

## RECENT DEVELOPMENTS IN PROPERTY LAW

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### INTRODUCTION

During the period covered by this Article,<sup>1</sup> Indiana courts addressed many issues concerning traditional areas of property law. From claims of adverse possession to disputes over water rights, the courts had opportunities to clarify the status of long-standing rules of law, to provide innovative interpretation to novel legal theories, and even to overrule antiquated tenets of property law. The most significant decisions impacting property law are discussed herein.

### I. ADVERSE POSSESSION

Adverse possession is a “strange and wonderful system, whereby the occupation of another’s land gains the occupier title . . . .”<sup>2</sup> To gain title, the occupier must demonstrate “actual, visible, notorious, and exclusive possession of the real estate, under a claim of ownership hostile to the true owner for a continuous ten-year period.”<sup>3</sup> Because any adverse possession claim is bound to be highly fact-sensitive, it is not surprising that several decisions addressing the elements of such a claim reached the appellate level during the survey period.

In *Thompson v. Leeper Living Trust*,<sup>4</sup> the Indiana Court of Appeals was faced with a multi-party dispute over the findings of a legal survey of the parties’ adjoining tracts of property. Property owned by the Thompsons was bordered on the east by property owned by Gardner and on the west by a tract owned by Salyer. A tract of land owned by the Leeper Living Trust (“Leeper”) extended along the southern border of each of these tracts.<sup>5</sup> The Thompsons and Gardner appealed the survey on an adverse possession theory, claiming that “the boundary line between their tracts and Leeper’s tract should have been located farther south than [the] survey indicated because they had acquired, by adverse possession, a 10-to-12-foot-wide strip of land between their tracts and Leeper’s

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1. This Article surveys decisions handed down by Indiana courts between October 1, 1997 and September 30, 1998.

2. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 11.7, at 807 (2d ed. 1993).

3. *Rieddle v. Buckner*, 629 N.E.2d 860, 862 (Ind. Ct. App. 1994); *see also* *Estate of Mark v. H.H. Smith Co.*, 547 N.E.2d 796, 799 (Ind. 1989). Section 34-11-2-11 of the Indiana Code provides that “[a]n action . . . for the recovery of the possession of real estate[] must be commenced within ten (10) years after the cause of action accrues.” IND. CODE § 34-11-2-11 (1998).

4. 698 N.E.2d 395 (Ind. Ct. App. 1998).

5. *See id.* at 396.

tract.”<sup>6</sup>

For well over the ten-year statutory period, a woven wire fence extended along the full length of the boundary between the Leeper tract of land and the tracts owned by Gardner and the Thompsons. In 1995, Leeper removed the fence and replaced it with a barbed-wire fence, which was positioned approximately ten to twelve feet north of the woven wire fence’s prior position.<sup>7</sup>

Gardner based his adverse possession claim on four grounds: 1) the location of the woven wire fence; 2) his belief that the woven wire fence marked the true boundary between the tracts; 3) that he utilized the disputed strip of land as a driveway for use by trucks in the operation of his grain storing business; and 4) that he stored certain machinery on the disputed strip.<sup>8</sup> The court rejected all four grounds.<sup>9</sup>

The court quickly dismissed the first two grounds offered by Gardner, stating that “[n]either the fact that the woven wire fence stood where it did, nor the fact that Gardner believed his property extended to the fence, can decisively show that he actually, visibly, notoriously, or exclusively possessed the disputed strip.”<sup>10</sup> In making such a conclusory disposition of the issue, the court took a relatively strict stance toward the establishment of an adverse possession claim, evidently granting little weight to the existence of a fence marking an apparent boundary.<sup>11</sup>

The court then found that the third and fourth grounds cited by Gardner also failed to support an adverse possession claim, stating that “periodic or sporadic acts of ownership are not sufficient to constitute adverse possession.”<sup>12</sup> The court concluded that the trucks’ use of the disputed strip of property could be characterized “at best” as periodic or sporadic use and that the storage of obsolete farm machinery on the tract was equally “intermittent.”<sup>13</sup> In drawing

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6. *Id.* at 397. The court also addressed a challenge to the survey based on the survey’s variance with the legal description of the property at issue. *Id.* In rejecting portions of the survey, the trial court noted that “the legal description is presumed correct and that compelling visual evidence at variance with the legal description must exist to support a legal survey which varies from a proper legal description.” *Id.* The court of appeals affirmed the trial court’s decision, granting deference to the trial court’s ability to “credit evidence of the survey’s inaccuracy and to discount evidence to the contrary.” *Id.* at 397-98.

7. *See id.* at 398.

8. *See id.*

9. *Id.*

10. *Id.*

11. *See* CUNNINGHAM ET AL., *supra* note 2, at 809 (recognizing that in many jurisdictions, “[e]nclosure of the land, perhaps even use of it up to some natural physical boundary, introduces an important factor favorable to the possessor”) (citing *Whittemore v. Amator*, 713 P.2d 1231 (Ariz. 1986); *Miceli v. Foley*, 575 A.2d 1249 (Md. Ct. Spec. App. 1990)).

12. *Thompson*, 698 N.E.2d at 398 (citing *McCarty v. Sheets*, 423 N.E.2d 297, 301 (Ind. 1981)).

13. *Id.* (quoting *Ferguson v. Prince*, 190 S.W. 548, 549 (Tenn. 1916) (holding that the evidence failed to sustain a claim of adverse possession where the claimant’s supposed possession

this conclusion, the court distinguished *Smith v. Brown*,<sup>14</sup> which found that adverse possession had been established

where the evidence showed, among other things, that the adverse possessor “trimmed the shrubbery, mowed the grass, and planted flowers on the land in dispute,” that he “used the entrance and driveway which crossed the land in dispute and put black top and crushed stone on it[,]” and that his wife “chased people off the property[.]”<sup>15</sup>

The court in *Thompson* held that Gardner failed to show evidence of activities comparable to those evidenced in *Smith* and that he therefore failed to establish his claim of adverse possession.<sup>16</sup>

In *Roser v. Silvers*,<sup>17</sup> the court was faced with a traditional adverse possession claim over a driveway, but had the opportunity to address an issue of first impression in Indiana. The facts leading to the dispute are as follows. The McPeaks acquired their property from the Rosers, whose predecessors in interest were the Brickers. This property is located adjacent to and east of Silvers’ lot, which Silvers obtained from her parents, the Weavers. The Weavers acquired the property in 1955, at which time the Brickers lived next door.<sup>18</sup>

In 1956, the Weavers installed a driveway that encroached upon the Brickers’ property. The Weavers paid to have the driveway paved in 1969, and the Weavers and their successors have been using the driveway continuously since that time. The Brickers never used the driveway.<sup>19</sup> In 1993, the McPeaks and Silvers began feuding over the use of the driveway. Silvers filed an action to quiet title. In a bench trial, the court “quieted title in the disputed strip of property in Silvers’ favor based on its determination that Silvers’ parents had acquired the property by adverse possession.”<sup>20</sup>

The Rosers and the McPeaks (hereafter the “Rosers”) appealed the trial court’s decision, arguing both 1) that the evidence was insufficient to support a determination that the disputed strip was acquired by adverse possession, and 2) that statements made by Silvers’ late father regarding the boundary line between the properties was inadmissible hearsay.<sup>21</sup> The court of appeals affirmed the

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consisted “simply of having dirt thrown upon the lot from time to time to fill up holes, and also of occasionally storing lumber and wagons thereon”).

14. 134 N.E.2d 823 (Ind. App. 1956).

15. *Thompson*, 698 N.E.2d at 398-99 (quoting *Smith*, 134 N.E.2d at 827).

16. *Id.* at 399. The court rejected the Thompsons’ claim on identical grounds, stating that “[b]ecause we have held above that adverse possession may not be established on these grounds, we do not address the Thompsons’ claim further.” *Id.*

17. 698 N.E.2d 860 (Ind. Ct. App. 1998).

18. *See id.* at 862.

19. *See id.* at 862-63.

20. *Id.* at 863.

21. *See id.* at 862. The Rosers and the McPeaks also made arguments based on an alleged violation of a separation of witnesses order and the defense of laches. *See id.*

decision of the trial court.<sup>22</sup>

In support of their first argument, the Rosers alleged that “the driveway had been shared by both properties in the past[,] . . . there was no fence or barrier between the properties[,] . . . the adverse possession of Silvers’ predecessors was not open and notorious[,] . . . [and] there was no evidence that the Weavers ever communicated their intent to possess the property to the Brickers.”<sup>23</sup> The court rejected these arguments, stating that they were “a mere invitation to reweigh the evidence” and that the trial court’s findings were “not clearly erroneous.”<sup>24</sup>

Next, the court analyzed a rule of evidence that previously had not been interpreted by Indiana case law, and that is particularly relevant to claims of adverse possession. At trial, the court admitted statements made by Silvers’ late father pertaining to the location of the boundary line between the two properties at issue, despite a hearsay objection by the Rosers.<sup>25</sup> The trial court admitted the statements under Rule 803(20) of the Indiana Rules of Evidence, which provides that “[r]eputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community . . .” are not excluded by the hearsay rule.<sup>26</sup>

Because no Indiana court had analyzed this rule, the court of appeals looked to other jurisdictions for interpretive guidance.<sup>27</sup> While courts in other jurisdictions have held that “[r]eputation evidence as to customs affecting land [are] not excluded,”<sup>28</sup> the court here found that the exception embodied in Rule 803(20) “applies only to reputation or general consensus evidence and does not permit the admission of specific statements or assertions made by the predecessor in interest regarding a boundary.”<sup>29</sup> As such, the court found that it was erroneous for the trial court to permit the hearsay testimony “regarding the statements made by Silvers’ late father with respect to the location of the boundary line.”<sup>30</sup>

In *Panhandle Eastern Pipe Line Co. v. Tishner*,<sup>31</sup> the Indiana Court of

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22. *Id.*

23. *Id.* at 863.

24. *Id.*

25. *Id.* at 863-64.

26. *Id.* at 864 (citing IND. R. EVID. 803(20) (1998)).

27. *Id.*

28. *Id.* (citing *Williams v. State*, 595 So. 2d 1299, 1306 (Miss. 1992); *Broyhill v. Coppage*, 339 S.E.2d 32, 35 (N.C. Ct. App. 1986)).

29. *Id.* (citing *Nature Conservancy v. Nakila*, 671 P.2d 1025, 1033 (Haw. Ct. App. 1983); *Goodover v. Lindsey’s Inc.*, 757 P.2d 1290, 1293-94 (Mont. 1988)). The court also stated that “[t]his approach comports with Indiana’s common law.” *Id.* (citing *Ellison v. Branstrator*, 54 N.E. 433, 437 (Ind. 1899) (finding no error in excluding evidence of a conversation with a surveyor regarding boundary line)).

30. *Id.* The court, however, found that the error was harmless in that it “was merely cumulative of other evidence to the effect that the western edge of the driveway marked the boundary line between the properties.” *Id.*

31. 699 N.E.2d 731 (Ind. Ct. App. 1998).

Appeals addressed the elements of an adverse possession claim relative to the rights of an easement holder.<sup>32</sup> Panhandle operated a pipeline that traveled through Hamilton County, Indiana. The Tishners lived on real estate located in Hamilton County, which they had owned since 1956. Panhandle owned an open easement of undefined width across the Tishners' property, which provided that Panhandle had the right to "lay, maintain, operate, repair, replace, change the size of, and remove a pipeline. The Tishners [were] entitled to fully use and enjoy the premises except for the purpose granted to Panhandle."<sup>33</sup> In addition, the easement required that Panhandle pay for damages to crops and fences caused by the exercise of their easement rights.<sup>34</sup>

The Tishners built a house and driveway on the property and also made several aesthetic improvements thereto, including "the installation of a swimming pool, a patio, a brick pool wall, a pool house, a stone wall entry into the pool area, and a brick entry wall. . . . In addition, the Tishners planted several trees in proximity to [a pipeline running through the property], and some directly over the [pipeline]."<sup>35</sup> Panhandle did not object to the Tishners' improvements.

In 1988, Panhandle discovered problems with the pipeline that would require entry pursuant to the easement for repair of the pipeline. Panhandle explained to the Tishners that the repair work would require the removal of the brick entry wall, a portion of the stone wall, and several trees and shrubs located on the property near the pipeline.<sup>36</sup> In fact, the repair work required Panhandle to "remove the brick entry wall, several trees and shrubs, the stone entry wall to the pool area, and to tear up the asphalt on the Tishners' driveway."<sup>37</sup> Upon completion of the project, Panhandle filled in the trench and reseeded the lawn, but did not repair or replace any of the damaged improvements or landscaping.<sup>38</sup>

A few years after Panhandle's repair work, the Tishners began making further improvements to the property. They planted trees near the pipeline and began construction of a brick entry wall that would sit directly on top of the pipeline. Panhandle obtained a temporary restraining order to prevent the Tishners from making any further improvements that would prevent Panhandle from exercising its easement rights. Panhandle then sought a permanent injunction against the Tishners and the Tishners filed a counterclaim for damages to their improvements caused by Panhandle's work pursuant to its easement.<sup>39</sup> The trial court ordered Panhandle to pay damages to the Tishners, and ordered that the Tishners be allowed to erect and maintain any improvements on their

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32. The *Panhandle* decision discusses both elements of adverse possession and rights of an easement holder. The aspects of the case addressing the elements of adverse possession will be discussed here, while the portions focusing on the use of easements are discussed in Part II, *infra*.

33. *Panhandle*, 699 N.E.2d at 734.

34. *See id.*

35. *Id.*

36. *See id.* at 735.

37. *Id.*

38. *Id.*

39. *See id.*

property that existed prior to the repair work described above. The court ruled, however, that the Tishners could not make improvements or erect structures that fall within the area that Panhandle claims as an easement.<sup>40</sup>

The first issue addressed by the court on appeal was whether Panhandle's easement was partially extinguished by the Tishners' adverse possession of the portion of the property subject to the easement. In holding that the easement was not partially extinguished, the court discussed two elements of an adverse possession claim, namely, that the claimant's use is "hostile" and that such use is "exclusive."<sup>41</sup> The court found that neither element was satisfied.

The court began its analysis by recognizing that "[a]n easement may be extinguished by adverse possession."<sup>42</sup> However, the court found that the Tishners failed to establish that their use of Panhandle's easement was "hostile."<sup>43</sup> According to the court, possession will be considered "hostile" if "the party claiming adverse use does not disavow his or her right to possess the property or acknowledge that it is subservient to the title of the true owner."<sup>44</sup> Here, the Tishners made no attempt to exclude Panhandle from its easement after Panhandle received a temporary restraining order prohibiting the Tishners from interfering with Panhandle's work. Therefore, the court concluded that "[t]here was no sustained hostile use of the easement."<sup>45</sup>

Further, the court found that the Tishners "failed to establish that their use of the easement was exclusive."<sup>46</sup> This element of an adverse possession claim requires that the party "claims possession adversely *to the exclusion of all others*" and requires possession "of such a nature that it operates as an ouster of the owner."<sup>47</sup> Panhandle's continuous use of the easement throughout the relevant time period negated any claims of "ouster" made by the Tishners. Panhandle regularly conducted projects on the property, performed aerial surveillance, conducted annual foot patrols, and even sought injunctive relief when the Tishners attempted to interfere with its access to the property.<sup>48</sup> The court thus concluded that "[t]o the extent that the trial court used the doctrine of adverse possession as the basis for its decision, it is unsupported by the evidence . . . ."<sup>49</sup>

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40. *Id.*

41. *Id.* at 736-37.

42. *Id.* at 736 (citing *McKinney v. Lanning*, 38 N.E. 601, 603 (Ind. 1894)).

43. *Id.*

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

45. *Id.* at 737.

46. *Id.*

47. *Id.* (emphasis added) (citing *Herrell v. Casey*, 609 N.E.2d 1145, 1148 (Ind. Ct. App. 1993); *Davis v. Sponhauer*, 574 N.E.2d 292, 298 (Ind. Ct. App. 1991)).

48. *See id.*

49. *Id.*

## II. EASEMENTS

A. *Scope and Use of Easements*

In addition to addressing certain elements of an adverse possession claim as they relate to extinguishing an easement, the court in *Panhandle* had the opportunity to clarify the status of Indiana law with regard to the scope of an easement and the parameters of an easement holder's permissible use of an easement.<sup>50</sup>

1. *Easement Implied to Ensure Compliance with Federal Law.*—The court in *Panhandle* noted that Panhandle's operation of the pipeline running through the Tishners' property was governed by the Natural Gas Pipeline Safety Act,<sup>51</sup> which sets forth the "minimum federal safety standards for the design, installation, inspection, emergency procedures, testing, extension, construction, operation, replacement, and maintenance of pipeline facilities."<sup>52</sup> The court continued by stating that "where common law rules of property are inconsistent with the congressional scheme set forth in the Act, the common law rules must give way, rendering any property use inconsistent with the Act subject to injunction."<sup>53</sup> As the court then recognized, it follows logically that "[a]n easement which grants the right to operate a natural gas pipeline must, if the easement is not to be wholly illusory, imply the right to operate the pipeline in accordance with applicable federal law."<sup>54</sup> Because federal law requires Panhandle to inspect the pipeline at regular intervals, as well as implement other safety measures, the right to access to the property for the purpose of complying with the federal law requirements is implied. The court concluded that Panhandle retained all of its rights to the easement.<sup>55</sup>

2. *Permissible Use of Dominant and Servient Estates.*—The Tishners argued that Panhandle owed them a duty to take reasonable steps to protect the improvements placed by the Tishners near the pipeline. The trial court agreed, awarding damages for repair of the Tishners' pool wall, patio, yard, curb, driveway, and playground.<sup>56</sup> In addressing the propriety of the damages award, the court of appeals examined the scope of Panhandle's easement.

The court noted that the terms of the grant creating the easement indicated that the easement was an "open easement" of undefined width.<sup>57</sup> As such, the

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50. See *id.* at 737-39. The facts of the *Panhandle* decision are set out in their entirety in Part I. See *supra* notes 31-49 and accompanying text.

51. *Id.* at 737 (citing 49 U.S.C.A. app. §§ 1671-88 (1994) (recodified at 49 U.S.C. §§ 60101-25 (1994 & Supp. II 1996 & Supp. III 1997))).

52. *Id.*

53. *Id.* at 738 (citing *Swango Homes, Inc. v. Columbia Gas Transmission Corp.*, 806 F. Supp. 180, 184 n.2 (S.D. Ohio 1992)).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

easement covered only “the area reasonably necessary to carry out the purposes of the easement.”<sup>58</sup> It was the court’s duty then to determine the extent of the easement given the particular necessities at hand.<sup>59</sup>

At trial, Panhandle demonstrated that an easement sixty-six feet wide would be sufficient for the purpose of maintaining and repairing the pipeline.<sup>60</sup> The Tishners provided no contradictory evidence. Further, the court noted that easements of sixty-six feet had received prior judicial approval for pipelines operated by Panhandle in the same area.<sup>61</sup> An easement of sixty-six feet was thus deemed reasonable.<sup>62</sup>

The court also addressed the respective rights of the owners of both the dominant and servient estates. Within an easement, the owner of the easement, or the dominant estate, possesses all the rights “necessarily incident to the enjoyment of the easement.”<sup>63</sup> The owner of the easement “may make repairs, improvements, or alterations that are reasonably necessary to make the grant of the easement effectual.”<sup>64</sup> The owner of the servient estate, on the other hand, may use the property that is subject to the easement “in any manner and for any purpose consistent with the enjoyment of the easement, and the dominant estate cannot interfere with the use.”<sup>65</sup> The servient estate owner “may not so use his land as to obstruct the easement or interfere with the enjoyment thereof by the owner of the dominant estate.”<sup>66</sup>

Based on the foregoing statements of law, the court in *Panhandle* concluded that Panhandle had the right to enter the Tishners’ property for the purpose of making repairs and replacements to the pipeline, “including any necessary excavation, without regard to structures erected upon the easement, and the Tishners erected such structures at their peril.”<sup>67</sup> Because the express terms of the easement grant made Panhandle liable only for damages to crops and fences within the easement, the court held that Panhandle’s liability in this case was limited to such.<sup>68</sup> The court remanded the case for a determination of whether

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58. *Id.*

59. *See id.* (citing *Rees v. Panhandle E. Pipe Line Co.*, 452 N.E.2d 405, 410 (Ind. Ct. App. 1983)).

60. *See id.*

61. *Id.* at 738-39 (citing *Rees*, 452 N.E.2d at 405; *Rees v. Panhandle E. Pipe Line Co.*, 377 N.E.2d 640 (1978)).

62. *Id.*

63. *Id.* at 739 (citing *Litzelswope v. Mitchell*, 451 N.E.2d 366, 369 (Ind. Ct. App. 1983)).

64. *Id.*

65. *Id.* (citing *Holding v. Indiana & Mich. Elec. Co.*, 400 N.E.2d 1154, 1157 (Ind. Ct. App. 1980)).

66. *Id.*

67. *Id.*

68. *Id.* The court distinguished Panhandle’s duties “within” the easement from its duties “outside” the easement. Outside the easement

a landowner has an absolute right to have his land in its natural state laterally supported by the lands of adjoining landowners. If the adjoining landowner excavates on his land



the damaged structures were within the area of the property subjected to the easement and for a determination of damages.<sup>69</sup>

*B. Prescriptive Easements and Disclaimer Thereof*

To acquire an easement by prescription, a claimant must show “actual, hostile, open, notorious, continuous, uninterrupted, adverse use for a period of twenty years under a claim of right or by continuous adverse use with knowledge and acquiescence of the owner of the servient estate.”<sup>70</sup> In *Book v. Hester*,<sup>71</sup> the court of appeals addressed the enforceability of a disclaimer of interest in a prescriptive easement.

The Books raised cattle on a forty-acre parcel of property. The property could be accessed only via a gravel road crossing Hester’s property, which was located to the east of the Books’ property. The road had been used continuously for access to the forty acres since at least 1907. In October 1995, Hester erected a fence blocking the Books’ use of the road. The Books then sought injunctive and declaratory relief, claiming that they had acquired a prescriptive easement for use of the road.<sup>72</sup> Hester argued that the Books had relinquished any right to use of the road that they might have acquired when they signed a disclaimer of

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thereby depriving the lands of his neighbor of lateral support, the adjoining landowner is absolutely liable for such damage even if he is free from negligence.

*Id.* The court therefore held that Panhandle had an absolute duty to provide lateral support to the Tishners’ land. However, the court recognized that “liability for damage to buildings resulting from the loss of lateral support must be based upon the negligence of the adjoining landowner in carrying on the activity which occasioned the loss of lateral support.” *Id.* Panhandle, then, had a duty to use reasonable care to avoid the negligent removal of lateral support to the improvements erected on the property by the Tishners.

69. *Id.* During the survey period, the Indiana Court of Appeals also had the opportunity to address easement issues in the context of riparian rights. See *Abbs v. Town of Syracuse*, 686 N.E.2d 928, 928-32 (Ind. Ct. App. 1997). In *Abbs*, shoreline property owners sued the Town of Syracuse and various residents for erecting piers and docking boats at the ends of certain public streets and alleys which lead to water’s edge. The Indiana Court of Appeals affirmed the lower court’s ruling that “in creating the public right-of-way, the grantors intended to grant to the public riparian rights of access to the lake, including the right to establish and use piers, subject only to regulation by the proper municipal or governmental authority.” *Id.* at 929.

70. Walter Krieger, 1993 *Developments in Indiana Property Law*, 27 IND. L. REV. 1285, 1287 (1994) (citing IND. CODE § 32-5-1-1 (1979) (recodified at IND. CODE § 32-5-1-1 (1998))); *Greenco, Inc. v. May*, 506 N.E.2d 42, 45 (Ind. Ct. App. 1987); *Searcy v. LaGrottee*, 372 N.E.2d 755, 757 (Ind. Ct. App. 1978)). See also CUNNINGHAM ET AL., *supra* note 2, at 451 (noting that the elements required to establish a prescriptive easement are nearly identical to those required to establish adverse possession, with the chief distinction being that “in adverse possession the claimant occupies or possesses the dissee’s land, whereas in prescription he makes some easement-like use of it”).

71. 695 N.E.2d 597 (Ind. Ct. App. 1998).

72. See *id.* at 598.

interest in 1989 relating to a quiet title action brought by the Swopes, the predecessors in interest to Hester.<sup>73</sup> The Books countered that the 1989 disclaimer was unenforceable because it was not recorded pursuant to section 32-3-2-7 of the Indiana Code.<sup>74</sup>

Section 32-3-2-7 of the Indiana Code provides, in relevant part, that “[a] disclaimer of an interest in real property is effective . . . *only if it is recorded in each county where the real property is located.*”<sup>75</sup> In rejecting the Books’ argument pursuant to this section, the court analyzed the Probate Code Study Commission Introductory Comments (“the Comments”) to the disclaimer statute.<sup>76</sup> The Comments provide that a “disclaimer is a refusal to accept property *ab initio* . . . .”<sup>77</sup> The Comments further state that the “law of disclaimer is founded on the property law concept that *a transfer of title to property is not complete until it is accepted by the recipient and that no person can be forced to accept property against his will.*”<sup>78</sup> Finally, the court noted that the disclaimer statute itself reads that the “right to disclaim an interest . . . is barred by acceptance of the interest . . . .”<sup>79</sup>

Based on the above commentary, the court concluded that “the disclaimer statute only contemplates the disclaimer of an interest in property *prior to* acceptance . . . [and that] [a]s such, the statute does not apply to the present case.”<sup>80</sup> In this case, the Books acquired their property by contract in 1969, at which time they accepted title without disclaiming their interest in the easement. The court stated that “[h]aving had the use and benefit of the easement for many years, the Books cannot now claim relief under a statute which, if it applied, would require them to disclaim their interest *ab initio*.”<sup>81</sup> Because the disclaimer statute did not apply, the Books could not rely upon it to require that for their disclaimer to be enforceable, it must have been previously recorded.

As an alternate ground for its decision, the court stated that “[e]ven if the disclaimer statute did apply, the Books had actual notice of the disclaimer and, thus, cannot now complain that they were prejudiced by the fact that the

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73. *See id.* at 598-99 & n.3.

74. *See id.* at 599.

75. *Id.* at 600 (quoting IND. CODE § 32-3-2-7 (1993) (emphasis added) (recodified at IND. CODE § 32-3-2-7 (1998)). Indiana’s disclaimer statute is located at sections 32-3-2-1 to 32-3-2-15 of the Indiana Code and outlines the procedures necessary to disclaim certain property interests. *See id.* (enumerating the types of property interests to which the disclaimer statute is applicable).

76. *Id.* (citing section 32-3-2-14 of the Indiana Code, which provides that commission’s comments may be consulted by the court in applying the disclaimer statute (recodified at IND. CODE § 32-3-2-14 (1998))).

77. *Id.* (quoting IND. CODE § 32-3-2-14 (1993) (recodified at IND. CODE § 32-3-2-14 (1998)) (Probate Code Study Comm’n Introductory Cmts.) (emphasis added)).

78. *Id.* (emphasis added).

79. *Id.* (quoting IND. CODE § 32-3-2-11 (1993) (recodified at IND. CODE § 32-3-2-11 (1998))).

80. *Id.* (emphasis added).

81. *Id.*

disclaimer was not recorded.”<sup>82</sup> The court noted that “the disclaimer statute is designed to give constructive notice to third-parties<sup>[83]</sup> . . . [and that] [a]s a general rule, a party to a deed, mortgage or other instrument concerning an interest in real estate is bound by the instrument whether or not it is recorded.”<sup>84</sup> Thus, the Books could not rely on technical compliance with the disclaimer statute to render their disclaimer of the prescriptive easement unenforceable.

In rendering its decision in *Book*, the court distinguished the holding from *Popp v. Hardy*,<sup>85</sup> that “a quiet title decree was not res judicata against a party not joined in the quiet title action.”<sup>86</sup> The Books relied on this case in arguing that the disclaimer should not be enforced, as they were not specifically named in the 1989 quiet title action brought by the Swopes, in connection with which the disclaimer was executed.<sup>87</sup> In distinguishing *Popp* from the present case, the court noted that “the Books voluntarily relinquished their interest in the easement. With the disclaimer in hand, the Swopes had no reason to make the prescriptive easement an issue and join the Books, who had denied having any claim or interest in the property.”<sup>88</sup> In addition, the court noted that Hester did not argue that the Books’ lawsuit was barred by the Swopes’ quiet title decree, but rather that it is barred “by virtue of their disclaimer.”<sup>89</sup> Therefore, the court found *Popp* distinguishable and affirmed the trial court’s ruling against the Books.<sup>90</sup>

### III. EMINENT DOMAIN

The acquisition of land by eminent domain is governed in Indiana by statute.<sup>91</sup> Any objection by a landowner to the appropriation and condemnation of land by eminent domain must be made in the manner specified by the statute. Section 32-11-1-5 of the Indiana Code provides the following:

Any defendant may object to such proceedings on the grounds that the court has no jurisdiction either of the subject-matter or of the person, or that the plaintiff has no right to exercise the power of eminent domain for the use sought, or for any other reason disclosed in the complaint or set up in such objections. Such objections shall be in writing, separately stated and numbered, and shall be filed not later than the first appearance of such defendant; and no pleadings other than the complaint and such statement or objections shall be allowed in such cause, except the answer

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82. *Id.*

83. *Id.* (citing *McIntyre v. Baker*, 660 N.E.2d 348, 352 (Ind. Ct. App. 1996)).

84. *Id.* (citing *Blair v. Whitaker*, 69 N.E. 182 (Ind. App. 1903)).

85. 508 N.E.2d 1282 (Ind. Ct. App. 1987).

86. *Book*, 695 N.E.2d at 601 (citing *Popp*, 508 N.E.2d at 1287).

87. *See id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. IND. CODE §§ 32-11-1-1 to -13 (1998).

provided for in section 8 of this chapter: provided, that amendments to pleadings may be made upon leave of court.<sup>92</sup>

In *Maharis v. Orange County*,<sup>93</sup> the Indiana Court of Appeals demonstrated the harsh effects of the above statutory provision resulting from a failure to strictly comply with the provision's terms. Orange County filed a complaint for Appropriation of Real Estate against Maharis in an effort to obtain a portion of Maharis' land for a bridge improvement project. A summons and notice was issued to Maharis on May 10, 1995.<sup>94</sup> Maharis failed to respond to the summons and an Order of Appropriation and Appointment of Appraisers was entered on June 5, 1995.<sup>95</sup> The Order, however, was set aside on June 8, 1995, because the May summons and notice were returned unclaimed.<sup>96</sup> Because all previous attempts to serve the summons and notice were unsuccessful, Summons by Publication was issued on July 13, 1995, which required a response by August 31, 1995.<sup>97</sup> Two days before the deadline, Maharis' attorney filed an appearance and moved for an extension of time to respond. This motion was denied and an Order of Appropriation of Real Estate and Appointment of Appraiser was entered on September 1, 1995.<sup>98</sup>

On October 10, 1995, Maharis filed an answer to the complaint that included numerous affirmative defenses, a counterclaim against Orange County, and a demand for trial by jury. On October 26, 1995, Orange County filed a motion to strike all of Maharis' filings because they were not filed in accordance with the provisions of the condemnation statute. The trial court granted the motion to strike.<sup>99</sup>

In affirming the trial courts' decision, the court of appeals explained that the acquisition of land via eminent domain is governed by statute and that "all objections to the appropriation and condemnation of land . . . must be filed 'not later than the first appearance of such defendant.'"<sup>100</sup> The court explained that Maharis' objections should have been filed with the appearance, but were incorrectly filed in other pleadings.<sup>101</sup> Thus, the court found that "Maharis [had] not preserved any error for appeal on [the] issues" and that the "trial court did not err in striking Maharis' pleadings that were not allowed under the eminent domain statute."<sup>102</sup>

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92. *Id.* § 32-11-1-5.

93. 685 N.E.2d 1131 (Ind. Ct. App. 1997).

94. *See id.* at 1132.

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.* at 1132-33.

100. *Id.* (quoting IND. CODE § 32-11-1-5 (1993) (recodified at IND. CODE § 32-11-1-5 (1998))).

101. *Id.*

102. *Id.*

In *Lehnen v. State*,<sup>103</sup> the court of appeals highlighted the time limits for filing exceptions to a report of appraisal and the “due process” requirements of an eminent domain proceeding. The State of Indiana filed a complaint for appropriation of a portion of Leynen’s real estate for the purpose of improvements to U.S. Route 231. The lower court appointed three appraisers to assess the damages that would be sustained by the landowner.<sup>104</sup> The report set damages at \$129,984. Lehnen and the State of Indiana, however, filed exceptions to the report.<sup>105</sup>

On September 27, 1995, the State of Indiana filed a second amended complaint, which reflected changes in the construction plans for the highway. The trial court appointed three appraisers to assess the damages sustained by the landowner.<sup>106</sup> Damages were assessed in a new report at \$166,000. Lehnen filed no exceptions to the report. Based on the absence of exceptions, judgment was entered on behalf of the landowner in the amount of \$166,000.<sup>107</sup> On June 3, 1996, Lehnen filed a motion to vacate the judgment, alleging mistake, surprise and excusable neglect for failure to file exceptions to the appraisal report. The motion was denied.<sup>108</sup>

In affirming the lower court’s decision, the Indiana Court of Appeals stated that in regard to a report of appraisal, either or both parties may file exceptions to the appraisal within twenty days of the report of appraisal being filed.<sup>109</sup> “Compliance with all the provisions relating to the assessment of damages and their recovery is essential.”<sup>110</sup> The court explained that the landowner considered the filing of exceptions unnecessary regarding the second report because exceptions were filed regarding the initial report of appraisal.<sup>111</sup> However, the court stated that “[s]hould a new appraisal be granted by the court . . . it will be open to the same proceedings as a first one would be.”<sup>112</sup> Thus, the landowner was required, by statute,<sup>113</sup> to file exceptions to the second appraisal report within

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103. 693 N.E.2d 580 (Ind. Ct. App. 1998).

104. *See id.* at 581.

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *Id.* at 582. Indiana Code section 32-11-1-8 states:

Any party to such action, aggrieved by the assessment of benefits or damages, may file written exceptions thereto in the office of the clerk of such court in vacation, or in open court if in session, within twenty (20) days after the filing of such report, and the cause shall further proceed to issue, trial and judgment as in civil actions; the court may make such further orders, and render such findings and judgments as may seem just.

IND. CODE § 32-11-1-8 (1993) (recodified at IND. CODE § 32-11-1-8 (1998)).

110. *Lehnen*, 693 N.E.2d at 582.

111. *Id.*

112. *Id.* (citing *Swinney v. Fort Wayne & Cincinnati Ry. Co.*, 59 Ind. 205, 218 (1877)).

113. IND. CODE § 32-11-1-8 (1993) (recodified at IND. CODE § 32-11-1-8)).

twenty days of the report being filed.<sup>114</sup> The court concluded that because neither party filed exceptions, the trial court did not abuse its discretion in approving the appraisal report.<sup>115</sup>

The landowner further argued that he was denied his “due process” rights because the report failed to inform him of his statutory right to file exceptions within the twenty day time period. He argued that his constitutional rights of notice were not met because the report is to be treated as a complaint, and as such, must provide adequate notice.<sup>116</sup>

The court disagreed with the landowner’s contentions. The court stated that in the context of an eminent domain proceeding, the report and the exceptions serve to establish that only the issue of damages is to be tried.<sup>117</sup> The court concluded that “the report of the appraisers is not a complaint for purposes of notice to the landowners and that Lehnert received adequate notice of the proceedings to satisfy due process.”<sup>118</sup>

The Indiana Court of Appeals further addressed issues relating to appraisal reports in *Daugherty v. State*.<sup>119</sup> On March 16, 1995, the State of Indiana commenced an eminent domain action against Daugherty for real estate located in Knox County. The State offered Daugherty \$1300 for the property. After the landowner rejected the State’s offer, the State filed a complaint for appropriation of real estate.<sup>120</sup>

The lower court entered an order of appropriation and appointment of appraisers.<sup>121</sup> The appraisers filed their report, which appraised the damage to the landowner at \$4500. The State filed exceptions to the report based on the following: “[The report] overstated the damages to the residue of Daugherty’s property, understated the value of the benefits to the residue, and overstated the amount of just compensation due to Daugherty.”<sup>122</sup>

On April 18, 1997, the State withdrew its exceptions and moved for an entry of judgment. Because the landowner had not entered any exceptions, the lower court granted the State’s Motion for Judgment and ordered the State to pay \$4500 to Daugherty.<sup>123</sup>

The sole issue on appeal was whether the trial court erred in permitting the State of Indiana to unilaterally withdraw its exceptions to the appraisal report.<sup>124</sup> In affirming the lower court’s decision, the Indiana Court of Appeals analyzed

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114. *See Lehnert*, 693 N.E.2d at 582.

115. *Id.*

116. *See Best Realty Corp. v. State*, 400 N.E.2d 1204, 1206 (Ind. Ct. App. 1980).

117. *Lehnert*, 693 N.E.2d at 582.

118. *Id.*

119. 699 N.E.2d 780 (Ind. Ct. App. 1998).

120. *See id.* at 781.

121. *See id.*

122. *Id.*

123. *See id.*

124. *Id.*

Indiana case law regarding the issue.<sup>125</sup> The court noted that an exception had been established to the general rule that stated that by dismissing his own exceptions, a party may preclude others from litigating.<sup>126</sup> In *State v. Blount*, the court found that “it is unnecessary that a land-owner file exceptions as a condition precedent to his right to recovery, if exceptions have been filed by the condemning party.”<sup>127</sup> In making this decision, “the trial court noted that Blount had invested both significant time and effort in preparing for trial and it would have been unfair to allow one party to unilaterally withdraw its exceptions.”<sup>128</sup>

After reviewing *Blount* and subsequent decisions, the court concluded that: “a party does not have an absolute right to withdraw exceptions to the appraisers’ report; rather, the withdrawal of exceptions is subject to the trial court’s discretion.”<sup>129</sup> Based on the facts of the instant case, the court concluded that the trial court did not abuse its discretion in allowing the withdrawal and that the lower court properly granted the State’s motion for judgment.<sup>130</sup>

In *Jenkins v. Board of County Commissioners*,<sup>131</sup> the court of appeals was faced with an inverse condemnation proceeding. In this case, a roadway was altered to eliminate a double T-intersection thereby allowing traffic to proceed straight on the roadway without the necessity of making a turn.<sup>132</sup> Utilizing the power of eminent domain, the Board of County Commissioners of Madison County (the “Board”) acquired property from the Appellant-Plaintiff’s neighbor to accomplish the project.<sup>133</sup> After the construction was complete, approximately 675 feet of the roadway was no longer adjacent to the Appellant-Plaintiff’s property.<sup>134</sup> The Appellant-Plaintiff filed a Complaint for Inverse Condemnation claiming a loss of ingress and egress, road frontage, and corner influence.<sup>135</sup> The lower court ruled in favor of the Board. In ruling for the Board, the lower court concluded that 1) “the removal of the road bed represented a seventeen percent (17%) loss of total road frontage[,]” 2) “there was no substantial and material

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125. *Id.* at 782.

126. *Id.* (citing *State v. Blount*, 290 N.E.2d 480 (Ind. App. 1972)).

127. *Blount*, 290 N.E.2d at 483-84.

128. *Daugherty*, 699 N.E.2d at 782 (citing *Blount*, 290 N.E.2d at 483).

129. *Id.* The court explained that the factors to be used in the determination include: [T]he length of time between the filing of the appraisers’ report and the motion to withdraw, whether the withdrawing party is attempting to do so on the eve of the trial, whether the withdrawing party and trial court have been put on notice of the other party’s dissatisfaction with the report, either that be through the filing of belated exceptions or otherwise, and the extent of trial preparation which has already occurred, including the securing of expert witnesses and the extent of discovery.

*Id.* at 783.

130. *Id.*

131. 698 N.E.2d 1268 (Ind. Ct. App. 1998).

132. *Id.* at 1270.

133. *Id.*

134. *Id.*

135. *Id.*

interference with Jenkins' rights of ingress and egress[.]" and 3) there was no 'compensable taking.'"<sup>136</sup>

The issue on appeal was whether the trial court erred in determining that the Appellant-Plaintiff's property had not been "taken."<sup>137</sup> In affirming the lower court's decision, the court explained that "[i]t has long been recognized that the right of ingress and egress is a property right which cannot be taken without compensation."<sup>138</sup> A "taking" of property includes "any substantial interference with private property which destroys or impairs one's free use and enjoyment of the property or one's interest in the property."<sup>139</sup> The trier of fact, the court explained, resolves the question of whether the interference is substantial.<sup>140</sup>

The court determined that the evidence supported the trial court's decision. The court explained that "[a]t most the record demonstrates that [the Appellant-Plaintiff] was inconvenienced in obtaining access to his property. . . . A property owner is not entitled to unlimited access to abutting property at all points along the highway."<sup>141</sup> In addition, the court stated that the "fact that ingress and egress is made more circuitous and difficult does not itself constitute a taking of private property."<sup>142</sup> The court concluded by stating that "[w]here, as here, there has been no taking the question is whether the action of the governmental entity diminished the value of the property in its present use. . . . There is no evidence that as farmland the value of [the Appellant-Plaintiff's] property has been reduced by reason of the relocation of [the roadway]."<sup>143</sup>

#### IV. LANDLORD AND TENANT

##### *A. Security Deposits Statute*

When drafting the Indiana Security Deposits Statute,<sup>144</sup> the Legislature confined the purposes for which a landlord may use a security deposit to the following:

- (1) To reimburse the landlord for actual damages to the rental unit or any ancillary facility that are not the result of ordinary wear and tear expected in the normal course of habitation of a dwelling.
- (2) To pay the landlord for all rent in arrearage under the under the rental agreement, and rent due for premature termination of the rental agreement by the tenant.
- (3) To pay for the last payment period of a residential rental agreement

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136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* (citing *Board of Comm'rs v. Joeckel*, 407 N.E.2d 274, 278 (Ind. Ct. App. 1980)).

140. *Id.*

141. *Id.* at 1271 (citing *State v. Ensley*, 164 N.E.2d 342, 348 (Ind. 1960)).

142. *Id.*

143. *Id.* at 1271-72.

144. IND. CODE §§ 32-7-5-1 to -19 (1993) (recodified at IND. CODE §§ 32-7-5-1 to -19 (1998)).



where there is a written agreement between the landlord and the tenant that stipulates the security deposit will serve as the last payment of rent due.

(4) To reimburse the landlord for utility or sewer charges paid by the landlord that:

- (A) are the obligation of the tenant under the rental agreement; and
- (B) are unpaid by the tenant.<sup>145</sup>

The Legislature also provided a notice requirement within the statute that states:

In case of damage to the rental unit or other obligation against the security deposit, the landlord shall mail to the tenant, within forty-five (45) days after the termination of occupancy, an itemized list of damages claimed for which the security deposit may be used as provided in section 13 of this chapter, including the estimated cost of repair for each damaged item and the amounts and lease on which the landlord intends to assess the tenant. The list must be accompanied by a check or money order for the difference between the damages claimed and the amount of the security deposit held by the landlord.<sup>146</sup>

During the survey period, three cases were decided by the Indiana Court of Appeals highlighting various provisions of the Indiana Security Deposits Statute, particularly the above limited purposes provision and notice requirement. In *Deckard Realty & Development v. Lykins*,<sup>147</sup> a landlord brought an action against four tenants for unpaid rent and damages to a house.<sup>148</sup> The tenants, students at Indiana University, entered a one-year lease and secured the lease with an \$850 deposit.<sup>149</sup> Upon application for the lease, the landlord's agent wrote down the address of one of the tenants and placed the address in the rental file.<sup>150</sup> Later, after an inspection in which the landlord discovered that marijuana was being grown throughout the house, the landlord requested that the tenants vacate the premises immediately.<sup>151</sup>

The sole issue presented to the court of appeals for review was whether the landlord's knowledge of one of the four tenant's addresses was adequate notice of the tenants' forwarding address as required by the Indiana Security Deposits Statute.<sup>152</sup> In addressing the landlord's liability under the statute, the court of

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145. *Id.* § 32-7-5-13.

146. *Id.* § 32-7-5-14.

147. 688 N.E.2d 1319 (Ind. Ct. App. 1997).

148. *See id.*

149. *See id.* at 1320.

150. *See id.*

151. *See id.* at 1320-21.

152. *Id.* at 1321. The statute provides the following: "The landlord is not liable under this chapter until supplied by the tenant in writing with a mailing address to which to deliver the notice and amount prescribed by this subsection." IND. CODE § 32-7-5-12(a)(1993) (recodified at IND.

appeals stated that “a tenant must show that he provided the landlord with a written record of an address, which was intended to be his forwarding address.”<sup>153</sup> If an address is provided, the landlord is required to provide to the tenants an itemized list of damages within forty-five days of the termination of the tenants’ occupancy.<sup>154</sup> Failure to do so “constitutes an agreement by the landlord that no damages are due.”<sup>155</sup> The court of appeals concluded that three of the tenants had not supplied the landlord with their forwarding address and that a material issue of fact remained as to whether the one address supplied to the landlord was intended to be the fourth tenant’s forwarding address.<sup>156</sup>

In *Greasel v. Troy*,<sup>157</sup> the Indiana Court of Appeals addressed the statutory notice requirement of the Indiana Security Deposits Statute.<sup>158</sup> In *Greasel*, after the tenant had vacated the premise at the lease expiration, the landlord performed an inspection of the house and detected a strong pet odor that necessitated replacement of the carpet.<sup>159</sup> As required by statute, the landlord provided the tenant with an itemized statement of damages that included a listing for the estimated cost of carpet replacement.<sup>160</sup> The tenant filed suit in small claims court for return of the security deposit. The landlord filed a counterclaim for damages plus costs, interest, and attorney fees.<sup>161</sup> On September 30, 1996, the lower court entered judgment in the landlord’s favor for which the landlord received the \$1000 security deposit, \$400 in damages, and \$700 in attorney fees.<sup>162</sup>

In *Greasel*, the dispute centered on whether the landlord complied with the statutory notice requirement of the Indiana Security Deposit Statute. In her statement of damages, the landlord listed the carpet damage from the pet odor, as well as other items that she did not consider acceptable.<sup>163</sup> The other items listed, however, were not assigned an estimated cost.<sup>164</sup> In deciding that the notice was sufficient, the court stated that the “purpose of the notice provision is to inform the tenant that the landlord is keeping the security deposit and for what reason.”<sup>165</sup> The court further stated that such notice gives the tenant the

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CODE § 32-7-5-12(a) (1998)).

153. *Deckard Realty & Dev.*, 688 N.E.2d at 1322. The court further noted that a “landlord is not liable for failing to itemize its damages until the tenant has supplied the landlord with an address to deliver the required notice.” *Id.* at 1322 n.3.

154. *See id.* at 1321 (citing IND. CODE § 32-7-5-12(a)(3) & (14)).

155. *Id.* (citing IND. CODE § 32-7-5-15 (1993) (recodified at IND. CODE § 32-7-5-15 (1998))).

156. *Id.* at 1322.

157. 690 N.E.2d 298 (Ind. Ct. App. 1997).

158. *See* IND. CODE § 32-7-5-14 (1993) (recodified at IND. CODE § 22-7-5-14 (1998)).

159. *See id.* at 301.

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.* at 302.

164. *See id.*

165. *Id.* (citing *Meyers v. Langley*, 638 N.E.2d 875, 878 (Ind. Ct. App. 1994)).

opportunity to challenge the costs for which the deposit was used by the landlord.<sup>166</sup> The court noted that the landlord's failure to assign cost estimates to the other items did not render the statement insufficient under the statute because she made no claim for damages other than the carpet at trial.<sup>167</sup> If provided for in the lease agreement, "other items" may even include attorney fees.<sup>168</sup>

In *Pinnacle Properties v. Saulka*,<sup>169</sup> tenants filed a complaint seeking the return of their \$2500 security deposit.<sup>170</sup> The trial court entered judgment in favor of the tenants.<sup>171</sup> On appeal, the first issue involved whether security deposits could be used by landlords for certain purposes.<sup>172</sup> As highlighted above, security deposits may only be used by landlords for limited purposes.<sup>173</sup> The landlord's damage report sent to the tenants listed the following charges against the tenant's security deposit: 1) cleaning/trash out, \$558; 2) carpet cleaning, \$180.40; 3) carpet replacement, \$550; 4) painting, \$700; 5) other damages, \$670; 6) unpaid rent, \$330.64.<sup>174</sup>

In deciding that the itemized list was not in compliance with the statute, the court stated that "the Security Deposits Statute . . . must be strictly construed."<sup>175</sup> The court stated that a landlord "cannot merely itemize and include the estimated cost of repair for some items and then arbitrarily lump together 'other damages' leaving the tenant unable to discern for what purpose his security deposit is being retained and whether such charge is proper or reasonable."<sup>176</sup> The court concluded that the landlord's failure to comply with the notice provision "constitutes an agreement that no damages are due."<sup>177</sup> The tenants were refunded their security deposit and were awarded attorney fees pursuant to the statute.<sup>178</sup>

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166. *Id.*

167. *Id.* In fact, the court noted that the landlord's compliance with the statutory notice requirement "preserves her right to recover 'other damages' beyond the amount of the security deposit to which she is entitled." *Id.* (quoting *Miller v. Geels*, 643 N.E.2d 922, 925 (Ind. Ct. App. 1994)).

168. Section 32-7-5-12-(c) of the Indiana Code provides that "[t]his section does not preclude the landlord or tenant from recovering other damages to which either is entitled." IND. CODE § 32-7-5-12(c) (1993) (recodified at IND. CODE § 32-7-5-12(c) (1998)).

169. 693 N.E.2d 101 (Ind. Ct. App. 1998).

170. *Id.* at 103.

171. *See id.*

172. *Id.*

173. *See* IND. CODE § 32-7-5-13 (1998).

174. *See Pinnacle Properties*, 693 N.E.2d at 104.

175. *Id.* (citing *Miller v. Geels*, 643 N.E.2d 922, 927 (Ind. Ct. App. 1994)).

176. *Id.*

177. *Id.* *See* IND. CODE § 32-7-5-15 (1998).

178. The Indiana statute provides the following in regard to attorney fees:

A landlord who fails to provide a written statement within forty-five (45) days of termination of the tenancy or the return of the appropriate security deposit is liable to

### B. Landlord Duty of Care

Under traditional Indiana law, a landlord covenants to a tenant to 1) deliver possession of the premises on the first day of the lease, 2) not interfere with the tenant's quiet enjoyment of the premises, and 3) provide habitable premises.<sup>179</sup> The Indiana Court of Appeals in *Smith v. Standard Life Insurance Co. of Indiana*,<sup>180</sup> addressed various aspects of a landlord's duty of care owed to a tenant. In *Smith*, an employee slipped and fell on an icy sidewalk outside of her place of employment. The employee filed a complaint for negligence against the owner and lessor of the premises.<sup>181</sup> The lower court entered summary judgment for the owner and lessor of the premises.<sup>182</sup>

The primary issue on appeal was whether an employee of a tenant qualifies as a "third person" under the public use exception to the general rule of non-liability for landlords.<sup>183</sup> In deciding that the lower court did not err in granting summary judgment for the landlord, the court addressed whether the landlord had a duty to the employee of the tenant under either the general rule of non-liability for landlords or the public use exception.<sup>184</sup>

Under the general rule of non-liability for landlords, the law is settled regarding a landlord's duty of reasonable care. The landlord's duty can be stated as follows:

[A]s a general rule, in the absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession

the tenant in an amount equal to the part of the deposit withheld by the landlord, plus reasonable attorney's fees and court costs.

IND. CODE § 32-7-5-16 (1998).

179. See generally *Avery v. Dougherty*, 2 N.E.2d 123 (Ind. 1985); *Kostuck v. Vincent D.*, 684 N.E.2d 573 (Ind. Ct. App. 1997); *Voss v. Capital City Brewing Co.*, 96 N.E. 11 (Ind. App. 1911). In *Bradtmiller v. Hughes Properties, Inc.*, 693 N.E.2d 85 (Ind. Ct. App. 1998), a tenant sued a landlord for negligence after being attacked and assaulted in the apartment building parking lot. In deciding that the landlord did not have a duty to protect the tenant, the court explained that "the mere relationship of landlord and tenant did not impose upon [the landlord] a legal duty to protect [the tenant] against the intentional criminal acts of unknown third parties. Foreseeability of the type of harm is required and, here, criminal activity was not a reasonably foreseeable risk." *Id.* at 90.

180. 687 N.E.2d 214 (Ind. Ct. App. 1997).

181. See *id.* at 216.

182. See *id.*

183. *Id.*

184. *Id.* at 217-19. The public use exception was explained as follows:

Where premises are leased for public or semi-public purposes, and at [the] time of lease[,] conditions exist which render premises unsafe for purposes intended, or constitute a nuisance, and landlord knows or by exercise of reasonable care ought to know of conditions, and a third person suffers injury on account thereof, landlord is liable, because [the] third person is there at invitation of landlord, as well as of tenant.

*Id.* at 217 (quoting *Walker v. Ellis*, 129 N.E.2d 65, 73 (Ind. App. 1955)).

of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property. Generally, once possession and control of property have been surrendered, a landlord does not owe a duty to protect tenants from defective conditions.<sup>185</sup>

In *Smith*, the landlord had relinquished complete possession and control of the premises in favor of the tenant. The tenant was responsible for the maintenance and repair of the premises, and employees of the tenant removed the snow and ice from the sidewalks. Based on these facts, the court determined that under the aforementioned general rule, the landlord did not owe the tenant's employee any type of duty.<sup>186</sup>

In order for the public use exception to apply, the court of appeals explained that the employee must provide evidence to support the following:

(1) the property was leased for a public purpose, (2) a condition existed at the time of the lease which rendered the premises unsafe and the landlord knew or should have known of the condition by the exercise of reasonable care, and (3) a third person was injured because of the existing condition.<sup>187</sup>

In determining the applicability of the public use exception to *Smith*'s scenario, the court explained that the dispositive issue is whether the employee qualifies as a "third person."<sup>188</sup> The court noted that a landlord may be "liable to a 'third person' when the property is leased for public use because the third person is there at the invitation of both the landlord and the tenant."<sup>189</sup> However, in ruling that summary judgment was appropriate, the court concluded that the employee did not qualify as a "third person" under the public use exception because: 1) the lease gave the tenant complete possession and control; 2) the employee was on the premises at the time of her injury; and 3) the employee was clearly acting within the scope of her employment at the time of the injury.<sup>190</sup>

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185. *Id.* at 217 (quoting *Rogers v. Grunden*, 589 N.E.2d 248, 254 (Ind. Ct. App. 1992) (citations omitted)).

186. *Id.*

187. *Id.* at 217-18. The court explained that the definition of a "third person" on business premises is found in the second Restatement of Torts which states:

"'Third persons' include all persons other than the possessor of the land, or his servants acting within the scope of their employment. It includes such servants when they are acting outside of the scope of their employment, as well as other invitees or licensees upon the premises, and also trespassers on the land, and even persons outside of the land whose acts endanger the safety of the visitor."

*Id.* at 218 (quoting RESTATEMENT (SECOND) OF TORTS § 344 cmt. b (1965)).

188. *Id.*

189. *Id.* (citing *Walker v. Ellis*, 129 N.E.2d 65, 73 (Ind. App. 1955)).

190. *Id.*

## V. LIFE ESTATES

In *Nelson v. Parker*,<sup>191</sup> the Indiana Supreme Court overruled earlier authority regarding the creation of a life estate. Earlier case law<sup>192</sup> upheld the common law rule that “a grantor could reserve an interest only for the grantor, but not for a third person, or ‘stranger’ to the deed. Words of reservation were not considered to be words of ‘grant’ and so could not create an interest in another.”<sup>193</sup> In an opinion written by Justice Boehm, the court in *Nelson* found that a warranty deed that was “subject to a life estate” in the grantor’s habitat created a valid life estate, contrary to earlier precedent.<sup>194</sup>

The sole issue for the supreme court was whether a deed “subject to a life estate” in a third party created a valid life estate.<sup>195</sup> In the case, Russell Nelson died three months after executing a warranty deed containing the following language:

Convey and Warrant to  
RUSSELL H. NELSON, DURING HIS  
LIFETIME AND UPON HIS DEATH, SHALL  
PASS TO DANIEL NELSON.

SUBJECT TO: EASEMENTS, LIENS,  
ENCUMBRANCES, *LIFE ESTATE IN*  
*IRENE PARKER*, AND RESTRICTIONS  
OF RECORD.<sup>196</sup>

Irene Parker, the individual subject to the life estate, had lived with Mr. Nelson for thirteen years prior to his death. Ms. Parker remained on the property after Mr. Nelson’s demise. In 1994, Daniel Nelson, Russell Nelson’s son, initiated an action to eject her based on the fact that no life estate had been effectively granted.<sup>197</sup> The lower court ruled in favor of Ms. Parker, finding that Russell Nelson “had intended to create a life estate in Parker.”<sup>198</sup>

The court of appeals affirmed the judgment for Ms. Parker based on the grantor’s intent. The court analyzed and rejected the common law rule upheld in *Ogle v. Barker*.<sup>199</sup> In rejecting earlier precedent, the court of appeals noted that “the common law rule was derived from efforts, dating back to feudal times, to limit conveyance by deed as a substitute for livery by seisen.”<sup>200</sup>

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191. 687 N.E.2d 187 (Ind. 1997).

192. *Ogle v. Barker*, 68 N.E.2d 550 (Ind. 1946).

193. *Nelson*, 687 N.E.2d at 188.

194. *Id.* at 187.

195. *Id.*

196. *Id.* (emphasis added).

197. *See id.*

198. *Id.*

199. 68 N.E.2d 550 (Ind. 1946); *see Nelson*, 687 N.E.2d at 188.

200. *Nelson*, 687 N.E.2d at 188.

In affirming the lower court's decision, the Indiana Supreme Court stated that "the common law rule upheld in *Ogle* serves no practical purpose today."<sup>201</sup> The decision to override earlier precedent, the court noted, is in line with scholarly opinion and several other jurisdictions.<sup>202</sup> The court was "not persuaded that the public policy promoting settled rules requires adherence to a vestige of ancient conveyancing law that has only pernicious efforts. To the extent *Ogle* holds otherwise, it is overruled."<sup>203</sup>

#### VI. JOINT TENANCY AND TENANCY IN COMMON

Under established Indiana law, the Indiana Joint Tenancy Statute<sup>204</sup> governs the ownership rights incident to property held by two or more persons. A joint tenancy represents a "single estate in property owned by two or more persons under one instrument or act."<sup>205</sup> The requirements that must exist for a joint tenancy to be found include: "1) The tenants must have one and the same interest; 2) the interests must accrue by one and the same conveyance; 3) the interests must commence at one and the same time; and 4) the property must be held by one and the same undivided possession."<sup>206</sup> This statute "preserves the nineteenth century preference for tenancy in common."<sup>207</sup>

Under settled Indiana law regarding tenancy in common, an owner in common of personal property is permitted to sell his undivided interest; however, he is not permitted to sell or dispose of the entire property with being granted authority to do so by his cotenants.<sup>208</sup> Further, when an owner in common "converts the whole to his own exclusive use or does something equivalent to an

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201. *Id.* at 189.

202. *Id.* (citing *Aszmus v. Nelson*, 743 P.2d 377 (Alaska 1987); *Borough of Wildwood Crest v. Smith*, 509 A.2d 252 (N.J. Super. Ct. App. Div. 1986); *Malloy v. Boetcher*, 334 N.W.2d 8 (N.D. 1983); *Simpson v. Kistler Inv. Co.*, 713 P.2d 751 (Wyo. 1986); ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 10.11, at 719 (1984); 14 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* ch. 81A, at 119-22, 122 para. 899[3][g] (1997)).

203. *Id.* at 190.

204. IND. CODE § 32-4-1.5-15 (1998). The statute provides:

Personal property, other than an account, which is owned by two (2) or more persons is owned by them as tenants in common unless expressed otherwise in a written instrument. However, household goods acquired during coverture and in possession of both husband and wife, and any promissory note, bond, certificate of title to a motor vehicle, or any other written or printed instrument evidencing an interest in tangible or intangible personal property, other than an account, in the name of both husband and wife, shall upon the death of either become the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument.

*Id.*

205. *Poulson v. Poulson*, 691 N.E.2d 504, 506 (Ind. Ct. App. 1998) (citations omitted).

206. *Id.* (citing *Richardson v. Richardson*, 98 N.E.2d 190, 192-93 (Ind. App. 1951)).

207. *Id.*

208. *See id.* (citing *Sims v. Dame*, 15 N.E. 217, 219 (Ind. 1888)).

utter denial of the rights of his co-owner, he becomes liable to such co-owner for the injury thereby inflicted.”<sup>209</sup>

In *Poulson v. Poulson*, the Indiana Court of Appeals, during the survey period, had the opportunity to address the ownership rights of jointly held property of spouses after a dissolution of marriage.<sup>210</sup> The Poulsons were married in April 1979. The couple separated on October 21, 1991, and the wife filed a petition for dissolution of marriage on October 25, 1991. The marriage was dissolved by court order on July 22, 1992, and the marital assets were distributed pursuant to the marital settlement agreement of the parties.<sup>211</sup>

In August 1996, the ex-wife filed a Rule to Show Cause alleging that the ex-husband had disposed of a 1966 dune buggy that was jointly owned by each and had failed to pay the ex-wife one-half of the value of the asset. After a hearing on the issue, the lower court found for the ex-wife and ordered that the ex-husband pay \$500 to the ex-wife, which represents one-half of the value of the asset.<sup>212</sup>

On appeal, the sole issue involved whether the lower court abused its discretion in awarding the ex-wife one-half the value of the asset. The ex-husband argued that the lower court incorrectly modified the original dissolution decree by awarding the ex-wife one-half the value of the asset.<sup>213</sup> The ex-wife, however, maintained that the Indiana Joint Tenancy Statute does not apply. She argued that “since the parties held the property as tenants by the entirety during their marriage, upon dissolution they became tenants in common by operation of law.”<sup>214</sup> Thus, she argued, she was entitled to one-half the value of the sold asset.<sup>215</sup>

In affirming the lower court’s decision, the Indiana Court of Appeals explained that it “has long been held in this state that a final decree of dissolution converts a tenancy by the entirety into a tenancy in common with both spouses taking equal shares.”<sup>216</sup> However, the court explained that “it has also been held that estates by entireties do not exist as to personal property except when such property is directly derived from real estate held by that title.”<sup>217</sup>

Applying the Indiana Joint Tenancy Statute to the instant case, the court

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209. *Id.* (citing *Sims*, 15 N.E. at 219).

210. *Id.* at 504.

211. *See id.* at 505.

212. *Id.*

213. *See* IND. CODE § 31-1-11.5-17(b) (1993) (recodified at IND. CODE § 31-15-7-9.1 (1998)). The court explained that this section “governs the modification of property disposition and states that property disposition orders entered under final decrees may not be revoked or modified, except in case of fraud which must be asserted within six years after the order is entered.” *Poulson*, 691 N.E.2d at 505.

214. *Poulson*, 691 N.E.2d at 505.

215. *See id.*

216. *Id.* at 506 (citing IND. CODE § 32-4-2-2 (1993) (recodified at IND. CODE § 32-4-2-2 (1998))).

217. *Id.* (citing *Koehring v. Bowman*, 142 N.E. 117, 118 (Ind. 1924)).



found that the ex-wife and ex-husband had owned the dune buggy as joint tenants with the right of survivorship, not tenants by the entirety.<sup>218</sup> The court reasoned that the individuals' joint tenancy status is dependant upon the continuation of the marriage relation and that by statute, the law presumes that such property is held by spouses as joint tenants.<sup>219</sup> In this case, however, the court explained that the evidence revealed that the asset, acquired during marriage and titled to both spouses, was not disposed of in the original dissolution decree.<sup>220</sup> Upon the dissolution of marriage and the failure of the property to be disposed of in the divorce decree, the court explained that "the joint tenancy was severed and [the spouses] became owners of the dune buggy as tenants in common with each spouse sharing equally in the property."<sup>221</sup> Thus, the court affirmed the lower court's decision by concluding that because "Husband disposed of the dune buggy without Wife's permission and failed to deliver any part of the value to Wife, Wife was entitled to one-half the value of the dune buggy."<sup>222</sup>

## VII. WATER RIGHTS

### A. Common Enemy Doctrine

In *Trowbridge v. Torabi*,<sup>223</sup> the Indiana Court of Appeals had the opportunity to affirm that Indiana continues to adhere to the "common enemy doctrine." The Indiana Supreme Court has encapsulated the doctrine as follows:

In its most simplistic and pure form the rule known as the "common enemy doctrine," declares that surface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.<sup>224</sup>

Therefore, under the common enemy doctrine, it is permissible "for a landowner to improve his land in such a manner as to accelerate or increase the flow of

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218. *Id.*

219. *Id.*

220. *Id.* at 507.

221. *Id.*

222. *Id.*

223. 693 N.E.2d 622 (Ind. Ct. App. 1998).

224. *Id.* at 627 (quoting *Argyelan v. Haviland*, 435 N.E.2d 973, 975 (Ind. 1982)). An exception to the common enemy doctrine (or more accurately, a limiting principle to the doctrine) was stated by the court in *Pickett v. Brown*: "[O]ne may not collect or concentrate surface water and cast it, in a body, upon his neighbor." 569 N.E.2d 706, 708 (Ind. Ct. App. 1991) (quoting *Argyelan*, 435 N.E.2d at 976). See also *Gene B. Glick Co. v. Marion Constr. Corp.*, 331 N.E.2d 26, 31 (Ind. App. 1975) (stating that one "cannot, by means of drains and ditches, concentrate surface water, and by that means carry it where it never flowed before, and discharge it onto a lower land-owner to his damage").

surface water by limiting or eliminating ground absorption or changing the grade of the land.”<sup>225</sup>

*Trowbridge* involved a dispute among three owners of adjacent properties. A pond is located on all three properties, but is principally located on property owned by the Torabis. In 1995, the Torabis constructed a stone driveway across the pond for the purpose of gaining access to a landlocked part of their property. The Trowbridges and the Hamiltons (collectively “the Trowbridges”) filed a complaint, alleging that the construction of the driveway caused damage to their property.<sup>226</sup> The Trowbridges based their claims for damages on theories of nuisance and trespass.<sup>227</sup> The trial court granted summary judgment in favor of the Torabis, finding that “the laws of property rights and water rights apply and not the law of nuisance.”<sup>228</sup>

The court of appeals initially recognized the need to “classify” the water at issue in the case, stating that “[d]ifferent ‘water rights’ attach depending on whether water is classified as a private pond, a common private pond, a natural watercourse, or mere surface water.”<sup>229</sup> If the body of water at issue is classified as surface water, then nuisance law would not apply.<sup>230</sup> However, if the body of water is labeled a private pond, a common private pond, or a natural water course, then nuisance law might apply.<sup>231</sup> The classification of the water at issue in *Trowbridge* was particularly relevant because if it was classified as surface water, the common enemy doctrine could apply to shield the Torabis from liability for damage caused by the construction of the driveway.

The court held that the trial court’s grant of summary judgment in favor of the Torabis was erroneous in that genuine issues of material fact existed with regard to whether the Torabis were liable for damage to the adjacent properties.<sup>232</sup> Specifically, the court stated that “if the water involved is mere surface water, then, pursuant to the common enemy doctrine, the Torabis are not liable for the alleged damage . . . and the Trowbridges and Hamiltons may not circumvent the well-settled laws pertaining to surface waters by characterizing their cause of action as one based upon a nuisance.”<sup>233</sup> On the other hand, the court continued, “if the water is a common private pond and not mere surface

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225. *Pickett*, 569 N.E.2d at 707; *Trowbridge*, 693 N.E.2d at 626 (citing *Argyelan*, 435 N.E.2d at 973. See also *Cloverleaf Farms, Inc. v. Surratt*, 349 N.E.2d 731, 732 (Ind. App. 1976) (stating that a landowner may improve his property so as to cause surface water to stand in unusual quantities on other adjacent land).

226. See *Trowbridge*, 693 N.E.2d at 623-24.

227. See *id.* at 624.

228. *Id.* at 625.

229. *Id.* at 626.

230. See *id.*

231. See *id.* The court in *Trowbridge* proceeded to define the terms “surface water,” “pond,” “private pond,” and “natural watercourse,” and also discussed the rights and liabilities of adjacent landowners with respect to each classification. *Id.* at 626-28.

232. *Id.* at 628.

233. *Id.*

water, then . . . the Torabis may be liable for damages based upon a nuisance theory . . . .”<sup>234</sup> The court determined that factual issues existed that could not be resolved on the present record, and therefore remanded the case to the trial court.<sup>235</sup>

### *B. Ground Water Removal*

In *City of Valparaiso v. Defler*,<sup>236</sup> the court of appeals addressed an issue of first impression in Indiana. *Defler* addressed the issue of “whether a landowner’s right to remove ground water from his property shields him from liability for subsidence damage to adjoining land caused by the water’s removal.”<sup>237</sup> In *Defler*, landowners filed a lawsuit against the City of Valparaiso (the “City”), its Board of Public Works, McMahon Associates, Inc., and Woodruff & Sons, Inc. The landowners alleged that in the course of designing and constructing a sewer lift station adjacent to their property, the defendants caused their land to subside.<sup>238</sup> The City filed a motion for summary judgment, which the lower court denied. This interlocutory appeal followed.<sup>239</sup>

In affirming the lower court’s decision, the Indiana Court of Appeals explained that “[t]wo general theories have developed in the United States regarding the ownership and use of ground water.”<sup>240</sup> These theories include: 1) the English Rule, or the absolute dominion rule; and 2) the American Rule, or the reasonable use rule.<sup>241</sup> The English Rule, “provides that ground water is part of the land and the landowner has the absolute right to use the water as he wishes. This absolute right allows the owner of land to remove ground water regardless of the damage caused to neighboring property owners.”<sup>242</sup>

The American Rule, on the other hand, “provides that where the rights of others are affected by a landowner’s use of ground water, his use is limited to a ‘reasonable and beneficial use’ or to ‘some useful purpose connected with its occupation and enjoyment.’”<sup>243</sup> Thus, under the American Rule, the actual effect that the use of ground water has on neighboring landowners is considered.<sup>244</sup>

Indiana is among only ten states that continue to follow some version of the English Rule.<sup>245</sup> After analyzing Indiana case law regarding the issue,<sup>246</sup> the court

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234. *Id.*

235. *Id.* at 629.

236. 694 N.E.2d 1177 (Ind. Ct. App. 1998).

237. *Id.* at 1179.

238. *See id.* at 1178-79.

239. *Id.* at 1178.

240. *Id.* at 1179 (citation omitted).

241. *See id.*

242. *Id.* (citation omitted).

243. *Id.* at 1180.

244. *See id.*

245. *See id.* (citations omitted).

246. *See Wiggins v. Brazil Coal & Clay Corp.*, 452 N.E.2d 958, 964 (Ind. 1983) (holding that

“decline[d] to interpret Indiana’s version of the English Rule in a manner which would essentially place the right to remove ground water from one’s property above the right of an adjoining landowner to the subjacent support of his land.”<sup>247</sup> The court explained that its refusal to strictly follow the English Rule is “bolstered by the clear trend in this state and in other jurisdictions toward ameliorating the often harsh consequences which can result from strict application of the English Rule.”<sup>248</sup> The court held that “Indiana’s law regarding the ownership and use of ground water does not shield the City from liability for subsidence damage caused by the City’s removal of the water.”<sup>249</sup>

### VIII. ZONING

During the survey period, a number of zoning cases reached the appellate courts. Several cases involved appeals from decisions of various zoning boards—some discussed the standard for reviewing those decisions,<sup>251</sup> while others assessed a party’s standing to challenge a board’s decision.<sup>252</sup> In *Brownsburg Conservation Club, Inc. v. Hendricks County Board of Zoning*

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the right to the use of ground water does not extend to causing injury gratuitously or maliciously to the nearby lands).

247. *Defler*, 694 N.E.2d at 1182.

248. *Id.*

249. *Id.* The court also addressed the applicability of the Indiana Tort Claims Act (“ITCA”) to the case. The court found that “the trial court properly denied the City’s motion for summary judgment based upon its claim of immunity under the ITCA.” *Id.* at 1183.

251. *See Scott v. Marshall County Bd. of Zoning Appeals*, 696 N.E.2d 884, 885 (Ind. Ct. App. 1998) (stating that “[o]nly if the Board’s decision is arbitrary, capricious or an abuse of discretion should it be reversed” and recognizing that this places a “heavy burden” on a party petitioning to overturn the Board’s decision); *Rush County Bd. of Zoning Appeals v. Ryse*, 686 N.E.2d 186, 186-87 (Ind. Ct. App. 1997) (stating that “[w]hen reviewing a decision of the Board of Zoning Appeals the trial court must determine if the board’s decision was incorrect as a matter of law” and “[u]nless the Board’s decision was illegal, it must be upheld” (quoting *Board of Zoning Appeals v. Kempf*, 656 N.E.2d 1201, 1203 (Ind. Ct. App. 1995))). The court in *Scott* held that the board reasonably denied a property owner’s request for special exception to construct and operate a dog kennel on land zoned for agriculture. *Scott*, 696 N.E.2d at 887. The property owners were already housing several dogs and neighbors had complained that noise from the dogs was already a problem. *See id.*

252. *See Robertson v. Board of Zoning Appeals*, 699 N.E.2d 310, 315-16 (Ind. Ct. App. 1998) (holding that a grocery store owner did not waive the right to challenge standing of the landowner and neighborhood association to challenge a board decision to grant a variance by failing to object to standing during the initial hearing before the board). In *Robertson*, the court ultimately found that both the landowner and the neighborhood association lacked standing to challenge the board’s granting of the variance. *Id.* at 316-17. *See also City of New Haven v. Allen County Bd. of Zoning*, 694 N.E.2d 306, 312-13 (Ind. Ct. App. 1998) (finding that a city adjoining a landfill was not an “aggrieved” party under the Planning and Development Act, and therefore lacked standing to challenge the board’s settlement of several lawsuits concerning the landfill’s operations).

*Appeals*,<sup>253</sup> the court reviewed the board's revocation of a variance that had been previously issued. The court explained that "[a] variance affords relief from the enforcement of a zoning ordinance and permits use of property which the ordinance otherwise forbids."<sup>254</sup> The court then pointed out that while "the initial grant or denial of a variance rests within the discretion of the board of zoning appeals, a zoning board has no inherent authority to revoke a variance once issued."<sup>255</sup> However, the court continued, "because a zoning board is expressly authorized to impose reasonable conditions when it first approves a variance, the board has implied authority to revoke a variance if the conditions have not been satisfied."<sup>256</sup> The court held that the board "erred in failing to give the [property owners] notice and an opportunity to be heard on the question of whether the conditions for approval ha[d] been met" and also that the board "erred in failing to enter findings of fact to support its decision."<sup>257</sup> This case demonstrates the care with which a zoning board must proceed when making the decision to revoke a variance, given that a landowner may have invested substantial sums in reliance on the variance.<sup>258</sup>

Other decisions handed down during the survey period discussed particular uses of property. Some discussed whether particular uses were permissible given local ordinances or zoning classifications,<sup>259</sup> while others addressed the triggering of use permit requirements given the particular language of the applicable zoning ordinances.<sup>260</sup> The court of appeals also addressed the constitutionality of fines imposed on property owners for failure to comply with zoning ordinances.<sup>261</sup>

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253. 697 N.E.2d 975 (Ind. Ct. App. 1998)

254. *Id.* at 977 (citing *Hazel v. Metropolitan Dev. Comm'n*, 289 N.E.2d 308 (Ind. App. 1972)).

255. *Id.* (citing *Ash v. Rush County Bd. of Zoning Appeals*, 464 N.E.2d 347, 350 (Ind. Ct. App. 1984)).

256. *Id.* (citing *Schlehuser v. City of Seymour*, 674 N.E.2d 1009, 1014 (Ind. Ct. App. 1996)).

257. *Id.* at 978.

258. See *Danaya C. Wright, Trains, Trails, and Property Law: Indiana Law and the Rails-to-Trails Controversy*, 31 IND. L. REV. 753, 778-79 (1998) (discussing *Schlehuser*, 674 N.E.2d at 1009, and the procedural safeguards to landowners provided therein).

259. See *Discovery House, Inc. v. Metropolitan Bd. of Zoning Appeals*, 701 N.E.2d 577 (Ind. Ct. App. 1998) (construing language of zoning ordinance and finding methadone treatment facility's operations to be a "permitted use" under the ordinance); *Board of Zoning Appeals v. Leisz*, 686 N.E.2d 935, 937-40 (Ind. Ct. App. 1998) (finding landlord's "nonconforming use" of rental property to be permissible in that the use was legal when commenced and it was continuous from the effective date of the applicable restrictive zoning ordinance).

260. See *Brennan v. Board of Zoning Appeals*, 695 N.E.2d 983 (Ind. Ct. App. 1998) (construing definitions contained in zoning code and finding that use permit requirement was triggered); *Ad Craft, Inc. v. Board of Zoning Appeals*, 693 N.E.2d 110 (Ind. Ct. App. 1998) (interpreting language of ordinance requiring use permit for erection of sign, finding that "sign" includes both the message and the frame or structure displaying the message, and holding that alteration of a sign triggers the requirement of obtaining a use permit).

261. See *Ritz v. Area Planning Comm'n*, 698 N.E.2d 386 (Ind. Ct. App. 1998) (finding a fine

In *Wallace v. Brown County Area Plan Commission*,<sup>262</sup> the court was faced primarily with a constitutional issue; however, the case involved an interesting zoning ordinance. In *Wallace*, the Brown County Area Plan Commission and Board of Zoning Appeals filed a complaint for injunctive relief against the Wallaces seeking the removal of a neon sign from the window of the Wallaces' restaurant in Nashville, Indiana.<sup>263</sup> The Wallaces claimed that the ordinance prohibiting neon signs amounted to an unconstitutional restriction of commercial speech.<sup>264</sup>

The court proceeded with a discussion of commercial speech doctrine under the framework of the U.S. Supreme Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.<sup>265</sup> In finding the zoning ordinance banning the use of neon signs constitutional, the court concluded that the ordinance directly advanced the town's interests of safety and aesthetics, as evidenced by the unique scenic and architectural characteristics of the town.<sup>266</sup> Further, the court held that the ban of neon signs was "no more extensive than necessary to further the [t]own's interests in safety and aesthetics."<sup>267</sup> The court agreed with the trial court's statement that "[o]ther reasonable alternatives are open to the Wallaces, such as ground lighted signs which would not contrast with the aesthetic aspects of the community the ordinance seeks to preserve."<sup>268</sup> Therefore, the ordinance was upheld.

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excessive in that it exceeded statutory authority and misinterpreted language of statute authorizing the fine).

262. 689 N.E.2d 491 (Ind. Ct. App. 1998).

263. *Id.* at 492.

264. *See id.*

265. *Id.* at 493-94 (discussing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)). In *Central Hudson*, the Supreme Court set forth a four-part test for determining the validity of government restrictions on commercial speech:

(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

*Id.* at 493 (citing *Central Hudson Gas & Elec.*, 447 U.S. at 566; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981)).

266. *Id.* at 493-94.

267. *Id.* at 494.

268. *Id.*