RECENT DEVELOPMENTS IN REAL PROPERTY LAW: OCTOBER 1, 2009 – SEPTEMBER 30, 2010

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I. CONVEYANCES AND PURCHASE AGREEMENTS

Once again, several cases concerning tax deeds were published by the Indiana Court of Appeals during this reporting term. In the most interesting case, *Tajuddin v. Sandhu Petroleum Corp. No. 3*,[1] errors by the Office of the Lake County Assessor required a "do-over" by a purchaser of a parcel in a tax sale.

Sandhu Petroleum Corporation No. 3 ("Sandhu") owned three parcels of real estate, each with its own key number ("Key 12," "Key 14," and "Key 17").[2] A gas station and other improvements were located on Key 17, while Keys 12 and 14 were vacant land.[3] Due to staff errors by the Office of the Lake County Assessor, the improvements on the parcel identified as Key 17 were assessed on the parcel identified as Key 12.[4] The owners of Sandhu received and paid property tax bills for Keys 12 and 14; however, they did not realize that the property consisted of three separate key numbers, and they did not provide the assessor with an updated address for Key 17.[5] The owners also did not realize that they were supposed to be receiving property tax bills for Key 17 because the amount of taxes they were paying for Keys 12 and 14 were consistent with the total amount of property taxes they had paid on all three parcels when they purchased the land.[6]

Because tax bills were not sent to the owners of Sandhu for Key 17, the parcel was eligible for tax sale and was sold to Tajuddin at such a sale on October 30, 2006.[7] Tajuddin sent notice of the sale via certified mail on April 30, 2007 to "Sandu [sic] Petroleum Corporation Number 3" at the address of record, but the notice was returned marked "Attempted—Not Known."[8] Tajuddin then hired a process server to post the notice on the door of the gas station and mail a notice to Sandhu by first class mail.[9] Finally, Tajuddin published notice of the tax sale in the local paper as required by statute.[10] He

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1. 921 N.E.2d 891 (Ind. Ct. App. 2010).
2. *Id.* at 892.
3. *Id.*
4. *See id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

petitioned for a tax deed, but Sandhu objected.[11] The trial court concluded that Tajuddin had not provided the required notice of the tax sale to Sandhu; however, the court of appeals found that this decision was not supported by the record.[12]

On appeal, the court upheld the trial court's ruling that Sandhu's payment of property taxes that were assessed on Key 12, but which were for the improvements on Key 17, prohibited issuing the tax deed.[13] The court of appeals reversed the trial court's ruling that Tajuddin had not provided proper notice to Sandhu, finding that the notice was incorrect due to errors of the assessor's office and that both parties had a right to rely on the information in the assessor's office.[14] It concluded that equitable principles required denying the tax deed and following the notice procedure required by statute—with the correct address for the owner of Key 17.[15]

Christy v. Sebo[16] concerned a breach of warranty of title and the interpretation of an attorneys' fees clause in a purchase agreement. In this case, Paul and Julia Christy purchased property from Paul and Anita Sebo.[17] After the closing, the Christys' neighbors (the Clarks) filed suit alleging that they owned a quarter-acre section of the Christys' real estate through adverse possession.[18] The Christys counterclaimed, filing a third party complaint against the Sebos alleging breach of warranty of title and a cross-claim against the Clarks for trespass.[19] After a series of summary judgment proceedings, the Clarks and the Christys ultimately entered into an agreement settling the Clarks' claims against the Christys.[20] The trial court granted the Christys' motion for partial summary judgment against the Sebos, holding that the Sebos had breached the warranty of title in the purchase agreement.[21]

Following this ruling, the Christys filed another motion for summary judgment against the Sebos to recover damages for the breach of warranty of title.[22] The trial court awarded damages to the Christys for the costs they incurred defending the adverse possession claim, as well as attorneys' fees they incurred in prosecuting their breach of warranty claim against the Sebos;[23] however, the court refused to award the Christys the costs for the survey that was

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11. *Id.*
12. *Id.* at 893-94.
13. *Id.* at 895.
14. *Id.*
15. *Id.* at 894-95.
16. 930 N.E.2d 1154 (Ind. Ct. App. 2010).
17. *Id.* at 1156.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 1156-57.

done in conjunction with defending the Clarks' claim.[24] Subsequently, the Sebos filed a motion for recusal and a motion to reconsider errors arguing that the Christys should not have been awarded attorneys' fees defending the Clarks' adverse possession claim or their breach of warranty claim against the Sebos.[25] The case was transferred to the Morgan Superior Court, and that court set aside the original award of attorneys' fees and costs.[26] At the subsequent damages hearing, the court gave the Christys summary judgment but held that they should not receive attorneys' fees under the purchase agreement.[27]

On appeal, the court observed that the settlement of the dispute between the Christys and the Clarks concerning the Clarks' adverse possession claim had nothing to do with the question of whether the Sebos breached the warranty of title to the Christys.[28] The court held that the Christys were entitled to reasonable attorneys' fees and costs, including survey costs, in defending their property against the Clarks' adverse possession claim.[29] Next, the court turned to the attorneys' fees clause in the Christys' purchase agreement, which stated as follows: "Any party to this Agreement who is the prevailing party in any legal or equitable proceeding against any other party brought under or with relation to the Agreement or transaction shall be additionally entitled to recover court costs and reasonable . . . [attorneys'] fees from the non-prevailing party."[30] The court discussed the well-settled Indiana rule recognizing the ability of parties "to enter into fee-shifting provisions as long as the . . . [provisions do] not violate public policy," noting that allowing attorneys' fees pursuant to an agreement is designed to compensate a party who has successfully enforced his or her legal rights in court.[31] The court held that the trial court correctly found that the Sebos breached the warranty of title.[32] As a result, the court concluded that the Christys, as the prevailing party in the litigation, were entitled to their attorneys' fees and expenses incurred in litigating the breach of warranty claim against the Sebos based on the attorneys' fees provision in the purchase agreement.[33]

II. COVENANTS

Several cases in recent years have addressed the scope of ingress and egress easements. In *McCauley v. Harris*,[34] the court was asked to determine whether or not the Harrises—holders of a thirty-foot-wide ingress and egress easement

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24. *Id.* at 1157.
25. *Id.*
26. *Id.*
27. *Id.* at 1158.
28. *Id.* at 1159.
29. *Id.*
30. *Id.* at 1156.
31. *Id.* at 1160.
32. *Id.*
33. *Id.*
34. 928 N.E.2d 309 (Ind. Ct. App. 2010), *reh'g and trans. denied.*

over the property of the McCauleys—had the right to clear and pave the entirety of the easement, which required removing a portion of the McCauleys' pole barn.[35] The court concluded that the ingress/egress easement was not limited to merely permitting access over the servient estate by the Harrises.[36] Relying on *Drees Co. v. Thompson*,[37] the court affirmed the trial court's decision, holding that the plain and ordinary meaning of the language used in the easement and the parties' intent established a clearly defined thirty-foot easement for the purpose of ingress, egress, and utilities.[38] The court concluded that the terms of the easement had to be enforced as written, thereby preventing the trial court from expanding the easement or restricting its terms.[39] The court upheld the trial court's ruling that the Harrises' use and enjoyment of the easement necessarily included "the right to use the easement in its entirety and to construct a roadway over all or any part of the easement."[40] This was the foundation for the court's ruling that the McCauleys' pole barn encroached on the easement and was a material impairment of the easement requiring its removal.[41]

Bass v. Salyer[42] concerned Jeffrey and Renea Salyer's claim of a prescriptive easement over property owned by Jerry and Bettye Bass abutting Yellow Creek Lake in Kosciusko County.[43] The Salyers filed a quiet title action alleging that they had (1) a prescriptive easement over real estate that had been platted as a driveway between County Road 850 and Yellow Creek Lake and (2) the right to access the riparian area of Yellow Creek Lake.[44] The Salyers also sought to enjoin the Basses and adjacent property owners (the Suttons) from interfering with the Salyers' use of the prescriptive easement.[45] The Basses argued that the existing driveway was dedicated to the public use according to previous plats and, as a result, the Salyers could not obtain a prescriptive easement to use the drive.[46] The trial court ruled in favor of the Salyers' quite title action establishing the prescriptive easement and access to the riparian area along the lake, and the Basses appealed.[47]

The court of appeals observed that prescriptive easements are not favored in the law and that a person claiming a prescriptive easement must therefore meet

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35. *Id.* at 311.
36. *Id.* at 314.
37. 868 N.E.2d 32 (Ind. Ct. App. 2007).
38. *McCauley*, 928 N.E.2d at 315.
39. *Id.*
40. *Id.*
41. *Id.* at 316.
42. 923 N.E.2d 961 (Ind. Ct. App. 2010).
43. *Id.* at 962-63.
44. *Id.* at 964.
45. *Id.*
46. *See id.* at 963-64.
47. *Id.* at 963.

strict requirements.[48] It recited the rules from *Wilfong v. Cessna Corp.*,[49] where the Indiana Supreme Court modified longstanding traditional elements of the requirements to establish a prescriptive easement to follow the court's reformulation of the elements of adverse possession.[50] In *Wilfong*, the Indiana Supreme Court held that the claimant in an adverse possession case (and, by extension, a prescriptive easement case) must establish "clear and convincing proof of (1) control, (2) intent, (3) notice, and (4) duration."[51] The court continued, "This reformulation [of the adverse possession rule] applies as well for establishing prescriptive easements, save for those differences required by the differences between fee interests and easements."[52] The court followed the long-established Indiana rule regarding easements that the intent of those creating the driveway was controlling.[53] Ultimately, the court found that the Salyers' use of the public easement was permissive and that the Salyers, like other members of the public, were able to use a platted drive for access to the lake.[54] The court added that the Salyers' use of the drive was "consistent with the grant of the public easement and did not become an adverse use until their right to use the easement expired when the [d]rive was vacated."[55] Additionally, the court noted that when the Salyers used the private drive, it was a dedicated public way.[56] The court pointed out that the Salyers used the drive as a public easement for its intended purpose (to access the lake), preventing them from claiming they used the easement under a claim of right that was exclusive, hostile, or adverse to the Basses' interest in the property as the owners of the fee.[57] The court stated that the Salyers' claim of a prescriptive easement was based solely upon the general public's right to use the dedicated drive.[58] As a result, their right of access to the lake depended upon rights granted to others in the plat, and it could not be said that their use of the drive or any right of access was exclusive concerning the right of the public at large.[59] The court summarized the holding concerning the prescriptive easement as follows:

> In sum, the Salyers' use of the [d]rive to access the lake was permissive, that is, their use of the [d]rive was a permitted use under the public easement. A permissive use cannot be adverse so as to ripen into an easement by prescription. A right shared with the public is, by

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48. *Id.* at 964.
49. 838 N.E.2d 403 (Ind. 2005).
50. *Bass*, 923 N.E.2d at 965.
51. *Wilfong*, 838 N.E.2d at 406 (quoting Fraley v. Minger, 829 N.E.2d 476, 486 (Ind. 2005)).
52. *Id.* at 406.
53. *See Bass*, 923 N.E.2d at 966.
54. *Id.* at 967.
55. *Id.*
56. *Id.* at 968.
57. *See id.* at 967-68.
58. *Id.* at 968.
59. *Id.* at 969.

> definition, non-exclusive. And where, as here, the use was not adverse, the easement cannot be expanded by prescription into an exclusive easement.[60]

The next issue considered was whether the Salyers had established a prescriptive easement in the riparian area where the driveway met the lake. The court noted that one claiming riparian rights and an interest in the riparian area of a lake must first have "a property interest in the land appurtenant to the water."[61] Continuing on, the court noted that "[a]lthough riparian rights arise from ownership of the land appurtenant to the water, we have also held that one may acquire a prescriptive easement in riparian rights."[62] The court held that because the Salyers neither established a prescriptive easement in the drive nor owned a fee simple interest or a prescriptive easement abutting the lake, they could not have a prescriptive easement over the Basses' riparian rights.[63]

III. Land Use

A. Annexation

The border war between the City of Greenwood, a developer, a landowner, and the Town of Bargersville was the topic of much debate during this reporting period and provides a good primer on how Indiana's annexation statutes are utilized.[64] At issue in this case was Bargersville's attempt to annex property located adjacent to the City of Greenwood.[65] The trial court upheld Bargersville's annexation of an area located within three miles of Greenwood's city limits.[66] The two issues raised on appeal were as follows: (1) whether Greenwood had standing to seek a declaratory judgment regarding the validity of Bargersville's annexation based on whether 51% of the annexed area's landowners had consented; and (2) if so, whether it was error for the trial court to conclude that 51% of the landowners consented to Bargersville's annexation.[67]

The Indiana Court of Appeals reviewed the three methods for annexing property under Indiana's statutory scheme. The first method, the court observed, may be used by a municipality to annex contiguous or non-contiguous territory meeting certain statutory requirements.[68] The second form of annexation may be initiated by property owners desiring to be annexed into a contiguous municipality. To support this type of annexation, a petition signed by at least

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60. *Id.* at 970 (internal citations omitted).

61. *Id.* at 971.

62. *Id.*

63. *Id.* at 973.

64. City of Greenwood v. Town of Bargersville, 930 N.E.2d 58 (Ind. Ct. App.), *trans. granted*, 940 N.E.2d 831 (Ind. 2010), *opinion reinstated*, 942 N.E.2d 110 (Ind. 2011).

65. *Id.* at 62.

66. *Id.* at 60.

67. *Id.*

68. *Id.*; Ind. Code § 36-4-3-4 (2011).

51% of the property owners in the territory sought to be annexed or property owners holding 75% of the total assessed value of the territory must be submitted to the municipality's legislative body.[69] The third form of annexation, which was the subject of this case, involves towns wishing to annex property located near a city.[70] This type of annexation requires "the consent of the legislative body of a second or third class city before annexing territory within three (3) miles of the corporate boundaries of that city" unless at least 51% of the property owners in the territory the town proposes to annex consent to the annexation.[71]

In the case at hand, Bargersville and Greenwood sought to annex the same property located in Johnson County.[72] However, instead of beginning annexation proceedings, Greenwood entered into a sewer service agreement for locations within the annexation area.[73] Greenwood began constructing a lift station and started providing service to one of the areas in the Bargersville annexation area, and Greenwood entered into an additional sewer service agreement for a later development.[74] Greenwood then built infrastructure exceeding the needs of current and future developments in the area.[75]

On the opposing side, Bargersville engaged a contractor to improve its sewer infrastructure in a project that included construction of sewer lift stations, interceptor lines, and other sewer work to serve property owners in the proposed annexation area.[76] Bargersville introduced an ordinance on November 13, 2007 to begin the process of annexing 3360 acres. A public hearing was held on October 15, 2008 regarding Bargersville's ordinance, which had been amended to add 1847 acres.[77] Bargersville's town council determined that Greenwood did not consent to the annexation and that as a result, Bargersville had to obtain consent from 51% of the owners of the 739 parcels in the proposed annexation area.[78] Bargersville relied upon annexation waivers as evidence of the property owners' consent to the annexation and maintained that it had satisfied the statutory consent requirement.[79] The town argued that the property owners expressly consented to the annexation because they signed a sewer service agreement for one of the projects or agreed to an annexation waiver (which did not contain the word "consent").[80] Greenwood charged that Bargersville's "consent" was insufficient and asked the trial court to declare Bargersville's annexation ordinance invalid and enjoin Bargersville from taking any further

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69. *City of Greenwood*, 930 N.E.2d at 61; IND. CODE § 36-4-3-5.
70. *City of Greenwood*, 930 N.E.2d at 61; IND. CODE § 36-4-3-9.
71. IND. CODE § 36-4-3-9(b).
72. *City of Greenwood*, 930 N.E.2d at 62.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 63.
79. *Id.*
80. *Id.*

action to implement the annexation ordinance.[81]

The trial court found that Greenwood did not have standing to remonstrate against Bargersville's annexation because it did not own land in the proposed annexation territory; however, it held that Greenwood did have standing to bring a declaratory judgment action because Bargersville's proposed annexation would affect Greenwood's rights under contracts among Greenwood, the other plaintiffs, and other property owners in the proposed annexation area.[82] In addition, the trial court held that Bargersville's signed annexation waivers were sufficient to evidence consent by property owners to the proposed annexation under the statute.[83] Finally, the trial court enjoined Greenwood from providing sewer service to the proposed annexation area.[84]

Concerning the first issue on appeal (whether Greenwood had standing to challenge Bargersville's annexation), the court of appeals rejected Bargersville's arguments that Greenwood had no interest in its three-mile buffer zone and could not challenge an annexation based on the interests of landowners according to the applicable annexation statute, Indiana Code section 36-4-3-9.[85] The court noted that Greenwood was not asking that its sewer service agreements be enforced; rather, it sought a judicial interpretation of the agreement as permitted by the Indiana Declaratory Judgment Act.[86] The court held that Greenwood had a significant interest in its three-mile buffer zone and that such interest would be affected by the sewer service agreements on which Bargersville relied in concluding that it had consent from 51% of the property owners in the proposed annexation area.[87]. As a result, the court held that Greenwood was entitled to seek a declaratory judgment regarding whether the agreements were legally valid "consents" to the annexation.[88] In addition, Greenwood was entitled to seek a declaratory judgment regarding the validity of Bargersville's annexation ordinance.[89]

As for the second question on appeal (whether 51% of the annexation area's property owners consented to Bargersville's annexation), the court noted that whether a waiver of the right to remonstrate, object to, or appeal an annexation constitutes "consent" as contemplated by Indiana Code section 36-4-3-9 had not been addressed by an Indiana appellate court.[90] Following the judicial standard of interpreting contracts by their plain meaning, the court concluded that the sewer service agreements affecting at least 407 of the parcels in the proposed

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81. *Id.*

82. *Id.* at 64.

83. *Id.*

84. *See id.*

85. *Id.* at 66.

86. *Id.* at 67. The Indiana Declaratory Judgment Act is codified at IND. CODE § 34-14-1-2 (2011).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 68.

annexation territory (55% of the total number of parcels) did not constitute valid consent to Bargersville's annexation according to the applicable Indiana annexation statute.[91]

Another annexation case decided in this term, *Town of Dyer v. Town of St. John*,[92] concerned the Town of Dyer's attempt to annex three parcels of property that were adjacent to Dyer's boundaries but not contiguous to each other.[93] The court discussed the history of annexation and the public policy behind how the statutes developed—in particular, the requirement that property to be annexed must be contiguous.[94] The court stated the ultimate conclusion in this case best:

> Since 1864, there has been an understanding that all of the tracts of land the municipality seeks to annex must be contiguous to each other. . . . If the legislature had wanted to allow the annexation of multiple, non-adjacent parcels of land in a single annexation ordinance, which would appear to contravene over a century of case law, it could have expressly drafted the new definition of contiguity in 1981 to clearly say so.[95]

The last annexation case to be discussed in this year's survey's article is *In re Annexation of Certain Territory to the City of Muncie v. Certain Halteman Village Section I*,[96] where the fiscal plan of the City of Muncie and the financial impact of the proposed annexation on city services were at issue. The city adopted a fiscal plan based on the annexation of two subdivisions into the city and subsequently adopted two ordinances annexing the subdivisions.[97] Property owners in the two subdivisions remonstrated against the annexation.[98] The trial court found many flaws in the annexation, including that the Muncie ordinances and the fiscal plan did not meet the requirements of Indiana Code section 36-4-3-13(d) for the following reasons: they did not take property tax caps into consideration; cost estimates for the cost of city services for the annexed property were not provided; and the fiscal plan did not provide fire protection services to the annexed property equivalent to those currently provided within the city within a year of the annexation.[99]

Reversing the trial court, the court of appeals found that subsection 13(d) of the annexation statute only requires cost estimates in a fiscal plan, which the city

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91. *Id.* at 70-71. On January 29, 2011, a split decision by the Indiana Supreme Court on this case resulted in the appellate court's decision being reinstated. City of Greenwood v. Town of Bargersville, 942 N.E.2d 110 (Ind. 2011). According to Indiana Appellate Rule 58, the intermediate appellate court's decision rendered on July 15, 2010 must be reinstated. *See id.* at 110.

92. 919 N.E.2d 1196 (Ind. Ct. App. 2010).

93. *Id.* at 1197.

94. *Id.* at 1200-01.

95. *Id.* at 1201-02.

96. 914 N.E.2d 796 (Ind. Ct. App. 2009), *trans. denied.*

97. *Id.* at 799.

98. *Id.*

99. *See id.* at 799-801.

had provided.[100] Furthermore, city officials had testified at trial that there would be no extra cost to the city as a result of the annexation for non-capital city services.[101] The court also rejected the trial court's holding that the annexation would have a "significant financial impact" on the residents of the annexed property because there was no evidence that the annexation would result in a tax increase—there was only the potential for a tax increase.[102]

B. Inverse Condemnation

Three significant cases discussing inverse condemnation were decided during the reporting period for this article. In the first case, *Murray v. City of Lawrenceburg*,[103] the Indiana Supreme Court addressed property owners' claims against the City of Lawrenceburg alleging that they owned a portion of the land under the local casino. The plaintiffs claimed to own a small parcel (less than an acre) located within a thirty-two-acre parcel in the City of Lawrenceburg along the Ohio River, which serves as the docking site for the Argosy Casino (operated by Indiana Gaming Co., L.P.—"Indiana Gaming").[104] The plaintiffs alleged that they were the successors in interest to the tenants in common (who were the grantees of the disputed parcel in an 1886 deed) and that from 1941 to 1945, the property had been incorrectly labeled on the Lawrenceburg flood control land acquisition map as having an "unknown" owner.[105] No one else claimed to have owned the property during that period of time.[106] In December 1995, the Lawrenceburg Conservancy District leased the thirty-two-acre site to the city and warranted title to the thirty-two acres, except for the parcel that was the subject of this case.[107] In 1996, the Central Railroad Company of Indiana gave the city a quitclaim deed for the disputed parcel with an affidavit "stating that it obtained title to the parcel through an 1865 deed from the White Water Valley Canal Company."[108] The city then subleased the thirty-two-acre parcel to Indiana Gaming in August 1996, and the casino began operations in December 1997.[109]

The plaintiffs filed suit in November 2005 against the city, the conservancy district and Indiana Gaming seeking to quiet title to the disputed parcel, remove the defendants from the property, set aside the quitclaim deed and leases, and recover damages for not receiving the rent from the leases.[110] The defendants moved for judgment on the pleadings, alleging that the plaintiffs' only cause of

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100. *Id.* at 803.
101. *Id.* at 804.
102. *Id.* at 805-06.
103. 925 N.E.2d 728 (Ind. 2010).
104. *Id.* at 729.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 729-30.
109. *Id.* at 730.
110. *Id.*

action was a case for inverse condemnation, which was barred by the six-year statute of limitations for injury to real property.[111] The trial court denied the motion, and an interlocutory appeal followed.[112] Although the court of appeals rejected the interlocutory appeal, it accepted a second interlocutory appeal by the plaintiffs from the trial court's subsequent denial of their demand for a jury trial because ownership of the disputed parcel had not been established.[113] The defendants again cross-appealed, requesting appellate review of the trial court's denial of their motion for judgment on the pleadings based on their argument that the statute of limitations barred the plaintiffs' claims.[114]

When the case was transferred to the Indiana Supreme Court, the right of a jury trial was the only issue presented by the order of the trial court.[115] The court determined that it had the obligation to review the trial court's ruling on a Rule 12(C) motion for judgment on the pleadings in addition to the claim for a jury trial.[116] The court observed that the defendants' claim to judgment on the pleadings produced two issues for consideration: "whether inverse condemnation . . . [was] the only remedy available to [the] plaintiffs, and, if so, what statute of limitations applies to a claim for inverse condemnation."[117]

The court discussed the fundamentals of the law of inverse condemnation, citing the state's inherent authority to take private property for public use.[118] In addition, the court observed that the Indiana Constitution and the Fifth Amendment to the U.S. Constitution require just compensation to property owners when private property is taken for public use.[119] Next, the court noted that Indiana Code section 32-24-1 establishes the process by which the state may initiate eminent domain proceedings—and if the government takes property but does not initiate such proceedings, Indiana Code section 32-24-1-16 specifically provides that an owner of property acquired for public use may bring a claim for inverse condemnation to recover money damages.[120] The court next recited the basic elements of an action for inverse condemnation: "(1) a taking or damaging; (2) of private property; (3) for public use; (4) without just compensation being paid; and (5) by a governmental entity that has not instituted formal proceedings."[121] Although the plaintiffs maintained that a quiet title action was appropriate because the title was clouded, the court disagreed, explaining that ownership of an interest in property is an element of a claim for inverse

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111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 731.
117. *Id.*
118. *Id.* at 731; *see also* Kelo v. City of New London, 545 U.S. 469, 477 (2005).
119. *Murray*, 925 N.E.2d at 731 (citing Schnull v. Indianapolis Union Ry. Co., 131 N.E. 51, 52 (Ind. 1921)).
120. *Id.*
121. *Id.* (quoting 29A C.J.S. *Eminent Domain* § 560 (2007)).

condemnation—and if the plaintiffs did not own the parcel, they had no claim.[122] On the contrary, if the plaintiffs owned the disputed parcel, their only remedy was a claim for inverse condemnation.[123] The court observed that declaratory and injunctive relief is not available to property owners where a lawful taking of private property for public use is alleged.[124] Rather, a suit for compensation may be brought against the government after the taking.[125] It explained further, relying on *Indiana Department of Transportation v. Southern Bells, Inc.*,[126] that equitable remedies are generally "unavailable [in takings claims] as a matter of law where an action for compensation can be brought subsequent to the taking."[127]

The plaintiffs also claimed trespass, but the court rejected this claim, observing that the authorities relied on by the plaintiffs were cases between private parties and did not address allegations of takings by a public authority.[128] The court observed that the same statute of limitations would apply to a trespass claim as an inverse condemnation action seeking damages.[129] Because the court concluded that the taking was for a public use, the plaintiffs' sole remedy was a claim for inverse condemnation to which a six-year statute of limitations period applied.[130] In this case, the claims were barred because the action was brought more than six years after the date when Indiana Gaming began operations on the site in December 1997. The plaintiffs did not file this suit until November 2005, almost eight years later. As a result, the claims were barred by section 34-11-2-7 of the Indiana Code.[131]

A second inverse condemnation case during this term, *Sagarin v. City of Bloomington*,[132] concerned a landowner and his neighbor's claim brought against the City of Bloomington based on the theory of taking without just compensation. Following fatal accidents on a road in the landowner's neighborhood, the City of Bloomington installed a stoplight at the corner of High Street and Southdowns Drive in 1972.[133] Later that year, a city employee visited the property owners (Campbell and the Jablonskis) to discuss the installation of a pathway "along their shared lot line for children to use to walk to and from school."[134] Campbell refused to agree to the installation of the pathway, and the city employee told her "that her permission was not necessary because the city had the right to install

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122. *Id.*
123. *Id.*
124. *See id.* at 731-32.
125. *Id.* at 732.
126. 723 N.E.2d 432 (Ind. Ct. App. 1999).
127. *Murray*, 925 N.E.2d at 732 (quoting *Southern Bells*, 723 N.E.2d at 434).
128. *Id.*
129. *Id.* at 733.
130. *Id.*
131. *Id.* at 733-34.
132. 932 N.E.2d 739 (Ind. Ct. App. 2010), *trans. denied.*
133. *Id.* at 742.
134. *Id.*

the path."[135] City employees made similar statements to the Jablonskis, and in late 1972, a small asphalt pathway was installed.[136] Neither property owner executed an easement or right-of-way document giving the city the authority to proceed with installing the pathway.[137]

Sagarin purchased the property from Campbell in 1993 and noticed the asphalt pathway.[138] His realtor explained that the city had an easement; however, Sagarin's title work only provided evidence of a utility easement affecting the property and did not include an easement or right-of-way for the pathway.[139] In 2007, the city engineer contacted Sagarin and told him that the city planned to widen the pathway to eight feet.[140] Sagarin went to city and county offices to obtain a copy of his deed and a copy of any easements that related to his or Mrs. Jablonski's property.[141] He did not find any documents concerning the existence of an easement for either property.[142] On July 6, 2007, Sagarin and Jablonski filed a complaint against the city alleging ejectment, inverse condemnation, and taking without just compensation.[143] They also sought to quiet title and restore the pathway property to their respective property.[144] At a bench trial, judgment was entered in favor of Jablonski on the inverse condemnation and taking without just compensation claims, but against Sagarin on both claims.[145] The court ordered appraisers to value the easement and assess damages for Jablonski.[146]

When Sagarin appealed the trial court's ruling concerning his inverse condemnation claim, the court of appeals concluded that he could not claim inverse condemnation because Campbell, not Sagarin, owned the property at the time the property was taken.[147] The court of appeals agreed with the trial court that when Sagarin purchased the property, he saw the pathway and was therefore on notice of the possibility of a burden on the property resulting in potential economic injury. Further, he had the opportunity to address this matter during negotiations to acquire the property.[148]

Jablonski also argued that she was entitled to the equitable remedy of ejectment because the property for the pathway was taken by the city by

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135. *Id.* at 742-43.
136. *Id.* at 743.
137. *See id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* By this time, one of the Jablonskis was deceased.
142. *Id.*
143. *Id.*
144. *See id.*
145. *Id.*
146. *Id.*
147. *Id.* at 743-44.
148. *Id.* at 744.

fraudulent means. Citing *Murray v. City of Lawrenceburg*,[149] the court explained that her only remedy was a suit for inverse condemnation. It noted that whether her property was taken by fraud or inverse condemnation, the remedy was still the same, and the remedies provided by the Indiana Code were all that were available to her.[150] The court concluded that the city exercised its authority according to state law to take private property for public use; however, it did not comply with constitutional and statutory mandates of just compensation.[151] As a result, Jablonski was entitled to receive damages under the state's eminent domain statute.[152] The court added that she was also able to recover attorneys' fees consistent with the statute.[153]

The appeal then addressed the question of the statute of limitations. The city argued that while the government must compensate landowners for a taking, the six-year statute of limitations for inverse condemnation had run in this case.[154] The court rejected the city's argument and instead ruled that the city had fraudulently concealed the fact that the property owners were entitled to compensation from the city for the pathway easement.[155] Specifically, the city engineer's statements that the city had obtained an easement to build the pathway, that it was a "done deal," and that the Jablonskis could not prevent the installation of the pathway—as well as the fact that the Jablonskis were not given any documents to sign to establish the easement or install the pathway—amounted to fraudulent concealment.[156] Noting that fraudulent concealment has been codified in section 34-11-5-1 of the Indiana Code, the court concluded that the city's statements prevented the homeowners from obtaining the information necessary to pursue a claim of inverse condemnation.[157]

The city's last argument was that the easement was established by conscription or the common law theory of dedication.[158] The court found that the elements of a prescriptive easement were not met because the city had not used the land in a manner adverse to a property owner who, having knowledge of the adverse use, acquiesced.[159] In this case, there was no acquiescence by the Jablonskis due to the statements made by the city employee and because they had no knowledge of their right to terminate the public use of the pathway.[160] As for the other argument that the easement was acquired by the common law theory of

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149. 925 N.E.2d 728, 723 (Ind. 2010).
150. *Sagarin*, 932 N.E.2d at 744.
151. *Id.*
152. *Id.* at 745.
153. *Id.*
154. *Id.* at 745-46.
155. *Id.* at 746.
156. *Id.* at 746-47.
157. *Id.*
158. *Id.* at 747.
159. *Id.*
160. *Id.*

dedication, the court observed that the two elements required for this type of easement were not met: "(1) the intent of the owner to dedicate and (2) the acceptance of the public of the dedication."[161] In a dissent, Judge Barnes stated that while he agreed with the majority opinion regarding Sagarin's claims, he did not agree that the city prevented the Jablonskis from inquiring about the pathway easement "so as to toll the statute of limitations regarding their claim."[162] Judge Barnes noted that the pathway was constructed on an existing utility easement, and there was nothing in the record to suggest that the city concealed information from the Jablonskis that prevented them from obtaining the information that Sagarin discovered in 2007.[163] As a result, Judge Barnes could not agree with the majority that the city intended to fraudulently conceal the Jablonskis' inverse condemnation claim.[164] He opined that the statute of limitations was designed to prevent this type of circumstance and "to guard against [these types of] stale claims, lost evidence, and faulty memories of witnesses."[165]

In *Sloan v. Town Council of Patoka*,[166] the plaintiff appealed the trial court's decision in favor of the town and denied Sloan's claims of inverse condemnation of a portion of his real estate.[167] The dispute between the town and Sloan dated to April 1982, when Sloan acquired property on South Barnes Street from his mother, who owned the property from 1941 to April 1982.[168] Barnes Street was a public right-of-way and was the only means of access to Sloan's property.[169] Sloan and the town had disagreed about who should maintain Barnes Street for many years.[170] They reached a mediated settlement agreement in October 2006, and the town agreed to maintain Barnes Street and pave a portion of it by November 1, 2008.[171] As part of the settlement, Sloan was required to sign all documents necessary to "legitimize the use of [Sloan's] property that . . . [was] currently being utilized as the travel portion of South Barnes Street."[172] The town refused to perform its obligations pursuant to the settlement agreement, and Sloan had a survey prepared to determine the exact location of Barnes Street vis-à-vis his property.[173] According to the survey, Barnes Street ranged in width from twelve to fifteen feet and encroached eight feet on Sloan's property.[174]

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161. *Id.* (citing Jackson v. Bd. of Comm'rs of Cnty. of Monroe, 916 N.E.2d 696, 704 (Ind. Ct. App. 2009), *trans. denied*)).

162. *Id.* at 748 (Barnes, J., dissenting).

163. *Id.*

164. *Id.*

165. *Id.*

166. 932 N.E.2d 1259 (Ind. Ct. App. 2010).

167. *Id.* at 1260.

168. *Id.* at 1261.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

Sloan and the prior owners of the property had not been compensated for the use of their property for the roadway.[175]

Sloan filed a complaint for declaratory judgment and inverse condemnation against the town on March 9, 2007.[176] The town did not contest that this part of Barnes Street was located on Sloan's property; however, it argued that the street was maintained solely for providing access to Sloan's property.[177] After a bench trial, the court ruled that no taking or inverse condemnation had occurred.[178]

The court of appeals recognized that Indiana Code section 32-24-1-16 is designed to provide compensation to property owners for a taking of property by a governmental authority that is otherwise prohibited by article I, section 21 of the Indiana Constitution.[179] The court noted that the record contained evidence that Barnes Street had existed as a graveled public thoroughfare since 1982 and was used by Sloan and other persons who owned homes on the street.[180] The record also demonstrated that neither Sloan nor the prior owners of the property had been compensated by the town for the use of the property for a public thoroughfare and that "no eminent domain proceedings had ever been initiated" for Barnes Street.[181] The court stated that an eight-foot encroachment onto Sloan's property, over half of the Barnes Street right-of-way, was a substantial interference with Sloan's use and enjoyment of this part of his property that had been created by the town.[182] In addition, the court stated that by graveling this part of Sloan's property "and allowing other property owners on the street to use this part of Barnes Street, the injury . . . [was] special and peculiar to his real estate and not some inconvenience suffered by the public generally."[183] As a result, the town's use of Sloan's property without compensation was a taking under the theory of inverse condemnation.[184] The trial court's holding was reversed, and the case was remanded to the trial court to appoint an appraiser and assess damages.[185]

C. Zoning Cases

After several years with few reported decisions concerning cellular towers, there were two significant cases during this reporting period. In *Helcher v. Dearborn County*,[186] a wireless service provider and landowners appealed a

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175. *Id.*
176. *Id.*
177. *Id.* at 1262.
178. *Id.* at 1261-62.
179. *Id.* at 1262.
180. *Id.*
181. *Id.* at 1263.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. 595 F.3d 710 (7th Cir. 2010).

decision by a township zoning board, alleging that the denial of their application for a conditional use permit to construct a cell phone tower violated the Telecommunications Act of the United States (the "Act").[187] Cincinnati Bell Wireless, LLC ("Bell") and several property owners petitioned to permit construction of a wireless cell phone tower on property owned by Dan and Merry Helcher in Dearborn County.[188] The Helchers' property was in an agricultural district of Dearborn County, and Bell wanted to locate a cell tower there to close a signal gap.[189] According to the local zoning ordinance, one seeking to construct a cell phone tower must obtain a conditional use permit from the local zoning board (the "BZA").[190] The ordinance specifically allowed non-agricultural uses in agricultural zoning districts, which includes cell phone towers under specific circumstances.[191] Bell worked with the county's consultants to meet conditional use criteria to establish the proposed cell tower.[192] When the conditional use petition went before the BZA, the consultants presented their opinion that the petitioner had met the requirements necessary to construct the cell tower and that the permit should be granted.[193] Several neighboring property owners remonstrated against the petition.[194] Among those who spoke on behalf of the remonstrators was a real estate appraiser who testified about property values and expressed concerns regarding potential hazards to children if the cell tower was approved.[195] Bell had studied other potential sites for the cell tower, but they were not satisfactory.[196] Additional evidence was presented in support of the petition from the standpoint that the location was appropriate and necessary to provide service coverage to Bell's customers.[197] The BZA rejected the petition.[198]

On appeal to the Seventh Circuit, Bell argued that (1) the BZA's decision did not comply with the requirements of the Act that a decision be "in writing;" (2) the BZA's decision was not supported by substantial evidence; and (3) by denying the permit, Bell was prohibited from providing wireless communication services as a result of the zoning board's unreasonable discrimination among wireless providers—all in violation of 47 U.S.C. § 332(c)(7).[199] The court first addressed the petitioner's argument that the zoning board's decision was not "in

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187. *Id.* at 713-14.
188. *Id.* at 713.
189. *Id.* at 714.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 714-15.
194. *Id.* at 715.
195. *Id.*
196. *See id.*
197. *Id.*
198. *Id.*
199. *Id.* at 715-16.

writing" as required by the Act.[200] The court stated that this was an issue of first impression in the Seventh Circuit and discussed a variety of approaches taken throughout the country concerning the issue.[201] It concluded that it would join the First, Sixth, and Ninth Circuits (the majority of the courts that had confronted this issue) in determining that the "in writing" requirements of the Act are satisfied if the written decision contains "a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons."[202] The court concluded that the BZA's minutes of the meeting when the decision was made were sufficient to determine, along with the written record, whether the decision was supported by substantial evidence.[203]

Next, the court addressed the argument that the decision by the BZA to deny their application for a conditional use permit was not supported by "substantial evidence."[204] The Act requires that any action by a state or local unit of government denying a request to install a wireless service facility must be in writing (as noted above) and supported by "substantial evidence contained in a written record."[205] The court followed established precedent that appellate review of the issue of whether "substantial evidence" supports a decision by a local unit of government will defer to the local unit of government and applied this standard to the substantial evidence requirements of the Act.[206] Specifically, the court stated that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[207] The court then turned its analysis to whether the decision by the BZA was supported by substantial evidence in this case.[208] The court observed that the BZA considered the value of closing Bell's signal gap against the impact the cell tower would have in a rural area and concluded that allowing a cell tower in this location "was not harmonious with the appearance or intended character of the area."[209] In addition, the court found that Bell's attempts to find another place to co-locate its tower were insufficient.[210]

The last issue considered by the court was whether the BZA had unreasonably discriminated among the telecommunications providers by denying this conditional use permit application.[211] The court found that there was no

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200. *Id.* at 716.

201. *Id.* at 717-18.

202. *Id.* at 719.

203. *Id.* at 722.

204. *Id.* at 722-23.

205. *Id.* at 723 (citing 47 U.S.C. §332(c)(7)(B)(iii) (2006)).

206. *Id.*

207. *Id.* (quoting VoiceStream Minneapolis, Inc. v. St. Croix Cnty., 342 F.3d 818, 830 (7th Cir. 2003)).

208. *Id.* at 724.

209. *Id.*

210. *See id.* at 726.

211. *Id.* at 728.

evidence that Bell was treated less favorably or differently from any other telecommunications company. Specifically, Bell did not identify any other carrier as a comparison on the same or similar facts.[212]

The second cell tower case was *Porter County Board of Zoning Appeals v. SBA Towers II LLC*,[213] where a local board of zoning appeals denied a special exception to construct a wireless telecommunications tower. This case raised issues about whether the local board of zoning appeals adopted findings of fact in writing according to the requirements of the Porter County Unified Development Ordinance.[214] Unlike the *Dearborn County* case, the court in this case concluded that the findings of fact were not sufficient, but that it was harmless error.[215] Specifically, the record reflected that at the hearing when the Porter County Board of Zoning Appeals (the "BZA") denied the petition for a special exception, the BZA stated that the findings of fact as prepared by its attorney were incorporated by reference into the record of the hearing; however, no written findings of fact existed when the vote was taken.[216]

Twelve days after the hearing, the BZA sent written notice to SBA Towers II, LLC ("SBA") denying the special exception and stating that the findings of fact were in BZA's file; however, the findings of fact were not approved by the BZA until September and were not signed and put in the file until after the October 7, 2008 meeting.[217] The court concluded that the BZA did not make findings of fact as required by section 36-7-4-19(f) of the Indiana Code, but it found that this delay did not deny SBA due process.[218] Furthermore, the court stated that SBA offered no argument or evidence of how it was prejudiced by the BZA's delay in entering the written findings of its decision beyond noting that its "failure to comply with . . . [the] statutory procedures was an abuse of discretion."[219] The court concluded that because prejudice was not proved, the BZA's delay in entering written findings of fact was harmless error.[220]

The court then turned to the question of whether or not there was "substantial evidence of probative value" which could serve as the basis for the BZA's decision to deny the special exception.[221] The court recognized well-established rules of law concerning zoning cases which provide that a BZA's findings will only be set aside if they are "clearly erroneous, meaning the record lacks any facts or reasonable inferences supporting them."[222] The court continued, "A

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212. *Id.* at 729.
213. 927 N.E.2d 915 (Ind. Ct. App. 2010).
214. *Id.* at 918-19.
215. *Id.* at 920.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 921.

decision is clearly erroneous when it lacks substantial evidence to support it."[223] It also noted that "evidence will be considered substantial if it is more than a scintilla and less than a preponderance."[224] The court held that the Telecommunication Act of 1996 is on equal footing with the authority granted to local boards of zoning appeals and requires the same "substantial evidence" that is required for a zoning board's decision to be upheld.[225] The court next discussed the discretionary authority given to boards of zoning appeals in certain circumstances and observed that the Porter County special exception zoning ordinance provides the BZA a great deal of discretion in making its determinations.[226] The court ultimately concluded that the BZA's findings and decision to deny SBA's special exception petition was clearly erroneous because there was no evidence upon which to base the BZA's decision.[227]

The development of wind energy as an industry in Indiana has brought about revisions to zoning ordinances throughout the state. A case considered by the Warrick County Board of Zoning Appeals gave rise to the question of whether or not a wind turbine and use of property zoned for residential use was "customary" in connection with residential property use and thus was a permitted accessory use or structure. *Hamby v. Board of Zoning Appeals of the Area Plan Commission of Warrick County*[228] concerned an appeal by remonstrators of the trial court's order supporting the Warrick County Board of Zoning Appeals (the "BZA") and the Board of Commissioners of Warrick County (the "Commissioners") in denying their claim for declaratory relief to prohibit the construction of a wind turbine on property in a residential zoning district.[229] Through Morton Energy, the petitioners requested a variance from the Warrick County Comprehensive Zoning Ordinance to allow the construction of a wind turbine greater than the maximum height requirement required in Warrick County's R-2 multi-family zoning district.[230] The petitioners wanted to construct the wind turbine to serve as an alternate power source and reduce their electric utility expenses and contribution to greenhouse gases.[231] Specifically, the variance sought was a request to construct a wind turbine twenty feet higher than what was permitted by the ordinance.[232] The BZA granted the petition for the variance, and various homeowners who were remonstrators filed a petition for writ of certiorari alleging that the variance was "unsupported by substantial evidence; was arbitrary and capricious; and was in all other respects contrary to

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223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at 922.
227. *Id.* at 925.
228. 932 N.E.2d 1251 (Ind. Ct. App. 2010), *trans. denied.*
229. *Id.* at 1251.
230. *Id.* at 1251-52.
231. *Id.* at 1252.
232. *Id.*

Indiana law."[233] The remonstrators also alleged that a freestanding wind turbine was "not a permitted use under the zoning ordinance in the R-2 district."[234] They argued to the trial court that the applicants did not meet the burden of demonstrating that application of the zoning ordinance would "result in 'practical difficulties' in the use of . . . [their] property as residential real estate."[235] The trial court adopted their argument and held that a wind turbine was "permitted as an accessory use in an R-2 district upon the proper granting of a variance."[236]

The single issue before the court of appeals was whether the zoning ordinance relied upon by the homeowners prohibits the construction of a wind turbine in an R-2 district.[237] The relevant ordinance stated that "[u]ses accessory to any of the above when located on the same lot and not involving the conduct of any business, trade, occupation or profession unless otherwise specified in this article"[238] were considered permissible. The relevant portion of the ordinance defined "accessory use or structure" as "the term applied to the BUILDING or USE which is incidental or subordinate to and *customary* in connection with the PRINCIPAL BUILDING or USE and which is located on the same lot with such PRINCIPAL BUILDING or USE."[239] The BZA argued that the word "customary" was confined to the specific piece of property that was the subject of the zoning petition.[240] The homeowners contended that it applied to all structures in a residential R-2 district. The court of appeals determined that the phrase "customary in connection with" for an accessory use or structure in a residential district should not be used "to prevent the implementation of new technologies in residential districts."[241] It observed that the homeowners, as plaintiffs and appellants, did not meet their burden of proof to offer any evidence to demonstrate that residential wind turbines were not customary in Warrick County.[242] The court concluded, "Because we construe a zoning ordinance to favor the free use of land and will not extend restrictions by implication . . . and because the . . . [ordinance] permits accessory use structures, we conclude that a residential wind turbine that meets all of the other requirements of the . . . [ordinance] is a permitted use in the R-2 zoning district."[243]

IV. Liens and Foreclosures

Whether a tenant's leasehold interests in real estate survives forfeiture of a

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233. *Id.* (citation omitted).
234. *Id.* (citation omitted).
235. *Id.* at 1253 (citation omitted).
236. *Id.* (citation omitted).
237. *Id.* at 1254.
238. *Id.*
239. *Id.* (citation omitted).
240. *Id.*
241. *Id.* at 1255.
242. *Id.*
243. *Id.* at 1256.

land contract by the purchaser and whether a seller knew or should have known that a tenant was in possession of property but did not make the tenant a party to the forfeiture action raised interesting issues of first impression for the Indiana Supreme Court during this reporting period.[244] In *Myers v. Leedy*, the court held that a tenant's leasehold interest in real estate survived forfeiture because the tenant was not made a party to a forfeiture or foreclosure action, even though the seller (or mortgagee) knew or upon reasonable diligence should have known that the tenant was in possession of the property.[245] The majority of the court also concluded that under the lis pendens doctrine, filing a forfeiture action gives third parties constructive notice of a pending lawsuit—but this does not apply to a tenant already in possession of the real estate.[246] Chief Justice Shepard authored a concurrence, stating that

> [i]mporting the open-ended idea of equity into the complicated, largely statutory system which governs the massive interests of commercial real estate mortgages, applying it to past and present financial commitments, and declaring that all subordinate unrecorded or informal possessors survive unaffected by foreclosure unless the lender undertakes to obtain service of process on all of them is really quite remarkable.[247]

Chief Justice Shepard concluded with his view that this decision was not consistent with "prevailing national doctrine" regarding mortgages and that waiting for a case involving mortgage lenders and commercial or industrial real estate would be a preferable way to address this shift in judicial policy.[248]

Miller v. LaSalle Bank National Ass'n[249] was an interesting case concerning a dull subject—the recordation of mortgages with technical flaws. In *Miller*, a Chapter 13 bankruptcy trustee filed a claim to avoid a mortgage on the debtors' residence, arguing that it had been improperly recorded.[250] The debtors gave a mortgage to Alliance, LaSalle's predecessor, secured by a lien on their home in Peru, Indiana in 2001; however, the acknowledgement was defective because it did not identify the individuals who executed the mortgage in the presence of the notary.[251] The bankruptcy trustee's 2008 claim alleged that a 2007 amendment to the Indiana mortgage statute (the "2007 amendment"), which provided that an improperly recorded mortgage could provide constructive notice of the mortgage lien to third parties (and did not render such a mortgage avoidable in bankruptcy), did not apply to the 2001 mortgage.[252] The bankruptcy court took the view of the trustee; however, the district court examined the 2007 amendment

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244. *See* Myers v. Leedy, 915 N.E.2d 133 (Ind. 2009).
245. *Id.* at 140.
246. *Id.* at 138.
247. *Id.* at 141 (Shepard, C.J., concurring).
248. *Id.*
249. 595 F.3d 782 (7th Cir. 2010).
250. *See id.* at 784.
251. *Id.*
252. *Id.* at 785.

and reversed the bankruptcy court, holding that it applied prospectively to mortgages recorded after the amendment's effective date of July 1, 2007.[253] The trustee appealed to the Seventh Circuit Court of Appeals.

The court of appeals recognized Indiana's long established rule—which follows other states' rules—that a properly acknowledged and recorded mortgage provides constructive notice to subsequent bona fide purchasers of the lien.[254] Before the 2007 amendment, a mortgage could not be recorded if there was a technical defect in the acknowledgement because it did not provide notice as required by the statute.[255] The court discussed the history of the 2007 amendment, recognizing that it had been adopted to provide guidance following the case of *In re Stubbs*.[256] The court also noted that the Indiana General Assembly amended the statute again in 2008 to make it clear that it applied to all mortgages, regardless of when they were recorded.[257]

The court discussed Indiana's traditional rules of statutory interpretation.[258] It then turned to the language of the 2007 amendment, noting that the parties in the case provided opposite interpretations of the phrase "is recorded" in subsection (c) of the 2007 amendment.[259] Because both of the parties' arguments appeared reasonable to the court, it concluded that the statute was ambiguous.[260] The court observed that it is possible to read "is recorded" in subsection (c) as clarifying that the subsection did not create an exception for technical violations in the acknowledgement to the mandatory recording requirement.[261] The court observed that Indiana law is settled that without "strong and compelling" reasons, a statute will not be interpreted to apply retroactively.[262] The court analyzed whether the 2007 amendment and the amendment adopted the following year (the "2008 amendment") were adopted to clarify the existing law or create a substantive change.[263] It concluded that whether the 2007 amendment applied retroactively was ambiguous, but the fact that the 2008 amendment was adopted quickly to clarify that subsection (c) applied to all mortgages meant that the legislature intended the 2007 amendment to apply to all mortgages—including those recorded prior to July 1, 2007.[264]

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253. *Id.*

254. *See id.* at 785-86.

255. *See id.* (citing IND. CODE § 32-21-2-3 (2011), which requires that a notary public authenticate signature for grantors of mortgage).

256. *Id.* at 785; *see also In re* Stubbs, 330 B.R. 717, 731 (Bankr. N.D. Ind. 2005).

257. *Miller*, 595 F.3d at 785.

258. *See id.* at 786.

259. *Id.* at 787.

260. *Id.*

261. *Id.* ("That is, reading the subsection (c) without 'is recorded,' someone might argue that subsection (c) creates an exception to both the mandatory recording requirement by subsection (a) and to the technical requirement it lists.").

262. *Id.*

263. *Id.* at 789.

264. *Id.* at 790.

A mortgage foreclosure case decided by the Indiana Supreme Court held that an equitable subrogee may not foreclose under the terms of the subrogated mortgage, recover interest provided in the mortgage, or receive attorneys' fees and costs.[265] In *Neu v. Gibson*, Bret Gibson sold his business to John Nowak, who financed the purchase with a note secured by a second mortgage on his home.[266] Thomas and Elizabeth Neu, who did not know about Gibson's mortgage on Nowak's home, subsequently purchased the residence from Nowak. When Nowak defaulted on his mortgage to Gibson, Gibson foreclosed.[267] In an earlier appeal, the Indiana Court of Appeals "determined that the Neus and their lender were entitled to priority ahead of Gibson, the same position held by Nowak's first mortgagee."[268] In the case before the supreme court, the Neus argued that this finding entitled them to interest, attorneys' fees, and costs.[269] They further claimed "that they . . . [could] foreclose on their own home under the terms of the Nowak mortgage or, in the alternative, that they . . . [had] a right to force a sheriff's sale of the property based on Gibson's foreclosure."[270] The trial court rejected all of these claims.[271]

When Nowak sold his home to the Neus, he signed a vendor's affidavit stating that the house was free and clear of "every kind or description of lien, lease or encumbrance except a mortgage" from him to Irwin Mortgage Corporation.[272] Investors Titlecorp closed the transaction and performed a title search, which found the Irwin mortgage but not Gibson's mortgage.[273] When Nowak closed on his sale to the Neus, he was behind on his monthly mortgage obligation to Gibson.[274] Gibson "sued Nowak, the Neus, and Washington Mutual on Nowak's promissory note and sought to foreclose on the real estate."[275] The Neus "cross-claimed against Nowak for breach of the warranty deed he executed" conveying the property to them.[276] Nowak then filed for bankruptcy.[277] The trial court denied all of the Neus' claims, and Gibson received a judgment permitting him to foreclose against the Neus' home.[278] This judgment led the Neus to bring suit to collect interest and recover attorneys' fees under the terms of the subrogated first mortgage—or, in the alternative, to allow them to

265. Neu v. Gibson, 928 N.E.2d 556, 557 (Ind. 2010).
266. *Id.* at 557.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* at 558.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.* at 559.

foreclose, forcing a sheriff's sale to satisfy Gibson's judgment.[279] The court of appeals affirmed this ruling but reversed the denial of the sheriff's sale, and the supreme court then granted transfer.[280]

The supreme court held that the Neus extinguished the first mortgage and its terms when they purchased Nowak's home and satisfied his debt under that mortgage.[281] The Neus were then in the first mortgage priority lien position through equitable subrogation, and the court held that they could not foreclose or collect attorneys' fees under the terms of the mortgage that had been extinguished.[282] The court also held that equitable principles would also not allow the Neus to collect interest or attorneys' fees and that they could not force a sheriff's sale to satisfy Gibson's judgment of foreclosure and their own priority lien.[283] Finally, the court affirmed the trial court's denial of the Neus' claims, finding that "[d]rawing the equitable subrogation line at priority" protected the Neus' interests while preserving Gibson's interest as the inferior lienholder.[284] The court also observed that the Neus might have a cause of action against the title insurance company that failed to find Gibson's lien and reported in the title search.[285]

Thomas v. Thomas[286] concerned quitclaim deeds exchanged between family members who later had a falling-out resulting in a complicated web of deeds, competing mortgages, and fraud. Benjamin Thomas purchased his home in Gary, Indiana in 1965.[287] In 1987, as part of his retirement planning, he conveyed his home to his son David by a quitclaim deed, although he and David had an understanding that it would remain Benjamin's residence "and that he could recover title at any time upon request."[288] In 1995, David conveyed Benjamin's home to his own son, Richard Thomas, via quitclaim deed.[289] Benjamin and Richard "agreed that Richard would return title to the home to Benjamin upon request."[290] Benjamin continuously occupied and possessed control over the home.[291]

A few years after the conveyance to Richard (after a family fight), Benjamin requested that Richard convey title to the home back to him, but Richard refused.[292] Two months later, Benjamin filed notice of intention to hold a

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279. *Id.*
280. *Id.*
281. *Id.* at 561.
282. *Id.* at 563.
283. *Id.*
284. *Id.* at 564.
285. *Id.*
286. 923 N.E.2d 465 (Ind. Ct. App. 2010).
287. *Id.* at 467.
288. *Id.*
289. *Id.* at 467-68.
290. *Id.* at 468.
291. *Id.*
292. *Id.*

mechanic's lien on the home in the amount of $200,000. In September 2001, Benjamin filed a quiet title action against Richard but did not file a lis pendens notice contemporaneously or subsequently.[293] In December of that year, Richard obtained an $118,000 loan from Trustcorp and placed a mortgage on the home in favor of Trustcorp.[294] Richard was living in Georgia at the time he applied for the loan, and he submitted the release of the mechanic's lien with what he said was Benjamin's signature.[295] The release indicated that the original recording of the document was "2001 003334" when the actual number on the notice was "2001 060516."[296] Trustcorp accepted the release, and the loan was closed.[297] Richard did not make payments on the mortgage loan.[298] Richard filed suit to foreclose his mechanic's lien on the home on July 3, 2002, and this suit also named Trustcorp as a defendant.[299]

In December 2003, Richard filed for bankruptcy in the Northern District of Georgia, and Benjamin intervened. As part of a mediated settlement a little over a year later, Richard conveyed the home back to Benjamin by quitclaim deed.[300] The bankruptcy terminated Richard's obligation to Trustcorp, but it did not address Trustcorp's lien on the property.[301] In August 2007, "the trial court entered partial summary judgment in favor of Trustcorp on the issue of the validity of Benjamin's mechanic's lien."[302] As a result, Benjamin executed a release of the mechanic's lien and sent it to Trustcorp.[303] Trustcorp at some point "conveyed the right to collect the mortgage loan to Fannie Mae and the servicing rights to EverBank."[304] The trial court entered judgment for Benjamin, concluding that Trustcorp's mortgage on the home was invalid because the mortgage was the product of fraud (the forged mechanic's lien release).[305] The court also found that even though Benjamin did not file a lis pendens notice, Trustcorp had constructive notice of its claims as a result of Benjamin's litigation with Richard and irregularities in the release of the mechanic's lien.[306]

The first issue that the court of appeals addressed was whether the trial court erred in concluding that Trustcorp's mortgage was invalid because it was not a bona fide mortgagee.[307] The court observed that for one to qualify as a bona fide

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293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 469.

purchaser, he must be a purchaser "in good faith, for a valuable consideration, and without notice of the outstanding rights of others."[308] There was no dispute that Benjamin failed to file a lis pendens notice as required by the Indiana Code.[309] Ignoring the requirement to file a lis pendens notice, the trial court found that Trustcorp was not a bona fide mortgagee because it had not acted in good faith and had constructive notice of Benjamin's lawsuit.[310] The court of appeals concluded that Trustcorp did not act in good faith and imputed notice of Richard's fraud and Benjamin's lawsuit to Trustcorp. The court observed that the Indiana Supreme Court has held that "one who fails to examine land which he is about to purchase, and to inquire as to the rights of the one in possession, is not acting of good faith and will not be treated as a bona fide purchaser."[311] The court stated that if there are competing claims, the means of knowledge—with a duty of using them—are akin to knowledge itself.[312] In addition, the court noted that the Indiana Supreme Court has held that "possession of land puts the world on notice that the possessor may have a claim of ownership and right to possession."[313] The court stated that it was undisputed that Benjamin was continuously in possession of the property, but Trustcorp did nothing to find out what rights he might have had in the property. As a result, Trustcorp was not a bona fide mortgagee, and the trial court's judgment was affirmed.[314] The court also stated that the irregularities appearing on the face of the forged release of mechanic's lien would have put "a reasonably prudent person on inquiry notice that something was amiss."[315] The court distinguished the type of notice that Trustcorp had from constructive notice, saying that Trustcorp could not have had constructive notice of the quiet title action because Benjamin had not filed a lis pendens notice.[316] The court of appeals concluded that given the amount of the loan, a reasonably prudent lender would have taken simple steps necessary to verify that a superior mechanic's lien had been released, especially when the instrument had been notarized.[317]

Finally, the court considered whether the trial court erred in concluding that the Trustcorp mortgage was invalid because it was the result of fraud. The court affirmed the trial court on this point as well, noting that because it found that Trustcorp could not have been a bona fide mortgagee because it did not investigate Benjamin's interest in the property, the trial court's decision was

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308. *Id.* (quoting Kumar v. Bay Bridge, LLC, 903 N.E.2d 114, 116 (Ind. Ct. App. 2009), *reh'g denied*).

309. *See* IND. CODE § 32-30-11-3 (2011).

310. *Thomas*, 923 N.E.2d at 469-70.

311. *Id.* at 470 (quoting Mishawaka, St. Joseph Loan & Trust Co. v. Neu, 196 N.E. 85, 90 (Ind. 1935)).

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 471-72.

affirmed concerning fraud.[318]

V. MISCELLANEOUS

In a case of first impression concerning the nature of a pre-closing possession agreement, *Chiprean v. Stock*,[319] the Indiana Court of Appeals determined that a prospective purchaser's pre-closing possession agreement was not a land title contract; thus, he was not entitled to demand foreclosure proceedings. *Chiprean* concerned a small claims court dispute over the Stocks' eviction action against Chiprean.[320] Chiprean executed a purchase agreement for a house owned by the Stocks.[321] The closing on the sale was contingent upon Chiprean obtaining financing to purchase the home, which he was unable to do in spite of his desire to occupy the property.[322] Chiprean and the Stocks executed a pre-closing possession agreement (the "possession agreement") permitting Chiprean to occupy the home, provided that he made monthly payments to the Stocks. The possession agreement stated that he was purchasing the property in "as is" condition and that the Stocks had no responsibility for maintenance or repair.[323] Chiprean was required to deposit $5000 with the listing broker; if he did not close, the $5000 deposit was to be forfeited to the Stocks and the listing broker.[324] Chiprean did not have the home inspected prior to moving in.[325]

After Chiprean began occupying the home, the roof over the great room collapsed.[326] The Stocks arranged to have the roof repaired using their insurance proceeds while Chiprean lived at the home.[327] Chiprean was not happy with the repairs but made regular payments under the possession agreement until the roof collapsed. Thereafter, he only made partial payments or no payments.[328] In January 2009, the Stocks filed a small claims action to evict Chiprean from the house.[329] Chiprean consented to an immediate order of eviction on February 17, 2009, and a separate hearing was set on damages for March 25, 2009.[330] Chiprean filed a counterclaim against the Stocks to recover the deposit.[331] The trial court entered judgment in favor of the Stocks in the amount of $6000, and

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318. *Id.*
319. 925 N.E.2d 489 (Ind. Ct. App. 2010).
320. *Id.* at 491.
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.* at 491-92.
326. *Id.* at 492.
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*

the deposit was split between the Stocks and Chiprean's real estate broker.[332] Chiprean argued that he should not have been evicted and that the Stocks should not have been awarded damages for the missed rental payments.[333] He asserted that his interest in the property should have been foreclosed upon pursuant to *Skendzel v. Marshall*.[334] He argued that the trial court's decision resulted in a forfeiture of his interest in the property, whereas if he had been permitted to foreclose on his interest, the proceeds of the sale would be applied to the balance of the contract principal and interest owed to the Stocks.[335]

The court of appeals first observed that Chiprean waived his argument that a foreclosure sale should have been conducted because he consented to being "evicted" from the property with the damages to be determined at a later date.[336] He did not request foreclosure of the property at any point during the trial court proceedings.[337] Even without the waiver, however, the court concluded that Chiprean was not entitled to request foreclosure proceedings.[338] To claim a foreclosure remedy, a "consummated" land sale contract for real estate must be in place, and the possession agreement did not amount to a land sale contract.[339] In addition, the purchase agreement was contingent upon Chiprean obtaining financing, which he was not able to do.[340] A purchase agreement contingent on financing is not enforceable until the financing is obtained.[341] As a result, the court stated that the purchase agreement was not consummated because the contingency was not satisfied.[342]

Although the court characterized the possession agreement as more of a lease than a land sale contract, it did not think it necessary to specifically call the pre-possession agreement a lease.[343] The court was able to find one case in New York analyzing a similar pre-closing possession agreement. In the New York case, the court held that the pre-closing possession agreement did not create an equitable interest in the real estate because the agreement did not express a clear intent that the property would be held, given, or transferred as security for an obligation under the agreement.[344] Here, the court concluded that the possession agreement provided for a limited term of possession and "the contingency required to make the purchase agreement effective never occurred."[345] As a

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332. *Id.*
333. *Id.*
334. 301 N.E.2d 641 (Ind. 1973).
335. *Chiprean*, 925 N.E.2d at 492.
336. *Id.* at 493.
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.* at 493-94.
343. *Id.* at 494.
344. *Id.* (citing Kaya v. B & G Holding Co., 853 N.Y.S.2d 95, 96 (App. Div. 2008)).
345. *Id.*

result, Chiprean did not have an interest in the property permitting foreclosure.[346] Furthermore, the $5000 deposit required by the possession agreement was not characterized as a "down payment" to be applied to the purchase price for the property.[347] The possession agreement specifically stated that it was a non-refundable brokerage fee and was not refundable to the buyer or seller.[348]

Another case of first impression before the Indiana Court of Appeals dealt with the authority of an agent of a title insurance company. *Fidelity National Title Insurance Co. v. Mussman*[349] concerned a lawsuit brought by sellers of real estate against the title insurance company, its agent, and the agent's owner, alleging theft and conversion by the agent and its owners of funds from an escrow account.[350] Fidelity National Title Insurance Company ("Fidelity") had an issuing agency agreement with an inter-county title company ("ITC").[351] ITC was authorized to countersign and issue title insurance commitments and policies on behalf of Fidelity in the state of Indiana.[352] The agency agreement contained specific provisions concerning the authority of ITC and did not provide that ITC had authority to conduct closing and escrow services in connection with Fidelity's title insurance policies.[353] The Mussmans owned real estate in Porter County and entered into a purchase agreement to sell it to Floramo Partners ("Floramo") in 1999 for $1.6 million.[354] The Mussmans agreed to provide an owner's policy of title insurance to Floramo, and the purchase agreement provided that ITC would issue the owner's and lender's policies.[355] ITC served as the closing and escrow agent on the transaction.[356] Fidelity did not have contact with the Mussmans or Floramo, and its name did not appear on any of the closing documents or title insurance commitments. ITC issued the title insurance policies, underwritten by Fidelity, after the December 30, 1999 closing.[357] When Fidelity became suspicious of ITC's business practices a few months later, it "imposed additional escrow account supervision" in addition to the terms in the agent agreement.[358]

On April 30, 2000, the Mussmans presented a check for $1.6 million drawn on ITC's escrow account and learned that there were insufficient funds to honor the check.[359] The Mussmans discovered later that the funds had been in the ITC

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346. *Id.*
347. *Id.*
348. *Id.*
349. 930 N.E.2d 1160 (Ind. Ct. App. 2010).
350. *Id.* at 1162.
351. *Id.*
352. *Id.*
353. *Id.* at 1162-63.
354. *Id.* at 1163.
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.* at 1164.

escrow account at the time of their December 1999 closing, but they had been stolen by the owner of ITC (Lawrence Capriotti) and others as part of a Ponzi scheme.[360] The Mussmans filed a complaint alleging conversion and theft by ITC and its owners, as well as negligence by Fidelity.[361] The Mussmans further alleged that Fidelity was liable to them for ITC's conduct under the agency theory of respondeat superior and under section 261 of the Restatement (Second) of Agency.[362] The court of appeals concluded that (1) Fidelity was not liable for the acts of ITC because its agency agreement specifically stated that ITC could only issue title insurance commitments and policies[363] and (2) it "was not to receive any funds, 'including escrow, settlement or closing funds'" on behalf of Fidelity.[364] The court noted that cases in other states had dealt with the question of "whether a title insurance agent is also an agent of the title insurance company with respect to escrow and closing services."[365] For instance, courts in Maryland and Texas held that an agent was not the title insurance company's agent for closing a transaction unless the agreement between the agent and the title insurance company "establish[ed] an agency relationship for purposes of settling and closing activities undertaken by that title agent."[366] In the case at hand, the court concluded that Fidelity did not give agency authority to ITC through its agency agreement, and it was therefore not liable for its actions.[367]

Another case of first impression concerning a title insurance company was *U.S. Bank, N.A. v. Integrity Land Corp.*[368] In the *U.S. Bank* case, a lender sought damages from a title insurance company for negligence in failing to uncover a defect during a title search.[369] The lender was a successor in interest to a prior lender for the property. The title insurance company claimed it had no obligation to the successor lender because there was no privity of contract between them and that the "economic loss rule" prevented the successor lender from recovering under a tort claim theory.[370]

Integrity performed a title search in connection with a February 2006 closing on the purchase of property financed by Texcorp Mortgage Bankers ("Texcorp").[371] Southern National Title Insurance Corporation ("Southern National") issued and underwrote a mortgage insurance policy based on the commitment prepared by Integrity, which did not disclose a 1998 foreclosure

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360. *Id.*
361. *Id.*
362. *Id.*
363. *See id.* at 1166-68.
364. *Id.* at 1166 (internal citation omitted).
365. *Id.*
366. *Id.* at 1167 (citation omitted).
367. *Id.* at 1168.
368. 929 N.E.2d 742 (Ind. 2010).
369. *Id.* at 743-44.
370. *Id.* at 744.
371. *Id.*

judgment on the property.[372] After closing, the holder of that mortgage and the 1998 judgment, LPP Mortgage Ltd. ("LPP"), filed suit against the owner of the property and Texcorp to enforce and foreclose the judgment.[373] U.S. Bank succeeded to Texcorp's interests and intervened in the action by filing a third-party claim against Integrity and Southern National alleging breach of contract and negligent real estate closing.[374] The trial court entered a judgment in favor of LPP, and the property was later sold to satisfy the judgment. This left U.S. Bank without any recourse on its mortgage loan.[375]

In subsequent litigation, U.S. Bank and Integrity filed cross-motions for summary judgment, which resulted in the trial court granting U.S. Bank's motion as to Southern and denying its motion as to Integrity's liability.[376] The trial court concluded that Integrity "was not in breach of contract because it was not a party to the title insurance policy, issued by Southern, and it was not negligent because it owed no duty to U.S. Bank in tort."[377] Integrity had maintained throughout all of the litigation that there was no privity of contract between it and U.S. Bank.[378] The Indiana Supreme Court agreed that there was no privity of contract and examined U.S. Bank's tort claim, an issue of first impression in Indiana, which it framed as "whether or not a title company, after issuing an incorrect title commitment . . . which the recipient . . . relied upon to its detriment, owes a duty [in tort] to the recipient to [which] it certified clear title to the subject real property."[379]

Integrity argued that U.S. Bank did not have a tort claim because no claim exists "for a mortgage company against a title company that issues an incorrect title insurance commitment to the underwriter of the insurance policy."[380] The court discussed the economic loss theory of recovery and the fact that a defendant is not liable under a tort theory for purely economic loss caused by his negligence.[381] However, it noted that several exceptions to this rule exist, including where a duty of care is owed by a liability insurer to the insured and negligent misstatement occurs.[382] Noting that courts in other jurisdictions are split on this issue, the court observed that Indiana has recognized the tort of negligent misrepresentation[383] and that it has ruled that "[n]egligent misrepresentation may be actionable and inflict only economic loss."[384] The

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372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.* at 744-45.
377. *Id.* at 745.
378. *Id.*
379. *Id.* (citation omitted).
380. *Id.*
381. *Id.*
382. *Id.* at 745-46.
383. *Id.* at 744.
384. *Id.* at 747 (citing Greg Allen Construction Co. v. Estelle, 798 N.E.2d 171, 174 (Ind.

court also pointed out that, consistent with its decision in *Indianapolis-Marion County Public Library v. Clark & Linard, P.C.*,[385] whether or not a contract exists is not dispositive in determining whether a tort action is allowable where there are "carve-out" exceptions for tort liability such as negligent misrepresentation.[386]

The court concluded that Integrity had a duty under Section 552 of the Restatement (Second of Torts) to communicate the quality of the title to the real property accurately when issuing its commitment for title insurance.[387] Furthermore, the court concluded that Integrity should have known that Texcorp, in closing the loan to the buyer, would reasonably rely on the statement in the preliminary commitment that the title was free of any liens and encumbrances.[388] The court also stated that the relationship between Integrity and Texcorp was advisory in nature in that "Integrity had superior knowledge and expertise, was in the business of supplying title information, and was compensated for the information it provided to Texcorp."[389] This information was provided in response to a request by Texcorp to advise it concerning its transaction as a lender for a third party, "and Integrity affirmatively vouched for the accuracy of the information" it provided.[390] Based on these facts, the supreme court concluded that tort law permitted U.S. Bank's tort claim to proceed.[391]

In *Kinsel v. Schoen*,[392] when a homeowner's manmade pond leaked water, flooding a neighbor's septic drainage field and causing the system to fail, the Indiana Court of Appeals was called upon to examine the common enemy doctrine and other issues relative to the flood. After Kinsel's pond leaked water and flooded the Schoens' property, the county health department filed an action again the Schoens and required them to replace their failed septic system.[393] The Schoens received a judgment against Kinsel at trial for nuisance, trespass, and negligence.[394] Kinsel appealed the judgment, alleging that the trial court should have applied the common enemy doctrine and that the damage award was improper because the Schoens did not mitigate their damages. He argued further that he should not have been required to pay the Schoens' attorneys' fees and expert witness fees.[395]

The trial court concluded that the common enemy doctrine did not apply to this situation because Kinsel built his pond without a permit; therefore, it was a

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2003)).

385. 929 N.E.2d 722, 727 (Ind. 2010).

386. *U.S. Bank*, 929 N.E.2d at 748.

387. *Id.* at 749.

388. *Id.*

389. *Id.* at 750.

390. *Id.*

391. *Id.*

392. 934 N.E.2d 133 (Ind. Ct. App. 2010).

393. *Id.* at 136-37.

394. *Id.* at 137.

395. *Id.* at 141.

common nuisance.[396] The trial court also determined that the water from Kinsel's pond "trespassed" on the Schoens' property, thereby making Kinsel liable for all damages resulting from the water flowing onto the Schoens' property.[397] Moreover, Kinsel had admitted that his pond was losing water and had received adequate notice from the authorities that the pond was likely to cause other problems with the Schoens' septic system and drainage field.[398] The trial court further found that because Kinsel placed his pond too close to the Schoens' septic field, he was negligent for failing to take any steps to prevent pond water infiltrating this area.[399]

On appeal, Kinsel unsuccessfully argued that the common enemy doctrine applied to this case, alleging that the Schoens' claim was "based on an overabundance of natural water from snowmelt, rainwater, surface water and groundwater entering his property."[400] The court noted that the common enemy doctrine recognizes that "all property owners hold dominion over their property with respect to the control of water."[401] The court discussed the common enemy doctrine, observing that the "common enemy" is a source of water that is diffused over the ground "or which temporarily flows upon or over the surface as the natural elevations and depressions of the land may guide it but which has no definite banks or channel"—surface water.[402] However, Kinsel's private pond did not qualify as surface water, and experts testified at trial that the sub-surface water was radiating out from Kinsel's pond.[403] Based on this evidence, the flood was caused by a leaking pond and not surface water.[404] As a result, the common enemy doctrine did not apply.[405]

The court of appeals also rejected Kinsel's argument that the Schoens failed to mitigate their damages. The court noted that there was no evidence that the Schoens' actions aggravated or increased their injuries, and Kinsel did not offer any alternative to the solution required by the health department (putting in a new septic system).[406] Finally, the court recognized the inherent authority that a trial court has in assessing attorneys' fees and expenses for consequential damages

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396. *Id.* at 138.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* at 139.

401. *Id.* ("In its most simplistic and pure form[,] the rule known as the 'common enemy doctrine' declares that surface water which does not flow into defined channels is a common enemy and that each landowner may deal with it in such a manner as it suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.").

402. *Id.* at 140.

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

suffered by plaintiffs in this situation and upheld that award.[407]

Marshall v. Erie Insurance Exchange[408] established that an urban or residential property owner has a duty to exercise reasonable care to prevent an unreasonable risk of harm to neighboring property owners arising from the condition of trees on his or her property.[409] John and Marjorie Meyer appealed the trial court's decision denying their motion to correct error following its judgment in favor of Erie Insurance Exchange ("Erie") on Erie's claims for damages. Erie's claims resulted from a tree on the Marshalls' property that fell and damaged the home of Cindy Cain.[410] The court of appeals concluded that the trial court did not abuse its discretion in denying the Marshalls' motion to correct error.[411]

The Marshalls owned several properties and were partners in a property management business called Multivest Properties.[412] John made management decisions for the rental properties that he and Marjorie owned, particularly after she became seriously ill in 2006.[413] The City of Elkhart would contact John concerning cleaning up debris on a particular property, and John would take care of the issue regardless of whether he or Marjorie actually owned the property.[414] Marjorie owned a vacant lot next to Cain's home, and a tree stood near the boundary line between the two lots.[415] When Cain purchased the home, she had concerns about the tree's health and the potential danger it posed to her home.[416] She called the Elkhart Code Enforcement Office and expressed her concern about the tree.[417] The city contacted Marjorie's property manager to inform her that the tree needed to be taken down and spoke directly with John, who hired a professional arborist to examine the tree.[418] The arborist testified at trial that he did not see enough evidence of decay to warrant removing the tree.[419] On December 31, 2006, the tree fell onto Cain's house, knocking over the chimney, and causing damage to the roof and the structure of the house.[420] Cain filed an insurance claim with Erie, who reimbursed her for the repairs to the home minus her deductible.[421] Then Erie, as a subrogee for Cain, sued the Marshalls for

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407. *Id.* at 142.

408. 923 N.E.2d 18 (Ind. Ct. App.), *aff'd on reh'g*, 930 N.E.2d 628 (Ind. Ct. App.), *reh'g denied*, 940 N.E.2d 830 (Ind. 2010).

409. *Id.* at 26.

410. *Id.* at 20.

411. *Id.* at 21.

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*

damages arising from their alleged negligence in maintaining the tree.[422] The trial court concluded that the Marshalls owed Cain a duty of reasonable care and breached this duty.[423]

The court noted that this case presented an issue of first impression concerning whether an urban or residential landowner owes a duty to protect neighbors from damage caused by a tree falling from the landowner's property.[424] The court observed that the Indiana Supreme Court had adopted section 363 of the Restatement (Second) of Torts in the case of *Valinet v. Eskew*,[425] stating:

> (1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.
>
> (2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to present unreasonable risk of harm arising from the condition of trees on the land near the highway.[426]

The court stated that on initial review, the Restatement and the rule from *Valinet* did not appear to imply a duty on the Marshalls to protect Cain from the tree; however, the court stated that this view would leave property owners in residential or urban areas without recourse where a neighbor "refused to remove or secure an obviously decayed and dangerous tree simply because it was a natural condition of the land."[427] The court observed that several other states have departed from strictly applying the rule from the Restatement "when an urban or residential landowner has actual or constructive knowledge of a dangerous condition."[428] The court noted that the rule in the Restatement evolved during a time "when land was mostly unsettled and uncultivated."[429] It also concluded that it would not be an extraordinary burden to require a landowner "to inspect his or her property and take reasonable precautions against dangerous natural conditions."[430] The court concluded that the trial court correctly applied

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422. *Id.*
423. *Id.* at 22.
424. *Id.* at 23.
425. 574 N.E.2d 283 (Ind. 1991).
426. *Id.* at 285.
427. *Marshall*, 923 N.E.2d at 23.
428. *Id.*
429. *Id.* at 24.
430. *Id.*

the duty of reasonable care to the Marshalls with respect to preventing damage cause by the fallen tree and did not abuse its discretion when it denied the Marshalls' motion to correct error.[431] Finally, the court concluded that there was deficient evidence that the Marshalls breached their duty of care based upon their knowledge of the potential dangerous nature of the tree.[432]

431. *Id.* at 25.
432. *Id.*