 Ind. App. 379, 385-86, 348 N.E.2d 656, 661 (1976).

name of the common grantor after the deed out to the land whose title is being searched has been recorded.

In *Hazlett*, it was unclear whether the grantor still owned the land when the deed conveying the other tract of land was recorded. If the grantor still owned the land, the recording of the instrument was within the chain of title and the decision was not as far reaching as the court of appeals concluded. By interpreting *Hazlett* so broadly, the court of appeals's opinion charges a subsequent purchaser with constructive notice of all claims and interests in a recorded deed from a common grantor regardless of when the instrument was recorded, provided it is recorded before the purchaser's deed. This holding would require the title searcher to continue to search the records under the name of every grantor of the property in the grantor-grantee index from the date the grantor acquired the title to the present.[231] Such a task would greatly increase the time and expense of a title search.[232]

During this survey period, the Indiana Supreme Court granted transfer of *Szakely*.[233] The supreme court agreed with the court of appeals that the subsequent purchasers in this case had notice of the easement across their property.[234] However, in a well-reasoned opinion by Justice Dickson, the court narrowly restricted the rationale of the lower court decision. The court observed that there was no need for the court of appeals to discuss the effect of a late recording outside the chain of title because the recording was in fact within the chain of title.[235] When the deed to the dominant estate was recorded in 1965, Isabelle Arvin, Smith's predecessor in title, was still the record owner of the servient estate.[236] A title searcher examining Smith's chain of title during the 1965 period would have searched the grantor-grantee index under the name of Isabelle Arvin and would have found the recorded deed from Sherrill and Isabelle Arvin to the Ransburgs. An examination of this deed would have revealed the existence of the easement across the property being purchased by Smith.

Although finding the recording in this case was within the chain of title, the court chose "to discuss and clarify the extent to which belatedly recorded conveyances of a common grantor provide construc-

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231. Some courts do require such an extended search of the record. *See, e.g.*, Woods v. Garnett, 72 Miss 78, 16 So. 390 (1894).

232. *See* J. CRIBBET AND C. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 321-22 (3d ed. 1989) [hereinafter CRIBBET].

233. Szakaly v. Smith, 544 N.E.2d 490 (Ind. 1989).

234. *Id.* at 492.

235. *Id.*

236. *Id.* This fact was not revealed in the court of appeals opinion, making it impossible to determine whether or not the recording was within the chain of title.

tive knowledge to subsequent grantees.''[237] In examining *Hazlett*, the court observed that the decision did not disclose the dates of recording of the deeds, and thus it was impossible to determine whether the deed creating the easement was recorded within the subsequent purchaser's chain of title. After examining several Indiana decisions, the court concluded that the recording of an instrument outside the chain of title does not provide notice to a bona fide purchaser for value.[238] Because in this case, however, the easement was recorded within the chain of title, the court held that the Smiths had constructive notice of the encumbrance and reversed the trial court's judgment.[239]

VIII. Warranty of Habitability in Sale of Home

A. Background

Until the 1960s, the law governing the purchase of a new home was *caveat emptor*.[240] Today, the overwhelming majority of jurisdictions imposes an implied warranty of habitability on the builder-vendor in the sale of a new home.[241] In 1972, the Indiana Supreme Court first recognized an implied warranty of habitability in the sale of a new home by the builder vendor.[242] In 1976, the court extended the builder-vendor's implied warranty to a second or subsequent purchaser of the home, allowing the subsequent purchaser to bring an action against the original builder-vendor for latent defects in the design or construction of the house.[243]

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237. *Id.* at 491.

238. *Id.* at 492. The court stated:

> *Hazlett* does not establish that a grantor is charged with constructive knowledge of conveyances from a remote grantor that are outside of his chain of title. In light of *Rogers v. Evansville*, 437 N.E.2d 1019 (Ind. Ct. App. 1982) and *Residents of Green Springs Valley Subdivision v. Town of Newburgh*, 168 Ind. App. 621, 344 N.E.2d 312 (1976) I view the language in *Hazlett* as limited by the chain of title requirement.

Id.

239. *Id.*

240. *See generally* Cribbet, *supra* note 232, at 282. For a discussion of the rationale and the historical development of the implied warranty of habitability in the sale of a new home by a builder-vendor, see generally Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 Cornell L.Q. 835 (1967).

241. *See generally* Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 Real Est. L.J. 291, 302 (1980). By 1980, 36 states and the District of Columbia had recognized implied warranty of habitability in the sale of a new home by a builder-vendor. *See id.* at 303-06. *See also* Conklin v. Hurley, 428 So. 2d 654, 656 n.2 (Fla. 1983) (citing 33 decisions recognizing the implied warranty of habitability).

242. Theis v. Heuer, 264 Ind. 1, 12, 280 N.E.2d 300, 306 (1972).

243. Barnes v. Mac Brown and Co., 264 Ind. 227, 230, 342 N.E.2d 619, 621 (1976).

Later, however, the Indiana Court of Appeals refused to recognize an implied warranty of habitability in the sale of a used home by a non-builder vendor.[244] The purchaser's sole remedy against his immediate seller would be under the tort theories of misrepresentation or fraudulent concealment.[245] Indiana does not currently view the mere failure to disclose hidden defects known to the seller and unknown to the buyer as fraudulent concealment.[246]

In 1986, the Indiana legislature enacted a statute establishing express statutory warranties that a builder may provide to the initial purchaser of a new home.[247] Upon providing these warranties to the initial buyer, the builder-vendor may disclaim any implied warranties. However, the statute requires that certain conditions be met before the builder can disclaim the implied warranties: (1) the performance of the warranty obligations must be backed by an insurance policy at least equal to the purchase price; (2) the builder must carry completed operations product liability insurance to cover any reasonably foreseeable consequential damages arising from a defect covered by the warranties; (3) the disclaimer of any implied warranties must be printed in a minimum size of ten-point and in bold face type; and (4) the buyer must acknowledge the disclaimer of any implied warranties by signing a separate one-page notice containing specific statutory language at the time of the contract's execution.[248]

During this survey period, there were four decisions touching upon one or more aspects of the implied warranty of habitability. These decisions continue to define the scope of the implied warranty in Indiana.

B. Statute of Limitations

In *Lechner v. Reutepohler*,[249] the Reutepohlers purchased a new home from the Lechners in November 1981. While moving into the house, the Reutepohlers noticed small cracks in a basement wall. They also noticed that small puddles of water appeared on the basement floor after every rain.[250] The Reutepohlers observed that the slope of the yard away from the house failed to prevent puddles from forming in front of the house. The Reutepohlers attempted to increase the

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244. Vetor v. Shockey, 414 N.E.2d 575, 577 (Ind. Ct. App. 1980).
245. *Id.* at 577; Lyons v. McDonald, 501 N.E.2d 1079, 1081 (Ind. Ct. App. 1986).
246. Indiana Bank & Trust Co. v. Perry, 467 N.E.2d 428 (Ind. Ct. App. 1984).
247. IND. CODE § 34-4-20.5-1 (1988).
248. *Id.* § 34-4-20.5-9.
249. 545 N.E.2d 1144 (Ind. Ct. App. 1989).
250. *Id.* at 1145-46.

slope, but water continued to run against the house and the basement continued to flood. In April 1985, the Reutepohlers called Gene Giehl of G & S Homes, who advised them that the cracks in the wall needed repair.[251] G & S Homes attempted to correct the water problem in April 1985 but additional repairs were required, and the work was not completed until July 1986. In 1987, the Reutepohlers contacted Lechner and requested that he pay for the repairs. When he refused, the Reutepohlers filed suit in small claims court for breach of an implied warranty of habitability.[252] The trial court awarded the Reutepohlers $3,000 (the jurisdictional limit) plus costs, and the Lechners appealed.[253]

Two issues were raised on appeal: (1) was the action barred by the statute of limitations; and (2) was the action barred by the release provision contained in the purchase agreement.[254] Regarding the first issue, the court observed that the Lechners were not required to plead the statute of limitations as an affirmative defense because the action was filed in a small claims court.[255] Nevertheless, the party claiming the statute of limitations as an affirmative defense must litigate the issue at trial, and the Lechners did not raise the statute of limitations.[256] Although the issue had been waived, the court nevertheless stated that the statute of limitations for breach of the implied warranty of habitability was six years.[257]

The Reutepohlers had argued that Indiana Code section 34-4-20-2 should apply. This provision states that an action to recover damages to property arising out of a deficiency in the construction of an improvement to real property must be brought within ten years of the completion of the improvement.[258] The court rejected this argument holding that this statute was a statute of repose, not a statute of limitations.[259] Read together with Indiana Code section 34-1-2-1, which

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251. *Id.*

252. *Id.* at 1146. The court appeared to have presumed Lechner's status as a builder-vendor. The facts indicate that Virgil Lechner provided the blueprints and hired subcontractors to do the actual construction. *Id.* at 1145. Furthermore, because he sold 12 other houses using a similar method it appears that he was in the business of selling houses to the general public. Perhaps the court did not find it necessary to discuss this point. The court subsequently found Lechner not liable for breach of an implied warranty of habitability because of the release clause in the purchase agreement. *Id.* at 1147-48.

253. *Id.* at 1146.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 1147 n.1 (citing IND. CODE § 34-1-2-1 (1988)).

258. *Id.* The cited statute also provides that an action may be brought within 12 years after the completion and submission of plans and specifications to the owner if the action is for design deficiency. IND. CODE § 34-4-20-2 (1988).

259. *Lechner*, 545 N.E.2d at 1147 n.1.

requires that an action for injury to property other than personal property be commenced within six years after the cause of action has accrued, these statutes indicate that a party has six years to bring an action for breach of an implied warranty of habitability after the harm occurs. Thus, if the cause of action began when the Reutepohlers discovered the water problem in 1981, their suit in 1988 would have been barred by the six-year statute of limitations even though the statute of repose had not yet expired.[260]

C. Waiver of the Implied Warranty of Habitability

In *Lechner*, the Lechners listed the house for sale with Century 21 Realty while it was still under construction.[261] All negotiations and transactions connected with the sale were conducted through Century 21. The Lechners had sold twelve other homes using a similar method.[262] The purchase agreement contained a provision releasing the seller from all liability relating to any defect in the house.[263]

Although the Reutepohlers contended that the release provision failed for lack of adequate consideration, the court found that the mutual promises of the Reutepohlers to buy and the Lechners to sell the house for $65,000 were adequate consideration to support the purchase agreement.[264] The court likewise rejected the Reutepohlers' argument that the provision should be considered void as against public policy. The court stated that "no public policy prevents parties from agreeing in advance that one is under no obligation of care for the benefit of the other," even if the conduct would otherwise be negligent.[265]

However, the court, in a footnote, emphasized that the purchase of the house occurred in 1981, before the enactment of Indiana Code section 34-4-20.5-9. This section sets forth specific requirements that a builder-vendor must comply with before disclaiming the implied warranties of habitability in the sale of a new home.[266]

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260. *Id.*
261. *Id.* at 1145.
262. *Id.*
263. *Id.* at 1148. The purchase agreement stated:
> Inspection of the real estate and improvements thereon is hereby waived by Purchaser who is relying entirely for its condition upon Purchaser's own examination and Purchaser hereby releases the Seller, Broker, and their sales agents from any and all liability relating to any defect or deficiency affecting the real estate and improvements which release shall survive the closing of this transaction.

Id.
264. *Id.*
265. *Id.*
266. *Id.* at 1148 n.3.

An identical release provision was involved in *Callander v. Sheridan*.[267] In *Callander*, the purchasers, the Sheridans, filed suit against the builder-vendor, Callander, alleging a breach of the implied warranty of habitability.[268] The trial court awarded the Sheridans $11,000 in damages.[269]

On appeal, Callander argued that the release clause in the purchase agreement barred any recovery against him. The court observed that the release clause was contained in a section of the purchase agreement entitled "Inspection" and that a box had been checked with a typed "x." [270] Based upon the wording of the release clause and its location in the purchase agreement, the court concluded that the provision only applied to defects discoverable by a reasonable inspection of the premises.[271] The defects were not discoverable by a reasonable inspection; therefore, the release clause was inapplicable.[272] The court further noted that Callander was a "builder-vendor," not just a "seller" and the wording of the clause did not explicitly release a builder-vendor from liability.[273]

The effect of a release provision in a purchase agreement involving the sale of a used home by a non-builder vendor was raised in *Kaminszky v. Kukuch*.[274] Kukuch, the owner of rental property, employed a professional contractor to install insulation in the house. Kukuch did not select the type of insulation nor did he inquire as to the type of insulation, but instead relied upon the contractor to use the best

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267. 546 N.E.2d 850 (Ind. Ct. App. 1989).

268. *Id.*

269. *Id.* at 851.

270. *Id.* at 853.

271. *Id.* Decisions from other jurisdictions have also concluded that "as is" provisions only waive patent defects and do not apply to latent defects not discoverable by a reasonable inspection. *E.g.*, Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970) (such provisions should be construed against the seller).

272. *Callander*, 546 N.E.2d at 853. The defects were not visible at the time of the sale, and an expert witness testified that the problem resulted from a lack of footing below the frost line that could not be determined until after excavations.

273. *Id.* In a separate dissenting opinion, Chief Judge Ratliff observed that in Lechner v. Reutepohler, 545 N.E.2d 1144, 1148 (Ind. Ct. App. 1989), an identical provision was found to bar recovery against the builder-vendor for defects in the foundation of the house. The language in the release provision was clear and unambiguous and released the seller from all liability arising out of defects in the premises, even latent defects, and at the time the purchase agreement was entered into there was no public policy prohibiting such a release. *Callander*, 546 N.E.2d at 854 (Ratliff, C.J., dissenting). The language "at the time the purchase agreement was entered into" suggests that Judge Ratliff might not be certain such a clause would be effective today to release the builder-vendor because of the subsequent enactment of Indiana Code § 34-4-20.5-9, which now governs the disclaimer of the implied warranty of habitability by a builder-vender. *See* IND. CODE § 34-4-20.5-9 (1988).

274. 553 N.E.2d 868 (Ind. Ct. App. 1990).

insulation available. In 1985, the Kaminszkys purchased the house from Kukuch. They inspected the house three times before purchasing it, observing insulation similar to the type installed at a previous residence. The house obviously had been insulated because there were plugs visible on the outside of the house. After purchasing the house, Judith Kaminszky noticed a "different" taste in her mouth and began to experience skin irritation and dizziness. Subsequently, the Kaminszkys found a type of insulation different from the type they observed during the original inspection. It proved to be urea-formaldehyde foam insulation. The Kaminszkys subsequently filed suit for damages and rescission, alleging breach of an implied warranty of habitability, failure to disclose, and mutual mistake.[275] After a bench trial, the court found for Kukuch. [276]

The Kaminszkys first argued that the formaldehyde insulation was a latent defect, which constituted a breach of the implied warranty of habitability. The court did not address this issue because it found that Kukuch was not a builder-vendor and that *Vetor v. Shockey*[277] limited the implied warranty of habitability to builder-vendors.[278]

Second, the Kaminszkys argued that Kukuch was under a duty to disclose the existence of the formaldehyde insulation. In response to this argument, the court remarked that the trial court had found that the seller made no fraudulent statements or misrepresentations.[279] In addition, the court noted that Kukuch had relied on the contractor to use the best insulation available and that he was unaware of the type of insulation installed.[280]

The court concluded that the inspection clause in the purchase agreement protected the seller from liability for latent defects.[281] The court distinguished *Callander v. Sheridan*,[282] which had held a similar inspection clause did not release a builder-vendor from liability on the grounds that Kukuch was only a seller and not a builder-vendor.[283]

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275. *Id.* at 870. Because the Kaminszky's presented no argument on the issue of mistake, the court did not address this issue in the opinion. *See id.* at 870 n.1.

276. *Id.* at 869-70.

277. 414 N.E.2d 575, 577 (Ind. Ct. App. 1980).

278. *Kaminszky*, 553 N.E.2d at 870. The Kaminszkys claimed that Kukuch acted as a general contractor and should be held liable as a builder-vendor. The court, however, found that Kukuch did not act as a general contractor but instead hired a professional to install the insulation. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 871.

282. 546 N.E.2d 850 (Ind. Ct. App. 1980).

283. *Id.* at 853.

Although the court did not address the issue, it is unlikely that a seller would be protected against liability by a release provision when the sellers made an express misrepresentation.[284]

D. Who is a Builder-Vendor?

In *Callander v. Sheridan*,[285] Ray Callander employed several subcontractors to build a house for his family. Callander subsequently sold the house to the Sheridans, who brought this action alleging defects in the foundation and construction of the home. The trial court awarded the Sheridans $11,000 damages.[286]

Callander contended that he was exempt from an implied warranty of habitability because he was not in the business of building homes for resale and lacked the experience and training of those in the building trade.[287] The court responded that Callander had obtained the plans for the house from a builder, and had modified them.[288] Callander also obtained a building permit in his own name, hired subcontractors, purchased electrical equipment and lumber for the house, told a subcontractor where to put the basement and how deep it should be, instructed a subcontractor on where and when to backfill, and placed a motor home on the premises from which to observe the work being done in the evenings. Callander did most of the electrical wiring, stained the molding, laid the ceramic floor, and did the landscaping. In his brief, Callender admitted acting as his own general contractor.[289] The court concluded that because he undertook to act as a general contractor, he must assume the responsibility and the liability of a builder-vendor to a subsequent buyer.[290] Thus, the court refused to limit the implied warranty to builder-vendors in the business of building homes for resale to the general public.[291]

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284. *See, e.g.*, Indiana Bank & Trust Co. v. Perry, 467 N.E.2d 428 (Ind. Ct. App. 1984).

285. 546 N.E.2d 850 (Ind. Ct. App. 1989).

286. *Id.*

287. *Id.* at 852. Callander lived in the house from 1976 until he sold it to the Sheridans in August 1979. *Id.* at 851. The facts did not indicate Callander's reason for selling.

288. *Id.* at 852.

289. *Id.*

290. *Id.*

291. *Id.* Other jurisdictions have limited the implied warranty of habitability to commercial builders in the business of building homes and have not created an implied warranty when the vendor is a casual builder. *See, e.g.*, Dryden v. Bell, 158 Ariz. 164, 761 P.2d 1068 (1988) (warranty does not apply to house built for personal use); Siders v. Schloo, 188 Cal. App. 3d 1217, 233 Cal. Rptr. 906 (1987) (no implied warranty when the sellers were not in the business of selling houses and built the house for their own use); Dawson Ind. Inc. v.

In *Deckard v. Ratcliff*,[292] Deckard built a house in 1979 and lived in it for approximately eight years before selling the house to the Hendersons, who in turn sold it to the Ratcliffs. The Ratcliffs later sued Deckard alleging a breach of the implied warranty of habitability.[293] In reversing a $3000 judgment in favor of the plaintiffs, the court of appeals questioned whether Deckard was, in fact, a builder-vendor. He had built the house for his own use and lived in it with his family for eight years before being forced to sell the house because of a drop in his income.[294] The majority opinion, however, never reached this issue because it determined that even if he was a builder-vendor, he was never provided an opportunity to repair the defect.[295]

D. Requirement that Builder-Vendor be Notified and Provided Opportunity to Cure Defect

In *Deckard v. Ratcliff*,[296] the court of appeals reversed a $3000 judgment against the builder-vendor for breach of an implied warranty of habitability because the builder-vendor had not been notified of the alleged defect or given the opportunity to repair it.[297] Under Indiana law, notice to the builder-vendor of the alleged defect and the opportunity to repair is a condition precedent to the purchaser's recovery

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Godley Constr. Co., 29 N.C. App. 270, 224 S.E.2d 266 (1976) (warranty limited to sale of new dwellings by a builder-vendor in the business of building homes). It is interesting to note that the Indiana Court of Appeals has refused to recognize an implied warranty of habitability in a residential lease by a "non-merchant" landlord. Zimmerman v. Moore, 441 N.E.2d 690, 696 (Ind. Ct. App. 1982).

292. 553 N.E.2d 523 (Ind. Ct. App. 1990).

293. *Id.* Indiana has extended the builder-vendor's implied warranty of habitability to subsequent purchasers, thus allowing the Ratcliffs to sue Deckard for an alleged breach of the implied warranty. Barnes v. Mac Brown, 264 Ind. 227, 342 N.E.2d 619 (1976).

294. *Deckard*, 553 N.E.2d at 523-24. Several courts have refused to find an implied warranty of habitability when the builder did not build the house for resale to the public but was later forced by economic reasons or a job transfer to sell the house. *E.g.*, Dryden v. Bell, 158 Ariz. 164, 761 P.2d 1068 (1988) (warranty does not apply to house built for personal use); Siders v. Selco, 188 Cal. App. 3d 1217, 233 Cal. Rptr. 906 (1987) (no implied warranty when the sellers built the house for their own use but were later forced to sell it). However, if the builder is a merchant in the business of selling homes to the public, the fact that the builder lives in the house or rents the house to a tenant prior to offering it for sale does not prevent the imposition of an implied warranty of habitability in the subsequent sale. *E.g.*, DeRoche v. Dame, 75 App. Div. 384, 430 N.Y.S.2d 390 (1980); Mazurek v. Nielsen, 42 Colo. App. 386, 599 P.2d 269 (1979).

295. *Deckard*, 553 N.E.2d at 523. Judge Staton, in his concurring opinion, considered Deckard a builder-vendor, even though he was not in the business of selling homes. Deckard "assumed the attached liability of a builder-vendor to a subsequent buyer" when he sold the house. *Id.* at 524 (Staton, J., concurring).

296. 553 N.E.2d 523 (Ind. Ct. App. 1990).

297. *Id.*

for breach of the implied warranty of habitability.[298] The court found that *Wagner Construction Co. v. Noonan* was dispositive.[299] Thus, the court followed the rule that

> before a purchaser of a residence may seek damages from the builder-vendor for an alleged breach of implied warranty of fitness for habitation, wherein the damages sought are based upon the cost of repair or diminution in value of the residence, the purchaser must, as a condition precedent to recovery, give notice of the defect and alleged breach of warranty to the builder-vendor thus affording the builder-vendor an opportunity to remedy the defect.[300]

E. Conditions that Constitute Breach of the Implied Warranty

In *Callander v. Sheridan*,[301] Callander sold a house to the Sheridans in August 1979. The Sheridans moved into the house in February 1980. That summer, they noticed cracks in the concrete porch and sidewalk, which grew larger over the next few years. They also noticed that four brick pillars supporting the roof overhang began to bow. The trial court found that there was a breach of the implied warranty of habitability and awarded damages. [302]

On appeal, Callander claimed there was no breach of the implied warranty of habitability because the house was still habitable.[303] The court rejected this argument, finding that a breach of the implied warranty of habitability is established by proof of a defect that substantially impairs the enjoyment of the residence.[304] The evidence admitted at the trial justified the court's finding that the pillars were in imminent danger of collapse and that the defects interfered with the Sheridans' use and enjoyment of the house.[305] Thus, the defective

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298. *Id.* at 523-24.

299. *Id.* (citing Wagner Constr. Co., Inc. v. Noonan, 403 N.E.2d 1144 (Ind. Ct. App. 1980)).

300. *Id.* (quoting *Wagner*, 403 N.E.2d at 1150).

301. 546 N.E.2d 850 (Ind. Ct. App. 1989).

302. *Id.* at 851.

303. *Id.* at 852-53.

304. *Id.* at 853.

305. *Id.* at 852-53. There appears to be disagreement concerning the degree to which the house must be unlivable or uninhabitable before there is a breach of the implied warranty. A few courts appear to require that the defect render the house uninhabitable. *E.g.*, Aronsohn v. Mandara, 98 N.J. 92, 103-05, 484 A.2d 675, 681-82 (1984) (the defect must affect habitability); Stuart v. Caldwell Banker Commercial Group, Inc., 745 P.2d 1284, 1289-90 (Wis. 1987) (the

condition does not have to render the house totally uninhabitable or unlivable before there is a breach of the implied warranty.[306]

In a concurring opinion in *Deckard v. Ratcliff*,[307] Judge Staton addressed the liability of the builder-vendor under the implied warranty of habitability in an action by a subsequent purchaser. The alleged defect was an insect problem caused by an improperly vented sewer pipe. Although the Ratcliffs were not the immediate purchasers of the house from Deckard, in *Barnes v. Mac Brown and Company*, the Indiana Supreme Court extended the builder-vendor's implied warranty of habitability to subsequent purchasers.[308] The supreme court in *Barnes* limited the implied warranty to latent defects.[309] Assuming that the defect was latent,[310] liability does not automatically follow. Rather, the test is one of reasonableness in light of the surrounding circumstances. Among the factors to be considered in applying the test are the age and maintenance of the home, its use, and any other factors that might aid the fact finder in making this determination.[311]

Judge Staton further observed that the legislature had likewise recognized the factual nature of the implied warranty when, in a statute

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defect must profoundly compromise the essential nature of the property as a dwelling). Other courts have indicated that the warranty is one of workmanlike quality and if the construction falls below this standard there is a breach of the warranty. *E.g.*, Gaito v. Auman, 327 S.E.2d 870, 877 (N.C. 1985) (builder has a duty to perform work in an ordinarily skillful manner); Griffin v. Wheeler-Leonard & Co., 225 S.E.2d 557, 567 (N.C. 1976) (quality, not livability, is the test for breach of warranty); Evans v. J. Stiles, Inc., 689 S.W.2d 399, 400 (Tex. 1985) (builder-vendor warrants both workmanship and habitability).

306. *Callander*, 546 N.E.2d at 853. Several courts have also concluded that a condition need not render the premises unlivable. In Petersen v. Hubschman Constr. Co., Inc., 76 Ill. 2d 31, 389 N.E.2d 1154 (1979), the court suggested the term habitability may be unfortunate and that the warranty is more like the warranty of merchantability and fitness of use contained in the UCC. *Id.* at 41-42, 389 N.E.2d at 1158-59.

307. 553 N.E.2d 523 (Ind. Ct. App. 1990).

308. 264 Ind. 227, 342 N.E.2d 619 (1976).

309. *Id.* at 331, 342 N.E.2d at 621.

310. Judge Staton remarked that according to Indiana law there are three components to a latent defect:

1. It is not discoverable by a purchaser's reasonable inspection;
2. It manifests itself after purchase; and,
3. It substantially impairs enjoyment of the residence.

Deckard, 553 N.E.2d at 524 (Staton, J., concurring).

Judge Staton did not believe that the defect in *Deckard* was latent because the Ratcliffs discovered one of the improperly vented sewer pipes when they inspected the house before the purchase and were on notice that other pipes might be improperly vented. However, for purposes of discussion, he was willing to assume that the defect was latent. *Id.*

311. *Id.* (citing *Barnes*, 342 N.E.2d at 621). *See also* Gaito v. Auman, 313 N.C. 243, 327 S.E.2d 870 (1985) (whether there has been a breach of the warranty must be determined on a case-by-case basis) (citing Barnes v. Mac Brown Co., Inc., 264 Ind. 227, 342 N.E.2d 619 (1976)).

permitting the builder-vendor to disclaim the implied warranties in exchange for express statutory warranties, it defined the implied warranties as "unwritten warranties relating to the reasonable expectations of a homeowner with regard to the construction of the homeowner's home, as those reasonable expectations are *defined by the courts on a case-by-case basis*."[312]

Here the insect problem caused by the improperly vented sewer pipe was discovered almost ten years after the construction of the house was completed. Under the circumstances, Judge Staton concluded that Deckard had no duty to repair because he did not breach the implied warranty of habitability.[313]

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312. *Deckard*, 553 N.E.2d at 525 (quoting IND. CODE § 34-4-20.5-9(b) (1988)).

313. *Id.* (Staton, J., concurring). Judge Staton indicated that findings of fact by the trial court would assist the court of appeals in its review of this factual determination. *Id.*