RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY LAW

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This Article takes a topical approach to the notable real property cases in the courts of the State of Indiana in this survey period, October 1, 2005, through September 30, 2006, and analyzes noteworthy cases in each of the following areas: restrictive covenants, contracts, landlord/tenant law, governmental action and eminent domain, tax sales, mortgages, and developments in the common law.

I. RESTRICTIVE COVENANTS

A. Fair Housing Act

The Indiana Court of Appeals, in *Villas West II of Willowridge v. McGlothin*,[1] was confronted with a situation that began in 1996, when Algie and Edna McGlothin purchased a "duplex condo-style home" in Villas West II in Kokomo, Indiana ("Villas West").[2] A set of restrictive covenants (the "Covenants") for Villas West was recorded in 1992 by the developer.[3] The Covenants provide that each unit may only be occupied by the owner and their immediate family and that owners are specifically prohibited from leasing their units.[4] After both Algie and Edna moved into nursing homes in 1998, they leased their unit to a non-family member.[5] Algie subsequently passed away.[6] In 2002, Edna McGlothin ("McGlothin") leased her unit to another non-family member for a term of three years.[7] Shortly thereafter, the homeowner's association for Villas West (the "Association") notified McGlothin that she was in violation of the Covenants.[8] McGlothin refused to cancel the lease, so the Association filed a complaint for injunctive relief.[9] McGlothin admitted that she had leased her unit, but argued that the covenant was invalid and unenforceable because it

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1. 841 N.E.2d 584, 588 (Ind. Ct. App. 2006). Note: The Indiana Supreme Court had not granted transfer as of June 15, 2007, but held oral arguments on October 26, 2006. *See* Indiana Courts.org, Oral Arguments Online, http://www.indianacourts.org (Follow "Oral Arguments Online" hyperlink; then search "October 2006 Supreme Court.").

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 588 n.2.

7. *Id.* at 588.

8. *Id.* at 589.

9. *Id.*

> evidenced an intention to make a preference, limitation, or discrimination among persons who could occupy dwellings within the subdivision based on race, color, sex, familial status, or national origin and that the covenant has a discriminatory effect on the availability of housing within the subdivision in violation of the Fair Housing Act.[10]

Following a bench trial, the court entered a number of findings of fact and conclusions of law. Selected findings of fact included:

> 13. Villas West II is a part of the Willowridge Community. Jim Bagley Construction Co., Inc. advertises the Willowridge Community as "Restricted—your investment is protected here."
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> 14. The word "restricted," is defined by Webster's Third International Dictionary (1993), as "limited to the use of a particular class of people or specifically excluding others (as members of a class or ethnic group felt to be inferior)(a residential area)(-hotels . . ." Other dictionary definitions include ["] . . . limited to white Christians," and ". . . limited to or admitting only members of a particular group or class, esp. white gentiles."
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> . . . .
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> 16. There are occasions where dwellings in Villas West II have been occupied by persons who were not members of the immediate family of the owner or contract purchaser. [examples omitted by author]
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> 17. [The Association had knowledge that McGlothin had leased her unit from 1999 to 2002 and "did not complain during that three (3) year period."]
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> . . . .
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> 19. Of the 149 lots in Villas West II, there are 147 owned by white persons and 2 by African Americans.
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> . . . .
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> 21. The covenants which remove housing units within Villas West II from the rental market effectively exclude the 1,036 African American householders who rent housing units from the subdivision. That is, 54% of all African American householders in Kokomo are excluded from the subdivision.

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10. *Id.*

. . . .

23. The covenants which remove housing units in Villas West II from the rental market effectively exclude the 1,446 racially minority householders who rent housing units in the City of Kokomo from the subdivision.

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25. The covenants exclude 56% of racially minority householders from the subdivision, and only 34% White alone householders from the subdivision.

. . . .

28. The covenants limit interracial association between residents of Villas West II and householders of minority races to those householders of minority races who are able to buy homes in the subdivision, to the total exclusion of racial minority households who could rent homes in the subdivision if homes were available.

. . . .

37. The Court can find no legitimate non-discriminatory reason for limiting occupancy of dwellings within Villas West II to owners and members of their immediate families.[11]

The trial court held, in part: "It is not fair to deny 1,446 racially minority householders who rent their homes, that is 56% of all racially minority householders, all opportunity to rent dwellings in Villas West II from owners in Villas West II who want to rent their dwellings."[12] The trial court also held that enforcement of the covenant would have harmed McGlothin because she "would have lost rent and her qualification for Medicaid unless she sold her home"; "Conversely, the Plaintiff suffers no conceivable harm by disallowing enforcement."[13]

On appeal, the substantive issue considered by the Indiana Court of Appeals was "whether the trial court's judgment that the restrictive covenant against leasing violated the Fair Housing Act[14] [] is clearly erroneous."[15] The Association cited a number of cases from "other jurisdictions holding that restrictive covenants prohibiting leasing of condominiums are, in general, valid

11. *Id.* at 591-94.

12. *Id.* at 594-95.

13. *Id.* at 594.

14. 42 U.S.C. §§ 3601-3619 (2000).

15. *Villas West II*, 841 N.E.2d at 597.

and enforceable."[16] Neither of the parties nor the court were able to locate any other cases which addressed whether a restrictive covenant barring leasing violates the Fair Housing Act.[17] The Fair Housing Act provides that it is unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[18]

The court of appeals noted that there are two theories of discrimination under the Fair Housing Act: disparate treatment and disparate impact.[19] The court proceeded to analyze the case under disparate impact, which is relevant when a "facially neutral policy or action has an unequal impact on different subgroups in the housing market."[20] After a discussion of the Seventh Circuit jurisprudence in this area, the court proceeded to analyze the case using the factors set forth in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*[21] ("*Arlington II*"). Those four factors are:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*[22] . . . (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.[23]

The court noted that these factors had been rephrased in *Phillips v. Hunter Trails Community Ass'n*, and proceeded with the updated factors:

> (1) the strength of the plaintiff's statistical showing; (2) the legitimacy of the defendant's interest in taking the action complained of; (3) some indication—which might be suggestive rather than conclusive—of discriminatory intent; and (4) the extent to which relief could be obtained by limiting interference by, rather than requiring positive remedial measures of, the defendant.[24]

With respect to the first factor, the court concluded that "the evidence presented at trial establishes that McGlothin made a significant statistical

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16. *Id.* at 598.
17. *Id.*
18. *Id.* at 598-99.
19. *Id.* at 599.
20. *Id.* (quoting Phillips v. Hunter Trails Cmty. Ass'n, 685 F.2d 184, 189 (7th Cir. 1982)).
21. 558 F.2d 1283 (7th Cir. 1977).
22. 426 U.S. 229 (1976).
23. *Villas West II*, 841 N.E.2d at 601 (citing *Arlington II*, 558 F.2d at 1290).
24. *Id.* (citing *Phillips*, 685 F.2d at 189-90).

showing of a disparate impact, and this factor weighs in favor of McGlothin."[25] In connection with the second factor, the court noted that the developer of Villas West II testified that the unit was a "duplex condo-style home but not a true condominium," without explaining the distinction.[26] The court then described a number of authorities, primarily from Florida, that demonstrate that condominiums are treated differently from single-family, detached homes.[27] Since even McGlothin's expert at trial testified that leasing can have an "adverse effect" on property values[28] and because restrictions contained within a declaration of condominium have traditionally been "clothed with a very strong presumption of validity when challenged,"[29] the court found that the second Arlington II factor weighed in favor of the Association.[30]

In its discussion of the third factor, indication of discriminatory intent, the court noted the trial court's findings with respect to the advertisement that Villas West II was "Restricted" and the dictionary definitions of "restricted" cited by the trial court in its findings of fact.[31] The court concluded that the third factor weighed "slightly" in favor of McGlothin.[32] With respect to the final factor, the court noted that the trial court made no relevant findings, but that relief could be obtained in this case by preventing the Association from enforcing the restrictive covenant, rather than by requiring the Association to take remedial action.[33] This factor, then, weighed in favor of McGlothin.[34]

The court then turned to the second part of its analysis, considering first whether McGlothin had made a prima facie showing of disparate impact, then whether the Association had proven a bona fide and legitimate justification for the housing action.[35] If the Association made that showing, then the plaintiff had the burden to show that less discriminatory alternatives were available.[36] As discussed with respect to the first *Arlington II* factor, the court found that McGlothin's statistics demonstrated a disparate impact.[37] As discussed with respect to the second *Arlington II* factor, the court found that the Association had a bona fide and legitimate justification for the restrictive covenant—protecting property values.[38]

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25. *Id.* at 604.

26. *Id.*

27. *See id.* at 604-05.

28. *Id.* at 605.

29. *Id.* (quoting Woodside Vill. Condo. Ass'n, Inc. v. Jahren, 806 So. 2d 452, 457 (Fla. 2002)).

30. *Id.*

31. *See id.* at 605-06.

32. *Id.* at 606.

33. *Id.*

34. *Id.*

35. *See id.*

36. *Id.*

37. *Id.* at 607.

38. *Id.*

Finally turning to the question of whether less discriminatory alternatives were available, the court noted that the trial court found that the restrictive covenants contained a number of requirements for owners to maintain their units, including exterior maintenance, watering of lawns and shrubs, and prohibited uses and nuisances.[39] The trial court found that "if the basis for the leasing covenant is to maintain property values because renters do not care for the residences as well as owners, the properties can be maintained just as well through the covenants listed above."[40] The court determined that it could not find this conclusion to be clearly erroneous.[41] The court took care to note that although it affirmed the trial court's decision that this restrictive covenant violated the Fair Housing Act, it thought this was a "close case."[42] "[W]e do not intend to imply that all restrictive covenants prohibiting leasing violate the federal Fair Housing Act. Rather, this is a complex, fact-sensitive analysis that should not be taken to apply to all such covenants."[43]

Stepping back from the mechanics of the application of the test used by the court of appeals, the threshold question is whether the application of the Fair Housing Act to the restrictive covenant was the appropriate inquiry. The court noted that "neither party cites authority directly on point, and our research likewise reveals no relevant authority on this issue."[44] In other words, *Villas West II* is the first appellate case to even discuss the possibility that a restrictive covenant which prohibits leasing could violate the Fair Housing Act. Because the court did not discuss any allegations that a specific racial minority was denied the right to rent or purchase a home in the complex, it follows that the court must have believed that the restrictive covenant "otherwise [made] unavailable . . . a dwelling . . . because of race, color. . ." Essentially, the court noted, the question under a disparate impact claim is whether the restrictive covenant "has a significantly greater discriminatory impact on members of a protected class."[45] The key word in that test, which the court never explicitly discusses, is "impact." The record included findings of fact that clearly showed a correlation between a person's race and such person's likelihood to rent rather than own a dwelling in Kokomo. However, the court never discussed whether this statistical correlation had any impact at all on the availability of a dwelling in Villas West II to a member of a racial minority. In the case of McGlothin herself, the court never mentioned the race of the unrelated person to whom McGlothin rented her unit. If that person was a member of a racial minority and was prevented from living in Villas West II as a result of the application of the restrictive covenant, that certainly would have made it easier to find an impact.

The court spent several pages detailing the trial court's findings of fact with

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39. *Id.*
40. *Id.* at 608.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 598.
45. *Id.* at 600.

respect to the first prong of the *Arlington II* test, and noted that the trial court concluded that: "'The statistics that [McGlothin] presented to the Court clearly prove that the restriction has a significantly greater negative impact on African American members of this community than it does on the Caucasian population.'"[46] The court of appeals agreed that the evidence supported that finding. Statistics can be powerful tools and are essential to providing a disparate impact claim. However, there is a big gap in reasoning in this case—a missing link between the statistics and a finding of disparate impact. Undeniably, whites and African American rent and own their dwellings at different rates in Kokomo. However, to conclude that "54% of all African Americans householders in Kokomo are excluded from the subdivision"[47] assumes that there is some reason that African Americans rent in higher numbers than whites that is caused by race rather than by personal choice or economic necessity. The restrictive covenant makes no unit in Villas West II unavailable to any person per se. The statistics presented by McGlothin only prove that the restrictive covenant has a potentially greater negative impact on African American members of the community than it does on the Caucasian population. Apparently no evidence was presented which showed that a disproportionate number of African Americans or other racial minorities: (1) desired to live in Villas West II; (2) could afford to rent a unit there; and (3) could not afford to purchase a unit there.

Although the court of appeals cautioned that it did not intend to imply that all restrictive covenants prohibiting leasing violate the Fair Housing Act and that this was a "complex, fact-sensitive analysis,"[48] it appears that the key fact driving the outcome of the application of the *Arlington II* test was the fact that African Americans rent in a higher proportion than whites in Kokomo. According to the U.S. Census Bureau, the homeownership rates in Kokomo (i.e. 46% of African Americans own their homes while 66% of whites own their homes) is actually slightly less disparate than the national average. In 1996, 65.4% of all householders in the United States owned their homes, including 69.1% of whites and 44.1% of African Americans.[49] If the key fact is the same across the United States, how would the outcome of the application of the *Arlington II* test to a similar restrictive covenant differ?

The Indiana Supreme Court heard oral arguments in *Villas West II* on October 26, 2006, but has not yet granted transfer. The authors look forward to discussing the Supreme Court's opinion in the next survey article.

B. Continuing Liability of Predecessor Developer

A second case concerning restrictive covenants decided by the Indiana Court

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46. *Id.* at 603 (quoting Appellant's App. at 20).

47. *Id.*

48. *Id.* at 608.

49. Robert R. Callis, *Moving to America—Moving to Homeownership*, U.S. CENSUS BUREAU (Sept. 1997), http://www.census.gov/prod/3/97pubs/h121-972.pdf.

of Appeals is *Paniaguas v. Endor, Inc*.[50] In this case, Aldon developed the Fieldstone Crossing subdivision, encumbered the lots with a reciprocal easement agreement and sold a lot to Paniaguas.[51] Subsequently, Aldon sold its remaining interests in Fieldstone Crossing to Endor.[52] Endor assumed the responsibility to "sustain the high quality of properties in accordance with the real covenants."[53] Paniaguas then brought an action against Endor and Aldon, alleging that Endor constructed homes of an inferior quality.[54] Aldon moved to dismiss itself pursuant to Indiana Trial Rule 12(B)(6).[55] The trial court granted the motion and Paniaguas appealed.[56]

Paniaguas argued that Aldon had a duty to the homeowners to ensure that Endor would adhere to the covenants in the subdivision and by failing to do so, should be held liable in tort.[57] The court affirmed the trial court and failed to find a tort upon which relief could be granted.[58]

The court found that "[o]n balance, the relationship between the parties, the foreseeability of harm, and sound public policy counsel against the extension of a duty to developers to insure that real covenants are adequately enforced upon subsequent developers."[59]

Paniaguas also argued that Aldon breached its purchase agreement with the homeowners because it could not delegate or assign to Endor its contractual duties.[60] The court declined to conclude that "Aldon's personal development of the Fieldstone Crossing subdivision is so essential to the purchase agreements between Appellants and Aldon as to preclude the assignment of the obligation to Endor."[61]

Paniaguas also filed suit concerning this transaction in the U.S. district court.[62] This suit claims, among other things, that Aldon violated the Interstate Land Sales Full Disclosure Act[63] and that Paniaguas is entitled to rescind the purchase agreement and obtain other damages.[64] Aldon and the other defendants moved for summary judgment on the grounds that the transaction met one of the several exemptions provided for under the Act, including specifically, that Aldon

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50. 847 N.E.2d 967 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 593 (Ind. 2006).

51. *Id.* at 969.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 970.

58. *Id.*

59. *Id.* at 971.

60. *Id.* at 972.

61. *Id.* at 973.

62. Paniaguas v. Aldon Cos. (*Paniaguas II*), No. 2:U4-CV-468-PKC, 2006 WL 2568210 (N.D. Ind. Sept. 5, 2006).

63. 15 U.S.C. §§ 1701-1720 (2000).

64. *Paniaguas II*, 2006 WL 2568210 at *1.

did not utilize any means of interstate commerce in connection with sales of the property.[65]

II. CONTRACTS

A. Waiver of Subrogation

In *S.C. Nestel, Inc. v. Future Construction, Inc.*,[66] the Metropolitan School District of Perry Township in Marion County contracted with Future Construction, Inc., a general contractor, to construct a warehouse.[67] The Perry Township/Future contract contained the standard American Institute of Architects (AIA) waiver of subrogation provision.[68] Future then contracted with S.C. Nestel as a subcontractor to construct the warehouse.[69] The Future/Nestel subcontract contained a standard AIA provision that prohibited Nestel from assigning or subcontracting without the written consent of Future.[70] It also included a provision which required Nestel to obtain general liability insurance.[71] The Perry Township/Future contract was incorporated by reference into the Future/Nestel subcontract.[72] Nestel then "contracted with Coffey Construction, Inc. . . . as a sub-subcontractor to construct the warehouse."[73] Future had no contractual relationship with Coffey.[74]

While Coffey was building the warehouse, it collapsed.[75] "MSD Perry Township paid Nestel $17,214 for demolition and removal of debris, and Future reimbursed MSD Perry Township" through its builder's risk insurance policy.[76] Future filed a lawsuit against Nestel and Coffey alleging that they "were negligent and responsible for the collapse and damage to the warehouse and that they breached their contracts" by not carrying appropriate insurance.[77] Nestel moved for summary judgment, arguing that the waiver of subrogation clause indicated that the "intent of the parties 'was to allocate the risk of damage to the building during construction by the provision of property or builders risk insurance by either the owner or the general contractor.'"[78] The trial court denied Nestel's motion for summary judgment and "denied Nestel's request to certify

65. *Id.* at *7.
66. 836 N.E.2d 445 (Ind. Ct. App. 2005).
67. *Id.* at 447.
68. *Id.* at 447-48.
69. *Id.* at 447.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 448.
78. *Id.* at 448-49.

the issue for interlocutory appeal."[79]

Following trial, the court found in favor of Future and "found that the waiver of subrogation clause had been 'superseded by Nestel's breach of its contract with Future by subcontracting work to Coffey without notice to Future and by the negligent acts of Nestel and Coffey which led to the collapse of the Warehouse.'"[80] Nestel appealed.[81]

The court of appeals quoted *South Tippecanoe School Building Corp. v. Shambaugh and Son, Inc.* for the proposition that a "builder's risk insurer is not entitled to subrogate against one whose interests are insured even though the party's negligence may have occasioned the loss, in the absence of design or fraud."[82] The court in *S.C. Nestel* explained that in short, "such contracts place the risk of loss from the project on the insurance, not on the insured."[83]

In this case, the court of appeals found that the contracts reveal "that it was the intent of MSD Perry Township, Future, and Nestel to allocate the risk of damage during construction through property or builder's risk insurance held by either MSD Perry Township or Future."[84] Therefore, "it makes no difference whether the theory of recovery is negligence or breach of contract—the waiver of subrogation provision bars recovery."[85] The court of appeals held that Nestel's breach of contract by subcontracting without consent did not supersede the waiver of subrogation.[86] The judgment of the trial court was reversed.[87]

B. Successor Liability

Stainbrook v. Low concerns a purchase agreement for forty acres.[88] Three days before closing, the seller died and the estate refused to consummate the purchase agreement.[89] The buyer filed a claim against the seller's estate.[90] Following a trial, the court awarded specific performance to the buyer.[91] The seller's estate appealed, arguing, among other things, that the trial court erred in awarding specific performance because the seller was eighty-nine years old and the buyer was twenty-two years old.[92] After dispensing with the estate's

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79. *Id.* at 449.

80. *Id.*

81. *Id.*

82. *Id.* at 450 (quoting S. Tippecanoe Sch. Bldg. Corp. v. Shambaugh & Son, Inc., 395 N.E.2d 320, 328 (Ind. App. 1979)).

83. *Id.*

84. *Id.* at 451.

85. *Id.*

86. *Id.* at 452.

87. *Id.* at 453.

88. 842 N.E.2d 386 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1009 (Ind. 2006).

89. *Id.*

90. *Id.*

91. *Id.* at 391.

92. *Id.* at 398.

arguments, which were not particularly noteworthy, the court of appeals affirmed the trial court's ruling.[93]

This case is interesting because it did not consider whether the buyer had an adequate remedy at law. Instead, it cited a 2000 court of appeals case for the proposition that:

> The decision whether to grant specific performance is a matter within the trial court's sound discretion. Because an action to compel specific performance sounds in equity, particular deference must be given to the judgment of the trial court. Specific performance is a matter of course when it involves contracts to purchase real estate.[94]

This is very different than the 2003 *Kesler v. Marshall*[95] decision, in which the court of appeals acknowledged that while the trial court has such discretion, "[s]uch judicial discretion is not arbitrary, but is governed by and must conform to the well settled rules of equity."[96] Those "well-settled rules" include the notions that equitable remedies like specific performance are "extraordinary" remedies and that they are "not available as a matter of right."[97] Instead, equitable remedies are only available when no adequate remedy at law, i.e. monetary damages, exists.[98] "Where substantial justice can be accomplished by following the law, and the parties' actions are clearly governed by rules of law, equity follows the law."[99]

By failing to address whether the buyer had an adequate remedy at law or whether such a question is necessary, the *Stainbrook* decision perpetuates the uncertainty regarding the availability of equitable remedies for the breach of real estate agreements in Indiana.

C. Specific Performance

In *Gabriel v. Windsor, Inc.*,[100] Windsor is a developer and residential home builder that developed a residential subdivision in northeast Indiana. Gabriel contracted to purchase a lot from Windsor and to have Windsor construct a custom home as designed by her architect.[101] A number of problems arose during construction.[102] After the home was substantially complete and a punch list had been signed by Gabriel, she sent Windsor a letter terminating the contract due to

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93. *Id.*

94. *Id.* at 394 (citing Ruder v. Ohio Valley Wholesale, Inc., 736 N.E.2d 776, 779 (Ind. Ct. App. 2000)) (citations omitted).

95. 792 N.E.2d 893 (Ind. Ct. App. 2003).

96. *Id.* at 897.

97. *Id.*

98. *Id.*

99. *Id.*

100. 843 N.E.2d 29 (Ind. Ct. App. 2006).

101. *Id.*

102. *Id.*

a number of specified "material breach."[103] Windsor sued to compel Gabriel to perform her obligations under the contract.[104] After a trial, the court ruled in favor of Windsor and ordered Gabriel to specifically perform her obligations under the contract within thirty days.[105] Gabriel appealed, arguing that the trial court's decision was clearly erroneous and that the trial court's grant of specific performance was clearly erroneous.

The court of appeals found that Gabriel was not entitled to rescind the contract because she did not show that Windsor refused to perform its obligations.[106] Instead, the appellate court found that Windsor had agreed to remedy the disputed items and was prevented from doing so because of heavy rains.[107] Beginning its discussion of the specific performance issue, the court reiterated that the decision to award specific performance is within the trial court's discretion and that a party seeking specific performance must show that it substantially performed its contractual obligations or offered to do so.[108] The court found that the trial court erred because it ordered Gabriel to grant a drainage easement to Windsor for the benefit of the adjoining lot, a term which was not a part of the original contract.[109] If specific performance is ordered the terms of the agreement must be enforced, but the trial court does not have the authority to change the terms.[110]

Finally, the court suggested that "[o]n remand, the trial court should consider an award of damages rather than specific performance"[111] and cited *Kesler v. Marshall*.[112] The court did not address whether the grant of specific performance was clearly erroneous because the trial court made no finding that Windsor did not have an adequate remedy at law.

D. Election of Remedies

UFG, LLC v. Southwest Corp.[113] represents the second trip made by the parties to the court of appeals. The case first arose when the plaintiffs ("Buyers") contracted to purchase real estate from Southwest ("Seller").[114] Buyers sued for specific performance and legal damages. The trial court found in favor of Seller. Seller then consummated a sale of the property to a third party. Buyers appealed, and the court of appeals held that there was an

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103. *Id.* at 33, 38.
104. *Id.* at 33.
105. *Id.* at 49.
106. *Id.* at 47.
107. *Id.*
108. *Id.* at 48.
109. *Id.* at 48-49.
110. *Id.*
111. *Id.* at 49.
112. 792 N.E.2d 893, 897 (Ind. Ct. App. 2003).
113. 848 N.E.2d 353 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 592 (Ind. 2006).
114. *Id.* at 357.

enforceable contract and that Buyers were entitled to specific performance or damages.[115] The trial court concluded that the remedy of specific performance was no longer available because the property had been sold and held that Buyers were not entitled to legal damages because it had "elected" the remedy of specific performance.[116] Buyers appealed again.

The court of appeals agreed with the trial court that specific performance is not available to the Buyers because the real estate is beyond the control of the parties.[117] Buyers argued that a third party who purchases property with notice of ongoing litigation concerning the property takes the property subject to the outcome of any appeal. The court did not address the merits of this argument as it applied to the case because the third party was not made a party to the litigation, thus leaving open the question of whether the Buyers could have been successful if they had filed an action against the third party.[118]

The court acknowledged that the election of remedies doctrine "provides that where a party has two coexisting but inconsistent remedies and elects to prosecute one such remedy to a conclusion, he may not hereafter sue on the other remedy."[119] However, the court found that in this case, the Buyers never "elected" specific performance as a remedy and pursued both equitable and legal remedies throughout the proceedings.[120] Indeed, "the denial of both remedies of specific performance and legal damages under the circumstances before us is a miscarriage of justice we should not condone."[121] The court remanded for a determination of monetary damages, if any.

E. Allocation of Real Estate Taxes

In *Trinity Homes, LLC v. Fang*,[122] Trinity Homes owned a parcel of real estate that it developed into a residential subdivision. Fang executed a purchase agreement for a lot in the subdivision. The purchase agreement included the following provision:

> [A]ll real estate taxes and assessment, if any, including penalties and interest, which are due and payable with respect to the real estate will be paid by Seller at the closing. Seller agrees to pay first real estate installment due after settlement. Purchaser agrees to pay taxes and assessments thereafter.[123]

Real estate taxes were assessed as of March 1 each year and were due and

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115. *Id.* at 357-58.
116. *Id.* at 360.
117. *Id.* at 361.
118. *Id.*
119. *Id.*
120. *Id.* at 365.
121. *Id.* at 363.
122. 848 N.E.2d 1065 (Ind. 2006).
123. *Id.* at 1067.

payable in May and November. Fang closed on his lot on March 3, 2000. Trinity Homes paid both the May and November 2000 assessments, which were based on the March 1, 1999 assessment conducted before the tract was subdivided into lots. Fang paid the May 2001 tax bill, but argued that under the terms of the purchase agreement it was Trinity Homes' responsibility. Fang sued Trinity Homes in small claims court, arguing that his lot was first assessed as a separate lot on March 1, 2000, that assessment was not due and payable until May and November 2001 and that the purchase agreement provided that Trinity Homes would pay the May 2001 payment.[124] The trial court found in favor of Fang.[125] The court of appeals affirmed the trial court in an unpublished memorandum, and the supreme court granted transfer.[126]

The trial court and the court of appeals found the tax provision to be ambiguous and construed it against the drafter, Trinity Homes.[127] The supreme court did not find the provision to be ambiguous.[128]

> We think there is no serious question that the May 2000 installment was the first installment of any real estate tax that was due and payable after the March 3, 2000 closing on Fang's lot. The only issue is whether the installment was the first due and payable 'with respect to the real estate,' i.e., on Fang's Lot 38.[129]

The court found that the fact that a separate assessment of Fang's lot had not occurred as of the closing did not relieve Lot 38 of its obligation for the taxes for the entire tract—the State acquired a lien for the entire tract on March 1, 1999.[130] If the taxes had not been paid, the entire tract, including Lot 38, would have been subject to collection procedures. In the court's view, Trinity's payment of the November 2000 installment was a "windfall" to Fang as that installment was his responsibility.[131]

Justice Rucker dissented from the court's decision:

> The record is clear that Lot 38 did not exist as a separate taxable parcel on March 1, 1999. As a consequence, there obviously were no taxes due and payable on the lot at the time of the March 3, 2000 closing date. Rather, the first installment of real estate taxes due and payable on this lot was May 10, 2001 based upon the March 1, 2000 assessment date. Under the express terms of the parties' Agreement these taxes were Trinity Homes' responsibility. The trial court reached the right

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124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 1068.
128. *Id.*
129. *Id.* at 1069.
130. *Id.*
131. *Id.*

conclusion, and its judgment should therefore be affirmed.[132]

III. LANDLORD/TENANT LAW

A. Tenant's Trade Fixtures

Ordinarily, title to any trade fixtures left by a tenant at leased premises following the termination of a lease will merge with the real estate and become the property of the landlord.[133] The Indiana Supreme Court addressed that general rule in the context of a tort claim by an injured employee of the tenant in *Dutchmen Manufacturing, Inc. v. Reynolds*.[134] The employee was injured when he was struck by a portion of scaffolding which had been erected at the manufacturing plant leased to his employer, Keystone RV, Inc., by the prior tenant of the plant, Dutchmen Manufacturing, Inc. The owner of the plant, Chapman Realty, Inc., had leased the plant to Dutchmen from 1992 through 1999. During its tenancy, Dutchmen erected the scaffolding for its manufacturing processes. As the end of the term of Dutchmen's lease neared, Chapman initially requested that Dutchmen remove the scaffolding at the end of the term. However, Chapman commenced negotiating with Keystone to lease the plant and Keystone expressed an interest in having the scaffolding remain at the premises. Dutchmen then offered to sell the scaffolding to Keystone, but Keystone elected not to acquire it from Dutchmen. Instead, Dutchmen vacated the Premises and left the scaffolding in place.[135]

Keystone then entered into a lease for the plant with Chapman on an "as is" basis and began using the scaffolding. The case came to the supreme court through an interlocutory appeal of the denial of Dutchmen's motion for summary judgment.[136] The injured Keystone employee claimed that Dutchmen was liable as the supplier of the property.[137] Dutchmen argued that it was not the owner or supplier of the property, rather the owner was Chapman because the scaffolding merged with the real estate owned by Chapman when Dutchmen left it at the premises upon termination of the lease of the premises.[138] The court acknowledged the general rule, stated above, that any trade fixtures of a tenant left at the expiration of the term of a lease merge with the real estate and become the property of the landlord; however, where the landlord consents to allowing the tenant to leave the trade fixture at the premises at the end of the lease term, ownership does not merge with landlord but remains with the tenant who may remove the trade fixtures within a reasonable time after the end of the lease

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132. *Id.* at 1070.

133. Dutchmen Mfg., Inc. v. Reynolds, 849 N.E.2d 516, 520 (Ind. 2006).

134. *Id.* at 516.

135. *Id.* at 518.

136. *Id.*

137. *Id.* at 519.

138. *Id.* at 524.

term.[139] The court found in this case that the facts indicated that the landlord did consent to allow the scaffolding to remain at the premises and Dutchmen, having a reasonable time to remove it, elected to transfer the scaffolding to Keystone and save the cost of removal.[140]

The court's decision highlights the need for both tenants and landlords to clearly describe and set forth their intentions regarding any property left at the premises at the time of the termination of the term of the lease and to follow a course of action that clearly demonstrates that intent. Obviously removal of trade fixtures will preclude a tenant from future liability and is the safest course. If the trade fixture will not be removed then tenants should make certain that either the landlord will accept title or that the next user of the trade fixture will accept title to the trade fixture and, in either case, such party indemnifies the tenant from any loss occasioned from the use of the trade fixture.

The landlord in *Reynolds* apparently never wavered from the position that Dutchmen needed to remove the scaffolding thereby preventing the trade fixture from becoming a part of the real estate and avoiding any liability arising from its use. To fully protect itself, the landlord should have specifically disclaimed any ownership of the scaffolding in the lease with Keystone and clarified that it was not part of the leased premises and with required removal at the end of the term of the lease by Keystone.

An issue suggested by this case, but not addressed, is the liability of a landlord in a situation where the tenant is not required to remove a trade fixture and the landlord allows such trade fixture to be merged with the real estate under the general rule cited above. If that trade fixture truly merges with the real estate, then it should lose its character as personal property and become part of the real estate. As such, there should be no claim for products liability that can be assessed against the landlord; instead, the landlord's potential liability would be for any unsafe condition of the real estate, which is a much less stringent standard of liability.

B. Exclusive Use Rights

Simon Property Group, L.P. v. Michigan Sporting Goods Distributors, Inc.[141] involved a situation where in 2001, Simon entered into a fifteen-year lease with MC Sports for space in Tippecanoe Mall in Lafayette. The lease included an exclusive use clause which specified that if Simon permitted or suffered the operation of a "full-line" sporting goods store in the Mall, MC Sports would have the right to pay alternate rent (four percent of gross sales) until the competing use stopped operating in the center.[142]

In 2004, Simon entered into a lease with Dick's Sporting Goods. MC Sports informed Simon that this was a breach of the lease and apparently threatened to

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139. *Id.* at 520-21.

140. *Id.* at 522.

141. 837 N.E.2d 1058 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1003 (Ind. 2006).

142. *Id.* at 1061.

terminate its lease. Simon filed an action for a declaratory judgment, asking the court to confirm that MC Sports' only remedy was to pay alternate rent.[143] The trial court granted Simon summary judgment and held that MC Sports' sole remedy was to pay alternate rent. MC Sports appealed.[144]

The court of appeals struggled with the terms of the lease and Indiana law. In particular, the court noted that Section 3.3 of the lease, which dealt with certain potential events of default by tenant, including a failure to open by a particular date, provided that "[a]ll remedies in this Lease or at law provided shall be cumulative and not exclusive."[145] Section 3.3 was not a general remedies provision. Section 24.23, which contained the exclusive use provision, only mentioned a single remedy, alternate rent, and did so with apparently permissive language: "If Landlord violates or suffers the violation of this paragraph . . . Tenant shall have the right to pay in lieu of Minimum Rent . . ."[146] Section 24.23 did not contain specific language that the payment of alternate rent was tenant's "sole" or "exclusive" remedy, nor did it specifically exclude other potential remedies.[147]

Simon argued that three different provisions included specific remedies for specific breaches by tenant or landlord: Sections 8.1, 8.7, and 24.23. If the "all remedies are cumulative" language from Section 3.3 applied to Section 24.23, Simon argued that it applied to all three provisions.[148] The court of appeals agreed. Unfortunately for MC Sports, a representative of the company apparently testified that if MC Sports violates Section 8.1 or 8.7, Simon has no remedy available except as specifically set out in such section. "In light of that admission," the court held, "we decline MC Sports' invitation to apply the language from Section 3.3 to modify only Section 24.23."[149]

The court of appeals noted that under Indiana law:

> [A] contract which excludes some remedy given by law should be so definite and positive in its terms as to show the clear intention of the parties to do so." Therefore, even if a lease provides a specific remedy, a landlord has not been deprived "of any rights given by law, unless the terms thereof expressly restricted the parties to such specified remedy.[150]

In a dissent in part, Chief Judge Kirsch disagreed with the majority's analysis, noting that "[t]he parties to this lease are sophisticated, commercial entities, dealing at arms length, represented by competent counsel. They clearly had the opportunity and ability to set out explicitly any limitation on remedies.

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143. *Id.*
144. *Id.* at 1065.
145. *Id.* at 1071.
146. *Id.*
147. *Id.*
148. *Id.* at 1073.
149. *Id.* at 1074.
150. *Id.*

They did not."[151]

C. Tenant's Exercise of Option to Purchase

The recent case of *Pinkowski v. Calumet Township of Lake County*[152] discusses the importance of clear communications between a tenant and landlord, especially concerning a matter as important as the exercise of an option to purchase leased property. In 1984, the lessor leased property in Gary, Indiana, to the Calumet Township Trustee for a term of ten years. During the course of that term, the parties leased additional adjacent space. At the end of that term, the lease was renewed and the lessee agreed to build a garage on the space and enlarge a parking lot. That lease amendment also granted to the lessee an option to purchase the property for $200,000 at the end of the renewed ten-year term provided that the lessee gave the lessor written notice of its exercise of the option during November 2003 and the lessee was not in default under the lease at the time of the exercise of the option.[153]

We are not told about the lessee's payment habits during the course of the lease, except that beginning in January 2002, the lessee never paid its monthly rent installment on the first of the month as the lease required. Instead, the lessor would send to the tenant a bill for the rent and the lessee would pay, on average, eight days late.[154] Apparently, the lessor acquiesced to this payment plan. On November 3, 2003, the lessee having not yet paid rent for the month, sent a letter to the lessor indicating that the lessee "proposes to enter into negotiations leading to the possible purchase of the [leased premises]."[155] The notice referenced the provision of the lease amendment granting the option, but did not mention the $200,000 price agreed upon in the lease. The lessor, justifiably sensing that the lessee may have been trying to renegotiate the price, responded with a letter challenging the efficacy of the letter as an exercise of the option and requested a second letter clearly exercising the option and referencing the price. On November 24, 2003, the lessee submitted a second notice clarifying the price.[156]

However, by this time, the rent for November remained unpaid. The lessor responded to the lessee's November 24 letter with a letter again rejecting the efficacy of the purported exercise of the option, this time on the basis that the lessee was in default because the rent had not been paid when due under the lease. The lease specifically conditioned the lessee's right to exercise the option on there being no uncured default by tenant. The lessor further stated that if the rent for November and December would be paid by December 8, the lessor would be willing to negotiate with the lessee upon the terms of the sale of the leased premises, as the lessor could not "simply restore the lapsed Option to

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151. *Id.* at 1075.

152. 852 N.E.2d 971 (Ind. Ct. App. 2006), *trans. denied*, (Ind. Jan. 18, 2007).

153. *Id.* at 973-74.

154. *Id.* at 974.

155. *Id.*

156. *Id.* at 975.

Purchase."[157] So it seemed that the lessor was changing his tune a bit, no longer content to just get confirmation that the lessee was willing to purchase the property on the terms originally agreed to in the lease. The lessee responded that it remained ready, willing and able to complete the purchase by the date set forth in the lease. When that closing did not occur timely, the lessee brought its declaratory judgment action against the lessor to resolve the dispute.[158]

The court of appeals ultimately found for the lessee and held that it had properly exercised the option under the Lease.[159] The court noted that in construing option agreements, "courts have required strict adherence to the option's terms."[160] In this case, the exercise of the option required the occurrence or existence of three items: (1) that the lease be in effect as of November 1, 2003; (2) that the lessee "must not [be] in default or in arrears on any payments due under the Agreement;"[161] and (3) that the lessee give written notice of exercise of the option during the month of November 2003. Regarding the last event, the court analyzed the two notices that the lessee had given. The first notice given on November 3, 2003, proved to be ineffective to exercise the option because it did not unequivocally state the purchase price, but instead seemed to indicate that the lessee was not necessarily agreeing to the price set forth in the lease.[162] Fortunately for the lessee, its additional correspondence sent on November 24, 2003, cured the deficiency of the initial letter, and the court concluded that this second notice satisfied the notice of exercise component of the terms of the option.[163]

Regarding the first two components, it is clear that on November 1, 2003, the lessee had not paid rent for November and, accordingly, was in default of the lease. The lease contained the following provision under the heading "Remedies of Lessor":

> If said rent, or any part thereof, shall at any time be in arrears and unpaid, and without any demand being made therefore (*sic*), or if said lessee or his assigns shall fail to keep and perform any of the covenants, agreements or conditions of this lease, on his part to be kept and performed, and such default is not cured within thirty (30) days after written notice from Lessor setting forth the nature of such default, . . . it shall be lawful for Lessor, his heirs or assigns without notice or process of law, to enter into said premises, and again have, repossess and enjoy the same as if the lease had not been made . . . .[164]

One grammatical interpretation of this language would be that no demand need

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157. *Id.* at 975-76.
158. *Id.*
159. *Id.* at 984.
160. *Id.* at 981.
161. *Id.* at 982.
162. *Id.*
163. *Id.* at 983.
164. *Id.* at 973.

be made by the lessor regarding the payment of rent and that notice of default is required only for those other (i.e., non-monetary) defaults by the lessee. The court indeed seemed to indicate agreement with that interpretation when it noted that "the Lessors may not have been *required* to provide notice to the [lessee]."[165] Nevertheless, the court found that under the lease and option the lessor "did not consider the [lessee] to be in default under the Agreement as long as the rent was paid within thirty days after the [lessee] was provided with written notice of any arrearage."[166] Here, the lessor first gave notice of the delinquency on November 28, in which the lessor stated that if the rent of November and December would be paid by December 8, the lessor would consider negotiating a sale of the property to the lessee. The lessee paid the November rent on December 2 (the day after it received the lessor's letter) and paid the December rent on December 8.[167] Because the rental arrearage was cured within thirty days, all of the conditions to the exercise by the lessee of the option were met, and the lessor was bound to honor the option.[168]

D. Tenant's Guarantor's Liability

In *HK New Plan Marwood Sunshine Cheyenne, LLC v. Onofrey Food Services*,[169] Onofrey Food Services, as tenant, assumed a retail lease. David Onofrey signed a personal guaranty which contained a clause which provided that the guaranty would terminate on September 25, 2001, "provided that Tenant at no time during the term of this Lease was in default thereunder beyond the applicable cure period, if any, as set out in the Lease."[170] Tenant made a number of late rent payments prior to September 25, 2001, but Landlord did not send Tenant a default notice. Tenant vacated the premises on May 19, 2004 and Landlord sued Tenant and Onofrey, as guarantor of the Lease.[171] Onofrey argued that the guaranty terminated on September 25, 2001. The trial court agreed, and granted summary judgment to Onofrey. The landlord appealed.

The court of appeals found that under the plain language of the lease and guaranty, the guaranty did not terminate on September 25, 2001 because the Tenant had been in default prior to that date. The court noted that landlord did not waive Tenant's default by accepting late payments because the lease contained a provision that expressly prohibited such waiver.[172] "Further," the court held, "[the guaranty] was not affected by [Landlord's] failure to assert its rights against [Tenant]."[173]

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165. *Id.* at 984.
166. *Id.*
167. *Id.* at 983.
168. *Id.* at 984.
169. 846 N.E.2d 318 (Ind. Ct. App. 2006).
170. *Id.* at 322.
171. *Id.*
172. *Id.*
173. *Id.* at 325.

E. Residential Tenant Security Deposit

The court of appeals in *Starks v. Village Green Apartments*[174] addressed the often-litigated statutory requirement requiring residential landlords to either return any security deposit made by their tenants or provide notice specifying any damages which are to be offset against such security deposits within forty-five days after the tenant's lease expires or terminate.[175] In this case, the landlord entered into a lease with four individuals, two college students and their fathers. The students lived in the apartment for a short time, but then vacated. Rent was paid for approximately four months of the one-year term.[176] The landlord within a month following the date through which rent had been paid, sent a security deposit notice addressed to one of the four tenants at the apartment address. The landlord then submitted the matter to a collection agency who then issued a demand letter addressed to the students and mailed to the apartment address. Somehow, the tenants learned of the collection activities and sent to it a letter claiming that the apartment had been relet to someone else, and that, therefore, there were no damages. Other than a mere denial of any reletting nothing further happened for approximately four years.[177]

Eventually the landlord filed suit against all four tenants for collection of the unpaid rent. The trial court granted the landlord's motion for summary judgment and the tenants appealed.[178] The tenants argued that they were not liable to the landlord because the landlord never sent the tenants the itemized list of damages required under the statute. The landlord dutifully and correctly pointed out that the landlord's obligation to provide the list does not arise until the tenant provides a forwarding address and that because the student/tenants who occupied the apartment did not do so, the landlord was not yet under an obligation to send the list.[179] The father/tenants reminded the landlord that they were tenants too and that the landlord had the fathers addresses from the outset. The trial court agreed with the landlord and found that because the father/tenants were not physically occupying the apartment, they were not the "tenants" as that term is used in the statute, i.e., an individual who occupies a rental unit."[180] The court of appeals, however, disagreed, holding that in one sense to "occupy" means "to take or hold possession or control."[181] In this sense, a "tenant" is not only those who physically occupy the leased property, but those who have the right to do so. Accordingly, the landlord had the forwarding addresses of the tenants in the landlord's possession on the date of lease termination and was obligated to send

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174. 854 N.E.2d 411 (Ind. Ct. App. 2006).

175. *See* IND. CODE § 32-31-3-12 (2004).

176. *Starks*, 854 N.E.2d at 413.

177. *Id.* at 412.

178. *Id.* at 413.

179. *Id.* at 416.

180. *Id.* (citing IND. CODE § 32-31-3-10 (2004)).

181. *Id.* (citing *Merriam-Webster's Online Dictionary*, http://ww.m-w.com/dictionary/occupy).

to them a security deposit notice within forty-five days of that date.

The court then addressed the results of landlord's failure to delivery the list, which was fairly draconian, but certainly in line with prior cases—it "constitutes an agreement by the landlord that no damages are due."[182] Judge Crone filed a dissenting opinion in this case on that issue.[183] He argued that the statute itself contains a provision that the section obligating landlord to deliver the itemized list of damages "does not preclude the landlord or tenant from recovering other damages to which either is entitled."[184] In Judge Crone's view, unpaid rent in excess of the security deposit falls within the category of "other damages" to which a landlord should still be entitled to recover and to hold otherwise would render the above-quoted provision meaningless.[185] The statute does not, unfortunately, attempt to define "other damages;" however, the statute does list the categories of damages that the landlord must itemize, the first one of which is accrued rent.[186] Since accrued rent is an item of damage specifically mentioned in that section, an interpretation which excludes accrued rent from being deemed "other damages" does not seem to be improper.[187]

IV. GOVERNMENTAL AND EMINENT DOMAIN

A. Pre-judgment Interest

In *State of Indiana v. Dunn*,[188] on April 24, 2000, the State filed an eminent

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182. *Id.* at 417 (quoting Mileusnich v. Novogroder Co., 643 N.E.2d 937, 941 (Ind. Ct. App. 1994)).

183. *Id.* at 418.

184. IND. CODE § 32-31-3-12(c) (2004).

185. *Starks*, 854 N.E.2d at 418.

186. IND. CODE § 32-31-3-12(a)(1).

187. The two cases the dissent cites for the proposition that a landlord remains entitled to "other damages" do not stand for the proposition that "other damages" available to a landlord include accrued rent. The first case, *Miller v. Geels*, 643 N.E.2d 922 (Ind. Ct. App. 1995), addressed a circumstance where the landlord had timely provided the itemized list of damages, but the tenant argued that the list included items not specifically delineated in the statute as categories of damages to be itemized. The court in that case found that the "other damages" provision clarified that the section's itemization of categories was not exhaustive. *Id.* at 927. The second case, *Schoknecht v. Hasemeier*, 735 N.E.2d 299 (Ind. Ct. App. 2000), was an appeal by a landlord of a summary judgment award to a tenant that the landlord's itemization was deficient in that it included deductions for items not specifically delineated in the security deposit statute. The court in that case, along the lines of the *Miller* case, reversed the summary judgment and remanded on the basis that the landlord is not precluded from including damages other than those specifically set forth in the statute in landlord's itemization. *Id.* at 303. Because accrued rent is listed as an itemizable category of damages, it seems clear that it cannot also be "other damages." *Id.* The result is harsh and perhaps, as the dissent states, "manifestly unreasonable"; however, this seems to be the result intended by the statute. *Id.*

188. 837 N.E.2d 206 (Ind. Ct. App. 2005).

domain action to acquire a portion of the Dunns' real estate. On October 2, 2002, the trial court ordered the appropriation of the real estate and commenced the valuation process. On November 13, 2002, the appraisers filed their report, appraising the property at $68,000.[189] On February 7, 2003, the State paid the appraised amount to the trial court. On April 4, 2003, the clerk disbursed the appraised amount to the Dunns. Following a jury trial in July 2004, the jury returned a verdict in favor of the Dunns for $302,895. The trial court ordered the State to pay the statutory eight percent interest rate from the date of the filing of the complaint, April 24, 2000, for a total of $71,890 in prejudgment interest. The State filed a Motion to Correct Errors, arguing that the trial court incorrectly calculated the prejudgment interest.[190]

The court of appeals agreed with the State, noting that Indiana Code section 32-24-1-11 provides that prejudgment interest shall be computed from the date the condemning party takes possession of the real estate. In this case, the State did not take possession until February 7, 2003, the day it paid the appraised amount to the trial court.[191]

B. Sewer Service Rates

In *Bass Lake Conservancy District v. Brewer*,[192] the Bass Lake Conservancy District defined a residence with two separate living areas as a "multiplex" and assessed a higher rate for sewer services. The Brewer's home has a separate kitchen and laundry facilities on the main floor for the use of elderly family members who have difficulty with the stairs. Although the Brewer's home was not divided into separate units and was occupied by a single extended family, the Board found that it is a multiplex.[193] The Indiana Court of Appeals held that the application of this definition to the Brewer's home was "arbitrary, capricious, and contrary to law."[194] The Indiana Supreme Court reversed and found that the classification was within the Board's discretionary authority.

C. Determination of Condemnation Award

In *Southtown Properties, Inc. v. City of Fort Wayne*,[195] the City of Fort Wayne offered a package of financial incentives for the redevelopment of the failing Southtown Mall. After a string of private contracts to acquire the mall from its group of owners failed to result in a sale, the City commenced condemnation proceedings. The court-appointed appraisers found the value of the mall to be $3.44 million. At the trial to determine damages, the Owners testified that the value of the mall was between $8 million and $9 million and

189. *Id.* at 207.
190. *Id.*
191. *Id.*
192. 839 N.E.2d 699 (Ind. 2005).
193. *Id.* at 701.
194. *Id.* at 702.
195. 840 N.E.2d 393 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1010 (Ind. 2006).

argued that the value of the City's incentives should be considered when valuing the mall.[196] The jury determined just compensation to be $4.5 million. The Owners appealed on two issues: (1) that the trial court erred by excluding evidence related to the value of the City's incentives; and (2) that the Owners should not have been required to pay 2004 property taxes because the City took title on the date of the filing of the condemnation action, October 30, 2003, which was before the assessment date for 2004 taxes, March 1, 2004.

The court noted that "it is well established in Indiana that the basic measure of damages in eminent domain cases is the fair market value of the property at the time of the take."[197] However, the court cautioned, "[n]ot *all* facts . . . are relevant to the fair market value of the property."[198] The court referred to a 1969 case in which the Indiana Supreme Court affirmed the trial court's exclusion of evidence that the value of the condemned property was impaired by the proposed highway project for which the property was being taken.[199] *Sovich* held:

> It is difficult to imagine a more specious argument. If [the State's] argument were adopted by this court it would be a simple matter for any condemnor to depress property values merely by publishing details of the planned project . . . . [I]t is clear that the weight of authority holds that neither an increase nor a decrease in the market value of the property sought to be taken, which is brought about by the same project for which the property is being taken, may be considered in determining the value of the property.[200]

The *Southtown* court did not deny that the value of the incentives increased the potential sale value of the mall, however, "any increase in the potential *sale* value of the Property brought about by the incentives is irrelevant to the determination of the *condemnation* value of the Property."[201] The court reasoned that the incentives are not being "taken" from the Owners, although if the Owners had been successful in selling the property prior to condemnation, they would have profited from those incentives. The court's holding is firmly based in public policy. By not including the value of public development incentives in the condemnation award, the property owner will be prevented from receiving a windfall. Including them would discourage municipalities from crafting revitalization plans with financial incentives because, in the event of condemnation, they would pay for them twice.

On the second issue, the City filed its condemnation action on October 30, 2003 and tendered the appraised condemnation value of the property to the court on March 5, 2004. The court, relying on Illinois cases, held that the City took title to the mall on October 30, 2003 and that the Owners were therefore not

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196. *Id.* at 398.

197. *Id.* at 400 (quoting State v. Bishop, 800 N.E.2d 918, 923 (Ind. 2003)).

198. *Id.*

199. State v. Sovich, 252 N.E.2d 582 (Ind. 1969).

200. *Id.* at 588.

201. *Southtown Props.*, 840 N.E.2d at 401 (emphasis in original).

liable for 2004 taxes, which were assessed March 1, 2004. "In short, after a property owner's land is condemned, he holds something less than legal title in fee to the property."[202]

D. Residential Unit Registration

In *City of Vincennes v. Emmons*,[203] the Vincennes housing code ("Code") was at issue. The Code sets standards for residential rental units and contains enforcement mechanisms that include inspection. The Code also requires landlord to pay an annual registration fee of $18 per unit. Three landlords, Emmons, Hendrixson, and Klein (collectively, "Landlords") failed to pay the registration fee for several years. The City brought an enforcement action and the Landlords claimed that the Code was unconstitutional because its provision for the inspection of rental units violated the Fourth Amendment to the Constitution.[204] The trial court agreed and found in favor of the Landlords. The City appealed and the court of appeals affirmed the trial court. The Indiana Supreme Court granted transfer and reversed, holding that the Code's lack of a warrant procedure did not violate the Fourth Amendment.

The Code calls for an initial inspection of a rental unit when it is put on the market and mandatory inspections every two years.[205] In addition, the Code permits inspections at the discretion of the Rental Housing Officer. Before an inspection is conducted, the Code provides for notice to be given to both the landlord and the tenant. If the tenant objects, the Code provides that the City may not inspect without a search warrant. The Code does not require landlord consent and if a tenant consents but the landlord objects, no warrant is required. The Landlords argued, and the court of appeals agreed, that the Fourth Amendment requires that a search warrant must be obtained if landlords refuse consent.[206]

Justice Boehm, writing for the court, noted that "[l]andlords do not themselves occupy the rental units as either personal residences or as commercial space. Their interests are therefore substantially further down the scale of protected interests than either the residential or commercial tenant, and in most circumstances fall off the scale altogether."[207] The Landlords argue that they have a "security interest" which may be compromised by a warrantless search because such a search could uncover a Code violation which would subject them to civil fines.[208] However, Justice Boehm reasoned, "[t]he discovery of a Code violation during the course of a housing code inspection compromises no

202. *Id.* at 409-10.
203. 841 N.E.2d 155 (Ind. 2006).
204. *Id.* at 157.
205. *Id.*
206. *Id.* at 158.
207. *Id.* at 161.
208. *Id.*

legitimate privacy interest."[209]

E. Inverse Condemnation

In *Beck v. City of Evansville*,[210] homeowners in Evansville suffered property damage following significant flooding in 2003 and 2004. Several homeowners sued the City for negligence, nuisance, and inverse condemnation. The trial court found that the City is immune from liability on the negligence and nuisance claims and determined that there was no taking. The homeowners appealed. The court of appeals affirmed the trial court.

The homeowners argued that the storm sewer system is inadequate during times of heavy rainfall, that the flooding deprives them of enjoyment of their property, and that such deprivation constitutes inverse condemnation.[211] The court cited a 1985 case for the proposition that:

> Some physical part of the real estate must be taken from the owner or lessor, or some substantial right attached to the use of the real estate taken before any basis for compensable damage may be obtained by an owner of real estate in an eminent domain proceeding. It must be special and peculiar to the real estate and not some general inconvenience suffered alike by the public.[212]

Since the homeowners suffered only temporary interference with their homes, the court found that their "free use, enjoyment, and interest in their properties have not been impaired." Therefore, no taking occurred.

V. TAX SALES

A. Notice of Redemption

In *Hall v. Terry*,[213] the court of appeals considered whether the notice of redemption contemplated by Indiana Code section 6-1.1-25-4.5(f) requires the notice to include an itemization of the components of the amount required to redeem the real property.[214]

Prior to 2001, the statute required that the notice contain "the amount of the judgment for taxes, special assessments, penalties, and costs under Indiana Code §6-1.1-24-4.7, to redeem the real estate."[215] The change in 2001 is clear from the amending statute: "The *components of the amount* of the judgment for taxes; special assessments; penalties; and costs under IC 6-1.1-24-4.7 required to

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209. *Id.*

210. 842 N.E.2d 856 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

211. *Id.* at 864.

212. *Id.* at 863 (quoting Taylor-Chalmers, Inc. v. Bd. of Comm'rs, 474 N.E.2d 531, 532 (Ind. Ct. App. 1985)).

213. 837 N.E.2d 1095 (Ind. Ct. App. 2005).

214. IND. CODE § 6-1.1-25-4.5(f) (2006).

215. *Hall*, 837 N.E.2d at 1098 (quoting former version of IND. CODE § 6-1.1-24-4.7).

redeem the . . . real property."[216]

In this case, the notice from Terry stated that the "components of the amount required to redeem the property include interest, taxes, special assessments, penalties and costs as set forth in Indiana Code §6-1.1-25-2,"[217] but it did not itemize those components. The court of appeals held that this language was sufficient.

B. Notice of Tax Sale

In *Diversified Investments, LLC v. U.S. Bank, NA*,[218] the Auditor sent notices of a tax sale to a mortgagee at its address of record. Those notices were sent via certified mail, return receipt requested. Both receipts were signed and returned; however, the first receipt had the address stricken and another address handwritten on the card. The tax deed was issued and the mortgagee was successful on a motion to have the tax deed voided due to insufficient notice.

The court of appeals then addressed the question of

> whether the alternative address written on a return receipt postcard by an unknown party is sufficient to supply inquiry notice of a change of address to the Auditor, or whether a party with a substantial interest in property has an obligation to update the Auditor's official record of address.[219]

The court concluded that the handwritten address did not trigger inquiry notice on the part of the Auditor.[220] The court distinguished similar cases, noting that in this case neither notice was returned and that the Auditor went beyond the notice requirements by requesting return receipt. In addition, the court noted that the mortgagee had twelve years to update its address in the Auditor's records and failed to do so.[221]

VI. MORTGAGES

A. Open-Ended Mortgages

The court of appeals addressed the enforceability of a so-called dragnet clause in a mortgage in *Hepburn v. Tri-County Bank*.[222] In this case, Lois and William Hepburn were a married couple. Lois owned some farmland solely in her name. William owned a window business. In 1998, Lois borrowed $40,000 from Tri-County Bank (the "Bank") and secured the loan with a mortgage on her

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216. *Id.* (quoting P.L. 139-2001 § 16).
217. *Id.* at 1097.
218. 838 N.E.2d 536 (Ind. Ct. App. 2005), *trans. denied*, 860 N.E.2d 584 (Ind. 2006).
219. *Id.* at 539.
220. *Id.* at 544.
221. *Id.*
222. 842 N.E.2d 378 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 592 (Ind. 2006).

land.[223] The mortgage contained a provision securing future obligations and advances. In 1999, Lois and William borrowed $116,750 from the Bank under a new note, secured by a second mortgage on the same farmland, with the same future obligations and advances provision.[224] In 2002, William borrowed $80,000 under a new note secured by, among other things, a third mortgage executed by Lois, which contained the same future obligations and advances provision, and a personal guaranty by Lois. The guaranty covered

> each and every debt, of every type and description, that the borrower may now or at any time in the future owe, up to the principal amount of $400,000 . . . . You may, without notice, apply this guaranty to such debts of the borrower as you may select from time to time.[225]

The guaranty had a checkbox for the Bank to mark "secured" or "unsecured." The bank marked the box for "unsecured." In 2003, William borrowed an additional $12,000 and $168,061 under two new notes, both of which referenced the 2002 security instruments.

In 2004, the Bank filed a complaint against Lois and William, alleging that William had defaulted on his notes and requesting foreclosure on the mortgages. The Hepburns disputed the amount of the debt and "demand[ed] the guaranty was secured by existing mortgages."[226] The Bank were granted summary judgment. The Hepburns appealed.

The Hepburns do not dispute that the Bank properly foreclosed on the three mortgages. Instead, they argue that the Bank should not have used the foreclosure to collect the amounts due on the other two loans to William that did not reference the mortgages. The Bank claims that Lois's three mortgages attached to all five of the notes because Lois executed the guaranty and the three mortgages contained future obligations and advances provisions.

The court of appeals affirmed that "dragnet" clauses, which essentially create an "open-ended mortgage" are valid in Indiana.[227] The provisions in Lois's mortgages "could not have been written more broadly, as it encompasses *any* future obligation Lois may have to the Bank."[228] Judge Robb, in dissent, agreed with Lois that the Bank "waived the opportunity to assert the mortgages secured the guaranty because the Bank marked the guaranty 'unsecured.'"[229]

In a second case involving the enforceability of mortgage dragnet clauses, the supreme court in *The Money Store Investment Corp. v. Summers*[230] declined to enforce an attempt by a purchaser of a mortgage containing a dragnet clause to

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223. *Id.* at 381.

224. *Id.*

225. *Id.* at 381-82.

226. *Id.* at 382.

227. *Id.* at 385 (quoting Citizens Bank & Trust Co. of Washington v. Gibson, 490 N.E.2d 728, 730 (Ind. 1986)).

228. *Id.* (emphasis in original).

229. *Id.* at 386 (Robb, J., dissenting).

230. 849 N.E.2d 544 (Ind. 2006).

enhance its priority over prior, junior debt of the mortgagor.[231] In this case, from 1992 to 1996, Summers granted eleven mortgages on three parcels of land to Fort Wayne National Bank (the "Bank"), three of which contained dragnet clauses.[232] In 2000, Summers and an entity he controlled, Mangy Moose, arranged a payoff of the Bank loans, to be replaced by new debt from Money Store secured by a mortgage on the three parcels.[233] Prior to the closing of the new loans, Summers received payoff statements from the Bank.[234] At the closing, the Bank received $375 less than indicated on the payoff statements and did not release the mortgages.[235] The Bank was also owed $4700 from Mangy Moose's overdrawn checking account.[236]

In 2001, Money Store filed a complaint for foreclosure and appointment of a receiver. In 2002, a judgment was entered against Summers and Mangy Moose in an unrelated case and the plaintiff, Phillips, was awarded $205,700.[237] Phillips then purchased the Bank's unreleased mortgages and moved to intervene in the Money Store foreclosure. Phillips and Money Store moved for summary judgment.[238] The trial court ordered foreclosure on both Phillips's and the Money Store's mortgages. It "held that the 'dragnet' clauses in three of the mortgages assigned to Phillips secured 'all debts or obligations owed to Paula Phillips by Summers, which included Phillips judgment lien against Summers."[239] The trial court granted priority to the Phillips mortgages over the Money Store mortgages. The court of appeals affirmed.[240] The Indiana Supreme Court granted transfer and reversed.[241]

Chief Justice Shepard, writing for the court, noted that it was an issue of first impression in Indiana whether a junior creditor could take "an assignment of the first mortgage holder's 'dragnet' mortgages, seeking to 'tack on' her judgment lien and 'leapfrog' the second mortgage holder."[242] The Chief Justice concluded that "this was a nice try, but the original parties to the dragnet mortgages did not intend to secure a subsequent debt owed by the mortgagor to a third party."[243]

Money Store argued that the Bank would have been equitably estopped from asserting the priority of its mortgages because Money Store was "induced" to make the loans to Summers and Mangy Moose in the belief that the Bank's

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231. *Id.* at 546.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at 546-47.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 546.
243. *Id.*

mortgages would be released.[244] The court disagreed with this reasoning, noting that Money Store had the means of knowing whether or not the prior mortgages had been released. "A simple title search and/or communications with [the Bank] would have revealed that the mortgage had not been released."[245]

The court noted that although dragnet clauses are valid in Indiana, they are strictly construed.[246] The main consideration is the parties' intentions. The court cited an 1888 case for the proposition that:

> The mortgage language need not literally describe the debt, but 'the character of the debt and the extent of the encumbrance should be defined with such reasonable certainty as to preclude the parties from substituting other debts than those described, thereby making the mortgage a mere cover for the perpetration of fraud upon creditors.[247]

In the court's view, it was not the intention of the Bank and Summers that the dragnet clause could be used to incorporate Phillips's judgment lien.[248] "Applying Phillips' rationale, the mortgages secured any debt owed by Summers to any creditor crafty enough to obtain an assignment of the mortgages. This simply cannot be."[249] Instead, Phillips was only entitled to collect the debts that she was assigned, namely, the $375 payoff shortfall, the $4700 checking account overdraft, plus interest, collection costs, and attorney's fees.[250]

B. Receiver

In *The Eryk-Midamco Co. v. Bank One*,[251] Bank One loaned money to a company that owned The 225 Building, the mortgage of which secured the loan. Eryk-Midamco ("Eryk") purchased the building and assumed the loan and mortgage.[252] After a few years, Eryk stopped paying its monthly payments and Bank One filed a complaint against Eryk and two guarantors to foreclose. Eryk and Bank One appointed a receiver. At the meeting to negotiate the Agreed Order Appointing Receiver and while Bank One's representatives were out of the room, the president of the property manager ordered the controller of the property manager to transfer $376,000 from Eryk's bank account to the property manager's bank account.[253] When Bank One learned of the transfer, it "demanded that the transferred funds be turned over to Bank One or the

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244. *Id.* at 547.
245. *Id.* at 547-48.
246. *Id.* at 548.
247. *Id.* (quoting New v. Sailors, 16 N.E. 609, 610 (Ind. 1888)).
248. *Id.*
249. *Id.*
250. *Id.*
251. 841 N.E.2d 1190 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1012 (Ind. 2006).
252. *Id.* at 1192.
253. *Id.* at 1192-93.

receiver."[254] Subsequent to Bank One's demand, the receiver issued its final report and request for discharge, which did not mention the disputed funds. Bank One did not object to the final report. A few months later, Bank One filed a complaint against Eryk and the property manager alleging conversion, among other similar charges.[255] The trial court found in favor of Bank One with respect to the conversion charge.[256] Eryk and the property manager appealed.[257]

The court of appeals noted that Indiana Code section 32-30-5-18 provides that a creditor or other interested party may file objections to the receiver's report within thirty days and that:

> any objections or exceptions to the matters and things contained in an account or report and to the receiver's acts reported in the report or account that are not filed within the thirty (30) day period referred to in section 17 of this chapter are forever barred for all purposes.[258]

The court found this language to be dispositive stating that "[h]aving failed to object . . . [Bank One] is 'forever barred' from raising these claims against the Appellants."[259]

VII. DEVELOPMENTS IN THE COMMON LAW OF PROPERTY

A. Prescriptive Easements

In *Wilfong v. Cessna Corp.*,[260] Wilfong's predecessors-in-title used a private roadway across Cessna Corp's property from approximately 1932 through 1998.[261] When Wilfong purchased the property in 1998, Cessna Corp. locked a gate and effectively denied Wilfong access to the roadway. In response, Wilfong filed a lawsuit claiming that he held a prescriptive easement based on his predecessors-in-title's use of the roadway.[262] After a bench trial, the trial court held that Wilfong did not have a prescriptive easement because the prior use was not hostile, but "by permission" of Cessna.[263] Wilfong appealed. The court of appeals reversed the trial court, finding that Wilfong held a prescriptive easement "[b]ased [in part] on the overwhelming evidence . . . that no permission has ever been given to use the Roadway linking the Wilfong estate to the public road."[264]

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254. *Id.* at 1193.
255. *Id.*
256. *Id.* at 1193-94.
257. *Id.* at 1194.
258. *Id.* (quoting IND. CODE § 32-30-5-18(b) (2004)).
259. *Id.* at 1195.
260. 838 N.E.2d 403 (Ind. 2005).
261. *Id.* at 405.
262. *Id.*
263. *Id.*
264. *Id.* (quoting Wilfong v. Cessna Corp., 812 N.E.2d 862, 867 (Ind. Ct. App. 2004)).

The Indiana Supreme Court granted transfer.[265]

The court noted that the reformulated test in *Fraley v. Minger*[266] applies to prescriptive easements as well, "save for those differences required by the differences between fee interests and easements."[267] The four required elements are: control, intent, notice, and duration. In this case, the court criticized the court of appeals for apparently reweighing the evidence presented to the trial court, particularly the testimony of witnesses for both Cessna and Wilfong with respect to whether express permission was ever granted to Wilfong's predecessors-in-title to use the roadway.[268]

Regardless of whether express permission was given, however, the court stated that "the trial court's ruling can be sustained under a theory of implied permission grounded in the cordial relationship between the Cessna and Inman families."[269] The testimony indicated a "very cordial" relationship between Leroy Inman, who owned the Wilfong parcel from 1944 to 1998, and the Cessna family, which acquired the parcel in 1953.[270] The court held that "this evidence is sufficient to infer permissive use."[271]

Interestingly, the court did not address whether a prescriptive easement could have been established prior to the Cessna family's acquisition of their parcel in 1953. The facts indicate that the roadway had been used by Inman's predecessor since at least 1932.[272] If that use otherwise met the test, the cordial relationship between Inman and Cessna could not have defeated the prescriptive easement.

The court of appeals in *Chickamauga Properties, Inc. v. Barnard*[273] addressed the requirements to establish the creation of prescriptive easements in light of last year's Indiana Supreme Court decision restating the common law rules for establishing rights created by adverse possession set forth in *Fraley v. Minger*[274] and discussed the common law rules for determining whether an easement has been abandoned.[275] In *Chickamauga*, the court was confronted with a situation where Chickamauga owned property fronting Airport Road.[276] The Barnards in 2001 acquired via a tax sale property behind the Chickamauga's property and in 2003 acquired a lot just south of that property. Neither of such lots had any direct access to Airport Road.[277] The second acquired lot was purportedly conveyed with an easement for access to and from Airport Road,

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265. *Id.*
266. 829 N.E.2d 476 (Ind. 2005).
267. *Wilfong*, 838 N.E.2d at 406.
268. *Id.* at 406-07.
269. *Id.* at 407.
270. *Id.*
271. *Id.*
272. *Id.* at 404.
273. 853 N.E.2d 148 (Ind. Ct. App. 2006).
274. 829 N.E.2d 476 (Ind. 2005).
275. *Chickamauga Props., Inc.*, 853 N.E.2d at 152-54.
276. *Id.* at 150-51.
277. *Id.* at 151.

which is the same easement language that the prior owner had received in 1994 when they acquired the property.[278] The roadway was actually on the Chickamauga's property which was apparently never owned by the party who initially granted the easement, Mr. Dixon.[279] In the spring of 2003 the Barnards began building a home on their property and in the summer Chickamauga blocked the access road. The Barnards contacted the police and a lawyer for advice and then removed the stakes blocking the access road and finished the home in which they began living in December 2003. The following month, Chickamauga began building a fence blocking the access road which prompted the Barnards to seek an injunction against Chickamauga's blocking of the access road.[280]

Evidence at the trial indicated quite clearly that in 1970s the prior owner of the Barnard's property, Mr. Dixon moved a double-wide mobile home onto the property and lived there until 1994, when he conveyed the property to the Barnard's predecessor. The access road was the principal means of access to the home and was used by Mr. Dixon as well as visitors to the home.[281] The *Fraley* factors of control, intent, notice and duration were plainly met by Mr. Dixon's use.

Chickamauga then argued that the easement rights were abandoned through non-use. It appears that the Barnards direct predecessor used the property for a kennel operation and, after being requested by Chickamauga to move some encroaching kennels off of Chickamauga's property and to stop using the access road, the kennel operator principally used another means to access the property through another parcel owned by the kennel operator. No one then used the portion of the access road located on the Chickamauga's property from 2000 through 2002 when the Barnards started building their home.[282] The court noted that easements, whether created expressly or prescriptively, may be abandoned by the discontinuance of the use of the easement coupled with "an intention to abandon and put an end to [the easement]."[283] In this case, intent to abandon the easement was not shown. There was intermittent use by the kennel operator after the confrontation with Chickamauga of at least that portion of the access road which was on the kennel operator's property and the conveyance of the property to the Barnards specifically included the easement. Furthermore, a prescriptive easement, being established by use in excess of twenty years, "may be deemed abandoned after 'nonuser for a like period.'"[284] Accordingly, even if there was an intent to abandon the prescriptive easement, discontinuance of the use of the access road for just a few years is insufficient to result in the abandonment of the prescriptive easement.

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278. *Id.*
279. *Id.* at 150-51.
280. *Id.* at 151.
281. *Id.* at 151, 153.
282. *Id.* at 154.
283. *Id.* (quoting Seymour Water Co. v. Lebline, 144 N.E. 30, 33 (Ind. 1924)).
284. *Id.* (quoting *Seymour*, 144 N.E. at 33) (emphasis omitted).

B. Easement by Implication

In *Hysell v. Kimmel*,[285] the court of appeals reaffirmed that the courts will only find that an easement has been created by implication if the moving party meets the strict test laid out in the common law:

> (1) there was common ownership at the time the estate was severed; (2) the common owner's use of part of his land to benefit another part was apparent and continuous; (3) the land was transferred; and (4) at severance it was necessary to continue the preexisting use for the benefit of the dominant estate.[286]

C. Adverse Possession

At issue in *Dewart v. Haab*[287] was a 5.64 acre parcel of land for which no deed has served as the root of title in excess of 124 years. Dewart claimed to be record title holder of the tract based on an affidavit duly recorded in 1961. Marian and Harold Dewart recorded the affidavit, which attested to their ownership of the tract, for the purpose of placing the Dewarts in the county tax records. Upon Harold's death, the tract passed to Marian and she later executed a quitclaim deed in favor of herself and her two daughters. Two neighbors, Haab and Hapner, believed themselves to be the owners of the disputed parcel. The Dewarts filed complaints alleging trespass and seeking eviction. Haab and Hapner filed a counterclaim seeking to quiet title by adverse possession in their respective portions of the tract. The trial court entered judgment in favor of Haab and Hapner. The Dewarts appealed.

"In the wake of *Fraley*, the Dewarts now maintain that the tax records unambiguously show that they were the exclusive taxpayers on the Tract. Accordingly, the Dewarts assert that Haab's and Hapner's adverse possession claim necessarily fails on this essential element."[288] The court noted that both Haab and Hapner "reasonably believed" that the land on which they paid taxes included their respective claimed portions of the Tract, but that this belief was not enough. "Kosciusko County's records for the Tract clearly denote the set 5.64 acres, as bounded by Haab's, Hapner's, and the Dewart's real property, with the Dewarts' name and address as the owners for the purpose of tax payment."[289] In light of these facts, the court ruled that a reasonable trier of fact could not concluded that Haab and Hapner complied with the adverse possession tax statute. The court reversed and remanded with instruction to enter judgment in favor of the Dewarts.[290]

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285. 834 N.E.2d 1111 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1006 (Ind. 2006).

286. *Id.* at 1114-15.

287. 849 N.E.2d 693 (Ind. Ct. App. 2006).

288. *Id.* at 696.

289. *Id.* at 697.

290. *Id.*

D. Boundary Descriptions

Harlan Bakeries, Inc. v. Muncy[291] contains, in dicta, a potentially useful reiteration of Indiana common law regarding the role of boundary descriptions and surveys:

> It is a familiar rule that it is not the office of a description to identify lands, but simply to furnish the means of identification. Parol evidence is therefore often necessary to make descriptions intelligible. Moreoever, we note that with respect to land descriptions, this court has held that the order of preference for the location of boundaries is in descending order as follows: natural objects or landmarks, artificial monuments, adjacent boundaries, courses and distances, and lastly quantity.[292]

E. Express Easement

In *Kopestsky v. Crews*,[293] the court of appeals held that where an instrument creating an express easement fails to identify the dominant tenement, an easement can still be created if "the physical situation of two parcels leads to only one reasonable conclusion as to the identity of the dominant tenement[.]"[294] The court reasoned that "if we can identify the dominant tenement with reasonable certainty based upon the language of the deed, we are not required to find a direct description of the tenement in the conveyance."[295] Where multiple parcels might fit the description in the instrument, an easement may not be created. However, if there is

> (1) an easement across a parcel deeded by the grantor, (2) leading directly to a landlocked parcel retained by the grantor, and (3) extending across no other parcel of land, the description contained in this deed, though not artfully drafted, provides a means of identifying the dominant tenement benefited by the easement created.[296]

F. Implied Warranties

In a case of first impression in Indiana, the court of appeals in *Williams v. Younginer*[297] held that the implied warranties of habitability and workmanship

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291. 835 N.E.2d 1018 (Ind. Ct. App. 2005).
292. *Id.* at 1031 (quotations and citations omitted).
293. 838 N.E.2d 1118 (Ind. Ct. App. 2005).
294. *Id.* at 1125.
295. *Id.* at 1126 (emphasis omitted).
296. *Id.* at 1126-27 (citations and emphasis omitted).
297. 851 N.E.2d 351 (Ind. Ct. App. 2006).

are not subject to the doctrine of merger by deed.[298] In this case, the Younginers purchased an existing home from Williams, who operated a home construction business under the trade name Prestige Home. The purchase agreement was signed by Williams in his individual capacity rather than as an officer of Williams's corporation.[299] The Younginers closed on the purchase of the home in February 2001, and in April 2001, they noticed water leaking in the basement. The Younginers contacted Williams who sent his father to inspect the home. Mr. Williams told the Younginers that the problem appeared to be due to over-watering the lawn, so the Younginers stopped watering the lawn. In fact, that was not the problem and the leaks continued. After over a year of consulting various professionals, the Younginers' water problems persisted and the Younginers filed suit.[300]

There was apparently no dispute on appeal that the implied warranties of habitability and workmanship were applicable in this case against Williams and that they were breached. Williams's only argument concerning these warranties was that they simply did not apply after the conveyance of the property due to the doctrine of merger by deed. This doctrine essentially provides that all prior or contemporaneous negotiations or executory agreements, written or oral, leading up to the execution of a deed are merged therein by the grantee's acceptance of the conveyance in performance thereof.[301] There is a general exception to this rule for any collateral or independent rights created under prior contracts or agreements which do not have to do with the "title, possession, quality, or emblements of the land conveyed."[302] The court relied on cases from Illinois, North Carolina and South Dakota in finding that public policy dictates that the implied warranties of habitability and workmanship, although they concern the quality of the real estate, should survive the conveyance and not be merged by the deed.[303]

298. *Id.* at 357.

299. *Id.* at 354. Mr. Williams admitted at trial that this was an oversight on his part and that he meant to sign the contract as the President of the corporation. It proved to be a costly oversight.

300. *Id.*

301. *Id.* at 356 (quoting Thompson v. Reising, 51 N.E.2d 488, 491 (Ind. Ct. App. 1943)).

302. *Id.* at 357 (quoting Link v. Breen, 649 N.E.2d 126, 128 (Ind. Ct. App. 1995)).

303. *Id.* at 358.