

# 1995 DEVELOPMENTS IN PROPERTY LAW\*

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## I. NONPROBATE TRANSFERS: MUTLI-PARTY ACCOUNTS

In *Parke State Bank v. Akers*,<sup>1</sup> Harold Akers and his wife, Ardith kept certificates of deposit (“CDs”) in a jointly owned safety deposit box in the Parke State Bank (“the Bank”). The CDs were issued in the names of Harold Akers or Ardith Akers or Survivor.<sup>2</sup> Harold, who was hospitalized with cancer, wanted his daughter, Deborah Hopkins, to have access to the safety deposit box so that she could remove the CDs. He telephoned the president of the Bank and was advised that written authorization would be required.<sup>3</sup> Harold gave Deborah written authorization, and the Bank allowed her access to the deposit box, where, at Harold’s direction, she removed four CDs totaling \$35,000.<sup>4</sup>

Harold, without Ardith’s knowledge or consent, subsequently endorsed the CDs, instructed Deborah to cash them, and then distribute the money to herself and two of Harold’s grandchildren.<sup>5</sup> Harold died a few weeks after Deborah cashed and distributed the proceeds of the CDs. After discovering this disbursement, Ardith brought an action against the Bank for breach of the safety deposit box rental agreement.<sup>6</sup> The rental agreement expressly stated that the safety deposit box could only be accessed by Harold or Ardith or by a deputy appointed with the consent of both parties.<sup>7</sup> The trial court entered judgment in

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1. 645 N.E.2d 1096 (Ind. Ct. App. 1995).

2. *Id.* at 1097.

3. *Id.*

4. *Id.* at 1097-98.

5. *Id.* at 1098.

6. *Id.*

7. The rental agreement provided in pertinent part:

Unless otherwise agreed in writing, a Safe leased by two or more persons shall be held jointly and severally, and either of them, or their du[1]y appointed deputy, without consent of any other of them, is entitled to separate access to the Safe . . . .

. . . .

A deputy may be appointed in writing . . . but no renter may appoint a deputy without the consent of the other renter(s), if any.

Ardith's favor and the Bank appealed.

The Indiana Court of Appeals reversed the trial court's judgment and found in favor of the Bank.<sup>8</sup> The court emphasized that under the nonprobate transfers statute, any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded.<sup>9</sup> Thus, the court determined that Harold had the authority to withdraw the funds from the account without the knowledge or consent of Ardith.

The court proceeded to conclude that making payment on joint accounts to one of the parties discharges the financial institution from all claims for amounts so paid.<sup>10</sup> The court agreed with Ardith that the Bank had violated the safety deposit box rental agreement by allowing Deborah access to the safety deposit box without Ardith's consent, but it concluded that "any pecuniary loss here necessarily depends on the Bank's liability in redeeming the certificates and issuing checks payable to persons other than the joint owners."<sup>11</sup> Because Harold could have personally gone to the Bank and cashed the CDs, "Deborah, acting on Harold's specific instructions, had the same authority."<sup>12</sup> Thus, the court concluded that the Bank could not be held liable for paying the funds to Deborah and thereby reversed the judgment of the trial court.<sup>13</sup>

Agreeing with the trial court's judgment in favor of Ardith, Judge Barteau dissented. She emphasized that the majority overlooked or ignored the fact that but for the Bank's breach of the safety deposit agreement, Deborah would not have gained access to the CDs, and the funds still would have been held jointly at Harold's death. Judge Barteau argued that because of the Bank's breach, Ardith was denied possession of the CDs and the funds they represented.<sup>14</sup>

The Indiana Supreme Court granted transfer, and in a decision authored by recently appointed Justice Myra Selby, the Court reversed the Court of Appeals and determined that the Bank was liable to Ardith for breach of contract.<sup>15</sup> The court determined that the essential question of this case was "whether the Bank's breach of contract resulted in cognizable damages to Ardith."<sup>16</sup>

Rejecting the Bank's contention that it should be relieved of liability because the CDs eventually came into possession of a rightful owner, Harold, the court determined that at the time of the Bank's breach of contract, Ardith had two identifiable interests in the CDs: (1) constructive possession based upon her access to the safety deposit box; and (2) a contingent beneficial interest as a donee-

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*Id.* at 1097 (quoting Record at 182).

8. *Id.* at 1100.

9. *Id.* at 1099 (citing IND. CODE § 32-4-1.5-9 (1993)).

10. *Id.* (citing IND. CODE § 32-4-1.5-12 (1993)).

11. *Id.* at 1098.

12. *Id.* at 1099-1100.

13. *Id.* at 1100.

14. *Id.*

15. *Parke State Bank v. Akers*, 659 N.E.2d 1031 (Ind. 1995).

16. *Id.* at 1034.

beneficiary of the CDs because CDs, which are contracts, created a third party beneficiary right with right of survivorship.<sup>17</sup> The court indicated that when the Bank breached the contract, it destroyed Ardith's present possessory interest in the CDs.<sup>18</sup> This present possessory interest, the court explained, "should have assured her that her contingent beneficial interest in the CDs would ripen into sole ownership of the certificates upon Harold's imminent death."<sup>19</sup>

The court then examined whether the Bank's breach of contract was the cause in fact of Ardith's loss. The Bank argued that Harold's subsequent endorsement of the certificates and distribution to the other family members was the true cause of the loss.<sup>20</sup> While the court noted that this may have contributed to Ardith's losses, Indiana does not recognize comparative causation in breach of contract claims.<sup>21</sup> Accordingly, the court concluded that the Bank's breach was a substantial factor in bringing about Ardith's damages, and that the trial court's measure of damages, \$35,000 plus statutory interest, was proper.<sup>22</sup>

Chief Justice Shepard, joined by Justice DeBruler, dissented, noting that the Bank merely responded to the deathbed request of a customer when it allowed Deborah to retrieve the CDs for her father. He indicated that the Bank should not be punished for its good samaritanship as it was Harold's change of heart, not the Bank's, which caused Ardith's lost expectancy.<sup>23</sup>

The Indiana Supreme Court decision ignores the Court of Appeals analysis under the nonprobate transfers statute.<sup>24</sup> Moreover, the court did not address an important subissue of the Court of Appeals decision involving the conflict between the Indiana Supreme Court's decision of *Shourek v. Stirling*<sup>25</sup> and the language used by the Indiana Court of Appeals in both *Voss v. Lynd*<sup>26</sup> and *Graves v. Kelley*.<sup>27</sup>

In *Parke State Bank*, Judge Rucker of the Indiana Court of Appeals indicated in a footnote that if this case had involved an action against Harold's estate, then the authority to withdraw the funds would not have necessarily relieved his estate of liability.<sup>28</sup> He stated, "[e]ven where both parties have authority to draw out all the money from an account, one of two joint tenants of money deposited in a joint bank account cannot, by withdrawing the money without the other's knowledge

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17. *Id.* at 1034 (citing *In re Estate of Fanning*, 315 N.E.2d 718, 720-21 (Ind. Ct. App. 1974)).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1035 (citing *Fowler v. Campbell*, 612 N.E.2d 596, 602 (Ind. Ct. App. 1993)).

22. *Id.*

23. *Id.*

24. IND. CODE §§ 32-4-1.5-1 to -15 (1993).

25. 621 N.E.2d 1107 (Ind. 1994).

26. 583 N.E.2d 1239 (Ind. Ct. App. 1992).

27. 625 N.E.2d 493 (Ind. Ct. App. 1993).

28. *Parke State Bank v. Akers*, 645 N.E.2d 1096, 1099 n.1. (Ind. Ct. App. 1995).

and consent, divest the other of his joint ownership therein."<sup>29</sup> This appears to conflict with *Shourek* wherein the Indiana Supreme Court held that under section 32-4-1.5-3(a) of the Indiana Code,<sup>30</sup> a joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to sums of deposit, and if one party contributes all the funds, those funds belong to that person during his lifetime, unless clear and convincing evidence of a contrary intent is established.<sup>31</sup>

Moreover, under section 32-4-1.5-4(a) of the Indiana Code,<sup>32</sup> only sums remaining on deposit presumptively belong to the survivor. Thus, if Harold had been the sole contributor of these funds, these funds belonged to him during his lifetime, and only those funds remaining on deposit at his death would have passed to Ardith. Judge Rucker's contention that a party to a joint account cannot withdraw the money without the consent of the other party conflicts with the Indiana Supreme Court's interpretation of the multi-party account statute as set forth in *Shourek*.

## II. LANDLORD AND TENANT

### A. *Holdover Tenant*

In *Houston v. Booher*,<sup>33</sup> the tenant, Houston, a dentist, entered into an agreement to purchase part of Booher's dental practice and to sublet a portion of his office space for a three-year term ending May 31, 1993. The sublease contained an option to renew for an additional two-year term, but required Houston to exercise the option in writing at least ninety days prior to the expiration of the term.<sup>34</sup> Houston did not exercise the option until March 10, 1993, seven days after the time set forth in the sublease agreement for notice of intent to renew. Nevertheless, when Houston remained in possession at the end of the term, Booher accepted Houston's rental payments for June and July at an increased rate as provided in the original sublease.<sup>35</sup>

On September 3, 1993, Booher filed a "Notice of Claim for Possession of Real Estate" in small claims court, alleging that he was entitled to eject Houston because Houston had failed to give timely notice of his intent to renew the sublease.<sup>36</sup> After the case was transferred to municipal court, both parties moved for summary judgment. The trial court granted Booher's motion, denied Houston's motion, and ordered Houston to pay attorney fees pursuant to the

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29. *Id.* (quoting *Rogers v. Rogers*, 437 N.E.2d 42 (Ind. Ct. App. 1982)).

30. IND. CODE § 32-4-1.5-3(a) (1993).

31. *Shourek v. Stirling*, 621 N.E.2d 1107, 1110 (Ind. 1994).

32. IND. CODE § 32-4-1.5-4(a) (1993).

33. 647 N.E.2d 16 (Ind. Ct. App. 1995).

34. *Id.* at 17.

35. *Id.* at 18.

36. *Id.*

sublease agreement. Houston appealed.<sup>37</sup>

On appeal, Houston contended that when he held over after the expiration of the term and Booher accepted the rent payments the sublease was extended for an additional one year period.<sup>38</sup> Booher countered that when a tenant holds over beyond the lease term he becomes a tenant from month to month.<sup>39</sup>

The Indiana Court of Appeals explained that when a lessee under “a lease for a definite term holds over after the expiration of that term, the lessor has the option of treating the lessee as a tenant or a trespasser.”<sup>40</sup> The court stated that when a tenant holds over beyond the expiration of the lease and continues to make rental payments, and the landlord unconditionally accepts these rental payments, the parties are deemed to have continued the tenancy under the terms of the expired lease.<sup>41</sup> However, the court noted that when the original term of a lease is for a period of more than one year, the duration of the renewal period will be only for one year at a time.<sup>42</sup> Thus, the court determined that when Houston held over after the expiration of the sublease, Booher did not treat him as a trespasser by evicting him, but accepted his rent payments. Consequently, Houston continued his tenancy under the terms of the expired sublease agreement.<sup>43</sup>

Booher also relied upon section 32-7-1-2 of the Indiana Code<sup>44</sup> to support his claim that Houston held over as a tenant from month to month. That code section provides: “[A]ll general tenancies . . . in which premises are occupied by the consent, either express or constructive, of the landlord, shall be deemed tenancies from month to month.”<sup>45</sup> The court determined that section 32-7-1-2 was not applicable in a holdover tenancy, because when a tenant holds over at the end of a fixed term with the consent of the landlord, a new tenancy is created, “not general or from year to year, but certain in point of time—one year—so fixed by the agreed notice to quit.”<sup>46</sup> This new tenancy is for a certain period of time, one year.<sup>47</sup> Therefore, the court concluded that despite the notice of renewal stipulated

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37. *Id.*

38. *Id.* at 19.

39. *Id.*

40. *Id.* (citing *Mooney-Mueller-Ward, Inc. v. Woods*, 371 N.E.2d 400, 403 n.1 (Ind. Ct. App. 1978); *Burdick Tire & Rubber Co. v. Heylmann*, 138 N.E. 777, 778 (Ind. Ct. App. 1923)).

41. *Id.* (citations omitted).

42. *Id.* (citing *Marcus v. Calumet Breweries, Inc.*, 73 N.E.2d 351 (Ind. Ct. App. 1947)).

43. *Id.* The court recognized *Carsten v. Eickhoff*, 323 N.E.2d 664 (Ind. Ct. App. 1975), which held that where notice of renewal or extension is stipulated in the lease agreement, notice must be given. However, the court found *Carsten* distinguishable, as it did not address the case where there is a lease which calls for a higher rent during the second term and the lessor holds over without objection and pays the higher rent. *Houston*, 647 N.E.2d at 19 n.5.

44. IND. CODE § 32-7-1-2 (1993).

45. *Houston*, 647 N.E.2d at 20 (quoting IND. CODE § 32-7-1-2 (1993)).

46. *Id.* (quoting *Walsh v. Soller*, 191 N.E. 334, 335 (Ind. 1934)).

47. *Id.* The court also relied upon *Marcus v. Calumet Breweries, Inc.*, 73 N.E.2d 351 (Ind. Ct. App. 1947), to support the conclusion that the facts created a tenancy for one year. In so doing, the court rejected Booher’s argument that the *Marcus* court misapplied the rule set forth by the

in the lease, Booher accepted Houston's tender of the increased rent for two months pursuant to the renewal terms in the lease which extended the tenancy for a new term of one year.<sup>48</sup>

Booher also argued that because Houston held over for a limited purpose of negotiating a new lease, he did not become a tenant for another year, but became a tenant from month to month or for a lesser period.<sup>49</sup> Although the court agreed with Booher that a landlord may allow a tenant to hold over on terms and conditions different from the original lease, the court found no evidence of an agreement between Booher and Houston to a new or different tenancy.<sup>50</sup> Accordingly, the court concluded that the trial court erred in granting Booher's motion for summary judgment and in denying Houston's motion for summary judgment, as Houston's lease was extended for a period of one year.<sup>51</sup>

The court also addressed the trial court's award of attorney fees to Booher based upon a purchase agreement incorporated by reference into the sublease. The agreement provided that in the event of a default or breach, the defaulting party shall pay all expenses including attorney fees.<sup>52</sup> Based upon its determination that Houston had become a holdover tenant for a new term of one year, the court reversed the trial court's award of attorney fees to Booher.<sup>53</sup>

Finally, the court rejected Houston's claim that he was entitled to attorney fees from Booher. Booher's action to evict Houston for failure to give notice of renewal, while unsuccessful, was not a default under the purchase agreement.<sup>54</sup> Thus, the court rejected Houston's claim for attorney fees.<sup>55</sup>

### *B. Breach of Implied Warranty of Habitability: Tort Liability*

In *Johnson v. Scandia Associates, Inc.*,<sup>56</sup> the tenant, Terri Johnson ("Johnson"), brought an action against the landlord, Scandia Associates, Inc. ("Scandia"), and the landlord's property management company, Oxford Management Co. ("Oxford"), for injuries suffered from an electrical shock when Johnson simultaneously touched the oven and the refrigerator in her apartment.

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Indiana Supreme Court in *Walsh. Houston*, 647 N.E.2d at 20.

48. *Houston*, 647 N.E.2d at 21.

49. *Id.*

50. *Id.* (rejecting Booher's reliance upon *Hoffman v. McCollum*, 93 Ind. 326 (1884); *Bright v. McQuat*, 40 Ind. 521 (1872); and *Burdick Tire & Rubber Co. v. Heylmann*, 138 N.E. 777 (1923) (in all three cases, the landlord and tenant expressly agreed to a fixed period of time the tenant could remain on the premises)).

51. *Id.* at 21-22. In conclusion, the court also noted that Booher failed to cite authority for the position that a tenant who holds over for the limited purpose of negotiating a new lease does not become a tenant for another year. *Id.* at 21.

52. *Id.* at 22.

53. *Id.*

54. *Id.*

55. *Id.*

56. 641 N.E.2d 51 (Ind. Ct. App. 1994).

Johnson sued under two theories: (1) negligence; and (2) breach of the implied warranty of habitability.<sup>57</sup> The trial court granted Scandia and Oxford's motion to dismiss Johnson's breach of the implied warranty claim and the case went to trial solely on the negligence theory. The jury found in favor of Scandia and Oxford, determining that neither were negligent.<sup>58</sup> Johnson then appealed the dismissal of her implied warranty of habitability claim.<sup>59</sup>

Assessing Johnson's implied warranty of habitability claim, the Indiana Court of Appeals set forth a brief history of the implied warranty of habitability in Indiana. Indiana courts had not recognized the implied warranty of habitability in a residential lease until 1980.<sup>60</sup> Subsequently, Indiana courts recognized the existence of the implied warranty of habitability in a landlord and tenant context on a number of occasions.<sup>61</sup> However, none of these cases held that a tenant could recover damages for personal injury under a breach of implied warranty of habitability theory. Thus, the single issue raised on appeal in *Johnson* was whether a tenant could recover damages for personal injury as well as damages for economic loss when there is a breach of the implied warranty of habitability in a residential lease.<sup>62</sup>

The court began its analysis with an examination of *Barnes v. Mac Brown & Co., Inc.*<sup>63</sup> There, the Indiana Supreme Court extended the implied warranty of habitability of a builder-vendor in the sale of a new home to the second or subsequent purchasers of the home, where the purchasers suffered damages from a hidden defect not discoverable by a reasonable inspection that manifested itself after the purchase.<sup>64</sup> The *Barnes* court rejected the contention that a distinction should be drawn between economic loss for damage to property and damages for personal injury.<sup>65</sup> Following *Barnes*, the *Johnson* court concluded: "We are likewise unconvinced that, upon a breach of the implied warranty of habitability in a residential lease, a distinction exists between recovery of damages for economic loss and recovery of damages for personal injury."<sup>66</sup>

The court observed that the recovery for breach of contract includes damages

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57. *Id.* at 53.

58. *Id.*

59. *Id.*

60. *See Breezewood Management Co. v. Maltbie*, 411 N.E.2d 670 (Ind. Ct. App. 1980), *trans. denied*.

61. *See Dawson v. Long*, 546 N.E.2d 1265 (Ind. Ct. App. 1989), *trans. denied*; *Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157 (Ind. Ct. App. 1988), *trans. denied*; *Kahf v. Charleston S. Apartments*, 461 N.E.2d 723 (Ind. Ct. App. 1984), *trans. denied*.

62. *Johnson*, 641 N.E.2d at 53.

63. 342 N.E.2d 619 (Ind. 1976).

64. *Johnson*, 641 N.E.2d at 53 (citing *Barnes*, 342 N.E.2d at 620-21).

65. *Id.* at 54 (citing *Barnes*, 342 N.E.2d at 621) (emphasis omitted). The *Barnes* court stated: "Why there should be a difference between an economic loss resulting from injury to property and an economic loss resulting from personal injury has not been revealed to us." *Barnes*, 342 N.E.2d at 621.

66. *Johnson*, 641 N.E.2d at 54.

that arise naturally from the breach or within the contemplation of the parties.<sup>67</sup> Because the implied warranty is a promise by the landlord to avoid hidden or concealed dangers, the court determined that personal injuries caused by such conditions are within the contemplation of the parties and arise naturally as the result of the breach.<sup>68</sup>

The court also analogized the sale of real property to the law of sales and concluded that the sale of real property should not be treated any differently than the sale of personal property with respect to the implied warranty of habitability.<sup>69</sup> Under Indiana's Uniform Commercial Code, if the seller is a merchant, an implied warranty of merchantability is implied in a contract for the sale of goods, and if the goods are defective, the buyer may recover consequential damages for injury to persons or property proximately resulting from any breach of warranty.<sup>70</sup> The court emphasized that the warranty of merchantability applies only to a sale by a merchant; one engaged in the business of selling such goods on a regular basis.<sup>71</sup> Thus, the court indicated that an implied warranty of habitability would only apply to the professional landlord in the business of renting dwellings to tenants.<sup>72</sup> Here, the court determined that Scandia was a professional landlord in the business of renting apartments and in a better position to spread the costs of liability for personal injuries, and thus, the implied warranty applied.<sup>73</sup>

The court distinguished *Hodge v. Nor-Cen, Inc.*,<sup>74</sup> the only other Indiana decision<sup>75</sup> in which the tenant sought to recover damages for personal injuries resulting from the breach of an implied warranty of habitability in a residential lease. However, in *Hodge*, the court could not address the issue because the appellants had failed to present a compelling argument for the extension of the warranty.<sup>76</sup> Here, the court decided the issue and determined that Johnson had advanced a case to support the recovery of personal injury damages under an implied warranty theory where the injury resulted from a hidden or concealed, dangerous condition on the leased premises.<sup>77</sup>

The court was careful to note, however, that the ruling did not subject a residential landlord to strict liability for injury to its tenants. Instead, a tenant is required to prove that a landlord is a merchant, that there is privity of contract, and that there has been a breach of the implied warranty of habitability.<sup>78</sup> The court

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67. *Id.*

68. *Id.* (citing *Barnes*, 342 N.E.2d at 621).

69. *Id.* (citing *Barnes*, 342 N.E.2d at 621).

70. *Id.* (citing IND. CODE §§ 26-1-2-314(1), 26-1-2-715(2)(b) (1993)).

71. *Id.* (citing IND. CODE §§ 26-1-2-314(1), 26-1-2-104(1) (1993)).

72. *Id.* at 55 (citing *Zimmerman v. Moore*, 441 N.E.2d 690, 695-96 (Ind. Ct. App. 1982) (an implied warranty of habitability does not extend to the non-merchant lessor)).

73. *Id.*

74. 527 N.E.2d 1157 (Ind. Ct. App. 1988), *trans. denied*.

75. The other case is *Zimmerman v. Moore*, 441 N.E.2d 690 (Ind. Ct. App. 1982).

76. *Hodge*, 527 N.E.2d at 1159.

77. *Johnson*, 641 N.E.2d at 56.

78. *Id.*



concluded that because Oxford executed the lease as the agent of Scandia, Oxford was not in privity of contract with Johnson; therefore, summary judgment was properly granted to Oxford.<sup>79</sup> However, the court determined that Johnson did have a claim against Scandia based on the implied warranty of habitability and thus, reversed the trial court's granting of summary judgment in Scandia's favor.<sup>80</sup>

Finally, on rehearing, the court withdrew language within a footnote of its opinion wherein the court interpreted *Breezewood Management Co. v. Maltbie*<sup>81</sup> to mean that parties to a residential lease could effectively disclaim the implied warranty of habitability.<sup>82</sup> The court explained:

By "effectively disclaim," we meant only that under the facts and circumstances of a particular case, it is conceivable that a warranty of habitability would not be a reasonable expectation of the parties. In our opinion, we decided only whether a tenant could recover damages resulting from personal injury under the implied warranty of habitability in a residential lease. . . . [W]e did not decide in a footnote, whether the implied warranty of habitability can be expressly disclaimed in a residential lease. Accordingly, . . . we have withdrawn the last sentence of footnote 3 in the opinion.<sup>83</sup>

Thus, this decision leaves open the question of whether a landlord may disclaim any implied warranties in a residential lease. It is likely that landlords may test this point in the future by including express disclaimers in the standard lease. However, the Indiana Supreme Court has granted transfer in this case and its opinion is pending.

### C. Security Deposits Statute

1. *Background.*—In 1989, the Indiana General Assembly enacted the Security Deposits Statute.<sup>84</sup> Section 12 of this statute requires that all of a security deposit held by a landlord be returned to a tenant at the termination of the rental agreement, except for amounts applied to certain specified obligations of the tenant.<sup>85</sup> Section 13 of the statute contains a list of the tenant's obligations for which the landlord may deduct from the security deposit.<sup>86</sup> If the landlord withholds any portion of the tenant's security deposit, the statute requires the landlord to give written notice to the tenant, including an itemized list of damages for which the security deposit is being applied, within forty-five days of the termination of the rental agreement and delivery of possession, and the estimated

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79. *Id.* at 56-57.

80. *Id.* at 56.

81. 411 N.E.2d 670 (Ind. Ct. App. 1980).

82. *Johnson*, 641 N.E.2d at 57.

83. *Id.*

84. IND. CODE §§ 32-7-5-1 to -19 (1993).

85. *Id.* § 32-5-7-12.

86. *Id.* § 32-5-7-13.

cost of repair for each damaged item.<sup>87</sup> The notice of damages must be accompanied by a check for the difference between the amount of damages claimed and the amount of the security deposit withheld.<sup>88</sup> Failure of the landlord to comply with the notice of damages provisions of the statute constitutes an agreement by the landlord that no damages are due, and the landlord must remit the full security deposit to the tenant.<sup>89</sup> If the landlord complies with the notice of damages provisions of the statute, the landlord can also recover "other damages" against the tenant.<sup>90</sup> Recent court decisions continue to explain and clarify the provisions of this new statute.

2. *Claims Against Security Deposits: Other Damages.*—In *Miller v. Geels*,<sup>91</sup> the Indiana Court of Appeals addressed several issues under the Security Deposits Statute. The facts in *Miller* reveal that four Indiana University students ("Tenants") leased a house from Donald Geels ("Landlord") in Bloomington for a one-year term ending August 14, 1992. The lease was secured by an \$840.00 security deposit. Under the terms of the lease, Tenants were required to shampoo the carpet before vacating the premises, to clean certain appliances and other items in the house, and to leave the house "in the same condition as when received, excluding reasonable wear and tear."<sup>92</sup> If they failed to do so, Tenants would be required to pay all costs of returning the rental unit to its prior condition. The lease further provided that Tenants were jointly and severally liable for any breach of the lease and were liable for any and all costs in the enforcement of the lease, including reasonable attorney fees.<sup>93</sup>

In April 1992, one of the tenants moved and failed to pay her share of the rent. At the end of the lease term, the unpaid rent was \$1,050.00. Landlord filed suit in the small claims division of the Monroe Circuit Court against Miller and Santagata, the only tenants upon which the landlord could obtain service, for unpaid rent, late fees, and cleaning and replacement expenses. When the Indiana University Student Legal Services entered an appearance on behalf of Tenants, Landlord retained an attorney, and on the date of trial, moved to amend his complaint to include a request for attorney fees which the court allowed.<sup>94</sup> The trial court entered judgment for Landlord on all claims except late fees, in the amount of \$1,805.00, itemized as: \$1,050.00 unpaid rent; \$130.00 apartment cleaning; \$85.00 carpet cleaning; \$80.00 replacement of bathroom carpet; and \$1,300.00 attorney fees, less the \$840.00 security deposit.<sup>95</sup> Tenants appealed.

The first issue addressed by the Indiana Court of Appeals was whether limitations on damages under the Security Deposits Statute allowed a landlord to

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87. *Id.* §§ 32-7-5-12, -14.

88. *Id.* § 32-7-5-14.

89. *Id.* § 32-7-5-15.

90. *Id.* § 32-7-5-12(c).

91. 643 N.E.2d 922 (Ind. Ct. App. 1994), *trans. denied*.

92. *Id.* at 924.

93. *Id.*

94. *Id.*

95. *Id.* at 924-25.

withhold a security deposit not only for the landlord's claim against the security deposit, but also for "other damages" to the rental unit.<sup>96</sup> Tenants contended that Landlord was not entitled to any "other damages exceeding the security deposit," other than actual damages not the result of ordinary wear and tear.<sup>97</sup> Landlord countered that the ordinary wear and tear limitation in the Security Deposits Statute applied only to claims made against the security deposit itself and not to other damages.<sup>98</sup>

Applying the Security Deposits Statute, the court observed that where a landlord has given written notice of damages to the tenant as required under the statute, the statute does not preclude the landlord from recovering other damages.<sup>99</sup> However, the statute provides that if a landlord has failed to give the required itemized written notice of damages to the tenant, then under section 15, no other damages were due.<sup>100</sup> Here, Landlord gave Tenants the requisite notice and thus, the court concluded that he could make a claim for other damages.<sup>101</sup>

Next, the court pointed out that the Tenants only challenged whether the Landlord was entitled to recover cleaning expenses he incurred as "other damages" under the lease.<sup>102</sup> The court noted that Landlord's claim for other damages was based on two provisions in the lease which required the tenants to clean certain appliances, wash and wax floors, shampoo rugs, and restore the premises to the same condition as when the Tenants took possession.<sup>103</sup> The court interpreted Tenants' argument to be that the Security Deposits Statute prohibited the parties from entering into a private agreement concerning the obligation to clean the leased premises because the legislature determined that the phrase "ordinary wear and tear" included the accumulation of dirt.<sup>104</sup> The Security Deposits Statute states that a security deposit may be used to reimburse the landlord for actual damages to the rental unit which are not the result of ordinary wear and tear.<sup>105</sup>

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96. *Id.* at 925.

97. *Id.*

98. *Id.*

99. *Id.* at 925-26 (citing IND. CODE § 32-7-5-12(c) (1993)).

100. *Id.* at 926 (citing IND. CODE § 32-7-5-15 (1993)).

101. *Id.*

102. *Id.* Tenants also claimed that the notice of cleaning and carpet replacement expenses in the written notice of damages was deficient because it contained only estimates of the costs and not actual receipts. Rejecting this contention in a footnote, the court indicated that the Security Deposits Statute only requires the landlord to advise the tenant of charges against the security deposit, not other damages. *Id.* at 926 n.6. Here, the entire security deposit was charged against unpaid rent. Furthermore, the court observed that even if the statute was interpreted to require the landlord to advise the tenant of the costs of other damages, the statute only requires the landlord to provide the "estimated costs of repairs," and not actual receipts with the notice. *Id.* (citing IND. CODE § 32-7-5-14 (1993)).

103. *Id.* at 924.

104. *Id.* at 926-27.

105. IND. CODE § 32-7-5-13(1) (1993).

Rejecting Tenants' position, the court determined that the statute was not intended to limit the freedom of contract by prohibiting the parties from contractually creating additional obligations under the lease beyond the protection of security deposits.<sup>106</sup> The court noted that the Security Deposits Statute unambiguously preserved to the landlord or tenant the right to recover other damages and the court stated: "[i]t was not the legislature's intent to limit the freedom of landlords and tenants to contractually define 'other damages,' including the obligation to clean the premises."<sup>107</sup> Therefore, the court rejected Tenants' contention that the Security Deposits Statute prohibited the parties from entering into a private agreement concerning the obligation to clean the leased premises.

Tenants then claimed that even if the Security Deposits Statute did not govern claims for other damages, the recovery for cleaning expenses was inconsistent with the "reasonable wear and tear" exclusion in the lease.<sup>108</sup> Again, the court disagreed. Although the phrase "ordinary wear and tear" had never been defined in Indiana, the court found authority in other jurisdictions which suggested that the term "refers to the gradual deterioration of the condition of an object which results from its appropriate use over time."<sup>109</sup> The court determined that the accumulation of dirt on objects was not the same as the gradual deterioration over time and that such objects are usually capable of being restored to their clean condition. The court opined that the accumulation of dirt was not ordinary wear and tear and that a rental unit, which tenants are required to clean under a lease but fail to do so, will be damaged by the accumulation of dirt.<sup>110</sup> Thus, the court concluded that Landlord could pursue a claim for cleaning expenses under the lease.<sup>111</sup>

Tenants further contended that Landlord's claim for damages was barred based upon Landlord's failure to comply with the Bloomington Housing Code ("Housing Code").<sup>112</sup> The Housing Code required that a joint written inspection be completed by the landlord both at the time of the tenants' initial occupancy and at the end of the lease term. The Housing Code also required that an inventory and damages list be completed and signed by the parties which would be considered part of the tenancy agreement.<sup>113</sup>

The court opined that all laws in force at the time of the lease, including municipal ordinances, impliedly became a part of the agreement and thus, the joint

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106. *Miller*, 643 N.E.2d at 926-27.

107. *Id.* at 927.

108. *Id.*

109. *Id.* (citing *Publishers Bldg. Co. v. Miller*, 172 P.2d 489, 496 (Wash. 1946); *Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 936 (W.D. Pa. 1973); *United States Gypsum Co. v. Schiavo Bros.*, 450 F. Supp. 1291, 1305 (E.D. Pa. 1978); *Smolen v. Dahlmann Apartments, Ltd.*, 338 N.W.2d 892 (Mich. Ct. App. 1983)).

110. *Id.* at 928.

111. *Id.*

112. *Id.* (citing BLOOMINGTON, IND., MUNICIPAL CODE tit. 16, § 16.12.040 (1994)).

113. *Id.* at 928 n.10.

inspection requirement was incorporated into the terms of the lease at issue.<sup>114</sup> The facts presented indicated that Landlord had failed to perform a joint written inspection either at the inception of the lease or at the end of the term. However, Landlord argued that the lease agreement provided that the tenant, not the landlord, had the duty to document the condition of the rental unit at the inception of the lease and thus, Landlord was not obligated under the Housing Code.<sup>115</sup> The court disagreed and noted that the Housing Code specifically provided that any private agreement which attempted to exclude or modify the inspection procedures created by the Housing Code was void.<sup>116</sup> Nevertheless, while determining that the lease provision which attempted to shift the responsibility of the inspection to Tenants was unenforceable, the court concluded that Landlord's compliance with the inspection requirements of the Bloomington Housing Code was not a condition precedent to a suit against Tenants for damages.<sup>117</sup>

The court noted that while the Housing Code is incorporated into the lease by operation of law, the Housing Code provisions were to be construed like other provisions of the lease and the Housing Code could not dictate the legal effect of the landlord's failure to conduct an inspection.<sup>118</sup> Thus, the Housing Code did not and could not declare that Landlord's noncompliance with the inspection provision precluded the admission of evidence on his claim for damages to the rental unit.<sup>119</sup>

Instead, the court indicated that the inspection provisions were subject to the same common law defenses usually available for breach of contract such as "waiver, estoppel, subsequent written or oral modification, compromise, settlement, accord and satisfaction and impossibility of performance."<sup>120</sup> Here, Tenants "failed to assert their right to a joint inspection" at the inception of the lease, and Landlord relied on their acquiescence and implied consent to no inspection.<sup>121</sup> Moreover, Landlord supplied Tenants with a "Summary of Tenants' and Owners' Rights and Responsibilities" as required by the Code, which informed Tenants that if the owner did not initiate a joint inspection, Tenants should request one, and that Tenants could initiate their own inspection report and send a copy to the owner.<sup>122</sup>

In addition, the court pointed out that Tenants waived their right to a "move-out inspection." One of the tenants, Miller, contacted Landlord regarding the cleaning of the apartment, and Landlord informed her that he could hire someone

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114. *Id.* (citing *Breezewood Management Co. v. Maltbie*, 411 N.E.2d 670 (Ind. Ct. App. 1980), *trans. denied*).

115. *Id.* at 929.

116. *Id.*

117. *Id.*

118. *Id.* at 929-30.

119. *Id.* at 930 (citing *City of Bloomington v. Chuckney*, 331 N.E.2d 780 (Ind. Ct. App. 1975), *trans. denied*; *Breezewood Management Co. v. Maltbie*, 411 N.E.2d 670 (Ind. Ct. App. 1980), *trans. denied*).

120. *Id.*

121. *Id.*

122. *Id.*

to professionally clean the rental unit for "no more than three hundred dollars."<sup>123</sup> Miller contacted two of the other tenants who agreed in writing to allow Landlord to clean the rental unit and to deduct the cost from the security deposit.<sup>124</sup> Although the Housing Code required Landlord to document the condition of the premises at the beginning and at the end of Tenants' occupancy, Tenants decided to forego the joint written inspection and agreed to Landlord's estimate of damages. Thus, the court concluded that Tenants were estopped from repudiating the agreement regarding the cleaning of the rental unit or from objecting to the lack of a joint inspection. Accordingly, the court affirmed the trial court's judgment in Landlord's favor.<sup>125</sup>

3. *Surrender and Acceptance As Triggering Statutory Notice of Damages Period.*—In *Mileusnich v. Novogroder Co.*,<sup>126</sup> Mileusnich leased an apartment from Novogroder Co. ("Novogroder") for a term of one year from July 29, 1993, through July 31, 1994. Mileusnich gave Novogroder a \$525.00 security deposit at the time he signed the lease. On August 7, 1993, Mileusnich attempted to take possession, but was told that the apartment was not yet completed. On August 11, 1993, after being informed that the unit would not be ready for another three days, he requested a return of his security deposit and tore up the lease.<sup>127</sup> Novogroder ignored Mileusnich's requests for the return of the security deposit and relet the apartment in mid-September 1993. Mileusnich filed a complaint against Novogroder seeking the return of his security deposit and attorney fees. The trial court denied relief and Mileusnich appealed.<sup>128</sup>

On appeal, Novogroder argued<sup>129</sup> that the action was premature because the rental agreement did not terminate until July 31, 1994, and that a landlord had forty-five days after termination of the rental agreement to return the security deposit.<sup>130</sup> Rejecting this argument, the court determined that a surrender and acceptance had occurred by operation of law in that:

A surrender will arise by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant

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123. *Id.* at 930-31.

124. *Id.* at 931.

125. *Id.*

126. 643 N.E.2d 937 (Ind. Ct. App. 1994).

127. *Id.* at 939.

128. *Id.*

129. In his reply brief, Mileusnich argued that Novogroder's failure to deliver possession of the premises on August 11, 1993 constituted a breach of the implied covenant of possession. *See Taylor v. Phelan*, 69 N.E.2d 145, 150 (Ind. Ct. App. 1946) (Indiana follows the English rule which provides that in the absence of an express provision in the lease, the lessor impliedly covenants that the premises will be both legally and actually open for the occupancy of the tenant on first day of the lease term). However, because Mileusnich failed to raise this argument during trial or in his appellate brief, the court determined that the issue was waived. *Mileusnich*, 643 N.E.2d at 940 n.3.

130. *See* IND. CODE § 32-7-5-15 (1993).

as to imply they have both agreed to consider the surrender as effectual.<sup>131</sup>

The court explained that for a surrender to occur there must be more than a mere yielding of the premises by the tenant. "There must be some decisive, unequivocal act by the landlord which manifests the lessor's acceptance of the surrender."<sup>132</sup> The court found that Mileusnich offered to surrender the premises when he tore up the lease and that Novogroder accepted the surrender when it relet the apartment in mid-September.<sup>133</sup> Thus, the court concluded that the lease was terminated and the forty-five day notice of damage period was triggered.<sup>134</sup>

Importantly, the court noted the longstanding rule that surrender and acceptance must be determined on a case-by-case basis by examining the acts of the respective parties.<sup>135</sup> In *Grueninger Travel Service v. Lake County Trust Co.*, the court determined that the acceptance of the keys by the landlord and the subsequent reletting of the premises to a third party did not constitute an acceptance of surrender by the landlord.<sup>136</sup> Similarly, in *Hirsch v. Merchants National Bank & Trust Co.*,<sup>137</sup> the court found that where a landlord relet the premises to fulfill its obligation to mitigate damages, the landlord's actions did not constitute an acceptance of surrender.<sup>138</sup> The mere reletting of the premises may not constitute an acceptance of a tenant's surrender and the *Mileusnich* court stressed that such a determination must be made on a case-by-case basis founded upon the facts before the court.

After determining when the lease was terminated, the court next addressed whether Novogroder complied with the Security Deposits Statute. The court determined that because Novogroder had not provided Mileusnich with a written itemized list of damages within forty-five days of termination of the lease as required by the sections 12 and 14 of the Security Deposits Statute, the failure to comply with the statute constituted an agreement by Novogroder that no damages were due.<sup>139</sup> Thus, the court concluded that Mileusnich was entitled to the return of his full security deposit plus reasonable attorney fees.<sup>140</sup>

4. *Abandonment by Tenant As Triggering Statutory Notice of Damages Period.*—In *Figg v. Bryan Rental Inc.*,<sup>141</sup> the tenant, Gary Figg ("Figg") entered into an agreement to lease an apartment from Bryan Rental Inc. ("Bryan Rental")

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131. *Mileusnich*, 643 N.E.2d at 939 (citing *Grueninger Travel Serv. v. Lake County Trust Co.*, 413 N.E.2d 1034, 1038 (Ind. Ct. App. 1980)).

132. *Id.* (citing *Grueninger*, 413 N.E.2d at 1039).

133. *Id.* at 940.

134. *Id.* at 940-41.

135. *Id.* at n.2 & n.4 (citing *Grueninger*, 413 N.E.2d at 1039).

136. *Grueninger*, 413 N.E.2d at 1039.

137. 336 N.E.2d 833 (Ind. Ct. App. 1975).

138. *Id.*

139. *Mileusnich*, 643 N.E.2d at 940-41 (citing *Chasteen v. Smith*, 625 N.E.2d 501, 502 (Ind. Ct. App. 1993)). See also IND. CODE § 32-7-5-12 (1993).

140. *Mileusnich*, 643 N.E.2d at 941.

141. 646 N.E.2d 69 (Ind. Ct. App. 1995), *trans. denied.*

for a one-year term ending August 14, 1992. The monthly rent was \$325.00 and Figg paid a security deposit of \$295.00. Figg's attorney notified Bryan Rental on March 27, 1992 that Figg had vacated the apartment and returned the front door and mailbox keys.<sup>142</sup> Bryan Rental then brought an action against Figg for unpaid rent for the remainder of the lease term, damages, and attorney fees. The trial court granted Bryan Rental's motion for summary judgment and entered judgment in the amount of \$1,005.00 itemized as four months rent less the security deposit.<sup>143</sup> Figg appealed.

The first issue Figg raised on appeal was the timeliness of Bryan Rental's itemized written notice of damages. Sections 12 and 14 of the Security Deposits Statute required that notice be given to the tenant within forty-five days after termination of the rental agreement and delivery of possession.<sup>144</sup> Figg contended that the forty-five day notice period should have begun on March 27, 1992 when his attorney notified Bryan Rental that Figg had vacated the premises.<sup>145</sup>

The court noted that both sections 14 and 15 of the Security Deposits Statute require that notice of damages must be given to the tenant within forty-five days after termination of occupancy.<sup>146</sup> However, section 12(a) of the statute states that the forty-five day notice period begins to run upon the "termination of the rental agreement and delivery of possession" and section 16 provides that the forty-five day notice period begins upon "termination of the tenancy."<sup>147</sup> Thus, the statute does not identify with certainty the event that will trigger the forty-five day period.

Addressing these different termination requirements, the court pointed out that if the forty-five day notice period began upon termination of occupancy, such an interpretation would lead to a result unintended by the legislature because the tenant could trigger the forty-five day notice period by unilaterally ending his occupancy of the rental unit by abandonment.<sup>148</sup> The tenant then could successfully escape all liability for future rent unless the landlord sends the statutory notice of damages to the tenant within forty-five days of abandonment even though the landlord did not treat the abandonment as a termination of the obligations under the lease agreement.<sup>149</sup> Thus, the court held that where a tenant abandons the premises and the lease agreement terminates at a later date, it is the termination of the lease agreement that triggers the forty-five day notice provision.<sup>150</sup>

Having reached this conclusion, the court then examined whether the tenant's offer of surrender was accepted by the landlord. Citing *Mileusnich v. Novogroder*

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142. *Id.* at 70.

143. *Id.*

144. IND. CODE §§ 32-7-5-12, -14 (1993).

145. *Figg*, 646 N.E.2d at 72.

146. *Id.*

147. *Id.* at 72 n.5 (quoting IND. CODE §§ 32-7-5-12(a), -16 (1993)). See also Walter Krieger, *1992 Developments in Indiana Property Law*, 26 IND. L. REV. 1113, 1117 (1993).

148. *Figg*, 646 N.E.2d. at 72.

149. *Id.*

150. *Id.*



Co.,<sup>151</sup> the court noted that there must be some decisive unequivocal act by the landlord that manifests the landlord's acceptance of the surrender.<sup>152</sup> When Figg's attorney informed Bryan Rental that Figg's abandonment of the premises was permanent on March 30, 1992, Bryan Rental's president, David Kamen, telephoned Figg and asked him to continue the lease agreement and Figg agreed to continue the rental payments until a subtenant could be found. However, on May 22, 1992, Figg's attorney informed Bryan Rental that Figg was no longer liable for the rent and on May 26, 1992, Bryan Rental sent Figg a written accounting of his security deposit. Based upon these facts, the court concluded that Bryan Rental accepted the surrender on May 26, 1992, when it responded to the demand letter from Figg's attorney.<sup>153</sup> Therefore, the court determined that Bryan Rental's damages letter was timely under the Security Deposits Statute and that the trial court did not err in granting Bryan Rental's summary judgment motion and denying Figg's motion.<sup>154</sup>

Figg further contended that even if the notice of damages letter was timely, it failed to itemize the damages as required by sections 12 and 14 of the Security Deposits Statute.<sup>155</sup> The court disagreed. The court pointed out that when the damage notice was sent on May 26, 1992, two months rent was due under the lease, an amount which exceeded the amount of the security deposit.<sup>156</sup> Under section 13 of the Security Deposits Statute,<sup>157</sup> unpaid rent is one of the enumerated obligations that the landlord may charge against the security deposit. The letter indicated that the rent had not been paid since March and that the security deposit would be applied towards the unpaid rent. The court noted that this was adequate to inform the tenant that the landlord was keeping the security deposit and the purpose for which it was being applied.<sup>158</sup>

In reaching this conclusion, the court distinguished *Duchon v. Ross*,<sup>159</sup> where the Indiana Court of Appeals found the notice inadequate because it did not contain an estimated cost of repairs. In *Duchon*, the letter informed the tenant that the landlord was keeping the security deposit for damages but did not indicate the cost of repairs.<sup>160</sup> However, in the present case, Figg was made aware that Bryan Rental was keeping his security deposit for unpaid rent and this provided Figg with an opportunity to challenge the costs for which the deposit was being used.<sup>161</sup> Accordingly, the court affirmed the trial court's grant of summary judgment in

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151. 643 N.E.2d 937, 939 (Ind. Ct. App. 1994).

152. *Figg*, 646 N.E.2d at 73.

153. *Id.* at 74.

154. *Id.*

155. IND. CODE §§ 32-7-5-12, -14 (1993).

156. *Figg*, 646 N.E.2d at 75.

157. IND. CODE § 32-7-5-13 (1993).

158. *Figg*, 646 N.E.2d at 75.

159. 599 N.E.2d 621 (Ind. Ct. App. 1992).

160. *Id.* at 624.

161. *Figg*, 646 N.E.2d at 75.

Bryan Rental's favor.<sup>162</sup>

### III. REAL ESTATE BROKER

#### A. *Fraudulent Misrepresentation*

In *Dawson v. Hummer*,<sup>163</sup> Marvin and Katherine Hummer, a married couple, contacted Steven Dawson, a real estate agent employed by Francis Real Estate, to assist them in finding a house. They explained to Dawson that "they were looking for a four bedroom home with a useable basement in the \$45,000.00 to \$50,000.00 range," and that they were interested in using Marvin's eligibility for a VA loan.<sup>164</sup> Both Katherine and Marvin are high school graduates. Marvin, age 32, had never purchased a house prior to this time, although Katherine, age 30, had purchased a house through FHA during her first marriage.

With Dawson's help, the Hummers made an offer on a house. When the offer was accepted, Dawson told them that the VA "would come through the house and look for things."<sup>165</sup> The Hummers, on Dawson's advice, then filled out the necessary paperwork to obtain a VA loan. Dawson then informed them that the garage window sills had to be scraped and painted before the closing could take place. Katherine assumed that it was the VA who had informed Dawson about the window sills because Dawson had informed them that the VA had approved the loan. The Hummers, apparently with Dawson's assistance, scraped and painted the window sills. However, the day before closing, a pest inspection revealed water damage to the joists. The owner of the house refused to repair the damage, and the deal fell through. The Hummers had not ordered the inspection, but Katherine assumed that this was automatically done when one purchases a house.<sup>166</sup>

A short time later, Dawson located another house fitting the Hummers needs and the Hummers, accompanied by Dawson, "toured" the house. During the tour, Katherine noticed that the basement walls were bowed, and that "[u]pon one wall were affixed metal plates from which metal rods protruded."<sup>167</sup> When questioned about the bowed walls and the anchor system, "Dawson told the Hummers that the anchored wall had been fixed and that the other walls were fine."<sup>168</sup> Katherine then asked Dawson if the basement was usable for her eldest son to sleep "down there."<sup>169</sup> Dawson said yes and told them that "the VA would do inspections of the house."<sup>170</sup>

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162. *Id.*

163. 649 N.E.2d 653 (Ind. Ct. App. 1995).

164. *Id.* at 657.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

Marvin testified that because the first house had been inspected to reveal the floor joist damage, he assumed that the VA would inspect the second house before closing. Dawson informed the Hummers that an additional inspection would cost \$175. The Hummers could not afford the additional expense and signed a waiver of additional inspection.<sup>171</sup>

Shortly before the closing, a personal friend of the Hummers, who was also a real estate broker, advised the Hummers not to purchase the house because the bowed basement walls had not passed an earlier FHA inspection. Katherine relayed this information to Alice Francis, owner of Francis Real Estate, but Francis assured her one wall had been repaired and the others were fine.<sup>172</sup>

After the sale was closed and the Hummers took possession of the house, significant problems developed in the basement, and condemnation was recommended by a private contractor.<sup>173</sup> The Hummers sued Dawson, Alice Francis and Francis Realty (collectively "Dawson"), alleging fraudulent misrepresentation and constructive fraud. Dawson filed a motion for summary judgment, which was denied. The case proceeded to a jury trial, after which the jury returned a verdict for the Hummers and awarded damages in the amount of \$18,000.<sup>174</sup> Dawson appealed.

Dawson first challenged the denial of his motion for summary judgment, arguing that the undisputed facts did not support the Hummers claim for fraud.<sup>175</sup> Specifically, Dawson argued that the Hummers' reliance on Dawson's representations was unreasonable in light of the Hummers' actual knowledge of the bowed basement walls. The Indiana Court of Appeals disagreed, concluding that in light of the representations made by Dawson and the Hummers' inexperience in real estate transactions, the reasonableness of the Hummers' reliance was a question of fact for the jury.<sup>176</sup>

Dawson also argued that summary judgment should have been granted based on the express waiver of inspection and release of liability in the purchase agreement. The court again disagreed reasoning that although Indiana law recognizes exculpatory clauses, such clauses are only enforceable if they are "knowingly and willingly made and free from fraud."<sup>177</sup> Because a factual issue existed regarding whether Dawson committed fraud, summary judgment was

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171. *Id.* at 658.

172. *Id.* at 659.

173. *Id.*

174. *Id.*

175. In order to prevail on their fraud theory, the Hummers had to demonstrate: 1) a material representation of past or existing fact; 2) that was false; 3) that was made with knowledge or with reckless disregard of its falsity; 4) that was relied upon by the Hummers; and 5) that proximately caused the Hummers' injury. *Id.* (citing *Showalter, Inc. v. Smith*, 629 N.E.2d 272, 274 (Ind. Ct. App. 1994), *trans. denied*).

176. *Id.*

177. *Id.* (quoting *General Bargain Ctr. v. American Alarm Co.*, 430 N.E.2d 407, 411 (Ind. Ct. App. 1983)).

properly denied.<sup>178</sup>

Finally, Dawson argued that summary judgment should have been entered on the Hummers' constructive fraud claim. Constructive fraud "arises by operation of law when there is a course of conduct which, if sanctioned by law, would secure an unconscionable advantage, irrespective of the actual intent to defraud."<sup>179</sup> In order to succeed on a constructive fraud claim, the Hummers needed to show that Dawson owed them a duty by virtue of the parties' relationship.<sup>180</sup>

Dawson argued that the Hummers could not prove the existence of this duty because the purchase agreement expressly indicated that Dawson was an agent of the seller. In addressing this argument, the court recognized that "constructive fraud may be found where one party takes unconscionable advantage of his dominant position in a confidential or fiduciary relationship."<sup>181</sup> Given the Hummers' inexperience and their continued reliance on Dawson's assistance in the resolution of their home-buying problems, conflicting inferences existed regarding whether Dawson and the Hummers had a confidential relationship. Accordingly, summary judgment on the constructive fraud claim was properly denied.<sup>182</sup> The judgment was affirmed.

### B. Commissions

In *Otto v. Pelis*,<sup>183</sup> Jeffery Pelis ("Pelis") worked as an associated real estate broker-salesperson under the umbrella of John Otto's ("Otto") license as a principal broker. Pursuant to this arrangement, Otto and Pelis orally agreed that Pelis would receive sixty percent of any commission payable to Otto based upon the sale of real estate.<sup>184</sup>

On May 21, 1992, Pelis procured a listing for a piece of residential property in Allen County. By August 1991, Pelis had obtained an agreement with a prospective purchaser of the property. On September 25, 1991, Pelis and Otto terminated their business relationship. Otto completed the transaction with the Allen County property and closed the transaction on February 2, 1992, receiving a commission of \$1,661.10 for the sale.<sup>185</sup> In May 1993, Pelis brought suit against Otto seeking his portion of the commission for the Allen County property. Otto counterclaimed and alleged that as of September 25, 1991, Pelis had been an independent contractor, his license had been returned, and all his listings had been forfeited.<sup>186</sup> Following a trial, the trial court entered judgment against Otto and

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178. *Id.*

179. *Id.* at 661 (citing *Biberstine v. New York Blower Co.*, 625 N.E.2d 1308, 1315 (Ind. Ct. App. 1993)).

180. *Id.*

181. *Id.*

182. *Id.*

183. 640 N.E.2d 712 (Ind. Ct. App. 1994).

184. *Id.* at 713.

185. *Id.*

186. *Id.*

awarded Pelis \$996.66 plus costs.<sup>187</sup> Otto appealed.

The issue presented to the Indiana Court of Appeals was whether Pelis was entitled to damages based upon his oral agreement with Otto. Otto contended that when his association with Pelis terminated in September 1991, Pelis turned over all of his listings with Otto and lost his interest in the Allen County property. Therefore, Pelis could not collect sixty percent of the commission.<sup>188</sup>

In support, Otto directed the court's attention to title 876 of the Indiana Administrative Code, which states that any licensee who terminates his association with a principal broker will turn over any and all listings obtained during the association.<sup>189</sup> The court agreed that under the regulation, Pelis was required to turn over his listings to Otto. However, the court determined that the regulation did not preclude Pelis from recovering, under his oral contract with Otto, his percentage of the commission from the Allen County property.<sup>190</sup> The court pointed out that section 19 applied to property rights in the listings; it did not inhibit recovery pursuant to an oral contract for Pelis' past performance.<sup>191</sup>

The court next addressed Otto's contention that Pelis lacked standing as a real party in interest pursuant to Indiana Trial Rule 17.<sup>192</sup> Otto claimed that because Pelis had terminated his association with Otto, Pelis was no longer licensed to sell real estate and therefore could not, as a matter of law, participate in the conveyance of the Allen County property in any brokerage capacity. Again, the court disagreed. The court noted that Pelis was requesting his percentage of the commission pursuant to his oral agreement with Otto. As one of the parties to the oral contract, the court determined that Pelis was a real party in interest.<sup>193</sup>

Otto also claimed that Pelis' termination prior to the actual sale of the property divested Pelis of any interest in recovery pursuant to the oral agreement. The court rejected this argument, pointing out that Otto mistook Pelis' claim against him with situations where an "unlicensed real estate agent asserts that he is entitled to a commission from the owner of the property."<sup>194</sup> The court pointed out that although Pelis' license was returned to the Indiana Real Estate Commission when his association with Otto terminated, Pelis was a licensed salesperson at the time he procured the listing and obtained the buyer's agreement to purchase the property at issue. Thus, the court concluded the Pelis was entitled to recover the

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187. *Id.*

188. *Id.* at 714.

189. IND. ADMIN. CODE tit. 876, r. 19 (1992).

190. *Otto*, 640 N.E.2d at 714.

191. *Id.*

192. Indiana Trial Rule 17 provides that every action shall be prosecuted by a real party in interest. To acquire a real party in interest status, "a person must have a present and substantial interest in the relief being sought"; in essence, "the plaintiff must be entitled to the fruits of the action." *Brenner v. Powers*, 584 N.E.2d 569, 573 (Ind. Ct. App. 1992), *trans. denied*.

193. *Otto*, 640 N.E.2d at 714.

194. *Id.* To illustrate these situations, the court cited *Voelkel v. Berry*, 218 N.E.2d 924 (Ind. Ct. App. 1966); *McKenna v. Turpin*, 151 N.E.2d 303 (Ind. Ct. App. 1958); and *Folsom v. Callen*, 131 N.E.2d 328 (Ind. Ct. App. 1956).

amount pursuant to the oral agreement.<sup>195</sup>

Finally, Otto contended that the oral agreement violated the statute of frauds in that a writing was required for a conveyance in real estate or, alternatively, an obligation to pay the debt of another.<sup>196</sup> The court rejected both claims.<sup>197</sup> First, the court noted that the statute of frauds provides that "no recovery can be had for services rendered in the sale of real estate unless a contract in writing promising to pay for such services has been executed by the owner or his duly authorized personal [sic]."<sup>198</sup> Here, the contract was between Otto and Pelis, not Pelis and the owner of the Allen County property. Thus, this part of the statute of frauds was not applicable.<sup>199</sup> Second, the court noted that the contract between Pelis and Otto did not involve the promise to pay the debt of another and that Pelis had not alleged the owner of the property was responsible for the debt. Again, the court concluded that the statute of frauds was not applicable.<sup>200</sup> As a result, the court affirmed the judgment of the trial court.

#### IV. SERVITUDES: EASEMENTS AND COVENANTS

##### A. Easements

1. *Scope.*—Two opinions decided by the Indiana Court of Appeals during the past year involved the rights of the dominant tenant under an easement appurtenant. The first case, *Metcalf v. Houk*,<sup>201</sup> addressed whether the granting of an easement to non-lakefront lot owners for access to the lake includes the right of the easement holders to build a pier at the lake end of the easement. The second case, *Wendy's of Fort Wayne, Inc. v. Fagan*,<sup>202</sup> involved the right of the dominant tenant to install utilities in a right-of-way easement.

*Metcalf* involved a dispute between landowners in a lakefront subdivision. When the subdivision was built, its developers constructed a roadway over a lot extending to the lakefront shoreline and granted a nonexclusive right to lot owners whose lots did not border the lake to use the easement for ingress and egress "to the water's edge."<sup>203</sup> The servient lot was subsequently sold to the plaintiff Houk. The defendants, *Metcalf* and *Keck*, owners of lots that did not border the lake, exercised their presumed rights to use the easement by occasionally parking their cars on a paved portion of the roadway, attaching a moveable pier to a seawall located on Houk's property, and mooring their boats to the pier.<sup>204</sup>

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195. *Otto*, 640 N.E.2d at 715.

196. *Id.* (citing IND. CODE § 32-2-1-1 (1993)).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. 644 N.E.2d 597 (Ind. Ct. App. 1994).

202. 644 N.E.2d 159 (Ind. Ct. App. 1994).

203. *Metcalf*, 644 N.E.2d at 599.

204. *Id.*

Houk requested that Metcalf and Keck remove the pier and stop parking their cars on the roadway. When they refused, Houk filed this action. The issue presented to the trial court was whether the conveyance of the easement appurtenant expressly granting “ingress and egress” over Houk’s property “to the water’s edge” contemplated the right of the easement holders to build, maintain and use a pier on the servient parcel. The trial court concluded that it did not and permanently enjoined the easement holders from doing so. The easement holders appealed.

On appeal, the court noted that while generally the granting of “an easement for ingress and egress confers only the right to pass over the land and not to control the real estate or install improvements,” in the case of an easement for access to a lake, the dominant owner “may gain the right to erect and maintain piers, moor boats and the like, where express language in the instrument creating the easement so provides.”<sup>205</sup> The court further noted that when construing easements involving access to a body of water in which the instrument is silent regarding the specific rights of the easement holder, “the trial court may allow extrinsic or parol evidence to ascertain the intent of the parties who created the easement.”<sup>206</sup> In reaching this conclusion, the court relied heavily on the following language from *Klotz v. Horn*:<sup>207</sup> “generally, access to a body of water is sought for particular purposes beyond merely reaching the water, and where such purposes are not plainly indicated, a court may resort to extrinsic evidence to assist the court in ascertaining what they may have been.”<sup>208</sup>

In the instant case, subdivision developer Leslie Willig testified that the grantors of the easement intended to allow the owners of landlocked lots to use the easement in such a manner “that they could have essentially the same rights as they would have if they had lakefront property, except that they would have to share it.”<sup>209</sup> Willig understood those rights to include the use of vehicular traffic and the installation and maintenance of a pier.<sup>210</sup>

In rejecting the right of the defendants to construct the pier at the lake end of the easement, the trial court noted that where a nonexclusive easement is held jointly with others, none of the dominant tenants has a right to “exclusively control a portion of the easement” or to “usurp for [their] own benefit that which is held in common with others.”<sup>211</sup> While agreeing with this general statement, the court of appeals observed that the defendants had not claimed exclusive use of the pier, and in fact had allowed others to dock their boats at the pier.<sup>212</sup> The court observed that the owner of an easement, including the owner of a non-exclusive easement, has the right to make alterations and improvements reasonably

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205. *Id.* (citing *Klotz v. Horn*, 558 N.E.2d 1096, 1097-98 (Ind. 1990)).

206. *Id.*

207. 558 N.E.2d 1096 (Ind. 1990).

208. *Id.* at 1098.

209. *Metcalf*, 644 N.E.2d at 600.

210. *Id.*

211. *Id.* at 600-01.

212. *Id.* at 601.

necessary to make the grant effectual, provided that where the easement is held in common with others, the owner "may not alter or use the land in such a manner as to render the easement appreciably less convenient and useful for other co-owners."<sup>213</sup>

Applying these principles, the court concluded that "the easement was intended only to grant those uses which make the grant of the easement effectual."<sup>214</sup> Because such was not necessary to effectuate the grant, the easement at issue did not allow the storage of equipment and parking of vehicles thereon, except as necessary for loading and unloading passengers and equipment. However, in order to use and enjoy the easement, it must be interpreted as allowing the easement holders to install and maintain a pier or dock, provided that the use of the pier was nonexclusive and did not interfere with the shared rights of other easement holders and the owner of the servient lot. Accordingly, the injunction was affirmed as to parking of motor vehicles and storage of personal property, and reversed as to installation of the pier.<sup>215</sup>

In *Wendy's of Fort Wayne, Inc. v. Fagan*,<sup>216</sup> Fagan owned a triangular shaped tract of land bounded on the southern and eastern sides by property owned by Wendy's of Fort Wayne, Inc. The western side of Fagan's land was the south-right-of-way of U.S. Highway 24. There was no means of entry to the Fagan tract from the limited access highway. In order to obtain approval of its plan to develop a restaurant on its property, the Allen County Plan Commission required Wendy's to grant Fagan an easement across its property to provide him access from his property to Liberty Mills Road, which lies to the south of Wendy's property. The easement provided for a nonexclusive right of way for purposes of ingress and egress to and from the Fagan property.

Thereafter, Fagan attempted to obtain Wendy's permission to install gas, water, electric and phone utilities in the easement. He also requested permission to install a 52-inch electrified sign in the unpaved portion of the easement near the Liberty Mills Road intersection, in order to direct customers and suppliers to the automotive service center which Fagan was constructing on his property. When he was unsuccessful, Fagan filed a declaratory judgment suit, and the trial court ruled that Fagan had a right to install the utilities and the sign within the easement. Wendy's appealed.

On appeal, the court first addressed the issue of whether the grant of the easement gave Fagan an unlimited right to install utilities in the easement. The court found that it did not, and distinguished *New York Central Railroad Co. v. Yarian*.<sup>217</sup> The court distinguished *Yarian* because that case involved a broad

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213. *Id.* (citing *Board of Comm'rs v. Joeckel*, 407 N.E.2d 274, 277 (Ind. Ct. App. 1980); *Litzelswope v. Mitchell*, 451 N.E.2d 366, 369-70 (Ind. Ct. App. 1983)).

214. *Id.*

215. *Id.*

216. 644 N.E.2d 159 (Ind. Ct. App. 1994).

217. 39 N.E.2d 604 (Ind. 1942). In *Yarian*, the Indiana Supreme Court held that the reservation of two farm crossing easements for access to two divided portions of the farm resulting from the sale of the servient estate was sufficiently broad to permit the installation of underground



grant of easement, whereas the easement in *Fagan* was “limited by the ingress and egress language.”<sup>218</sup> Here, the installation of utilities was not necessary to effectuate the purpose of the grant, which was to provide Fagan with direct access to a public road. Moreover, the court noted that, unlike the *Yarian* grant, which was made in 1871, the grant at issue was made in 1993, “a time when electricity, gas, water, and phones were not just contemplated but considered necessary.”<sup>219</sup> Thus, the grantor’s failure to specifically provide for the installation of utilities indicated that Fagan’s use of the easement was limited to ingress and egress.<sup>220</sup>

With regard to Fagan’s right to install the 52-inch electrified sign, the court found that this right was necessary to effectuate the grant of ingress and egress to Fagan’s business, which was located 261 feet from Liberty Mills Road, the only public street leading to Fagan’s property.<sup>221</sup> Without a sign, employees, customers and suppliers might not be able to locate the entrance to Fagan’s business and the easement would be rendered virtually worthless. In addition, the court concluded that Fagan had a limited right to install electricity lines “for the sole purpose of illuminating the sign.”<sup>222</sup> Thus, the decision of the trial court was reversed with regard to the construction of utility and power lines and affirmed with regard to the installation of the illuminated sign.<sup>223</sup>

2. *Easements: Abandoned Railroad Property.*—In *Huff v. Langman*,<sup>224</sup> the Indiana Court of Appeals addressed the issue of ownership of an abandoned railroad right-of-way. The facts revealed that the Huffs purchased several acres of land, a portion of which was an abandoned railroad right-of-way, and received a quitclaim deed. Thereafter, the Huffs made numerous improvements on the land. The Langmans, owners of the adjoining land, filed a complaint to quiet title to the eastern half of the Huffs’ land, which was the abandoned railroad right-of-way. The trial court granted the Langmans’ motion for summary judgment, concluding that as a matter of law, the former right-of-way portion of the Huffs’ land had reverted to the Langmans upon abandonment.<sup>225</sup> The Huffs appealed.

The Huffs did not challenge the trial court’s finding that the land at issue was an abandoned railroad right-of-way subject to reversion.<sup>226</sup> Instead, the Huffs

water pipes and a conduit for the purpose of supplying electricity. *Id.* at 607.

218. *Fagan*, 644 N.E.2d at 162 (citing *Hagemeier v. Indiana & Michigan Elec. Co.*, 457 N.E.2d 590 (Ind. Ct. App. 1983) (ingress and egress involves the right to pass over another’s land rather than a more extensive right to alter or partially control the land)).

219. *Id.* at 163.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. 646 N.E.2d 730 (Ind. Ct. App. 1995).

225. *Id.* at 731.

226. The court of appeals recognized the rule that

when a landowner conveys some interest in land to a railroad, and in so doing limits use of that land ‘for railroad purposes only,’ the landowner conveys an easement to the railroad. The easement terminates upon abandonment by the railroad, at which time fee

argued that the Langmans' status as adjoining landowners was in dispute, making summary judgment inappropriate. The court of appeals disagreed. Although at one time the Langmans' property was a railroad right-of-way, the land was subsequently conveyed in a series of transactions involving the issuance of tax deeds.<sup>227</sup> By statute, a properly executed tax deed vests fee simple absolute ownership in the grantee.<sup>228</sup> Accordingly, the prior owners of the land, whose ownership was evidenced by a tax deed, necessarily held the property in fee simple.<sup>229</sup> It followed that when the land was transferred to the Langmans, the Langmans received fee simple title thereto. The Langmans were therefore the lawful owners of the property adjacent to the abandoned railroad right-of-way, and thus the proper recipients of the reversionary interest. The court concluded that the Langmans' summary judgment motion was appropriately granted.<sup>230</sup>

However, despite this result, it is important to note that the improvements made by the Huffs to the land at issue did not go to the Langmans without compensation. The trial court expressly ordered that the Huffs were entitled to the protections provided in the Occupying Claimant Act.<sup>231</sup>

Two cases involving identical parties and arising out of one disputed railroad easement were also decided by the court of appeals in 1995.<sup>232</sup> The most recent case was *Calumet National Bank v. American Telephone & Telegraph Co. (Calumet II)*.<sup>233</sup> In *Calumet II*, Calumet National Bank as Trustee under Trust No. P-3362 ("the Trust") instituted a trespass action against AT&T and its subsidiaries (collectively "the Utilities"). The trespass action arose out of the Utilities' installation of a fiber optic cable over an abandoned railroad easement that adjoined property owned by the Trust. Conrail, the previous owner of the railroad right-of-way, had granted a license to the Utilities permitting installation of the fiber optic cable. The Trust argued that the license was invalid, and that as a result, the Utilities' installation of the cable constituted a trespass. The trial court determined that the Utilities' license was valid and granted their motion for

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simple interest in the land reverts to the adjoining landowners.

*Id.* at 732 n.1 (quoting *Richard S. Brunt Trust v. Plantz*, 458 N.E.2d 251, 253, 256 (Ind. Ct. App. 1983)).

227. *Id.* at 732.

228. *Id.* (citing IND. CODE § 6-1.1-25-4(d) (Supp. 1994)).

229. *Id.*

230. *Id.*

231. *Id.* at n.4. The Occupying Claimant Act appears at IND. CODE §§ 34-1-49-1 to -12 (1993).

232. In *Calumet National Bank v. American Telephone & Telegraph Co.*, 647 N.E.2d 689 (Ind. Ct. App. 1995), *trans. denied*, the issues centered around whether AT&T and its subsidiaries properly utilized Indiana's eminent domain procedures in condemning the former railroad easement at issue. Although noteworthy, this case involved the construction of Indiana's condemnation statutes. A full discussion of these statutes is not particularly relevant to the issue of abandonment of railroad easements. For purposes of clarity, however, this case will be referred to as *Calumet I*.

233. 654 N.E.2d 816 (Ind. Ct. App. 1995).

summary judgment.<sup>234</sup> The Trust appealed.

The disposition of this case centered around whether the Trust obtained fee simple title to Conrail's former right-of-way *prior to* the time that Conrail and the Utilities entered into the license agreement. The Trust argued that by operation of sections 8-4-35-4 and 8-4-35-5 of the Indiana Code,<sup>235</sup> Conrail had abandoned the easement prior to the execution of the license. Therefore, the Utilities' license was invalid, and the installation of the cable constituted a trespass.<sup>236</sup>

On the contrary, the Utilities argued that by operation of sections 8-4-35-6, 8-4-35-7 and 8-4-35-8 of the Indiana Code,<sup>237</sup> Conrail and the Utilities had entered into the license agreement prior to the Trust obtaining record title to the abandoned railroad easement.<sup>238</sup> After examining the statute as a whole and construing its provisions together, the court of appeals concluded that the Utilities' license was valid.<sup>239</sup> Because the Utilities entered the land under authority of a valid license, the trial court was correct in granting summary judgment in favor of the Utilities on the Trust's trespass claim.<sup>240</sup>

*Calumet II* is of marginal importance in light of the fact that in its 1995 session, the Indiana General Assembly repealed sections 8-4-35-1 through 8-4-35-11 of the Indiana Code.<sup>241</sup> The ownership of abandoned railroad rights-of-way is now governed by sections 32-5-12-1 through 32-5-12-15 of the Indiana Code.<sup>242</sup> This new chapter of the Indiana Code became effective on May 10, 1995.

### B. Real Covenants and Equitable Servitudes

In *Noblesville Redevelopment Commission v. Noblesville Associates Limited Partnership*,<sup>243</sup> the Noblesville Redevelopment Commission ("the Commission") and the Noblesville Redevelopment Authority ("NRA") instituted a project to finance the acquisition and redevelopment of certain property, called the "allocation area," which incorporated the construction of an extension of Logan Street through Noblesville, Indiana.<sup>244</sup> The NRA financed the acquisition and redevelopment of the property from the proceeds of the sale of bonds. The bonds were to be repaid from lease payments by the Commission, who in turn was to make its lease payments from taxes on the real estate and from the sale or lease of property in the allocation area.<sup>245</sup>

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234. *Id.* at 818.

235. IND. CODE §§ 8-4-35-4, -5 (1993).

236. *Calumet II*, 654 N.E.2d at 819.

237. IND. CODE §§ 8-4-35-6 to -8 (1993).

238. *Calumet II*, 654 N.E.2d at 819-20.

239. *Id.* at 820.

240. *Id.*

241. IND. CODE §§ 8-4-35-1 to -11 (1993).

242. IND. CODE §§ 32-5-12-1 to -15 (Supp. 1995).

243. 646 N.E.2d 364 (Ind. Ct. App. 1995), *trans. denied*.

244. *Id.* at 367.

245. *Id.*

Noblesville Associates Limited Partnership, its general partner, and two other individuals ("the Guarantors") agreed to secure the Commission's lease payments in consideration for the NRA's issuance of the bonds.<sup>246</sup> Under the terms of the guaranty agreement, if the tax increments generated from certain real estate in Schedule C of the agreement failed to equal \$93,500 in 1992, the Guarantors promised to make a supplemental payment to the Commission in the amount of the deficiency.<sup>247</sup>

No tax increments were generated in 1992, and despite a written demand by the Commission, the Guarantors failed to tender a supplemental payment. As a result, the Commission brought this action against NDC to foreclose a lien on the property. NDC made a motion for judgment on the pleadings, contending that the agreement did not create a lien on the property. The trial court agreed and entered judgment for NDC.<sup>248</sup> The Commission appealed.

In its motion to correct error, the Commission conceded that the guaranty agreement did not create a lien on the property. On appeal, the Commission argued that despite this fact, the agreement was in substance a covenant running with the land which entitled it to equitable relief.

The court's analysis of the covenant at issue first involved determining whether the covenant at issue ran with the land. An affirmative covenant will run with the land if it was the intent of the parties that it should run, "the covenant touches and concerns the land, and there is privity of estate."<sup>249</sup>

The court applied each of these criteria to the agreement in question. First, the court determined that the contract at issue unambiguously revealed the parties' objective intent to be bound and to render the debt enforceable against remote grantees. This was true despite the fact that NDC did not meet the legal definition of "successor in interest," and was in fact a remote grantee of the original covenantor.<sup>250</sup> In reaching this conclusion, the court relied upon the proposition that "the language of a real covenant must be read in an ordinary or popular sense and not in a legal or technical sense, since the goal of contract interpretation is to effectuate the parties' intent."<sup>251</sup> Because no particular language is required to demonstrate intent to run with the land, the court could rely on the plain language of the guaranty agreement to make this determination.<sup>252</sup>

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246. *Id.*

247. The relationship of the Guarantors to the realty upon which enforcement of the lien was sought was not contained in the guaranty agreement or the complaint, nor was it ever determined by the court. In fact, the opinion assumed that no privity of estate existed. Noblesville Development Company was the fee simple owner of the real estate, and Merchants Bank of St. Louis held a mortgage on the property dated July 9, 1991 (Noblesville Development Company and Merchants Bank are referred to collectively as NDC).

248. *Noblesville Redevelopment Commission*, 646 N.E.2d at 366.

249. *Id.* at 368 (quoting *Moseley v. Bishop*, 470 N.E.2d 773, 776 (Ind. Ct. App. 1984)).

250. *Id.* at 368-69.

251. *Id.* at 369 (citing *Adult Group Properties, Ltd v. Imler*, 505 N.E.2d 459, 465-66 (Ind. Ct. App. 1987), *trans. denied*).

252. *Id.*

Next, the court determined that under general principles of law, the guaranty agreement touched and concerned the land because it “further[ed] society’s goals of land utilization and free alienability.”<sup>253</sup> The totality of the transaction between the parties indicated that the parties fully contemplated the benefits of obtaining complete use of the land, and that the parties did not consider the obligations of the guaranty a disincentive to the transaction. In fact, “the transaction of which the guaranty and covenant [were] a part transformed the burdened property from a ‘blighted area’ with an impaired value . . . to a revenue-producing shopping center.”<sup>254</sup> Accordingly, the covenant’s burden on the property bore a reasonable relationship to the benefit enjoyed by the guarantors.<sup>255</sup>

However, the court’s inquiry could not end here, because in Indiana, the concepts of touch and concern and privity are not analytically distinct. Privity requires that the interest to be burdened be conveyed contemporaneously with the execution of the guaranty. In this case, neither the Commission’s complaint nor the guaranty agreement indicated that there was a transfer of interest among the parties to the transaction, the Commission and the Guarantors. Without privity, the guaranty agreement created a personal obligation, but did not create a covenant that ran with the land.<sup>256</sup>

Finally, the court determined that despite the fact that the covenant did not run with the land, the well-pleaded facts were sufficient to state a claim for enforcement of the Guarantors’ obligation as an equitable lien against the property.<sup>257</sup> A lien may be created by contract if the language of the contract and the attendant circumstances indicate the parties’ intent to create a lien upon specific property.<sup>258</sup> An equitable lien may be enforced against the original obligor or her heirs, personal representatives, assigns, or purchasers with notice. Because NDC and its mortgagee had actual notice of the covenant and the parties’ intent to thereby create a binding obligation, the covenant may be enforced in equity.<sup>259</sup>

The court concluded that the Commission’s complaint stated well-pleaded material facts that could entitle it to an equitable remedy. As a result, judgment on the pleadings in favor of NDC was inappropriate, and reversal was ordered.<sup>260</sup>

### C. Restrictive Covenants: Residential Use Only

In *Corner v. Mills*,<sup>261</sup> the plaintiffs sought to have restrictive covenants limiting the use of their subdivision lots to residential purposes declared unenforceable. The subdivision tract was divided into thirty-two lots in 1937.

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253. *Id.*

254. *Id.* (citation omitted).

255. *Id.* at 370.

256. *Id.* at 371.

257. *Id.*

258. *Id.* (citing *Carmichael v. Arms*, 100 N.E. 302, 304 (Ind. Ct. App. 1912)).

259. *Id.*

260. *Id.*

261. 650 N.E.2d 712 (Ind. Ct. App. 1995).

Between 1939 and 1941, four lots were sold without restrictions on their use. In 1942, Lot 11 was sold with restrictive covenants. The covenants limited any structures erected on the lots to detached single family dwellings, contained minimum set-back and cost requirements for such structures, forbade certain commercial and trade behavior, and prohibited tents, trailers, barns or outbuildings from being used as a temporary or permanent residence. In addition, the covenant contained a race restriction prohibiting "persons of any race other than the white race" to use or occupy any building or lot "other than occupancy by domestic servants of a different race."<sup>262</sup>

Two additional lots were sold before 1946, one containing similar covenants and one without them. In 1946, the subdivision was recorded, but no covenants were recorded in the plat index. However, all lot owners joined in the recording and were using their lots for residential purposes. Of the next thirteen lots conveyed, some contained covenants similar to those on Lot 11, others contained residential use restrictions but not race restrictions, one lot was conveyed with restrictions against conducting "noxious or offensive trade or activity," and one lot was conveyed "subject to restrictions of record."<sup>263</sup>

The court observed that at the time of the hearing, there were only two vacant subdivision lots and that the other lots continued to be used for residential purposes only. In addition, all lots in the subdivision were zoned R-1 Single Family Residential.<sup>264</sup>

Fourteen lot owners wanted to use their lots for commercial purposes and brought this action to have the restrictive covenants declared unenforceable. They argued that the race restrictions, which were clearly unconstitutional, could not be separated from the other restrictions without disturbing the intent of the grantors. Thus, the covenants were against public policy.<sup>265</sup> The trial court agreed that the race restrictions were unenforceable, redacted those restrictions from the deeds, and upheld the enforceability of the remaining covenants, including the residential use restriction.<sup>266</sup> The lot owners appealed.

The court of appeals first addressed the racial covenants. Relying on the findings of the trial court, the court of appeals determined that "severing the illegal racial covenants only destroy[ed] a small portion of the covenants' intent. It [did] not affect the prevailing and apparent intent to have Christiana Acres remain residential."<sup>267</sup> The court thereby concluded that the trial court did not err by redacting the original deeds to remove the racial restrictions and ordering that the remaining covenants be enforced.<sup>268</sup>

The plaintiffs also argued that the residential restrictions were unenforceable

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262. *Id.* at 714.

263. *Id.* Because there were 32 subdivision lots, the deeds conveying some of the lots were not directly addressed by the court.

264. *Id.*

265. *Id.* at 715.

266. *Id.* at 714-15.

267. *Id.* at 715.

268. *Id.*

because the lack of uniformity in the restrictions was insufficient to prove the existence of a general plan or scheme for residential development. In support of this argument, the plaintiffs pointed to the fact that some of the lots were conveyed without restrictions prior to the recording of the plat, as well as the fact that the restrictive covenants were not included in the plat itself. The appellate court disagreed, determining that these factors alone did not conclusively prove the lack of a general plan or scheme of residential development.<sup>269</sup> Instead, the court concluded that whether a general scheme or plan of development exists should be determined from the particular circumstances of the case.<sup>270</sup> Relevant to this determination is the language of the deed and the grantor's intent; the failure to include uniform restrictions in all deeds or the failure to include any restrictions in one or more deeds is not conclusive evidence that intent was lacking.<sup>271</sup> Evidence that every lot owner joined in the recording of the plat in 1946, coupled with evidence that after 1946 all transfers of lots consistently contained some type of residential restriction, sufficiently demonstrated the grantor's intent to create a general plan or scheme of development to support the trial court's finding.<sup>272</sup>

The court also addressed the issue of whether commercial development on the thoroughfares surrounding Christiana Acres rendered the residential use restrictions infeasible. In concluding that it did not, the court considered the applicable local zoning classification (which was exclusively residential) and the long standing residential character of the neighborhood.<sup>273</sup> The court observed that the condition of the surrounding areas must undergo radical changes in order to render continued residential use impractical; such changes were not evident in this case. In fact, several newer residents had purchased lots within the subdivision in the past several years, arguably in reliance on the residential use covenants. "Plaintiffs' unilateral speculation that their properties [were] worth more if developed commercially [was] insufficient by itself to nullify the otherwise valid covenants for residential use."<sup>274</sup> The decision of the trial court was affirmed.

## V. VENDOR AND PURCHASER

### A. *Warranty of Title: Damages for Breach*

In *Hudson v. McClaskey*,<sup>275</sup> McClaskey purchased a tract of land by warranty deed from Hudson in 1984. The State of Indiana, which had acquired a right-of-way easement over the land prior to the conveyance to McClaskey, subsequently brought a condemnation action against McClaskey. McClaskey defended his title

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269. *Id.* (citing *Elliot v. Keely*, 98 N.E.2d 374, 379 (Ind. Ct. App. 1951), *trans. denied*; *Bachman v. Colpaert Realty Corp.*, 194 N.E.2d 783, 789 (Ind. Ct. App. 1935)).

270. *Id.*

271. *Id.* (citing *Elliot*, 98 N.E.2d at 379).

272. *Id.* at 716.

273. *Id.*

274. *Id.*

275. 641 N.E.2d 36 (Ind. Ct. App. 1994), *trans. dismissed*.

against the State and filed a cross-complaint against Hudson for breach of warranty of title. The trial court held that the State had a valid easement, but entered summary judgment in favor of Hudson on the cross-complaint.<sup>276</sup> McClaskey appealed.

On appeal, the court reversed summary judgment in favor of Hudson and remanded to the trial court to determine what remedy McClaskey should receive as a result of the breach of warranty.<sup>277</sup> On remand, the trial court allowed rescission of the sale and Hudson appealed. The court of appeals again reversed,<sup>278</sup> holding that rescission was not a proper remedy. This time the Indiana Supreme Court granted transfer, affirmed the court of appeals' determination that rescission was not a proper remedy, and remanded to the trial court with directions "to conduct a hearing to determine all proper damages."<sup>279</sup> On remand, the trial court entered judgment for McClaskey in the amount of \$173,486.36, with interest of ten percent from the date of the judgment until satisfaction.<sup>280</sup> Hudson appealed.

The trial court found that the diminution in value of the real estate at issue resulting from Hudson's breach of warranty of title was \$60,000.00. Hudson challenged this finding as clearly erroneous. In addressing this issue, the court of appeals observed that the measure of damages for breach of the warranty of title where the title fails completely is the return of the purchase money with interest.<sup>281</sup> Where the grantee is deprived of the use of a portion of the land, the measure of damages is "the value which that specific part of the land bore to the value of the whole tract conveyed," and not just a ratable portion of the purchase price based on the difference in "the quantity of the land purchased to the residue left over after the incumbrance is discovered."<sup>282</sup> Where there is an encumbrance, the measure of damages is the difference between the value of the property with the encumbrance and the value of the property without the encumbrance on the date of the conveyance.<sup>283</sup>

Lee Shaffer, an auctioneer, real estate broker and appraiser of property, testified that because of its commercial development potential the land was worth \$3,000 an acre without the easement but only \$450 to \$625 with the easement.<sup>284</sup> Frederick Bumb, a farmer who had farmed the land for thirty-one years, testified

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276. *Id.* at 39.

277. *Id.* (citing *McClaskey v. Bumb & Mueller Farms, Inc.*, 547 N.E.2d 302 (Ind. Ct. App. 1989), *trans. denied*).

278. *Id.* (citing *Hudson v. McClaskey*, 583 N.E.2d 1228 (Ind. Ct. App. 1992)).

279. *Id.* (quoting *Hudson v. McClaskey*, 597 N.E.2d 308, 309 (Ind. 1992)).

280. *Id.* at 40.

281. *Id.* at 41 (citing *Sherwood v. Johnson*, 62 N.E. 645 (Ind. Ct. App. 1902)).

282. *Id.* (citing *First Nat'l Bank v. Colter*, 61 Ind. 153, 160 (1878) ("The true and just rule is, that the proportional value, and not the quantity of the several parts of the land, should be the measure of damages.")).

283. *Id.*

284. The court rejected Hudson's contention that Shaffer should not have been allowed to testify as an expert witness because of his lack of formal training in appraising property. *Id.*



that, with the easement, only eighteen acres were suitable as farmland worth \$1,000 an acre and the rest of the land was a “swamp.”<sup>285</sup> McClaskey testified that without the easement the property was worth \$80,000, the purchase price paid to Hudson, but that with the easement the land was worth only \$20,000. Based on this evidence, the court concluded that the trial court had correctly used the \$80,000 sale price as the value of the land without the easement, and that its determination that the value of the property had diminished by \$60,000 when the easement was included was within the range of the evidence.<sup>286</sup>

Next Hudson argued that the trial court erred in awarding attorney fees and engineering fees to McClaskey in the defense of his title. The court acknowledged that although the grantor under a general warranty deed covenants that he will warrant and defend his title, “[i]n Indiana, the party seeking recovery of litigation costs is generally required to tender the defense to the party who breached the covenant of warranty.”<sup>287</sup> However, the court observed that the rule requiring notice of the pendency of the suit and a demand that the grantor defend the suit does not apply when the grantor is named as a party to the action.<sup>288</sup>

Because Hudson was named as a party in the State’s action to condemn access rights to the easement, a demand was not necessary for McClaskey to recover the costs of defending against the State’s claim. Nevertheless, because McClaskey’s defense of his title involved two separate tracts of land, only one of which had been purchased from Hudson, the court remanded for a further hearing to determine the amount of litigation costs to be allocated to the defense of Hudson’s title. The court rejected the trial court’s position that Hudson should pay the entire costs of defending McClaskey’s title purely on the theory that a large portion of the defense of both lots was duplicative.<sup>289</sup>

Finally, the court agreed with Hudson that the trial court erred in compounding monthly the interest on the award of damages and expenses. Interest on a damage award should be limited to simple interest. The trial court was directed on remand to calculate the interest on the award as simple interest.<sup>290</sup>

In his cross-claim, McClaskey contended that the trial court should not have allowed Hudson a set-off on his cross-claim for the amount due on the note and mortgage used to purchase the land from Hudson, because there was no evidence that any amount was due. The court disagreed. McClaskey’s failure to file an answer to Hudson’s cross-claim amounted to an admission of the claim, and on remand the court was directed to admit evidence of the exact amount of the balance remaining due. The decision of the trial court was thus affirmed in part, reversed in part and remanded.

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285. *Id.*

286. *Id.* at 42.

287. *Id.* at 43 (citing *Groves v. First Nat’l Bank*, 518 N.E.2d 819, 823 (Ind. Ct. App. 1988), *trans. denied*).

288. *Id.*

289. *Id.*

290. *Id.*

*B. Oral Contract to Reconvey Land: Statute of Frauds*

In *Lux v. Schroeder*,<sup>291</sup> Lux and Schroeder orally discussed purchasing 207 acres of land. They proposed dividing the property into four tracts and agreed upon which of the tracts each would take. Lux proposed that he pay sixty percent of the sale price and Schroeder forty percent. Later Schroeder became dissatisfied with Lux's proposed apportionment of the purchase price, but there was a dispute as to if or when Schroeder communicated his disapproval to Lux. Subsequently, they purchased the land as tenants in common for \$475,000, and each party paid one-half of the purchase price and one-half of the cost of surveying the land. Schroeder brought an action to partition the land and Lux sought to enforce the oral agreement regarding the partition of the land and the apportionment of the purchase price. The trial court found that an oral contract existed at the time the offer to purchase the land was submitted, but that the oral contract was unenforceable under the statute of frauds.<sup>292</sup> Judgment was entered ordering the land be partitioned by sale and the proceeds divided equally between the parties.<sup>293</sup> Lux appealed.

The issue raised on appeal was whether the oral contract to reconvey land fell within the statute of frauds. Lux argued that the oral agreement was not within the statute of frauds for two reasons. First, Lux argued that his agreement with Schroeder was an agreement to reconvey the property and not a contract for the sale of land within the meaning of section 32-2-1-1 of the Indiana Code.<sup>294</sup> Lux based this argument on a misinterpretation of *Teague v. Fowler*.<sup>295</sup> In *Teague*, the Indiana Supreme Court concluded that an oral agreement to reconvey property was enforceable in equity because there was "an unmistakable taint of fraud" in the parties refusal to reconvey land pursuant to an oral agreement.<sup>296</sup> The *Teague* court did not create a reconveyance exception to the statute of frauds' writing requirement; nor could the court find any other authority in support of the proposition.<sup>297</sup> Accordingly, the court rejected Lux's argument.<sup>298</sup>

Lux further argued that the statute of frauds was inapplicable because he and Schroeder were joint purchasers of the land at issue with joint possession thereof, and the oral agreement at issue was related to this transaction. In support of this argument, Lux relied on *Green v. Vardiman*, an early case in which the court utilized its equitable powers to enforce an oral agreement regarding the division of property between joint purchasers.<sup>299</sup> The court distinguished *Green* on the basis that the deed in *Green* did not reflect one party's joint ownership of the

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291. 645 N.E.2d 1114 (Ind. Ct. App. 1995), *trans. denied*.

292. *Id.* at 1116.

293. *Id.* at 1115.

294. IND. CODE § 32-2-1-1 (1993).

295. 56 Ind. 569 (1877).

296. *Lux*, 645 N.E.2d at 1117.

297. *Id.*

298. *Id.*

299. *See id.* (citing *Green v. Vardiman*, 2 Blackf. 324 (1830)).

property despite the fact that he had paid for the property and established a residence thereon.<sup>300</sup> Application of the statute of frauds under such circumstances would have led to an inequitable result.<sup>301</sup> The deed reflected Lux and Schroeder's joint ownership of the property, thus there was no injustice that would warrant the court's use of its equitable powers to suspend the operation of the statute of frauds. The court thereby rejected Lux's argument.<sup>302</sup>

The court further rejected Lux's reliance on the doctrines of promissory estoppel and part performance.<sup>303</sup> Because the trial court correctly determined that the statute of frauds precluded Lux's recovery on the oral agreement, its judgment was affirmed.<sup>304</sup>

### *C. Doctrine of Merger: Contract Rights Merged into Deed*

In *Link v. Breen*,<sup>305</sup> the seller ("Link") warranted, in a rider to the purchase agreement, that the premises were "free from termite or other wood destroying infestation, or damage therefrom." The rider to the purchase agreement provided that Link was to pay for a termite inspection by a reputable pest control company, to "be completed no less than 14 days prior to closing."<sup>306</sup> Should any infestation be discovered, Link was to "assume all cost of eradicating the same and restoring the premises."<sup>307</sup> A termite inspection was conducted by Franklin Pest Control ("FPC") and a report was furnished to the purchasers ("Breens") stating there was no termite infestation. The report was qualified due to FPC's inability to access the entire house. Relying on the report, the Breens closed the sale. One month later, while remodeling, they discovered termite damage to the house.

The Breens filed suit against FPC and Link, alleging breach of contract and seeking damages for failure to discover and disclose the termite infestation. Link filed a motion for summary judgment, which the trial court denied.<sup>308</sup> Link then filed an interlocutory appeal.

By denying Link's motion for summary judgment, the trial court determined that a material question of fact existed as to whether the rider merged into the deed. On appeal, Link argued that summary judgment should have been granted because the unambiguous language of the rider indicated that Link's obligations thereunder merged into the deed, and therefore did not survive the Breens' acceptance of the deed and possession of the property. In response, the Breens argued that Link's duties under the warranty against termite infestation would not arise until the discovery of termites, regardless of when discovery occurred.

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300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 1118-19.

304. *Id.* at 1119.

305. 649 N.E.2d 126, 127 (Ind. Ct. App. 1995), *trans. denied.*

306. *Id.*

307. *Id.*

308. *Id.*

The Indiana Court of Appeals agreed with Link that merger by deed precluded recovery by the Breens.<sup>309</sup> Under the doctrine of merger, all prior and contemporary negotiations or executory agreements are merged upon the grantee's acceptance of the deed as performance of the contract, and all rights under the contract are eradicated.<sup>310</sup> The test for merger is the express or implied intent of the parties. If the parties' intent is clear from the deed's language, the deed is decisive; if not, other evidence may be introduced to settle the issue. The court concluded that, based on the plain language of the deed at issue, the parties intended that merger occur in this case.<sup>311</sup>

In so doing, the court rejected the Breens' argument that merger was inapplicable because "the contract create[d] rights collateral to and independent of the conveyance."<sup>312</sup> The Breens argued that the broad language in the rider warranting "that the premises are free from termite or other wood destroying infestation or damage therefrom" created such rights, and should not be merged into the deed. While conceding that when read in isolation this language appeared to create a strict warranty, the court noted that the language in a contract must be read in context.<sup>313</sup> The termite inspection clause contained a specific time frame in which Link was to inspect for and correct termite damage prior to closing. It could not simultaneously impose a limitless duty to inspect at any time after closing, as such would impose unlimited liability. From this language as a whole, it was reasonable to conclude that the parties intended the obligations under the deed not to be collateral and independent, but rather to merge into the deed.<sup>314</sup>

In reaching this conclusion, the court emphasized that the purchase agreement gave the Breens the express option to order an independent inspection. The Breens chose instead to rely solely on Link's inspection; they did so to their own detriment. Because the application of the merger doctrine terminated Link's obligation to the Breens, the trial court erred in denying Link's motion for summary judgment, and reversal was warranted.<sup>315</sup>

## VI. LOCAL BUILDING CODES

The Indiana Court of Appeals for the first time addressed section 36-7-8-3 of the Indiana Code<sup>316</sup> in *Robinson v. Monroe County*.<sup>317</sup> In that case, Jesse Cloud Robinson and Sue Ann Mitchell (collectively "Landowners") purchased two acres of real property in Monroe County in 1991. In early 1992, Landowners began construction of a single family dwelling on the property. Although they completed

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309. *Id.* at 129.

310. *Id.* at 128 (citing *Thompson v. Reising*, 51 N.E.2d 488, 491 (Ind. Ct. App. 1943)).

311. *Id.* at 129.

312. *Id.* at 128.

313. *Id.* at 128-29.

314. *Id.* at 129.

315. *Id.*

316. IND. CODE § 36-7-8-3 (1993).

317. 658 N.E.2d 647 (Ind. Ct. App. 1995).

part of the construction on their own, they hired contractors to excavate and prepare foundation trenches, build foundation walls and finish concrete garage floors, build and finish the concrete slab floor, hang and finish the drywall, and install the heating and ventilation system.<sup>318</sup>

The Monroe County Building Code required that various permits be obtained in conjunction with construction of a house including a building permit and an occupancy permit.<sup>319</sup> Landowners refused to obtain the permits and the County subsequently sought an injunction to “enjoin [Landowners] from further erecting, constructing, enlarging, altering, repairing, improving, removing, converting, equipping, using, occupying or maintaining the [house] until all permits required by the Code [had] been obtained.”<sup>320</sup> Landowners countered that they were not required to obtain any permits because they were exempted from the permit requirements. The trial court granted the County’s motion for summary judgment and Landowners appealed.<sup>321</sup>

On appeal, Landowners contended that they did not have to obtain the permits required under the local building code because they were building a private home, and thus, were exempted from its requirements pursuant to section 36-7-8-3(d) of the Indiana Code.<sup>322</sup> The issue before the Indiana Court of Appeals was whether Landowners’ home constituted a home “built by individuals” under the statute.<sup>323</sup>

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318. *Id.* at 649.

319. *Id.*

320. *Id.* (citing Record at 56).

321. *Id.*

322. IND. CODE § 36-7-8-3(d) (1993). The Monroe County Commissioners created the Monroe County Building Code which was applicable to the construction, alteration, repair, use, occupancy, maintenance, and addition to all buildings and structures in the unincorporated areas of Monroe County. The Commissioners also set up the Monroe County Building Department which was granted the powers and duties set out in IND. CODE §§ 36-7-8-1 to -11. *Robinson*, 658 N.E.2d at 649.

323. IND. CODE § 36-7-8-3 (1993) provides:

(a) The legislative body of a county having a county department of buildings or joint city-county building department may, by ordinance, adopt building, heating, ventilating, air conditioning, electrical, plumbing, and sanitation standards for unincorporated areas of the county. These standards take effect only on the legislative body’s receipt of written approval from the fire prevention and building safety commission.

(b) An ordinance adopted under this section must be based on occupancy, and it applies to:

(1) the construction, alteration, equipment, use, occupancy, location, and maintenance of buildings, structures, and appurtenances that are on land or over water and are:

(A) erected after the ordinance takes effect; and

(B) if expressly provided by the ordinance, existing when the ordinance takes effect;

If so, Landowners were not required to obtain the permits.

The County argued that Landowners could not claim the exemption because the exemption was only applicable when a party "personally performs[] all of the construction work on his or her house."<sup>324</sup> The County then claimed that because Landowners hired subcontractors to perform certain jobs on their house, the entire construction project was subject to the requirements of the building code.<sup>325</sup>

In order to determine whether the exemption was applicable to Landowners, the court looked to the legislative intent of section 36-7-8-3<sup>326</sup> and concluded that the underlying purpose of the statute was to promote safety.<sup>327</sup> However, the court observed that the exception set forth in subsection (d) ran afoul of the safety-oriented purpose of the statute in that:

[E]xempting an individual from the requirements of obtaining authorization for proposed construction and subjecting the completed work to inspection and approval prior to permitting occupancy of the building runs contrary to goal of ensuring safe buildings. Yet, Subsection (d) undeniably creates such an exception from the requirements set out in Section 3.<sup>328</sup>

Based upon this conflict, the court inferred that the only purpose of the exemption in subsection (d) was to remove impedents from those persons who either may not

(2) conversions of buildings and structures, or parts of them, from one occupancy classifications to another; and

(3) the movement or demolition of buildings, structures, and equipment for the operation of buildings and structures.

(c) The rules of the fire prevention and building safety commission are the minimum standards upon which ordinances adopted under this section must be based.

(d) An ordinance adopted under this section does not apply to private homes that are built by individuals and used for their own occupancy.

Pursuant to this statute, the Monroe County Building Code required that various permits be obtained in conjunction with the construction of a house.

324. *Robinson*, 658 N.E.2d at 650.

325. *Id.*

326. IND. CODE § 36-7-8-3 (1993).

327. In its original language, the statute read:

The purpose of the ordinance is to provide for the safety, health and public welfare through structural strength and stability, means of egress, adequate sanitation, plumbing, light and ventilation, and protection of life and property from fire and hazard incident to design, construction, alteration, and for the removal or demolition of buildings and structures in the unincorporated areas of counties having a population between 300,000 and 600,000 according to the last preceding United States census.

*Robinson*, 658 N.E.2d at 650 (citing 1965 Ind. Acts 348, § 2).

328. *Id.* at 650-51.

possess the skills to construct a home in accordance with “the technical specifications set out in the ordinances” or have the funds to hire professionals or others to build their house.<sup>329</sup> The court stated:

We can conceive of only one purpose which could justify allowing a builder to circumvent certain applicable building safety ordinances . . . . It may be argued that ordinances such as those contemplated by IC 36-7-8-3, which establishes construction specifications and require permits and inspections for residential construction projects, interfere with the ability of some individuals to build their own home and thus to pursue the American dream.<sup>330</sup>

With this purpose in mind, the court analyzed whether Landowners “built” their house, and thus, were subject to the exemption. The court concluded that the exception applied when the homeowner himself completes a substantial portion of the construction of his home.<sup>331</sup> Because Landowners completed the framing, roofing, finish and cabinet work, electrical work, and the plumbing, the court concluded that this comprised a substantial portion of the construction work necessary for a new house, making the exception contained in section 36-7-8-3(d) applicable.<sup>332</sup>

However, the court determined that section 36-7-8-3(d) did not extend to the work performed by professional subcontractors or others hired to work on a house. The court rationalized that this hiring “indicates that the homebuilder can afford to pay others to do a portion of the construction work, and contractors obviously possess the expertise and equipment to comply with applicable building codes.”<sup>333</sup> Accordingly, the court concluded:

when IC 36-7-8-3(d) operates to exempt an individual from having to comply with the requirements set out in Section 3, any construction work performed by professional subcontractors or others paid by the owner is

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329. *Id.* at 651.

330. *Id.*

331. *Id.* Reaching this conclusion, the court rejected Landowners’ contention that under the statute, “built” meant that an individual was responsible for construction, not that he did all the work himself. The court noted that such an interpretation would allow an individual to essentially become a general contractor and hire subcontractors to construct the house without complying with the building code requirements. The court determined that this conflicted with the underlying purpose of the statute which is to relieve those persons who did not have the skills or funds to build a home in accordance with the technical requirements of the codes and allow them to build their home themselves. Therefore, Landowners’ interpretation would have allowed persons who could afford to pay professionals to construct their home to be relieved of the code regulations. The court also rejected the County’s “all or nothing” approach wherein the exemption could only apply if the person privately constructed every component of the home. To do so, the court stated, would narrow this exception to such an extent as to render it meaningless. *Id.* at 651-52.

332. *Id.* at 651.

333. *Id.* at 652.

not subject to the exemption and said work must be performed in compliance with all applicable building code requirements.<sup>334</sup>

Thus, the court reversed the trial court's grant of the County's motion for summary judgment which enjoined Landowners from further working on their home.<sup>335</sup>

On rehearing, the court took the opportunity to address the ramifications of its decision in response to Monroe County's petition for reconsideration and the Indiana Fire Prevention and Building Safety Commission's Amicus Curiae Brief in support of rehearing.<sup>336</sup> Writing for the Majority, Judge Friedlander recognized their concerns that "the construction of safe houses is a matter of paramount importance" and that this statutory provision was inconsistent with that objective of insuring safe houses.<sup>337</sup> However, he noted that its decision exempted individuals from only those requirements set forth in Indiana Code section 36-7-8-3 and did "not provide a similar exemption from the requirements set out in Section 4 concerning minimum housing standards and related ordinances."<sup>338</sup>

The court agreed with the County's contention on rehearing that Indiana Code section 36-7-8-3(d) "does not promote the interests of the public at large," because it allows individuals to erect homes that do not meet the minimum safety standards adopted by the Indiana Fire Prevention and Building Safety Commission.<sup>339</sup> Nevertheless, the court emphasized that it could not "ignore the clear language of a statute, regardless of [its] view as to its wisdom."<sup>340</sup> In so doing, the court rejected the Fire Prevention and Building Safety Commission's invitation to narrow the scope of the exemptions to include only log cabin-type dwellings, and to exclude homes in residential areas.<sup>341</sup>

Finally, in response to an issue raised in the Commission's brief, the court clarified the definition of "substantial" as set forth in its opinion.<sup>342</sup> The court

334. *Id.*

335. *Id.* at 649.

336. *Robinson v. Monroe County*, 663 N.E.2d 196 (Ind. Ct. App. 1996).

337. *Id.* at 196.

338. *Id.* at 197 (quoting *Robinson*, 658 N.E.2d at 652).

339. *Id.* (quoting Appellee's Petition for Rehearing at 10).

340. *Id.*

341. *Id.* The court noted that "[i]t is not a proper function of this court to, in effect, rewrite a statute in order to render it consistent with our view of sound public policy" and that Commission's and the County's concerns regarding the scope of the exemption should be directed to the legislature not the courts. *Id.* (citing *S.V. v. Estate of Bellamy*, 579 N.E.2d 144 (Ind. Ct. App. 1991)).

342. *Id.* The Commission stated:

The Court does not define "substantial." The failure to define "substantial," which could be taken to mean 10%, 25%, 50% or any other value, creates an enforcement nightmare. Many local building departments already have been faced with irate citizens who claim they can avoid codes and permitting [sic], and other departments have had requests, based on the decision in this case, for refunds of building permit fees already collected. Although later litigation could further define "substantial," until that



indicated that the definition of "substantial" should be consistent with its customary meaning: "of ample or considerable amount, quantity, [or] size."<sup>343</sup> Thus, the court concluded, "[I]t would clearly be inconsistent with the ordinary meaning of the term to construe a 'substantial portion' of something as referring to only one-half of the whole."<sup>344</sup> Subject to these comments and clarifications, the court denied the County's petition for rehearing.

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litigation occurs local building officials are left without guidance as to who is covered by their building codes.

*Id.* (quoting Brief of Amicus at 4-5).

343. *Id.* (quoting THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1418 (1967) (alteration in original)).

344. *Id.*

