1994 DEVELOPMENTS IN PROPERTY LAW

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I. ADVERSE POSSESSION

In *Rieddle v. Buckner*,[1] the Rieddles sought to quiet title to a lot they had purchased by general warranty deed from the Weyhriches in 1989. Their neighbors, the Buckners, counterclaimed, asserting title by adverse possession to approximately 268 square feet of the Rieddles' property lying within their fence line. In addition to the quiet title action, the Rieddles also sought damages against the Weyhriches for breach of warranty of title. The trial court found for the Buckners on their counterclaim, quieted title to the portion of the lot outside the fence line in the Rieddles, and determined that the Rieddles had suffered $500 in damages as the result of the loss of the land acquired by the Buckners.[2] The Rieddles appealed the award of title to the Buckners based on adverse possession and the court's denial of attorneys' fees and consequential damages in their action against the Weyhriches for breach of warranty of title.[3]

On the adverse possession issue, the Indiana Court of Appeals observed that in order to acquire title by adverse possession, "the claimant must prove actual, visible, notorious, and exclusive possession of the real estate, under a claim of ownership hostile to the true owner for a continuous ten-year period."[4] While Indiana Code section 32-1-20-1 imposes an additional requirement that the adverse claimant must have paid all taxes and assessments on the real estate during the period of adverse possession,[5] the court noted that the tax-paying requirement of the statute does not apply where a boundary dispute exists over the erection of a fence or other structure.[6]

The court rejected the Rieddles' contention that the Buckners' possession was not exclusive because a utility easement was located upon the disputed area.[7] While recognizing that where the claimant occupies the land in common with a third person or

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1. 629 N.E.2d 860 (Ind. Ct. App. 1994).
2. *Id.* at 862.
3. *Id.* at 862-63.
4. *Id.* at 862 (citing Snowball Corp. v. Pope, 580 N.E.2d 733, 734 (Ind. Ct. App. 1991)).
5. IND. CODE § 32-1-20-1 (1993).
6. *Rieddle*, 629 N.E.2d at 862. The Indiana Supreme Court, in Echterling v. Kalvaitis, 126 N.E.2d 573, 575 (1955), held that the additional statutory requirement that the claimant pay all taxes and assessments on the disputed land during the adverse possession period did not apply in boundary disputes involving the erection of a fence or other structures. In a concurring opinion in *Rieddle*, Judge Sullivan conceded that until overruled, the Indiana Court of Appeals was bound by the *Echterling* decision. *Rieddle*, 629 N.E.2d at 866. However, Judge Sullivan agreed with the dissenting opinion by Judge Hoffman in Kline v. Kramer, 386 N.E.2d 982, 990 (Ind. Ct. App. 1979) that the supreme court had ignored the clear and unambiguous language of IND. CODE § 32-1-20-1, and had rewritten the statute to exclude the tax-paying requirement in boundary disputes. *Rieddle*, 629 N.E.2d at 865. Where the language of the statute is clear and unambiguous, it "must be given its apparent or obvious meaning," and the court is not free to read into it some perceived legislative purpose. *Id.* (citations omitted).
7. *Rieddle*, 629 N.E.2d at 862.

the general public the possession is not exclusive, the court observed that in *Snowball Corp. v. Pope*,[8] the presence of licensees on the land did not prevent exclusive possession by the claimant. Similarly, the existence of an easement would not negate exclusivity. The utility companies used the land only for a limited purpose and did not claim ownership.[9]

The Rieddles also argued that the Buckners had failed to show that their possession was hostile and notorious. To be notorious, the possession must be "so conspicuous that it is generally known and talked of by the public in the vicinity."[10] To be hostile, the possession by the claimant must "not disavow his right to possess the property or acknowledge that it is subservient to the title of the true owner."[11] Both elements are designed to alert the true owner that someone is making a claim to the property. The court could not understand how the presence of the fence and the landscaping would fail to alert the Rieddles that a claim was being made to the disputed area.[12]

Although the court did not elaborate on the nature of the Buckners' activities within the disputed area, the court did comment that their "actions exhibit an exclusive possession of the property within their fence," which had been erected by the Buckners in 1977.[13] This observation would indicate that the ten-year period for acquiring title to the disputed area by adverse possession had been reached prior to the Rieddles' acquiring of record title to the lot from the Weyhriches in 1989.

On the issue of damages for breach of warranty of title, the Rieddles claimed that they were entitled to consequential damages resulting from their inability to refinance their mortgage at a lower interest rate because of the lack of a clear title. The court observed, however, that damages for breach of contract are limited to those damages reasonably foreseeable at the time the contract is made, and damages relating to refinancing were not foreseeable.[14]

Next, the Rieddles contended that because the Weyhriches had refused to defend their title against the Buckners' adverse possession claim, they were entitled to reimbursement for litigation expenses, including attorneys' fees.[15] The court noted that a warranty deed guarantees that the property is free from all encumbrances and that the covenantor will defend the title against all lawful claims.[16] Here, the Weyhriches had refused to defend

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8. 580 N.E.2d at 736.

9. *Rieddle*, 629 N.E.2d at 862-63.

10. *Id.* at 863 (citing *Snowball Corp.*, 580 N.E.2d at 735).

11. *Id.* (citing Kline v. Kramer, 386 N.E.2d 982, 988 (Ind. Ct. App. 1979)).

12. *Id.* The Rieddles contended that since the subdivision covenants allowed fences to be erected on the lots, the maintenance of a fence was neither notorious nor hostile. In rejecting this contention, the court noted that the covenants did not authorize the erection of a fence on someone else's property. *Id.*

13. *Id.* at 862-63.

14. *Id.* at 864.

15. *Id.* The Rieddles relied upon an Illinois decision, Rauscher v. Albert, 495 N.E.2d 149, 154 (Ill. App. Ct. 1986), which awarded attorneys' fees and expenses in defending title against an adverse possession claim, but not the expenses and attorneys' fees arising from the plaintiff's action for breach of covenants in the deed. *Rieddle*, 629 N.E.2d at 864.

16. *Rieddle*, 629 N.E.2d at 864 (citing McClaskey v. Bumb & Mueller Farms, Inc., 547 N.E.2d 302, 304 (Ind. Ct. App. 1989), *trans. denied*; *appeal after remand rev'd sub nom.* Hudson v. McClaskey, 583 N.E.2d

the Rieddles' title against the adverse possession claim of the Buckners, and as a result, the Rieddles were entitled to reimbursement for attorneys' fees and other litigation expenses.[17] The court concluded, however, that the trial court had not abused its discretion in denying the Rieddles attorneys' fees of $16,225 and additional legal and litigation expenses of $900, where the land in dispute was worth only $500.[18] The court remanded the case and directed the trial court to award the Rieddles reasonable attorneys' fees.[19]

II. BROKER: WHEN COMMISSION EARNED

Under Indiana law, "a broker earns its commission when it causes a sale or procures a buyer ready, willing, and able to purchase the property."[20] However, the broker and the seller are free to enter into a listing agreement that provides different terms or conditions as to when a commission is earned.[21]

In *Bishop v. Sanders*,[22] the sellers, the Sanders, signed a four-month exclusive listing contract on May 3, 1991, with Donn Bishop, d/b/a Century 21 Donn Bishop Real Estate ("Century 21"). The listing contract provided that:

> OWNER agrees to pay principal broker a fee of seven percent . . . upon the occurrence of any of the following events: . . . 4. At the time OWNER sells the Property to a Purchaser procured in whole or in part by the efforts of the principal broker, a cooperating Broker or the OWNER during the term of the Contract . . . .[23]

In addition, the listing contract contained an exclusion clause that stated: "This listing contract excludes Ruth Kennedy for [a] two week period starting today's date."[24] The two-week period ended May 17, 1991. Ruth Kennedy made an offer to purchase the house on June 21, 1991 and the sale was completed on August 19, 1991. The listing contract did not expire until September 3, 1991. Century 21 brought suit to recover a commission on the sale. The trial court entered judgment in favor of the Sanders, finding

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1228 (Ind. Ct. App. 1992), *aff'd in part, rev'd in part*, 597 N.E.2d 308 (Ind. 1992); IND. CODE § 32-1-2-12 (1993)).

17. *Id.* The court relied upon Worley v. Hineman, 33 N.E. 260 (Ind. App. 1893) as "[t]he sole Indiana case discussing the recovery of costs and expenses in defending title." *Rieddle*, 629 N.E.2d at 864. However, a second Indiana Court of Appeals opinion, Teague v. Whaley, 50 N.E. 41, 42 (Ind. App. 1897), apparently overlooked by the court, indicates that where the grantee gives proper notice of the suit to the covenantor and requests him to defend the title, if the grantor refuses to do so, the grantee may defend his title and recover from the grantor damages for injury to the land and costs of defending the suit, including attorneys' fees.

18. *Rieddle*, 629 N.E.2d at 864-65.

19. *Id.* at 865.

20. Bishop v. Sanders, 624 N.E.2d 64, 66 (Ind. Ct. App. 1993) (citing Fischer v. Bell, 91 Ind. 243, 244-45 (1883)). *See also* Wilson v. Upchurch, 425 N.E.2d 236, 238 (Ind. Ct. App. 1981).

21. *Sanders*, 624 N.E.2d at 66 (citing Lane v. Albright, 49 Ind. 275, 279 (1874)).

22. *Id.* at 65.

23. *Id.*

24. *Id.* at 66.

that Century 21 failed to prove it had procured the buyer or that the defendant had procured the buyer after May 17, 1991, and Century 21 appealed.[25]

The Indiana Court of Appeals observed that under the terms of the listing contract, except for the exclusion clause, the Sanders had agreed to pay a commission to Century 21 if the house was sold during the period of the listing contract with or without the efforts of Century 21.[26] Thus, it was critical to ascertain the effect of the language contained in the exclusion clause.[27]

The court determined that the language was susceptible to more than one interpretation,[28] and that when interpreting an ambiguous provision it "must treat the contract as a whole so as to harmonize all words and phrases therein to best give effect to the parties' intentions at the time they entered the contract."[29] Looking at the entire agreement the court concluded that the purpose of the provision was to exempt the Sanders from paying a commission to Century 21 should a sale to Kennedy result from certain activities within the two-week period.[30] The question then became: "[W]hat conduct, at what time, qualifies for the exclusion provision[?]"[31]

The Sanders argued that since they had found Kennedy as a potential buyer within the two-week period, no commission was due on the later sale to her. In rejecting this contention, the court noted that to hold a mere introduction to a potential buyer is sufficient to "procure" that buyer would render the exclusion clause "useless," because the Sanders were aware that Kennedy was a potential buyer at the time the listing contract was signed.[32] Instead, the court interpreted the exclusion clause to exempt Sanders from the payment of the commission upon the sale to Kennedy during the period of the listing contract only if Kennedy was ready, willing, and able to purchase the house before May 17, 1991.[33] The evidence established that Kennedy was not in such a position. Kennedy testified that she did not believe she could afford the house before she made the offer to purchase on June 21, 1991. Thus, the exclusion clause did not apply and Century 21 was entitled to its commission, court costs, and attorneys' fees.[34] The court reversed the trial court's judgment and remanded for an assessment of attorneys' fees and costs.[35]

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25. *Id.*

26. *Id.* The court noted that the record was unclear as to whether Century 21 had assisted in the sale of the house to Kennedy. *Id.*

27. *Id.*

28. *Id.* at 67. The parties presented three possible interpretations: (1) Kennedy was prohibited from purchasing or otherwise negotiating with the Sanders for a two-week period; (2) the Sanders were free to negotiate with Kennedy for a two-week period and any fruits of the negotiations would be exempt from the provisions of the listing contract; or (3) the Sanders could escape the provisions of the listing contract only if they completed the sale to Kennedy within the two-week period. *Id.*

29. *Id.* (citing DeHaan v. DeHaan, 572 N.E.2d 1315, 1320 (Ind. Ct. App. 1991)).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 68.

35. *Id.*

III. CONCURRENT OWNERSHIP: MULTIPLE PARTY ACCOUNTS

During the past few years, several opinions from the Indiana Court of Appeals have held that the right of survivorship in funds placed in a multiple-party account cannot be terminated without the consent of all of the parties to the account. In *Voss v. Lynd*,[36] the Indiana Court of Appeals held that a husband could not destroy the wife's right of survivorship in certificates of deposits (CDs) in the names of both parties by removing the wife's name from the CDs without her consent. In *Shourek v. Stirling*,[37] the estate of the deceased co-tenant, Jonas, who had deposited all the funds into the accounts, sought to recover the funds that had been removed from the accounts prior to Jonas's death by the surviving co-tenant, Stirling. In awarding the funds that had been removed from the accounts to the surviving co-tenant, the Indiana Court of Appeals held that the removal of the funds by one co-tenant without the consent of the other did not destroy the right of survivorship in the funds that had been removed.[38]

The Indiana Supreme Court granted transfer in *Shourek* and vacated the opinion of the court of appeals, noting that under the multiple-party account statute, only sums remaining on deposit at death presumptively belong to the survivor.[39] Since all the funds had been removed prior to death, there were no funds upon which the statutory presumption could operate.[40] The funds removed from the accounts during Jonas's lifetime apparently belonged to her estate at her death because Jonas had contributed all the funds in the accounts, and, under the provisions of the multiple-party bank account statute, "[a] joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent."[41] The court remanded the case to determine if Jonas had intended to create a present interest in the funds in Stirling prior to her death by making an inter vivos gift.[42]

The Indiana Supreme Court in *Shourek* did not comment on the *Voss* decision.[43] In *Voss*, the husband merely removed his wife's name from the CDs. However, in dictum, the opinion suggests that the husband could not have destroyed the right of survivorship even by cashing in the CDs:

> A joint account can be terminated only by mutual agreement of the joint tenants. Moreover, one joint tenant of money in a joint bank account cannot divest the other of his joint ownership by withdrawing the money without the other's

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36. 583 N.E.2d 1239, 1242 (Ind. Ct. App. 1992). For a discussion of the *Voss* decision, see Walter W. Krieger, *1992 Developments in Indiana Property Law*, 26 IND. L. REV. 1113, 1113-16 (1993).

37. 607 N.E.2d 402, 403-04 (Ind. Ct. App. 1993), *vacated* 621 N.E.2d 1107 (Ind. 1993).

38. *Id.* at 405. For a discussion of the *Shourek* opinion, see Walter W. Krieger, *1993 Developments in Indiana Property Law*, 27 IND. L. REV. 1285, 1285-87 (1994).

39. 621 N.E.2d at 1109 (citing IND. CODE § 32-4-1.5-4(a) (1993)).

40. *Id.* at 1110.

41. IND. CODE § 32-4-1.5-3(a) (1993).

42. *Shourek*, 621 N.E.2d at 1110.

43. *See supra* note 36 and accompanying text.

> knowledge and consent . . . . [The wife's] estate would still have acquired the CDs by right of survivorship.[44]

This dictum clearly conflicts with the supreme court's holding in *Shourek*.

An additional factor to be considered with regard to the termination of a multiple-party account was raised in *Graves v. Kelley*.[45] In *Graves*, the mother, McGinness, used her individual funds to open a joint account with right of survivorship with her son, Graves, in 1986. On March 17, 1992, McGinness telephoned the financial institution, Shearson, Lehman Brothers, Inc. ("Shearson") and instructed them to liquidate the account. The account was liquidated that afternoon, and McGinness died the next morning, March 18, 1992. On the afternoon of March 18, 1992, Shearson issued a check for $17,453.60 made payable to "Marie McGinness and Chester Graves, JTWROS."[46] The next day the check arrived at McGinness's address. In an action by the personal representative of McGinness's estate to determine the ownership of the funds, the trial court awarded the account proceeds to McGinness's estate, and Graves appealed.[47]

The estate argued, under the same rationale put forth in *Jonas v. Stirling*, that since the account was empty at the time of McGinness's death, Graves had no right of survivorship with regard to the funds withdrawn by McGinness before her death.[48] The Indiana Court of Appeals observed, however, that although the joint account deposit agreement, signed by both McGinness and Graves, stated that each joint tenant had the right to receive and withdraw funds "as fully as if he alone were interested in said account," the agreement also provided that: "Notwithstanding the foregoing, you [Shearson] are authorized, in your discretion, to require joint action by the joint tenants with respect to any matter concerning the joint account, including . . . the withdrawal of moneys, securities, or commodities."[49] In this case, Shearson chose not to pay the funds to McGinness individually but to issue the check to both co-tenants with right of survivorship. Thus, the proceeds from the account were still held in joint tenancy with the right of survivorship at the time of McGinness's death. The judgment was reversed and the case remanded for proceedings consistent with the decision.[50]

The *Graves* decision points out the critical importance of the wording of the contractual agreement creating the multiple-party account. Under the contract with Shearson, joint action by the joint tenants could be required "with respect to any matter concerning the account, including . . . the withdrawal of [funds]."[51] Thus, while the multiple-party bank account statute itself does not require the consent of both parties to withdraw funds from the account without the consent of the other co-tenants, the contract creating the account could add such a requirement.

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44. Voss v. Lynd, 583 N.E.2d 1239, 1242 (Ind. Ct. App. 1992) (citations omitted).
45. 625 N.E.2d 493 (Ind. Ct. App. 1993).
46. *Id.* at 494.
47. *Id.*
48. *Id.* at 495.
49. *Id.* (emphasis omitted).
50. *Id.*
51. *Id.*

Unfortunately, the court in *Graves* continued to repeat the dictum in *Voss*: "A joint account can be terminated only by mutual agreement of the joint tenants."[52] The court then stated that Graves did not agree to the termination of the joint account.[53] To the extent the language in *Graves* suggests that the multiple-party bank account statute itself requires the consent of all the parties to a joint account to terminate the right of survivorship to funds removed from the account by one of the parties, the decision appears to conflict with the supreme court's holding in *Shourek*.

IV. LANDLORD AND TENANT

A. Constructive Eviction: Damages Recoverable by Tenant

A constructive eviction occurs when an act or omission by the landlord materially deprives the tenant of the use or enjoyment of the leased premises.[54] Where a tenant has been constructively evicted by the landlord, the duty to pay rent is suspended and the tenant may treat the lease as terminated.[55] In addition, the tenant may also recover damages for the wrongful eviction. The standard measure of damages is the difference between the reserved rent and the fair rental value of the premises for the balance of the lease term. However, the tenant may be allowed to prove special damages such as loss of expected business profits for the remainder of the lease term.[56] The question of whether lost profits for the remainder of the lease term can be recovered by a commercial tenant who was constructively evicted by the landlord was raised in *Williams v. Hittle*.[57]

In *Williams*, the lessees, Hittle and Brown, vacated the leased premises following several ineffective attempts by the landlord, Williams, to repair a roof which had been severely damaged in a storm.[58] The lessees brought an action for damages resulting from the landlord's constructive eviction from the premises and Williams counterclaimed for nonpayment of rent. The jury awarded the lessees $30,000 in damages and Williams appealed.[59]

On appeal, the Indiana Court of Appeals determined that there was sufficient evidence that Williams had breached his duty under the lease to repair the roof, and that the failure to repair the roof deprived the lessees of the beneficial use and enjoyment of the premises, which amounted to a constructive eviction.[60] Williams argued that even if he had breached his duty to repair the roof, the only relief available to the lessees was the

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52. *Id.* at 494 (citing Voss v. Lynd, 583 N.E.2d 1239, 1239 (Ind. Ct. App. 1992)).

53. *Id.*

54. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 6.33, at 286-87 (2d ed. 1993).

55. *Id.* at 287; ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT §3:8, at 105 (1980).

56. SCHOSHINSKI, *supra* note 55, § 3:8, at 107.

57. 629 N.E.2d 944 (Ind. Ct. App. 1994).

58. *Id.* at 945. As a result of the leaking roof, the lessees' hair care business began to decline, and, after portions of the ceiling fell onto two customers, the lessees closed the salon. *Id.* at 946.

59. *Id.* at 945.

60. *Id.* at 950. The court noted the term "constructive eviction" means "an act or omission by the lessor [that] materially deprives the lessee of the beneficial use or enjoyment of the leased property." *Id.* (quoting Sigbee v. Swathwood, 419 N.E.2d 789, 794 (Ind. Ct. App. 1981)).

suspension of the obligation to pay rent. The court disagreed, noting that in the case of a constructive eviction, "[a]s in other contract actions, upon a finding of injury suffered as a consequence of breach of a duty to repair, a party may recover consequential damages."[61] Furthermore, "lost profits may be used as a measure of damages where such are appropriate and ascertainable with a reasonable degree of certainty."[62] Here, the lessees had operated an established business and had introduced into evidence financial records showing that the partnership had realized a net profit of $11,561.65 in 1987, and that the net profits had increased to $31,296.15 in 1988. From this, the court concluded, the jury could have reasonably determined that the tenants "suffered a business loss in 1989 (the remainder of the lease period) roughly equivalent to the amount of net profit realized in 1988."[63] Therefore, the court affirmed the judgment.

B. Covenant to Maintain Leased Premises: Public Policy

In *Fresh Cut, Inc. v. Fazli*,[64] the Indiana Court of Appeals addressed the question of whether it is against public policy to allow a landlord to contractually shift the duty to maintain a sprinkler system in an operable condition on the leased premises to the tenant where a municipal ordinance places that responsibility on the owner of the building. In *Fresh Cut*, the tenant, Fresh Cut, Inc. ("Fresh Cut"), and State Farm Fire & Casualty Co. sued the landlord, Fazli, for damages sustained in a fire on the leased premises. They alleged that Fazli had been notified by the Indianapolis Fire Department that the sprinkler system was inoperative and that his refusal to maintain the sprinkler system in an operable condition was reckless and willful conduct entitling them to punitive damages.[65] Fazli counterclaimed, alleging that Fresh Cut had breached its contractual obligation to maintain the building's sprinkler system. The trial court denied Fresh Cut's motion for summary judgment on Fazli's counterclaim and Fresh Cut appealed.[66]

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61. *Id.* at 951.

62. *Id.* (citing Wolff v. Slusher, 314 N.E.2d 758, 763 (Ind. Ct. App. 1974)).

63. *Id.* The decision contains a detailed discussion of the admissibility of financial statements under the business record exception to the hearsay rule. Although the statements were prepared by an accountant who was not an employee of the lessees, because the statements were used by the lessees in the preparation of their taxes, the court concluded that they were business records pertaining to regularly conducted business and admissible under the business record exception to the hearsay rule. *Id.* at 946-49.

64. 630 N.E.2d 575 (Ind. Ct. App. 1994). After the Survey period had ended, the Indiana Supreme Court granted transfer on this case. *See* 1995 LEXIS 73. The supreme court adopted the analysis used by the court of appeals. It found that the owner of commercial property can shift to the tenant by written agreement a responsibility imposed upon the owner by a municipal ordinance to maintain a fire protection sprinkler system. However, the supreme court did not agree with the court of appeals' conclusion that in this case the written lease agreement had unambiguously placed the responsibility for maintaining the sprinkler system on the tenant. The supreme court concluded that the trial court was correct in denying summary judgment for the tenant on the owner's counterclaim for breach of contract. A lease provision shifting the duty to maintain the sprinkler system to the tenant would not be against public policy, but the court remanded the case to the trial court to determine whether in this case the owner or the tenant was responsible for maintaining the sprinkler system under the lease.

65. *Fresh Cut*, 630 N.E.2d at 575 n.1.

66. *Id.* at 577.

Fresh Cut argued that the duty to maintain the sprinkler system imposed by a municipal ordinance was non-delegable and could not be shifted by contract. The Indiana Court of Appeals disagreed, finding that "it is in the best interest of the public that persons should not be unnecessarily restricted in their freedom of contract. . . . [T]he parties to a contract are free to include in the agreement any provisions they desire so long as such provisions do not offend the public policy of this state."[67] Furthermore, the court noted:

> In Indiana, the parties may agree to cover the risk of harm which may be sustained by third persons by agreeing through an indemnity clause to shift the financial burden from the indemnitee to the indemnitor. . . . An indemnification clause in a lease is not void or voidable as against public policy simply because the indemnitee is charged with a nondelegable duty to the public or third persons.[68]

The court observed, however, that such private agreements have been found to be unenforceable "when it is determined that they contravene statutory law, are clearly contrary to what the legislature has declared to be public policy or clearly tend to injure the public in some sort of way."[69] Here, the court found that neither the Indiana Fire Prevention Code as adopted by the Indiana Fire Prevention and Building Safety Commission nor the ordinance at issue, which incorporated Chapter 13 of the National Fire Prevention Association Standards (NFPA), "explicitly prohibits" the lessor from requiring the lessee to perform the duties imposed by the ordinance.[70] However, since Chapter 13 of NFPA placed the responsibility for the maintenance of the sprinkler system on the owner of the building, a question was raised as to whether shifting the responsibility to the tenant contravened the legislative intent or adversely affected the public welfare.[71] In resolving this question, the court used a balancing test where it evaluated

> the nature of the subject matter of the contract, the strength of the public policy underlying the statute, the likelihood that refusal to enforce the bargain or term will further that policy and how serious or deserved would be the forfeiture suffered by the party attempting to enforce the bargain. . . . We must also weigh in the balance the parties' freedom to contract.[72]

The court found that the purpose of the ordinance was to protect the public and commercial lessees from the dangers associated with fire.[73] However, since a commercial lessee is able to protect itself in the transaction, there is no unequal bargaining position "as might have existed with residential lessees."[74] Moreover, the public welfare is not

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67. *Id.* (citations omitted).

68. *Id.* at 578.

69. *Id.*

70. *Id.* at 579.

71. *Id.*

72. *Id.* (citations omitted).

73. *Id.*

74. *Id.* This language strongly suggests that a landlord would not be permitted to shift the duty to maintain residential units in a safe and habitable condition under the implied warranty of habitability

adversely affected by the clause because "third persons still have recourse to Fazli in tort for their damages."[75] Thus, the trial court did not reach an erroneous conclusion as to the enforceability of the clause.[76]

Fresh Cut argued in the alternative that the lease did not impose on it a contractual duty to maintain the sprinkler system. The court disagreed, finding that the wording of the lease "unambiguously place[d] responsibility for keeping all of the leased premises, including the sprinkler system, in proper operating condition upon Fresh Cut."[77] Therefore, Fresh Cut was not entitled to summary judgment on the landlord's counterclaim, and the trial court's judgment was affirmed.[78]

C. Ejectment and Liability for Future Rent

Normally, when the landlord evicts the tenant prior to the end of the stated term in the lease, the tenant's obligation for future rent ends.[79] The landlord is not entitled to both possession and rent. However, in 1989, the Indiana Court of Appeals held that where the lease contains a "savings clause," the tenant remains liable for the rent for the balance of the lease term, even though the tenant has been evicted from the premises.[80]

In the 1994 case of *Marshall v. Hatfield*,[81] the landlords, the Marshalls, brought an action for ejectment against the tenant, Hatfield. At the possession hearing, the trial court ordered Hatfield to pay the Marshalls the rent then due and owing and to vacate the apartment at the end of the month.[82] Hatfield complied with the court order in all respects. At a later damages hearing, the court awarded the Marshalls $100.00 in damages and court costs, and ordered them to return the balance of the $345.00 security deposit to Hatfield. The Marshalls appealed the trial court's order.[83]

On appeal, the Marshalls argued that the lease contained a savings clause that made the tenant liable for the rent for the balance of the lease term. The Indiana Court of Appeals failed to uncover a savings clause in the lease, but the court determined that even if a savings clause had been included in the written lease, no future rent would be owed by the tenant.[84] The written lease was from April 11, 1992 to April 30, 1992, a term of

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to a residential tenant. For further discussion of this issue, see SCHOSHINSKI, *supra* note 55, §§ 3:27, 3:33, at 144, 156.

75. *Fresh Cut*, 630 N.E.2d at 579.

76. *Id.* at 580.

77. *Id.* The lease provided that the Lessee was not to use the premises "in any manner constituting a violation of any ordinance, statute, regulations or order of any governmental authority," and was to "maintain in good condition and repair the leased premises, including but not limited to the electrical systems, heating and air conditioning systems." *Id.*

78. *Id.*

79. SCHOSHINSKI, *supra* note 55, § 5:34, at 334.

80. Nylen v. Park Doral Apartments, 535 N.E.2d 178, 182 (Ind. Ct. App. 1989), *trans. denied*, Aug. 31, 1989. The savings clause provided: "Eviction of tenant for a breach of lease agreement shall not release tenant from liability for rent payment for the balance of the term of the lease." *Id.* at 181.

81. 631 N.E.2d 490 (Ind. Ct. App. 1994).

82. *Id.*

83. *Id.*

84. *Id.* at 493.

nineteen days. When Hatfield held over after April 30, the lease only extended from month to month, and terminated when Hatfield paid rent for the month of June and vacated the premises at the end of the month in compliance with the order of the trial court.[85]

The Marshalls further contended that the trial court was in error when it ordered them to return the balance of the security deposit to Hatfield. In response, the court observed that since the case was placed on the small claims docket, it was not necessary for Hatfield to file a counterclaim for this relief.[86] Even though the Marshalls had never been given the opportunity to voluntarily comply with the notice provisions of the Security Deposit Act,[87] they failed to demonstrate how they were harmed by the trial court's order to return the balance of the security deposit to Hatfield. The Marshalls conceded that no damages were due other than the July rent, utilities and advertising expenses totalling $99.80. Thus, the issue was tried by the implied consent of the parties and Hatfield was entitled to a return of the balance of the security deposit.[88] Therefore, the judgment was affirmed.[89]

D. Jurisdiction Limit of Small Claims Court

In Indiana, small claims courts have original and concurrent jurisdiction over landlord-tenant disputes.[90] The jurisdiction of the small claims docket of a circuit or superior court is limited in civil actions to claims "in which the amount sought or value of the property sought to be recovered is not more than three thousand dollars ($3000)," but a party "may waive the excess of any claim that exceeds three thousand dollars ($3000) in order to bring it within the jurisdiction of the small claims docket."[91] In

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85. *Id.*

86. *Id.* "The trial shall be informal, with the sole objective of dispensing speedy justice . . . and shall not be bound by statutory provisions or rules of practice, procedure, pleadings or evidence . . . ." *Id.* (quoting IND. R. SMALL CLAIMS, Rule 8(A)).

87. Under the Security Deposit Act, the landlord has 45 days after termination of the rental agreement and delivery of possession to mail an itemized notice of damages to the tenant along with the balance of the security deposit held by the landlord. IND. CODE § 32-7-5-12(a) (1993).

88. *Marshall*, 631 N.E.2d at 494.

89. *Id.*

90. In most counties the circuit or superior court has a standard small claims division. The small claims docket of the circuit or superior court has jurisdiction over "[c]ivil actions in which the amount sought or value of the property sought to be recovered is not more than three thousand dollars ($3000)," and "[p]ossessory actions between landlord and tenant in which the rent due at the time the action is filed does not exceed three thousand dollars ($3000)." IND. CODE §§ 33-4-3-7(1)(2), 33-5-2-4(1)(2) (1993). Marion County has independent small claims courts with "original and concurrent jurisdiction with the circuit, superior, and municipal courts in all civil cases founded on contract or tort in which the debt or damage claimed does not exceed six thousand dollars ($6000), not including interest or attorney fees." *Id.* § 33-11.6-4-2. The small claims court also has original and concurrent jurisdiction "in possessory actions between landlord and tenant in which the past due rent at the time of filing does not exceed six thousand dollars ($6000)," excluding interest and attorney fees. *Id.* § 33-11.6-4-3.

91. *Id.* §§ 33-5-2-4(1), 33-4-3-7(1).

Meyers v. Langley,[92] one issue raised was whether the amount of the award of damages to the landlord exceeded the jurisdictional limit of the small claims division. A second issue involved the sufficiency of the landlord's itemized list of damages mailed to the tenant as required by Indiana Code section 32-7-5-14.[93]

In *Meyers*, the landlord, Langley, brought an action in the small claims division of the Howard Superior Court seeking accrued rent payments and damages against his former tenant, Meyers. Following a trial, the court found that the amount of damages owed to Langley, after giving credit for the $300 security deposit, was $3,305.74, and entered judgment for Langley in the amount of $3000, the jurisdictional limit of the small claims division.[94] Meyers appealed the judgment of the court.[95]

Meyers contended that Langley, by offering evidence of damages in excess of $3000, exceeded the jurisdictional limit of the small claims division. Similarly, Meyers argued that the court, by finding Langley's damages were $3,365.74, made an award in that amount, which exceeded its jurisdiction. The Indiana Court of Appeals rejected these arguments. Meyers had confused the amount of damages with the amount of relief sought.[96] Indiana statutory law expressly provides that a party in a small claims action "'may waive the excess of any claim that exceeds three thousand dollars ($3,000.00) in order to bring [the claim] within the jurisdiction of the small claim docket.'"[97] To hold that a party could not prove damages in excess of $3000 would be to "completely negate the waiver portion of the statute."[98] Langley's complaint requested relief of no more than $3000. The court concluded that a finding of damages is not the same as an award of damages, and the statute only limits the awarding of damages to no more than $3000.[99]

Meyers further asserted that by deducting the $300 security deposit from the damages before awarding the landlord $3000, the court had in effect awarded the landlord $3300. Since the court must limit its award of damages to $3000, the security deposit should have been subtracted from the $3000 judgment. In support of his position, Meyers cited *Skiver v. Brighton Meadows*,[100] in which the Indiana Court of Appeals apparently approved of the trial court's judgment that awarded the landlord $2650 after first deducting a $350 security deposit, even though the proof of damages exceeded the $3000 jurisdictional limit. The *Meyers* court, however, concluded that the *Skiver* court "merely restated the award made by the small claims court," and "then overturned the award on grounds

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92. 638 N.E.2d 875 (Ind. Ct. App. 1994).

93. *Id.* at 878. Under this statute, the landlord may retain the tenant's security deposit and apply it towards accrued rent and damages to the rental unit. However, the landlord is required to mail an itemized list of damages for which he intends to use the security deposit within 45 days after the termination of the occupancy. IND. CODE § 32-7-5-14 (1993).

94. *Meyers*, 638 N.E.2d at 876-77.

95. *Id.* at 876.

96. *Id.* at 877.

97. *Id.* (quoting IND. CODE § 32-5-2-4(1) (1993)). The statute controlling the jurisdiction of the small claims docket of circuit courts, IND. CODE § 32-4-3-7(1) (1993), contains identical language regarding waiver of claims in excess of the jurisdictional limit.

98. *Meyers*, 638 N.E.2d at 877.

99. *Id.* at 878.

100. 585 N.E.2d 1345, 1346 (Ind. Ct. App. 1992).

having nothing to do with the jurisdictional amounts of [Indiana Code] 33-5-2-4."[101] Thus, it was not error for the trial court to apply the security deposit to the damages in excess of $3000 before awarding the $3000 judgement.[102]

The second issue raised on appeal was whether the letter of notification of damages sent to Meyers by Langley complied with Indiana Code section 32-7-5-14.[103] Meyers vacated the premises the last week of April 1991, and on June 13, 1991, Langley mailed a letter to Meyers notifying her that she owed $300 in rent for the months of May and June and indicating that Langley would seek an additional $7,789.57 for repairs to the rental unit. A list of damages and an estimated cost of their repair was attached to the letter. Langley retained Meyers' $300 security deposit. According to section 32-7-5-14, when the landlord retains the tenant's security deposit, the landlord is required to mail to the tenant within forty-five days after the termination of occupancy an "itemized list of damages" for which he intends to use the tenant's security deposit, along with the "estimated cost of repair for each damaged item."[104] Failure to comply with the statutory notice of damages "constitutes agreement by the landlord that no damages are due, and the landlord must remit to the tenant immediately the full security deposit."[105] Meyers claimed that while the list of repairs attached to the letter included general estimates of the costs of repairs, it did not contain an "itemized list of damages."[106] The court disagreed:

> The letter sent by Langley itemized as damages material for two doors, material to fix the bathroom, material for a "kit" room, labor costs, and court costs and set forth specific dollar amounts attributable to each. The letter further provided that Langley was claiming $600.00 for two months accrued rent. The purpose of the notice provision is to inform the tenant that the landlord is keeping the security deposit and for what reason. It provides the tenant an opportunity to challenge the costs for which the deposit is being used. That purpose has been served here.[107]

Therefore, the judgment of the trial court was affirmed.[108]

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101. *Meyers*, 638 N.E.2d at 877 n.2. While it is true that in *Skiver* the judgment of the trial court was reversed on grounds unrelated to the amount of the damage award, the *Skiver* court restated the trial court's award of damages without any suggestion that it disagreed with the amount of the judgment. *Skiver*, 585 N.E.2d at 1346.

102. *Meyers*, 638 N.E.2d at 877 n.1. The trial court found for the tenant on her counterclaim in the amount of $308.56 "as reimbursement of actual expenses," but did not consider the counterclaim in awarding the $3000 judgment. *Id.* at 878 n.3. The court observed that there were two separate judgments: "Langley prevailed upon his claim in the amount of $3,000.00, and Meyers prevailed upon her counterclaim in the amount of $308.56." *Id.*

103. IND. CODE § 32-7-5-14 (1993).

104. *Id.*

105. *Id.* § 32-7-5-15 (1993).

106. *Meyers*, 638 N.E.2d at 878.

107. *Id.* at 878-79.

108. *Id.* at 879.

E. Security Deposit Act

In *Chasteen v. Smith*,[109] the landlord, Smith, brought suit for possession and damages against the tenants, Chasteen and Cox; the tenants counterclaimed for return of their security deposit. The trial court awarded Smith possession and $2506 in damages and the tenants appealed.[110]

The tenants contended that Smith's claim for damages was barred by Indiana Code section 32-7-5-14 which requires the landlord to mail to the tenant an itemized list of damages claimed, together with a check or money order for the difference between the damages claimed and the amount of the security deposit, within forty-five days after the termination of occupancy.[111] Unless the landlord complies with the statutory notice provision, the tenant may recover from the landlord all of the security deposit together with reasonable attorneys' fees, and the landlord is barred from pursuing a claim for damages.[112] Smith admitted that he did not mail an itemized list of damages claimed to the tenants even though he had actual knowledge of their mailing address. However, Smith argued that by initiating the suit within the forty-five day period, he had complied with the statutory notice requirement. The Indiana Court of Appeals did not agree.[113] When Smith filed the action in the small claims court he neither itemized his damages nor estimated the amount of damage attributable to each item as required by the statutory notice provision. Thus, by operation of the statute, the failure to comply with the notice requirement constituted an agreement by Smith that no damages were due.[114] The judgment of the trial court was reversed with instructions to enter an award in favor of the tenants for the amount of their security deposit plus attorneys' fees.[115]

F. Trade Fixtures

At early common law, personalty that was attached to realty in a permanent manner became a part of the realty to which it adhered under the ancient Roman maxim *quicquid plantatur solo, solo cedit* (whatsoever is attached to the land yields to the land). As such, the article became a "fixture," or part of the land, and could not be removed from the land. An exception was later created for fixtures used in a trade or business by a tenant.[116] Such

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109. 625 N.E.2d 501 (Ind. Ct. App. 1993).

110. *Id.*

111. *Id.* (citing IND. CODE § 32-7-5-14 (1993)).

112. IND. CODE §§ 32-7-5-12, -15, -16 (1993); *see also* Duchon v. Ross, 599 N.E.2d 621, 623-25 (Ind. Ct. App. 1992).

113. *Chasteen*, 625 N.E.2d at 502.

114. *Id.* at 502-03. In Raider v. Pea, 613 N.E.2d 870, 872 (Ind. Ct. App. 1993) (citing IND. CODE § 32-7-5-12(a)(3)), the Indiana Court of Appeals held that the landlord was not liable for failure to provide the tenant with the statutory notice of damages until the tenant had "supplied" the landlord with a mailing or forwarding address. However, the *Chasteen* court concluded that Smith, by admitting that he had actual knowledge of the tenants' mailing address, could have complied with the notice of claim provision and *Raider* was therefore distinguishable. *Chasteen*, 625 N.E.2d at 503 n.1.

115. *Id.* at 503.

116. For a discussion of the right of a tenant to remove trade fixtures, see SCHOSHINSKI, *supra* note 55, §§ 5:29-5:31.

"trade fixtures" can be removed from the leased premises by the tenant at the end of the lease term if they can be removed without substantial damage to either the chattel or the freehold, provided they can be used by the tenant at another location.[117] The right of a tenant to remove a trade fixture from the leased premises at the end of the term was raised in *Roebel v. Kossenyans*.[118]

In *Roebel*, the landlord, Roebel, brought an action against the tenant, Kossenyans, for removing incandescent "can" lighting from the leased premises at the end of the lease and for damages to the premises. The facts established that at the beginning of the lease, the premises consisted only of blank white walls, fluorescent lights, and heat. Additionally, Kossenyans agreed to take the premises "as is." Kossenyans, who intended to operate a restaurant on the premises, purchased and installed recessed "can" incandescent lighting and dimmers to create an appropriate atmosphere for an upscale restaurant. At the end of the lease, Kossenyans removed the "can" lighting from the leased premises and installed it in his new restaurant. The removal of the lighting did not cause any damage to the ceiling, although its removal left openings in the ceiling where the lights had been installed. Roebel subsequently had "can" lighting reinstalled in the holes left in the ceiling at the insistence of his new tenant who also intended to operate an upscale restaurant on the premises. The trial court found that the lighting was a trade fixture that Kossenyans had a right to remove at the end of the term and that no damages were caused by the removal of the lighting.[119] Roebel appealed the judgment of the trial court.[120]

Roebel contended that the trial court erred in finding that the incandescent "can" lighting was a trade fixture. The Indiana Court of Appeals approved the definition of a trade fixture used by the trial court: "A trade fxture is defined under Indiana law as personal property put on the premises by the tenant which can be removed without substantial or permanent damage to the premises and is capable of being set up or used in business elsewhere."[121] As to the right of a tenant to remove trade fixtures at the end of the term, the trial court substantially used the test set forth in *New Castle Theater Co. v. Ward*:[122] "'As between landlord and tenant, the general rule is that the tenant may remove trade fixtures within the term of his lease, if they are capable of being detached without material injury to the freehold or themselves, and of being set up and used elsewhere."[123] The *Roebel* court concluded that the "can" lighting was indeed a trade fixture.[124] It was considered essential by Kossenyans, who had ten years' experience in the restaurant business, to create a proper ambiance for an upscale restaurant, and Kossenyans had re-installed the "can" lighting in his new restaurant.[125]

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117. CUNNINGHAM ET AL., *supra* note 54, §6.48, at 364-65. For a more detailed discussion of the law governing trade fixtures, see SCHOSHINSKI, *supra* note 55, §§ 5:29-5:33.

118. 629 N.E.2d 241 (Ind. Ct. App. 1994).

119. *Id.* at 242.

120. *Id.*

121. *Id.* at 242-43 (quoting Record at 10).

122. 104 N.E. 526 (Ind. App. 1914).

123. *Roebel*, 629 N.E.2d at 243 (quoting *New Castle*, 104 N.E. at 528).

124. *Id.* at 244.

125. *Id.* at 243.

Finally, Roebel argued that even if the lighting was a trade fixture, the trial court erred in finding that its removal did not cause any damage to the leased premises. The court apparently interpreted Roebel's argument as a claim that trade fixtures cannot be removed from the leased premises by the tenant if their removal will cause any damage to the freehold. In rejecting this position, the court observed that the trial court was not required to find the absence of any damage to the leased premises in order to permit the removal of trade fixtures at the end of the lease. Under Indiana law, trade fixtures can be removed unless their removal would cause "substantial or permanent damage" to the premises.[126] Here the evidence supported the trial court's finding that the removal of the "can" lighting caused no substantial or permanent damage to the leased premise. Therefore, the judgment was affirmed.[127]

V. PURCHASE AGREEMENT: STATUTE OF FRAUDS

The English Statute of Frauds requires written evidence of the terms and conditions of a contract or sale of real property signed by the party to be charged with the contractual obligation.[128] The written memorandum may consist of several writings, if each writing is signed by the party to be charged and indicates that it is related to the same transaction.[129] Furthermore, a document written after the contract for sale has been performed can be used to prove the terms and conditions of the contract and satisfy the Statute of Frauds.[130] The requirement that there be a written memorandum of the contract for the sale of land satisfying the Statute of Frauds was raised in *Newman v. Huff*.[131]

In *Newman*, Marie Henderson, because of her declining health, decided to sell rental property consisting of eight apartment units located at 6002 Fullerton Avenue, Buena Park, California, to her friends Jesse and Jane Newman ("the Newmans"). For tax reasons, Henderson desired an arrangement whereby she could obtain monthly income for life. The purchase agreement provided that the Newmans would make a downpayment of $19,000, with the balance of the purchase price ($225,000) payable by a promissory note at the prevailing interest rate. The "interest only" on the note was to be paid in monthly installments of $2,062.50, with the principal on the note due in either ten or fifteen years at the Newmans' option. Henderson orally agreed that if the Newmans

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126. *Id.* at 244. If the landlord was in fact arguing that trade fixtures cannot be removed by the tenant where damage to the lease premises will occur, this position is inconsistent with a covenant in the lease providing that upon removal of any trade fixtures from the leased premises: "Tenant shall repair any damages to the premises caused by such removal." *Id.* at 241-42.

127. *Id.* at 244.

128. Stat. 29 Car. II, c.3 § 4 (1677). The Indiana version of the Statute of Frauds is found in IND. CODE § 32-2-1-1 (1993).

129. Wertheimer v. Klinger Mills Inc., 25 N.E.2d 246, 247-48 (Ind. 1940); Block v. Sherman, 34 N.E.2d 951, 953 (Ind. App. 1941).

130. Newman v. Huff, 632 N.E.2d 799, 803 (Ind. Ct. App. 1994) (citing Smith v. Hunt, 98 N.E.2d 841 (Ind. App. 1912)).

131. *Id.* at 802.

timely made the monthly interest payments, the unpaid balance of the note would be forgiven at her death.[132]

The real estate closing took place on January 3, 1984. Henderson conveyed the property to the Newmans by a grant deed and the Newmans executed a promissory note secured by a deed of trust with the Grover Escrow Corporation named as trustee. The corporate trustee was to reconvey the property to the Newmans when the note was paid. On January 19, 1984, Henderson executed a will stating that the balance of the note should be forgiven at her death and that the Newmans should take the property free and clear of any obligation to Henderson's estate. A subsequent 1986 will reiterated that the balance of the note arising from the sale of the Buena Park property was to be given to the Newmans "in accord with a contractual agreement made when [she] sold these units to Mr. Newman but never put in writing."[133]

After learning of Henderson's death in 1991, the Newmans ceased direct payments on the note, but continued to make payments into a trust account pending the outcome of two actions filed by the Newmans against Henderson's estate, the executor of her estate, and the legatees. The first action sought the return of any payments made and funds expended and the reasonable value of services rendered, or, in the alternative, specific forgiveness of the note and delivery of title.[134] The trial court granted the legatees' motion to dismiss for failure to state an actionable claim.[135] In the second action, the Newmans sought specific performance of the agreement to devise the unpaid balance of the note—$225,000.[136] The trial court granted summary judgment in the estate's favor.[137] The Newmans appealed the two decisions, which were consolidated for review.[138]

The Newmans contended that the provisions in the wills served as a written memorandum evidencing the existence of an agreement in the contract for sale of the real estate that the unpaid principal on the note would be forgiven at Henderson's death.[139] The Indiana Court of Appeals observed that the agreement between the parties that the unpaid balance of the note would be forgiven at Henderson's death was not reduced to writing until after "the real estate sale, promissory note and trust arrangement had been consummated."[140] Nevertheless, the court determined that the subsequent memorialization of the oral agreement in Henderson's will satisfied the Statute of Frauds.[141] The will on its face showed that the obligation to forgive the debt "arose at the time of, and in connection with, the sale of the property to the Newmans."[142]

The estate first argued that the promise to forgive the note and reconvey title was made without consideration and unenforceable; and, secondly, that it was a separate oral

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132. *Id.* at 801.
133. *Id.* at 802 (quoting Record at 111).
134. *Id.* n.2.
135. *Id.* n.3.
136. *Id.* n.2.
137. *Id.* n.3.
138. *Id.* at 802.
139. *Id.*
140. *Id.* at 803.
141. *Id.* at 804.
142. *Id.*

promise and not part of the consideration for the sale. The court did not agree: "Marie's promises to forgive the debt and to reconvey title at her death were integral parts of the original bargain struck by the parties."[143] In a "strikingly similar" case, *Cadigan v. American Trust Co.*,[144] the court noted that the California Court of Appeals found a promise to remit the unpaid portion of the principal of a promissory note upon the death of the payee to be an integral part of the bargain and the major inducement for the purchase of property.[145] While Henderson's will used the word "gift," it also stated that the forgiveness was part of the contractual agreement. Unlike a gift or testamentary devise, the Newmans were bound to perform the terms of the contract during Marie's life.[146] Therefore, the judgment was reversed and the cause remanded for further proceedings.[147]

In discussing the enforceability of the contract agreement to forgive the balance of the note at Henderson's death, the court observed that the single issue was whether the provision in the grantor's will can be used to satisfy the written memorandum requirement of the Statute of Frauds to prove the otherwise oral promise in the original purchase agreement.[148] Had the duty or obligation to forgive the debt been created by the will, the enforceability of the obligation would depend upon the validity of the will.[149] However, since the obligation to forgive the debt at the vendor's death was a part of the original contract of sale, the writing signed by the testatrix/vendor can satisfy the Statute of Frauds even if the will is held invalid or is subsequently revoked by the testatrix.[150]

VI. SERVITUDES: EASEMENTS AND COVENANTS

A. Implied Easements

An implied easement can arise at the time of a conveyance. For an implied easement based on prior use to arise at the time of the severance of a tract of land, it is necessary to establish that during the unity of title, a permanent and obvious servitude was imposed on one part of the land for the benefit of the other, and that at the time of the conveyance, the continued use of the easement was reasonably necessary for the enjoyment of the dominant estate.[151]

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143. *Id.* at 805.

144. 281 P.2d 332 (Cal. Ct. App. 1955).

145. *Newman*, 632 N.E.2d at 805. In *Cadigan*, the landlord agreed to sell the rental property to the tenants with a small downpayment and monthly payments, and orally represented that the balance of the note would be cancelled upon the landlord's death. A letter written by the landlord four months after the purchasers had signed the note and deed of trust confirmed the oral agreement that the remaining balance would be cancelled upon her death. The court found that the promissory note, deed of trust, and the letter constituted a single contract. *Cadigan*, 281 P.2d at 334.

146. *Newman*, 632 N.E.2d at 807.

147. *Id.*

148. *Id.* at 802-03.

149. It should be noted that the facts of this case indicate that the Newmans are presently contesting the probate of a later will executed by Marie in 1987. *Id.* at 802 n.4.

150. *Id.* at 804.

151. CUNNINGHAM ET AL., *supra* note 54, § 8.4, at 445; *see also* John Hancock Mut. Life Ins. Co. v.

In *Reed v. Luzny*,[152] George Luzny, the owner of property, subsequently divided it into two tracts and installed water and sewer pipes running from his residence on one part of the property to a commercial building located on the other. Anna Luzny, the current owner of the residential tract, conveyed the tract with the commercial building to Reed by warranty deed in September 1980. Luzny had paid the water and sewer services supplied to the Reed property since the conveyance. In January 1992, Luzny sought a declaratory judgment allowing her to discontinue the gratuitous supply of utility services to the Reed property. The trial court granted Luzny's motion for summary judgment finding that there was no implied or prescriptive easement and Reed appealed.[153]

Reed contended that the trial court should have found an implied easement based on the generally recognized rule of law that where, during the unity of title, one part of the land is used for the benefit of another part, and where, at the time the parts are severed, the easement is apparent and reasonably necessary for the enjoyment of the dominant estate, the law will imply the continuance of an easement.[154] Luzny contended that providing free utilities is a service rather than an easement. The Indiana Court of Appeals, however, agreed with Reed that the supplying of utility services through underground pipes was a use of the land and hence an easement.[155]

This ruling by the court is questionable. The burden on the servient tenant involves more than just allowing utility services to be supplied through pipes running beneath the servient estate. Supplying free utility services is an affirmative covenant. It requires the owner of the servient estate to pay utility bills for the owner of the dominant estate.[156] However, the question of whether or not the court was correct in classifying the servitude as an easement became moot when the court found that no implied easement was created.[157] To establish the existence of an implied easement by prior use, the party asserting the easement must show that it was reasonably necessary for the fair enjoyment of the land at the time the property was severed. Here, Reed admitted that he could have obtained water and sewer services for the building by alternative means, even though, "in doing so[,] he would incur 'considerable' expense and rearrangement of his premises."[158] Therefore, the judgment was affirmed.[159]

Patterson, 2 N.E. 188, 190-91 (Ind. 1885).

152. 627 N.E.2d 1362 (Ind. Ct. App. 1994).

153. *Id.* at 1363.

154. *Id.* (citing *John Hancock*, 2 N.E. at 191).

155. *Reed*, 627 N.E.2d at 1364.

156. An affirmative covenant requires the owner of the burdened estate to perform a positive act for the benefit of the owner of the benefitted estate. RALPH E. BOYER ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY 389 (4th ed. 1991).

157. *Reed*, 627 N.E.2d at 1365.

158. *Id.* at 1364-65. For a discussion of the amount of necessity required to establish an implied easement based on prior use in Indiana, see Walter W. Krieger, *Recent Developments in Indiana Law*, 25 IND. L. REV. 1375, 1380-83 (1992).

159. *Id.* at 1365.

B. Creation and Termination of Servitudes

Oakes v. Hattabaugh[160] involved both the creation of an express easement and the termination of a restrictive covenant. In *Oakes*, Bales and Pitts, who jointly owned a parcel of land, divided their property into lots and sold them at a public auction. Lot Nineteen was purchased by Kent and Lot Twenty was purchased by the Meyers. Both deeds indicated that there was a fifty-foot wide easement across the Meyers' property for ingress and egress, and that the maintenance of the easement would be shared pro rata among the users. The deeds did not, however, identify the dominant estate. The two deeds also contained restrictive covenants prohibiting "nonresidential uses and buildings, noxious or offensive activities, and signs larger than one square foot."[161]

The Kent property, Lot Nineteen, which was situated east of a portion of the easement, would have been landlocked without the right to use the easement. In June 1988, the Meyers conveyed Lot Twenty to the Oakes. The deed set forth the easement on the property, but did not refer to any specific restrictive covenants, although the deed did indicate that the grantees took "subject to all easements, rights-of-way, restrictions and agreements of record."[162] In 1988, the Oakes constructed a barn on the property and began raising farm animals. At the entrance of the driveway, the Oakes erected a sign reading "Oakshire Estates and Stables."[163] Later the Oakes improved the easement with gravel at a cost of $5000 and requested that Kent pay $2500 of the expense. Kent refused, and therefore in January 1991, the Oakes filed suit against Kent for $2500. Kent filed a counterclaim for injunctive relief, charging the Oakes with violating the restrictive covenants by building the barn and fence, stabling horses and donkeys, and erecting the sign. Big Ten Developers ("Big Ten"), who owned 375 acres of land adjacent to the Oakes' property, intervened, claiming a perpetual easement across the Oakes' land. The trial court granted Big Ten a perpetual easement across the Oakes' property, ordered Kent to reimburse the Oakes $2500, and granted the injunction sought in Kent's counterclaim.[164] The Oakes appealed the judgment on the counterclaim and Big Ten's third-party claim.[165]

With regard to Big Ten's claim to an easement, the Indiana Court of Appeals noted that while the Oakes' property was obviously the servient estate, since the easement was located upon their land, the description of the easement in the Meyers', Kent's, and the Oakes' deeds did not identify the dominant estate.[166] Thus, the court reversed the portion of the judgment granting Big Ten a perpetual easement across the Oakes' property.[167]

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160. 631 N.E.2d 949 (Ind. Ct. App. 1994).

161. *Id.* at 951.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 952. While the failure to set forth the dominant tenement would appear to preclude the use of the easement by Kent, the court observed that the Oakes had never challenged Kent's right to use the easement and in fact claimed compensation for Kent's use of the easement. *Id.* at n.3.

The court then turned to the restrictive covenants and the granting of Kent's counterclaim for injunctive relief. The court did not agree with the Oakes' contention that the restrictive covenants were intended only to bind the original parties to the deeds from Bales and Pitts.[168] Instead, the court found that the language in the deeds providing that the covenants last for twenty-five years was evidence of an intent that the covenants should run with the land.[169] Nevertheless, the court agreed with the Oakes that the covenants should not be enforced because of laches and acquiescence.[170] In 1988, the Oakes built their barn to board their horses, improved the dirt driveway with gravel, built a fence, erected a sign at the entrance to the driveway, and began raising farm animals. Later, the Oakes built a house on Lot Twenty and bought an adjacent field. Kent waited for approximately two years before complaining about the violations of the covenants. The court found that this delay was prejudicial because the Oakes built their house and bought additional land after the violations were committed without objection.[171] Kent's silence was an implied acquiescence of the violations. The court found that it would be inequitable to require the removal of the items, and vacated the trial court's injunction.[172]

In *Coffin v. Hollar*,[173] Sarah and Cordie Coffin conveyed land near Cedar Lake to their daughter Mylene Hollar. The land conveyed to Hollar was separated from Cedar Lake by other land owned by the Coffins, upon which they operated a resort. The deed from the Coffins to Hollar granted a ten-foot wide easement across the resort property to provide access to Cedar Lake. After the death of Hollar's father, Hollar's mother began conveying the resort property to Hollar's brother, Merritt Coffin. In 1983, Merritt's son, Terry, erected a fence between the Hollar property and the resort property while Hollar was away for an extended period. Hollar objected to the location of the fence without a survey establishing the boundaries, and in 1986 a survey established that the fence was on Hollar's property. In 1988, Merritt became the owner of the resort property and transferred the property to a trust. Terry then began buying the property from the trust. In either 1991 or 1992, Terry barred Hollar's access to the resort property, including the easement, and Hollar filed suit asking that all obstructions to her easement and the fences encroaching upon her land be removed. Terry admitted to interfering with Hollar's use and enjoyment of the easement and to encroaching on her land with the fence, but raised the affirmative defenses of adverse possession, laches and estoppel. Terry appealed the judgment in favor of Hollar.[174]

On appeal, the Indiana Court of Appeals determined that Terry had failed to prove all of the elements of adverse possession.[175] Although Hollar had not used the easement

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168. *Id.* at 952.

169. *Id.*

170. *Id.* at 953. The court observed that laches "is comprised of 1) an inexcusable delay in asserting a right, 2) an implied waiver from a knowing acquiescence in existing conditions, and 3) prejudice to the adverse party." *Id.* (citing LaPorte Prod. Credit Ass'n v. Kalwitz, 567 N.E.2d 1202, 1204 (Ind. Ct. App. 1991), *trans. denied*, Mar. 2, 1992).

171. *Id.*

172. *Id.*

173. 626 N.E.2d 586 (Ind. Ct. App. 1993).

174. *Id.* at 588.

175. *Id.* at 589.

across the resort land very often in the past, and had allowed the resort to establish campsites on the easement, she did so because she was allowed passage over all parts of the resort property and had no need to use the easement. The resort's use of the easement before Terry terminated Hollar's access to the resort area could not be deemed hostile, an element necessary to establish title by adverse possession.[176]

Terry also argued that Hollar's claim to the easement across the resort property and her contention that the fences encroached upon her land were barred by laches. The court observed that "[l]aches is comprised of three elements: inexcusable delay in asserting a known right; an implied waiver arising from knowing acquiescence in existing conditions; and a change of circumstances causing prejudice to the adverse party."[177] It was not until Terry terminated Hollar's access to the resort property that she needed to assert her right to the easement, which she did by filing this action two or three months later. In addition, she objected to the location of the fence from the time Terry began its construction. She could not be said to have slumbered on her rights. Therefore, the court affirmed the judgment.[178]

C. Restrictive Covenants: "Residential Purposes Only"

Two decisions during this Survey period discuss the scope of a restrictive covenant limiting the use of property to "residential purposes only." In *Stewart v. Jackson*,[179] the Stewarts brought an action to prevent their neighbors, Leigh and Rodney Jackson, from operating a day care facility in their home. Leigh Jackson had applied to the Evansville Board of Zoning Appeals for a special use permit required by city ordinance to care for six to ten children in her home. When Kenneth Stewart opposed the granting of the permit, Jackson withdrew the application and reduced her home day care to five children, which did not require a special use permit. Stewart, however, filed an action seeking an injunction to prevent the Jacksons from operating a day care facility in their home, claiming that such activity violated the subdivision's restrictive covenant, which limited the use of the lots to residential purposes only and expressly prohibited any commercial or business activity.

During a bench trial, the evidence established that there were four other day care homes in the neighborhood, that other neighbors operated commercial activities out of their homes, and that the Stewarts themselves had violated the covenants by operating two businesses out of their home—a general contracting construction company and a wholesale toy business. In addition, other neighbors testified that the day care facility operated by the Jacksons was an asset to the neighborhood. In ruling in the Jacksons' favor, the trial court found that the Stewarts had substantially violated the covenants, that the Jacksons had not violated the covenants, and that the restrictive covenant prohibiting home day care was void as against public policy.[180]

On appeal, the Indiana Court of Appeals first addressed the trial court's conclusion that the Stewarts were estopped from bringing the action by the doctrine of "unclean

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176. *Id.*

177. *Id.* (citing Lowry v. Lowry, 590 N.E.2d 612, 621 (Ind. Ct. App. 1992)).

178. *Id.* at 589-90.

179. 635 N.E.2d 186 (Ind. Ct. App. 1994).

180. *Id.* at 188-89.

hands" because they themselves had substantially violated the restrictive covenant. Although the court observed that one who seeks equity must be free of wrongdoing in the matter before the court, it also noted that "Indiana has recognized the ability to purge oneself of wrongdoing, which effectively restores the right to equitable relief."[181] The court reasoned that because the Stewarts no longer operated any business from their home, they had purged themselves of wrongdoing and reversed the trial court's findings that the action was barred by the doctrine of unclean hands.[182]

The Stewarts further contended that the trial court erred as a matter of law in holding that home day care was not a commercial activity that violated the restrictive covenant. The court stated that the statutory definition of a "child care home" is "a residential structure in which at least six (6) children [at a time] (not including the children [of the provider]) . . . receive child care from a provider . . . for more than four (4) hours but less than twenty-four (24) hours in each of ten (10) consecutive days per year, excluding intervening Saturdays, Sundays, and holidays."[183] Therefore, Indiana does not require a license to care for five or less children in one's home. Since Leigh Jackson cared for less than six children in her home, the court limited its consideration to an unlicensed home day care.[184]

While the Stewarts contended that this was a case of first impression in Indiana, the court noted that it had struggled with a similar question with regard to the operation of group homes in residential subdivisions. In *Clem v. Christole, Inc.* ("*Clem I*"),[185] the Indiana Court of Appeals divided on whether group homes are in violation of restrictive covenants prohibiting commercial activities. The Indiana Supreme Court granted transfer in the case ("*Clem II*") and concluded that Indiana Code section 16-13-21-14(a),[186] which prevented the enforcement of restrictive covenants prohibiting the operation of group homes in residential subdivisions, violated the contract clause of the Indiana Constitution.[187]

The *Stewart* court observed that a minority of the supreme court in *Clem II* believed that the restrictive covenants did not prohibit the establishment of group homes in residential subdivisions, and in its analysis concluded that the restrictive covenants were never intended to exclude home day care.[188] Similarly, in *Minder v. Martin Luther Home Foundation* ("*Minder II*"),[189] although the supreme court reversed the court of appeals, which had held that group homes are residential and not business uses ("*Minder I*"),[190] it

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181. *Id.* at 189-90.

182. *Id.* at 190.

183. *Id.* (quoting IND. CODE § 12-7-2-28.6 (1993)).

184. *Id.* In passing, the court noted that a child care center usually refers to a "nonresidential structure where at least seventeen children receive child care." *Id.* (citing IND. CODE § 12-7-2-28.4 (1993)). The Jacksons were not operating a "child care center," and the court made no determination as to whether such a center would be a violation of the restrictive covenant. *Id.* at 190.

185. 548 N.E.2d 1180, 1187 (Ind. Ct. App. 1990).

186. IND. CODE § 16-13-21-14(a) (repealed 1993).

187. 582 N.E.2d 780, 785 (Ind. 1991).

188. *Stewart*, 635 N.E.2d at 190-91 (citing *Clem II*, 582 N.E.2d at 786).

189. 582 N.E.2d 788 (Ind. 1991).

190. Minder v. Martin Luther Home Found., 558 N.E.2d 833, 835 (Ind. Ct. App. 1990).

did so for the constitutional reason stated in *Clem II*, but remanded back to the trial court to decide whether group homes violated the restrictive covenants.[191]

The *Stewart* court noted that decisions in other states deciding whether private residence day care violates "residential use only" covenants were divergent, but examined decisions from Michigan and Washington that held that a residence day care does not violate such restrictive covenants.[192] In *Beverly Island Ass'n v. Zinger*,[193] the Michigan Court of Appeals held that such covenants are to be construed strictly in favor of the free use of property and concluded that restrictions allowing residential use of land permited a wider use than restrictions prohibiting commercial or business use.[194] Business or professional use does not constitute a per se violation of a residential use restriction.[195] The *Beverly Island* court also acknowledged that day care licensing reflected Michigan's policy to provide for "the protection, growth and development of children," and concluded that day care homes are residential uses of property.[196]

Next, the *Stewart* court reviewed *Metzner v. Wojdyla*,[197] in which the Washington Court of Appeals held that an in-home day care for ten children did not violate a "residential purposes only" covenant. The *Metzner* court based its decision on three factors: "1) the use of the home for day care was incidental to the residential use, 2) the day care was small and not significantly more intrusive than normal single-family activity, and 3) child care is an activity customarily incident to residential use of property."[198] Thus, the *Stewart* court concluded that these restrictive covenants never contemplated the exclusion of unlicensed day care homes as commercial businesses.[199]

The court also examined Indiana's public policy toward home day care. It noted the creation of the board for the coordination of child care regulation, which studies the necessity of programs to meet child care needs of Indiana residents, assesses the availability and projected need for safe and affordable child care, and reports its findings to the Indiana General Assembly.[200] One of the board members testified at the trial that most parents choose in-home day care when available over day care centers because it simulates the family, allows children to learn and play at their own individual levels, and is more accommodating to parents' different work schedules because of more flexible hours.[201] The General Assembly's decision not to regulate or monitor small home day care was further evidence of Indiana's policy favoring home day care.[202] Thus, the court

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191. *Minder*, 582 N.E.2d at 789.

192. *Stewart*, 635 N.E.2d at 191.

193. 317 N.W.2d 611 (Mich. Ct. App 1982).

194. *Id.* at 613.

195. *Id.*

196. *Id.* at 614-15.

197. 848 P.2d 1313 (Wash. Ct. App. 1993), *rev'd*, 886 P.2d 154 (1994).

198. *Stewart*, 635 N.E.2d at 192 (citing *Metzner*, 848 P.2d at 1316-17).

199. *Id.* at 193.

200. *Id.* (citing IND. CODE §§ 12-17.2-3-1 to -11 (1993)).

201. *Id.*

202. *Id.*

concluded that home day care is a residential use within the meaning of the residential use covenant.[203]

Finally, the court noted that if it had found that unlicensed residential day care violates the covenant, it still would have affirmed the trial court's denial of injunctive relief based on the Stewarts' acquiescence of other day care homes in the neighborhood.[204] In determining acquiescence, the court noted that it must consider three factors:

> 1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property upon which a nonconforming use has been allowed; 2) the similarity of the prior nonconforming use to the nonconforming use sought to be enjoined; and 3) the frequency of prior nonconforming uses.[205]

Here, four other day care homes were located within two blocks. Kenneth Stewart admitted that he was aware of two day care homes, one at the end of the street and one on the other side.[206]

In *Bagko Development Co. v. Damitz*,[207] the Damitzes purchased two adjoining lots in Willowridge Subdivision. They constructed a $400,000 residence on one lot and a Little League baseball practice field (infield and batting cage) on the other. The practice field lot included a complete infield, an underground sprinkler system, a batting cage, a pitching machine and lighting. The total investment in the practice field exceeded $45,000. The Damitzes had three boys, ages ten, seven and five. Mr. Damitz coached two Little League teams and used the field two or three times a week during the Little League season for infield practice. No games were played on the field and neighbors testified that they had never seen a baseball hit off the lot. When the field was not being used for practice, neighborhood children used the field to play soccer, football and baseball with whiffle balls.[208]

The Longworths, neighbors, and Bagko, the subdivision developer, sought a permanent injunction to prevent both the maintenance and use of the lot as a Little League practice field, claiming that it violated both the subdivision covenant limiting the use of the lots to "residential purposes," and the lot's R1-zoning.[209] The trial court denied an injunction, finding that the development and use of the lot violated neither the restrictive covenant nor the zoning ordinance.[210]

Bagko claimed that the trial court erred as a matter of law in finding that the use of the lot as a practice facility did not violate the "for residential purposes only" restrictive covenant. The Indiana Court of Appeals noted that the term "for residential purposes"

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203. *Id.* at 193-94.

204. *Id.* at 194.

205. *Id.* (citing Hrisomalos v. Smith, 600 N.E.2d 1363, 1368 (Ind. Ct. App. 1992)).

206. *Id.*

207. 640 N.E.2d 67 (Ind. Ct. App. 1994).

208. *Id.* at 69.

209. *Id.* at 69-70. The plaintiffs also claimed that the use of the lights on the practice field created a nuisance. This issue is discussed *infra*, at note 216.

210. *Bagko*, 640 N.E.2d at 70. The court also found that the use of the practice field was not a nuisance. *Id.*

was not defined in the covenants.[211] It observed that residential use is to be distinguished from commercial or business use. Similarly, other authorities have suggested that "for residential purposes" merely limits the use to living purposes as distinguished from business or commercial purposes.[212] The trial court found that in the community, "'residential use' includes the construction and use of tennis courts, basketball courts, and swimming pools."[213] Thus, the court found that the trial court's conclusion that the recreational use of the lot as a baseball practice field was not a violation of the covenant was not clearly erroneous.[214]

Bagko also contended that the use of the lot as a practice field violated the county zoning ordinance. The ordinance listed two permitted uses of property zoned R1-Residential: single-family dwellings; or public parks, playgrounds, or recreational areas. Bagko argued that since the lot was not being used for either of these stated purposes, its use violated the zoning ordinance. The court noted that, under this rationale, if a person purchased a lot zoned R-1, until they built a structure on the lot, they could not picnic or play volleyball on the lot.[215] A building permit may be obtained to build a house on two lots even though the house is built on one of the lots. Thus, the Damitizes had one parcel consisting of two lots, and the parcel was primarily used for a single-family dwelling costing in excess of $400,000. The use of a portion of the parcel as a practice field for approximately 8.75 hours a week for about ten weeks out of the year was an accessory use subordinate to the primary use as a residence. Thus, the court held that the trial court's finding that the use of the practice field was not a violation of the zoning ordinance was not clearly erroneous.[216]

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211. *Id.*

212. *Id.*

213. *Id.* at 71 (citing Record at 472).

214. *Id.*

215. The court observed that in Boone County Area Plan Comm'n v. Kennedy, 560 N.E.2d 692, 696 (Ind. Ct. App. 1990), the court found a 15-acre private skeet range within a 40-acre parcel on which the owner maintained a "country home" an accessory use of the real estate. *Bagko*, 640 N.E.2d at 71. The primary purpose of a parcel can be residential use and recreational development on the parcel is only an accessory use of the land.

216. *Bagko*, 640 N.E.2d at 71-72. The court also discussed the issue of whether the practice field lights might be a nuisance. Bagko contended that the finding of the trial court that the use of lights producing a total rating of 144,000 lumens did not constitute a nuisance was erroneous as a matter of law. While the lights, when turned on, shined through the Longworths' bedroom window, the evidence indicated that the lights had only been used six or seven times from July 28, 1991 to the date of the trial, and that the Longworths had not complained on any of those occasions. Furthermore, the first time the lights were used, Mr. Damitz called Mr. Longworth and indicated that he should let him know if they bothered him. No complaint was made. Under these facts, the court was not willing to overrule the trial court's determination that the practice field lights did not create a nuisance. *Id.* at 72-73.