

NEW BRICKS FOR THE WALL: DEVELOPMENTS IN PROPERTY LAW IN INDIANA

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The image of construction of a great structure, commencing long ago in our legal history and growing one small brick at a time to the present, is a metaphor that has been used to describe the incremental growth of the common law.¹ This metaphor recognizes that the common law usually advances by small steps based on the resolution of particular disputes between particular individuals rather than by great leaps of categorical pronouncements.² Both the pace and direction of the law's construction can, however, be accelerated by legislation and certain judicial decisions. When a court determines that the time has come to exercise the common law's capacity to adapt to new conditions, rather than to hold to its predisposition to stability, another brick is added.³ A case can be made that the law of the property surveyed for this law review in 1999⁴ exhibited an unusual emphasis in that year on categorical, as opposed to incremental, growth. In that survey period, the Indiana legislature redefined real estate broker duties owed to buyers and sellers to eliminate the principle of subagency that had been in place for decades⁵ and rearranged priority positions, at least in commercial developments, between construction lenders and mechanics and material suppliers.⁶ Finally, the Indiana Supreme Court announced that the proper framework for analyzing tenants' claims against landlords for personal injuries sustained in leased residential housing sounds in tort and not in contract for breach of warranty.⁷ In the 1999 survey period, new bricks were not only added to the legal wall, but the architects of that wall also decided to turn the course of

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1. Karl Lewellen describes this process of growth of the law as “a course of building as steady, as irresistible, as craftsmanlike, in some ways as beautiful, as that which through the medieval centuries raised cathedrals.” K.N. LEWELLEN, *BRAMBLE BUSH* 176 (1960).

2. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Dover Publications, Inc. 1991).

3. See ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 182 (Beacon Press 1963).

4. Lloyd T. Wilson, Jr., *Reconstructing Property Law in Indiana: Altering Familiar Landscapes*, 33 *IND. L. REV.* 1405 (2000).

5. See *id.* at 1419-31. The statutes that effected this change are Indiana Code sections 25-34.1-10-0.5 to -34-10-17. The survey period for that Article was October 1, 1998, to September 30, 1999.

6. See *id.* at 1406-19. The statutes that effected this change are Indiana Code sections 32-8-3-1 to -3-15.

7. See *id.* at 1440-53. The supreme court's analysis of this issue is found in *Johnson v. Scandia Associates, Inc.*, 717 N.E.2d 24 (Ind. 1999).

its direction.

The state of the law for the survey period for this article returns to the model of methodical and incremental growth. The legislature was not particularly active in property matters in 2000,⁸ a fact that may be explained both by the relative flurry of activity in 1999 and the reality of the short legislative session in 2000. The opinions published by the appellate courts in 2000 focus on adapting existing rules to fit new situations rather than on creating new rules. This fact does not mean that the appellate opinions issued in 2000 are not interesting or important, for they are both. It means only that the analysis in those opinions is conducted within an existing context rather than creating new contextual rules.

Six topics considered by the appellate courts are discussed in this article: (1) enforceability and priority of mechanic's liens; (2) rights and responsibilities of real estate licensees and landowners under exclusive right to sell listing agreements; (3) duties and liabilities of landlords to tenants; (4) premises liability; (5) mortgagee duties to mortgagors and to third parties, and mortgage enforcement procedures; and (6) the impact of the statute of frauds on real estate conveyances. The first three of these topics relate to issues considered in the 1999 survey issue.

I. MECHANIC'S LIENS

The Indiana Court of Appeals issued four opinions in 2000 that build upon existing mechanic's lien law principles. These cases are: *Dinsmore v. Lake Electric Co.*;⁹ *Rose & Walker, Inc. v. Swaffar*;¹⁰ *Ford v. Culp Custom Homes, Inc.*;¹¹ and *Mercantile National Bank of Indiana v. First Builders of Indiana, Inc.*¹² The amendments to the mechanic's lien statute passed by the Indiana legislature in 1999, which became effective on July 1, 1999, have not had time

8. Two statutes enacted by the Indiana General Assembly and signed into law by the Governor are: 1) Public Law 22-2000, House Enrolled Act 1180, codified as IND. CODE § 4-20.5-21-1 and -21-2 (permitting the words of the Ten Commandments to be displayed on real property owned by the State of Indiana) and IND. CODE § 36-1-16-1 and -16-2 (permitting the words of the Ten Commandments to be displayed on real property owned by a political subdivision). (These statutes were declared to be unconstitutional under the establishment clause of the First Amendment of the United States Constitution in the case of *Indiana Civil Liberties Union, Inc. v. O'Bannon*, 110 F. Supp. 2d 842 (S.D. Ind. 2000). and 2) Public Law 49-2000, House Enrolled Act 1228, codified as amendments to IND. CODE § 36-4-3-2.1 (providing notice procedures in annexation proceedings in which all property owners within the area to be annexed provide written consent to the annexation). The legislature passed Public Law 129-2000, Senate Enrolled Act 262 (directing the Indiana Department of Environmental Management to develop a non-rule policy document to address the migration of a spill or release from an underground storage tank to property that is owned by a person who does not own or operate the site where the UST is located).

9. 719 N.E.2d 1282 (Ind. Ct. App. 1999).

10. 721 N.E.2d 899 (Ind. Ct. App. 2000).

11. 731 N.E.2d 468 (Ind. Ct. App. 2000).

12. 732 N.E.2d 1287 (Ind. Ct. App. 2000).

to present issues for litigation that could reach the appellate court level. As a result, the cases confronted by the court of appeals in 2000 dealt with pre-amendment rules. However, because many pre-amendment rules were not affected by changes in the statute, the court's opinions in these four cases remain important.

*A. Scope of Property Against Which a Mechanic's Lien Can Be Filed:
Dinsmore v. Lake Electric Co.*¹³

In *Dinsmore*, the court was required to decide whether a bagger machine used by a lessee of real estate to screen, bag and dry various products was a proper subject of a mechanic's lien under Indiana's statute.¹⁴ The determination of the status of the bagger was crucial to the determination of the timeliness of Lake Electric's mechanic's lien filing. Lake provided electrical services to the lessee of the real estate, NIR, in various time periods. It first performed work between November 8, 1993, and March 16, 1994, for which it received only partial payment. Lake then provided additional services in April 1995, when it built a control system, repaired a burner control, and fixed the outside bagger system. Finally, Lake provided repair services on the bagger between May 20 and May 22, 1995. Lake filed its notice of intention to hold a mechanic's lien on July 21, 1995, which included all work performed from November 8, 1993, forward. Following a bench trial, the trial court entered a judgment in favor of Lake on its claim to foreclose on its mechanic's lien.¹⁵

The court of appeals reversed the judgment of the trial court, holding that the bagger was not a type of property that was subject to a mechanic's lien.¹⁶ The court of appeals reviewed the types of property identified in section 1 of the mechanic's lien statute and concluded that the only kinds of property that could conceivably include the bagger were "fixture" and "other structure."¹⁷ The court of appeals relied on three factors in deciding that the bagger was neither a fixture nor an other structure: its portability; its ability to be removed from the real estate without damage to any buildings or land; and NIR's intent to remove the bagger from the real estate at the end of the lease term.¹⁸ Based on these factors, the court of appeals concluded that the bagger was either an item of personal property or a trade fixture, neither of which can be the subject of the mechanic's lien.¹⁹ The entire lien was thus invalid because Lake provided no other work or

13. *Dinsmore*, 719 N.E.2d at 1282.

14. *See id.* at 1284. *Dinsmore* was reviewed in the 2000 volume of the survey edition of this law review, and the reader should consult the author's article in that edition, *see Wilson, supra* note 3, at 1415-16.

15. *See id.* at 1285.

16. *See id.* at 1288-89.

17. *See id.* at 1286.

18. *See id.* at 1288.

19. *See id.*

materials during the sixty days prior to the July 21 filing of its mechanic's lien.²⁰

Dinsmore implicitly reaffirms the long-established analytical framework used by courts in ruling on the validity of mechanic's liens. Courts strictly construe the lienholder's compliance with all elements of the statute²¹ because mechanic's liens are purely creatures of statute and are in derogation of the common law.²² Although Indiana courts utilize a liberal construction of the remedial provisions of the mechanic's lien statute once a claimant establishes that his claim is within the scope of the statute,²³ strict compliance is initially required for each element of the statute, including the type of property improved and the time provided for filing the notice of intention to hold mechanic's lien.

*B. Recording Requirement for Pre-Lien Notice:
Rose & Walker, Inc. v. Swaffar*²⁴

In *Rose & Walker*, the court of appeals applied the strict compliance approach to the statutory requirement of recording the claimant's pre-lien notice. The Swaffars were constructing a home on their lot, and Rose & Walker provided insulation and drywall for the construction but was never paid. Rose & Walker mailed a Notice of Lien Rights and Personal Liability letter to the Swaffars, and it recorded its Notice of Mechanic's Lien in the office of the county recorder. Rose & Walker subsequently filed a lawsuit to foreclose on its mechanic's lien. The parties thereafter filed cross-motions for summary judgment. The trial court denied Rose & Walker's motion because it failed to record a copy of the Notice of Lien Rights and Personal Liability letter it mailed to the Swaffars.²⁵ Rose & Walker appealed.

Rose & Walker clearly complied with the pre-lien notice requirements of Indiana Code section 32-8-3-3, but at issue was its compliance with the recording requirement for that notice, contained in Indiana Code section 32-8-3-1. This section states that a mechanic's lien claimant shall

furnish the owner of the real estate . . . with a written notice of the

20. *See id.*

21. *See, e.g., Abbey Villas Dev. Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91, 98 (Ind. Ct. App. 1999) ("As the Indiana statutes governing the filing of a notice of intention to hold a mechanic's lien . . . [are] in derogation of the common law, their provisions must be strictly construed."); *Riddle v. Newton Crane Serv., Inc.*, 661 N.E.2d 6, 9 (Ind. Ct. App. 1996) ("The Indiana statute governing filing of a notice of intention to hold mechanic's lien is in derogation of common law, and its provisions must be strictly construed.").

22. *See, e.g., Garage Doors of Indianapolis, Inc. v. Morton*, 682 N.E.2d 1296, 1302 (Ind. Ct. App. 1997).

23. *See, e.g., Abbey Villas*, 716 N.E.2d at 98 (stating that once claimants prove they are within Indiana's mechanic's lien statute, "the remedial provisions of the legislation should be liberally construed") (citing *Beneficial Fin. Co. v. Wegmiller Bender Lumber Co.*, 402 N.E.2d 41, 45 (Ind. Ct. App. 1980)).

24. 721 N.E.2d 899 (Ind. Ct. App. 2000).

25. *See id.* at 900.

delivery [of materials] or [provision of] labor and the existence of lien rights within sixty (60) days from the date of the first delivery or labor performed *and* shall file a copy of the written notice in the recorder's office of the county within sixty (60) days from the date of the first delivery or labor performed.²⁶

Rose & Walker did not comply with the recording requirement but urged the court to adopt a liberal reading of the statutory clause "shall file" that would render the failure to record the notice letter with the recorder's office harmless if no third party was adversely affected. In rejecting Rose & Walker's argument, the court of appeals identified two purposes furthered by the public filing requirement. First, the filing puts the landowner on notice that a lien has been placed on his property.²⁷ Second, the filing puts third party buyers on notice that the lien exists.²⁸ Of course, that notice would also be of keen interest to other third parties who might contemplate dealing with the real estate, including other providers of materials or labor and creditors who might wish to secure an extension of credit by a lien on the real estate.

The court of appeals noted that the second purpose of the public filing requirement was left unfulfilled by Rose & Walker's failure to record its pre-lien notice.²⁹ Instead of permitting a claimant to avoid the statute by demonstrating that no actual harm had occurred to a third party, the court evaluated the validity of Rose & Walker's mechanic's lien "in accordance with the strict rules of construction applied to these statutes."³⁰ In so doing, the court of appeals also supported the integrity of the public document recording system. An exception to the recording requirement would have created a gap in the public records and would have rendered those records less reliable for persons looking to acquire an interest in real estate.

C. *Venue and Recoverable Expenses: Ford v. Culp Custom Homes, Inc.*³¹

In *Ford*, the court of appeals considered the proper venue for filing a complaint to foreclose on a mechanic's lien and types of expenses that can properly be included in a lien. In this case, the Fords entered into a contract with Culp Custom Homes to build a house. Under this contract Culp was also to serve as general contractor. In return, the Fords agreed to pay Culp the total construction costs on a cost-plus basis and an eight percent contracting fee. Mrs. Ford's parents provided the financing for the construction of the home, and they recorded their mortgage against the real estate on August 9, 1995, in the office of the Recorder of LaPorte County.

Construction began on May 30, 1995, and disputes about the construction

26. IND. CODE § 32-8-3-1 (1998) (emphasis added).

27. *See Rose & Walker*, 721 N.E.2d at 902.

28. *See id.*

29. *See id.*

30. *Id.*

31. 731 N.E.2d 468 (Ind. Ct. App. 2000).

began shortly thereafter. By August of 1995, the Fords had fired Culp, and Culp terminated its work on the house. On October 13, 1995, Culp recorded its Notice of Mechanic's Lien in LaPorte County. The amount of the lien included sums due to Culp and due to another material supplier.

On October 31, 1995, Mrs. Ford's parents, as mortgagees, served Culp with a Notice to Commence Suit within thirty days, pursuant to Indiana Code section 32-8-3-10. On November 25, 1995, Culp filed a complaint, including a claim to foreclose its mechanic's lien, in the St. Joseph Circuit Court. The St. Joseph Circuit Court later transferred the case to the LaPorte Circuit Court, which accepted the transfer.³² The Fords and the mortgagees filed motions to dismiss the mechanic's lien foreclosure count of Culp's complaint. Both motions were denied, and the Fords and the mortgagees appealed.³³

The venue issue arose because the mechanic's lien claimant, Culp, filed its complaint to foreclose on mechanic's lien in a county other than the one in which the real estate is located. The Fords and the mortgagees argued that Culp's choice of venue rendered its mechanic's lien invalid. The court of appeals first noted that even though Indiana Code section 32-8-3-3 (pre-lien notice filing requirement) and Indiana Code section 32-8-3-6 (enforcement of mechanic's lien) both specifically require the mechanic's filing to occur in the county in which the subject real estate is located, the notice to commence suit provisions of Indiana Code section 32-8-3-10 are silent as to where suit must be filed.³⁴ To effect harmony and consistency among statutes that are *in pari materia*, the court of appeals held that section 10 imposes the same venue requirement as sections 3 and 6. Despite Culp's failure to file its complaint to foreclose on its mechanic's lien in the county where the real estate is located, the court of appeals concluded that Culp's claim was not subject to dismissal on that ground.³⁵ Instead, the general venue rules of Trial Rule 75 required that the case be transferred to the county where the real estate is located.

The court of appeals concluded that the provision of Trial Rule 75(D), which says: "No statute or rule fixing the place of trial shall be deemed a requirement of jurisdiction,"³⁶ means that the county where the subject real estate is located is the preferred venue, but filing a complaint to foreclose on a mechanic's lien in that county is not a jurisdictional requirement.³⁷ As a result, the trial rules provide one exception to the generally observed rule that strict compliance with the terms of the mechanic's lien statute is required for a trial court to have jurisdiction over a mechanic's lien claim.

The second issue considered by the court of appeals in *Ford* was the proper economic components of a mechanic's lien claim. Culp's claim contained three components: 1) \$22,301.49 that Culp owed to one material supplier for lumber

32. *See id.* at 471.

33. *See id.*

34. *See id.* at 472-73.

35. *See id.* at 473-74.

36. IND. TRIAL RULE 75(D).

37. *See Ford*, 731 N.E.2d at 473.

used on the project; 2) \$15,510.99 owed to a second material supplier for concrete products; and 3) Culp's eight percent contracting fee. The Fords and the mortgagees challenged these components on the grounds that a mechanic's lien claimant cannot assert a lien for labor or materials provided by third parties and cannot assert a lien for profit, which is the way they characterized Culp's contracting fee.

The Fords and the mortgagees further argued that Culp should not be permitted to include in its claim sums owed to the two material suppliers because both of those material suppliers had failed to send pre-lien notices and failed to timely record their liens. The Fords and the mortgagees argued that to permit the sums owed to these two material suppliers to be included in Culp's lien claim would be to open a backdoor that would enable mechanics to avoid the requirements of the mechanic's lien statute.

The Fords and the mortgagees' argument failed because of Culp's status as general contractor on the construction project. Culp was liable to the material suppliers for the cost of materials it ordered because, as general contractor, Culp was responsible for furnishing the labor and materials for the project. Thus, the court of appeals concluded that even though the materials originated from other sources, Culp was asserting a lien on its own behalf and not on the behalf of the suppliers to whom it was obligated.³⁸ The court of appeals noted that the remedial purpose of the mechanic's lien statute, including the prevention of "the inequity of a property owner enjoying the benefits of the labor and materials furnished by others without recompense,"³⁹ would be frustrated if a general contractor were prohibited from asserting a lien that includes labor or materials supplied by others when that general contractor is liable both to the owner and to the subcontractors hired to complete the project.⁴⁰

The final disputed component of Culp's lien claim was its contracting fee. The Fords and the mortgagees characterized this fee as profit, which had not previously been considered an item for which a lien can be asserted under Indiana Code section 32-8-3-1. The court of appeals acknowledged that section 1 of the mechanic's lien statute does not specifically mention profit as an item that can be included in a mechanic's lien claim⁴¹ but noted that a cost-plus contracting fee has been recognized as lienable, so long as the contractor's work included more than supervision.⁴²

The court of appeals expanded the existing rule, and stated that profit is indeed an item properly recoverable by way of a mechanic's lien under section 1.⁴³ The court concluded that "any claim for labor or materials reasonably

38. *See id.* at 474.

39. *Id.* at 472.

40. *See id.* at 475.

41. *See id.*

42. *See id.* (citing *Premier Invs. v. Suites of Am., Inc.*, 644 N.E.2d 124, 127 (Ind. 1994)).

43. *See id.* The exact words of the court are: "We decline to require that any person or entity asserting a mechanic's lien must exclude from that lien any monies that constitute profit to the claimant." *Id.* Stated positively instead of with multiple negatives, the court's holding is that a

includes some degree of profit," and that "[o]perating expenses, such as obtaining the supplies and delivering the product, are inseparably connected to the 'cost' of the materials, and constitute labor and materials within the meaning of the mechanic's lien statutes."⁴⁴

Ford may be an accurate recognition of the fact that materials and services are provided by businesses and individuals on a for-profit basis, but a blanket assertion that profit is a lienable item under the mechanic's lien statute should be qualified by a requirement that the profit component must have been agreed to by the land owner or agent purchasing material or labor on his behalf. The prices charged by a material supplier or laborer, and upon which each may assert a mechanic's lien, will necessarily already include a profit component that the owner agrees to by virtue of his purchase of the supplies or labor. Similarly, a contractor working on a cost-plus basis will have obtained the owner's agreement to the plus-profit component before work begins.

What would not be proper is for a contractor to assert a lien for profit in the sense of lost opportunity profits incurred as a result of the contractor's termination prior to the completion of the project. In *Ford*, Culp's contracting fee profit must be restricted under the mechanic's lien statute to the percentage of profit previously agreed to and to the amount of materials and labor supplied to the project before it was discharged. Whatever extra profit Culp might have earned had the project continued to completion would not relate to materials and labor provided for the improvement of the real estate, as required by section 1. Whether such lost opportunity profit is recoverable under breach of contract theory will depend on contract principles, but such profit should not be lienable under the mechanic's lien statute.

*D. Personal Liability Statute: Mercantile National Bank of Indiana v. First Builders of Indiana, Inc.*⁴⁵

In the final mechanic's lien case to be surveyed, *Mercantile National Bank*, the court of appeals had to determine the responsibilities of the owner of real estate to a material supplier who brought an action to foreclose a mechanic's lien and to hold the owner personally liable for the cost of materials that were provided to the project but for which the supplier had not been paid when the cost of completing the project far exceeded the contract price.

In the spring of 1994, the Thompsons entered into a contract with First Builders of Indiana, Inc. (FBOI) for the construction of a house. FBOI opened an account with Schilling Brothers Lumber and Hardware (Schilling) for the purchase of building materials. The Thompsons were aware of the existence of this account and at various times selected items to be charged to it. By July 1994, the Thompsons noticed a number of construction deficiencies,

person or entity asserting a mechanic's lien may include in that lien monies that constitute profit to the claimant.

44. *Id.*

45. 732 N.E.2d 1287 (Ind. Ct. App. 2000).

unauthorized structural changes and variations from the agreed design. FBOI assured the Thompsons that the problems would be remedied. In September and December 1994, the Thompsons paid FBOI the first two construction draws pursuant to their contract. Part of those draws was paid to Schilling for materials supplied. The Thompsons continued to notice deficiencies in the construction and, on December 22, asked FBOI to address them. When FBOI did not respond to the Thompsons' complaints, they refused to pay the third draw and FBOI ceased work on the house.

FBOI sued the Thompsons for failure to pay the third draw. Schilling intervened and asserted a claim against the Thompsons and FBOI to foreclose on its mechanic's lien and to obtain a judgment against both defendants for the value of the materials it had provided to the project. The Thompsons moved for summary judgment on Schilling's mechanic's lien claim, and, for reasons not stated in the appellate opinion, that motion was granted.⁴⁶

After the Thompsons filed their motion for summary judgment on the mechanic's lien claim, but before the trial court ruled on the motion, Schilling sent to the Thompsons a notice of intent to hold the owner personally liable, under Indiana Code section 32-8-3-9, for the balance of the cost of materials it had provided. The trial court entered judgment in favor of Schilling on this claim.⁴⁷ The Thompsons' first basis for challenging the decision of the trial court was that no cause of action existed between Schilling and them. This argument was based on the absence of any explicit reference to the personal liability provisions of the mechanic's lien statute in Schilling's complaint. The court of appeals rejected this argument by concluding that the presence of this issue could be inferred from the pleadings.⁴⁸ Further, the court concluded that the issue had, in fact, been tried with the implied consent of the parties, and thus the pleadings were deemed amended to conform to the evidence.⁴⁹

The Thompsons next argued that even if Schilling did assert a claim under the personal liability statute, it could not recover from them because a subcontractor's right to recover under the statute is limited to the amount of money that the owner owes the contractor. The Thompsons argued that they did not owe any money to FBOI because the cost to repair the defective work done by FBOI far exceeded the amount they owed to FBOI under the contract. The court of appeals rejected this argument as inconsistent with the purpose of the personal liability statute.⁵⁰

Central to the court of appeals' analysis is the decision of *McCorry v. G. Cowser Construction, Inc.*⁵¹ The court of appeals quoted *McCorry* for the rule that "the amount 'due' means the amount unpaid on the original contract, 'which amount would have been available for payment of subcontractors had the

46. *See id.* at 1289.

47. *See id.*

48. *See id.* at 1290.

49. *See id.* at 1290-91.

50. *See id.* at 1291.

51. 636 N.E.2d 1273 (Ind. Ct. App. 1994).

contractor not defaulted.”⁵² Accordingly, a bona fide indebtedness exists from the property owner to subcontractors after the contractor’s default even if the owner is compelled to pay more to have the construction completed properly than he would have owed if the contractor had completed the contract.⁵³ Any other result, the court said, would mean that no subcontractor would ever be able to recover under the personal liability statute after a contractor default, and the purpose of the statute would be defeated.⁵⁴ That purpose, as stated by the court of appeals, is “to protect a subcontractor ‘from the consequences of the contractor’s absconding or going broke or otherwise defaulting’ by providing to the subcontractor a means of shifting from himself to the owner the burden of the general contractor’s financial difficulties.”⁵⁵

The difference between this case and *McCorry* relates to the existence of money unpaid to the contractor at the time of default. In *McCorry*, the home owner had paid to the general contractor at the time of termination only \$108,300 out of a contract price of \$170,000. The Thompsons, by contrast, apparently contended that they had already paid out the full contract price by the time they terminated their relationship with FBOI. Even if that were the case, the court of appeals determined that several of the items that were included in the Thompsons’ calculation of expenditures had either been purchased by them and had been credited against the contract price, were outside the scope of the original contract, or were for upgrades from the original contract.⁵⁶ As a result, the court held that the Thompsons had in fact paid to FBOI \$70,000 less than the contract price and thus were liable to Schilling for the nearly \$43,000 it claimed under the personal liability statute.⁵⁷

Mercantile National Bank demonstrates that an unwary owner can incur liability for expenses in excess of the original construction contract price by using the unpaid portion of the original contract to pay for extra-contractual materials or labor to correct defective work by the original contractor and by his own direct participation in the materials purchasing process. The answer to these problems, of course, lies in traditional owner-protection devices such as no-lien contracts, lien waivers by material suppliers and laborers upon progress payments, and checks paid jointly to the general contractor and subcontractors. Although the availability of these remedies is restricted in commercial construction projects by the 1999 revision of the mechanic’s lien statute,⁵⁸ they are still available to protect individual homeowners like the Thompsons. If a homeowner fails to use available tools to protect his interests, or does not know

52. *Mercantile Nat’l Bank*, 732 N.E.2d at 1292 (quoting *McCorry*, 636 N.E.2d at 1279).

53. *See id.*

54. *See id.*

55. *See id.* at 1291 (quoting *McCorry*, 636 N.E.2d at 1278).

56. *See id.* at 1292.

57. *See id.*

58. *See* Acts of April 23, 1999, Pub. L. No. 53-1999, 1999 Ind. Acts 292 (codified as amended at IND. CODE §§ 32-8-3-1 to -3-15 (Supp. 1999)); *see also* Wilson, *supra* note 4, at 1406-19.

about them, he may be compelled by the personal liability statute to pay twice.

II. RIGHTS AND RESPONSIBILITIES OF REAL ESTATE LICENSEES

The property section of the 2000 edition of this law review contains an extensive discussion of the fundamental changes made to the law governing the relationship between real estate licensees and buyers and sellers of real estate.⁵⁹ In revisions made to Indiana Code sections 25-34.1-10-0.5 to -34.1-10-17, the legislature eliminated the long-standing principle of subagency and substituted a set of duties existing between a real estate licensee and a buyer or seller based on a customer relationship.⁶⁰ Similar to the significant changes made to the mechanic's lien statute in 1999, cases dealing with the changes made to the real estate agency statute have not yet had an opportunity to make their way through the appellate process. Nevertheless, two cases addressing rights and responsibilities of real estate licensees and landowners under exclusive listing agreements were addressed by the court of appeals during the survey period of this article.

A. *Exclusive Right to Sell Listing Agreement: Samar, Inc. v. Hofferth*⁶¹

In *Samar Inc.*, Hofferth brought a breach of contract claim against Samar for failure to pay a real estate commission to Hofferth pursuant to an exclusive right to sell listing agreement the parties had executed. The trial court entered a judgment in favor of Hofferth,⁶² and Samar appealed.

On April 1, 1997, Samar entered into a listing agreement with Hofferth, a real estate broker. The agreement contained an "exclusive right to sell" clause and was effective from April 1 to October 1, 1997. In addition, the agreement contained an extension clause that provided:

In the event of any transfer of an interest in said real estate within 180 days after the expiration of this Listing Contract and its extensions, to any person, firm or corporation who has been introduced, interested, or shown the property during the exclusive period of [the] listing by the Owner or by the Broker . . . Owner agrees to pay Broker a Commission as provided by this Listing Contract. . . .⁶³

The exclusivity provision in favor of Hofferth would cease to apply only if during the extension term Samar relisted the real estate with another broker under an exclusive right to sell listing contract.

In August 1997, Hofferth showed Samar's property to Lalwani, L.L.C. In September, Lalwani made an offer to purchase the property, and Samar accepted that offer. Subsequently, a dispute arose between Samar and Lalwani, and the

59. See Wilson, *supra* note 4, at 1419-31.

60. Act of May 3, 1999, Pub. L. 130-1999, 1999 Ind. Act 696.

61. 726 N.E.2d 1286 (Ind. Ct. App. 2000).

62. See *id.* at 1288.

63. *Id.*

sale was canceled. When the listing agreement expired on October 1, 1997, Hofferth refused to relist the property because of problems that had developed with Samar, including Samar's request that Hofferth agree to a reduced commission. Sometime later in October, Samar again negotiated with Lalwani and asked Hofferth if he would "put the deal together" for a commission significantly less than provided in the original listing agreement. Hofferth declined and reminded Samar of the extension clause contained in that agreement. Samar responded that he could defeat Hofferth's rights under the original contract by relisting the property with another broker.

Thereafter, on October 23, 1997, Samar entered into an exclusive right to sell listing contract with another broker. However, Samar excluded one party from this agreement, Lalwani. Under the new agreement, if the property were sold to Lalwani the new broker would not earn a commission. On October 30, Samar and Lalwani entered into an agreement for the sale of the real estate at the same price as in Lalwani's previous offer. The new broker did nothing to facilitate the sale, was paid only \$1500 for his time and was not paid a commission. Hofferth sued Samar to recover the ten percent commission payable under the exclusive listing agreement he had with Samar, and the trial court entered judgment in his favor. Samar appealed, contending that the trial court erred when it concluded that he had not relisted the property with another broker under an exclusive right to sell contract.

The court of appeals identified the "pivotal issue" in determining whether Hofferth was entitled to a commission as whether the contract that Samar entered into with the second broker was an exclusive right to sell listing contract.⁶⁴ In addressing this issue, the court of appeals stated that real estate brokerage contracts are subject to the same rules of construction as are applied to all other types of contracts.⁶⁵ One such rule requires a court to interpret the language used in a contract so as not to render any words meaningless; another rule requires a court to further the paramount goal of carrying out the intent of the parties.⁶⁶

The court correctly identified the purpose of including an extension clause in a real estate listing contract as providing protection for a broker who "has expended time and effort in discovering a purchaser, but the sale of the listed property to that purchaser does not occur until after the expiration of the term of the listing contract."⁶⁷ There would be no protection if a buyer is found during the term of the listing agreement, but the seller "avoid[s] the commission through the simple device of waiting until the brokerage contract had expired."⁶⁸

Samar clearly intended to avoid paying a commission to Hofferth. He not only attempted to avoid paying a commission to Hofferth by waiting to sell after the end of the term of the listing agreement but he also entered into a new agreement with a second broker, which excluded Lalwani, a buyer procured by

64. *See id.* at 1289.

65. *See id.* at 1290.

66. *See id.*

67. *Id.*

68. *Id.* (quoting *Ackerman v. Dobbs*, 580 N.Y.S.2d 793, 795 (App. Div. 1992)).

Hofferth. This behavior was transparent, and the court of appeals refused to permit Samar to avoid its contractual obligations to Hofferth.⁶⁹

It is important to note that the court did not invalidate clauses that exclude certain potential parties from exclusive right to sell listing agreements. There is no question that such exclusions can be included when the exclusive right to sell agreement is originally executed.⁷⁰ They are not permissible, however, “where the party [sought to be excluded by the seller] is subject to an extension clause and the buyer sought to be exempted is one to whom the extension clause applies.”⁷¹ There is also no dispute that an owner of real estate can avoid paying a commission to a broker if the parties have executed a non-exclusive listing agreement and if a buyer is located solely by the efforts of the owner. Apart from these two situations, however, the law will protect the broker’s legitimate expectation of a commission as agreed in the listing contract and will reject an owner’s attempts to obtain the benefits of a broker’s services without paying for them.

*B. Exclusive Right-to-Sell Agreements: Rogier v. American Testing & Engineering Corp.*⁷²

In *Rogier*, the court of appeals was presented with wide-ranging set of issues relating to an exclusive right-to-sell agreement. These issues included: determining whether a listing agreement was an exclusive right-to-sell contract or an exclusive agency contract; whether the agreement had terminated by the passage of time; whether the agreement was void for lack of consideration; whether the agreement was void for lack of mutuality; whether the agreement had been revoked by the passage of ten years after the date of execution; whether the broker had abandoned the agreement by not contacting the seller for two years; whether the broker had waived his rights under the agreement as a result of failing to communicate with the seller; whether the agreement was unenforceable because the broker had failed to disclose the exclusive right-to-sell feature of the agreement to the seller; and whether the seller had repudiated the agreement and thereby precluded the broker from performing his duties. At the heart of all of these issues is the same fundamental problem that lay at the heart of the *Samar* case—under what circumstances does a broker earn a commission under an agency agreement.

The facts of this case are lengthy, but an understanding of the actions and chronology is important for understanding the court’s opinion. Rogier was a marketing consultant who was experienced in sales, mergers, and acquisitions of commercial businesses, including environmental firms. American Testing & Engineering Corp. (ATEC) was an environmental engineering firm. By 1984 ATEC’s president had decided to sell the business, and on April 24, 1984, ATEC

69. *See id.*

70. *See id.*

71. *Id.*

72. 734 N.E.2d 606 (Ind. Ct. App. 2000).

and Rogier entered into a listing agreement whereby Rogier would seek suitable buyers. That agreement contained a clause that read: "6. EXCLUSIVE AGENT. [ATEC] appoints [Rogier] as the exclusive agent with an exclusive listing and all prospective buyers shall send copies of all correspondence and purchase offers to [ATEC] and [Rogier]."⁷³ If Rogier's services resulted in a "merger, acquisition, joint-venture, sub-contract, association, teaming or employment contract,"⁷⁴ the buyer, not ATEC, would pay Rogier. ATEC was obligated, however, to provide Rogier with its financial and business records so that Rogier could make presentations to prospective buyers. These records were referred to as "presentation materials."

From 1984 to 1990, Rogier "routinely" contacted ATEC with opportunities to sell the company, but ATEC's president did not begin to take "active steps" to sell until 1990. This six-year period of inactivity by the seller proved to be significant for the court of appeals in recognizing the continuing validity of the listing agreement following periods of apparent inactivity by Rogier.

In June 1990, Rogier entered into a search agreement with Baker, a large engineering firm that was looking to acquire businesses like ATEC. The search agreement provided that Rogier would be paid a commission of five percent of ATEC's gross income for the year prior to sale if Baker purchased ATEC. It further provided that Baker would pay Rogier two percent of that gross income immediately upon Rogier's sales presentation even in no purchase occurred.

From mid-1990 to the end of 1993, Rogier did not communicate with ATEC. Despite that lack of communication the trial record reflected that Rogier continued to work under listing agreement but that ATEC was unaware of his work. On or about January 21, 1994, Rogier notified ATEC in writing that Baker was interested in acquiring ATEC. Rogier asked ATEC to sign a "purchase offer letter" authorizing him to present ATEC to Baker as a possible acquisition candidate. ATEC eventually responded to Rogier's request and agreed to provide the presentation documents so that Rogier could Baker could make a "realistic offer."

On May 26, 1994, Baker reaffirmed its interest in making an offer to buy ATEC and asked Rogier to obtain certain additional financial information. In June and July, Rogier communicated with both ATEC and Baker to finalize a deal, but he was unable to make a sales presentation because ATEC refused to provide the requested financial and operations data. On July 29, 1994, Baker advised Rogier that it was no longer interested in acquiring ATEC. Rogier's last communication with ATEC was on July 29, 1994, although he continued to work under the listing agreement after that date.

In mid-1994, without informing Rogier, ATEC initiated contacts with another interested buyer, ATC. ATEC provided financial and operations data to ATC. In 1996 ATEC sold its business to ATC for "a large eight-figure sum" without involving Rogier or any other broker. In other words, ATEC sold its business "By Owner" when it was arguably subject to a listing agreement with

73. *Id.* at 611 (brackets in original).

74. *Id.*

Rogier.

When Rogier learned of the sale through a business journal, he filed suit against ATEC alleging that ATEC breached the listing agreement by: 1) refusing to provide the presentation materials so that Rogier could make a sales presentation to Baker and 2) failing to disclose the existence of the sale. As a result of ATEC's alleged breach, Rogier argued that he was damaged by the lost opportunity to make a sales presentation to Baker and by the loss of a commission on the sale to ATC. The trial court entered summary judgment in favor of ATEC, concluding that Rogier had sustained no damages as a result of ATEC's conduct and that the listing agreement was unenforceable, had terminated, or was abandoned or waived by Rogier as a matter of law.⁷⁵ Rogier appealed. The court of appeals affirmed the trial court's ruling with regard to the "lost opportunity" damages relating to his inability to make a presentation to Baker but reversed the trial court's decision with regard to Rogier's claim that he was entitled to receive a commission on the sale to ATC by virtue of an exclusive right-to-sell clause in the listing agreement.⁷⁶

Because of the large number of issues raised by the parties in this case, the court of appeals' decision contains a thorough review of rules relating to broker listing agreements. This article will not attempt to review all of those issues. Instead it will focus on the fundamental issues of determining the nature of the agreement between Rogier and ATEC and the impact that determination has on Rogier's claim that a commission had been earned and was payable by ATEC.

ATEC argued that under the listing agreement it retained the discretion to sell its own business, and that the agreement conferred on Rogier an exclusive listing but not an exclusive right to sell. Under this view, Rogier's commission would be earned only if he were the "procuring cause" of the sale of ATEC's business. Rogier argued that the listing agreement conferred on him an exclusive right to sell ATEC's business, which meant that his commission was earned even if he were not the procuring cause. The court of appeals agreed with Rogier.⁷⁷

The court of appeals began its analysis of the listing agreement by stating that "[i]t has long been the rule in Indiana that a broker earns its commission when it causes a sale or procures a buyer ready, willing, and able to purchase."⁷⁸ The court added that "in the absence of a special contract to the contrary,"⁷⁹ a broker must be the procuring cause to be entitled to receive a commission. But, "[n]otwithstanding the doctrine of procuring cause, Indiana courts will enforce specific provisions in a listing contract which allow a broker to earn a commission under other circumstances."⁸⁰ With regard to such circumstances, the court of appeals observed that "a listing contract may grant a broker the right to a commission even if the broker did nothing to contribute to the sale of the

75. *See id.* at 613.

76. *Id.* at 621-22.

77. *See id.* at 615.

78. *Id.*

79. *Id.*

80. *Id.*

property and regardless of whether the sale was effected by the broker or the owner or by any other person.”⁸¹ Rogier’s claim for payment of a commission on ATEC’s “by owner” sale to ATC depended, therefore, on whether the listing agreement the parties signed was an exclusive agency agreement or an exclusive right-to-sell agreement. Because he was not the procuring cause of the sale to ATC, ATEC would be liable to Rogier only under the latter.⁸²

In deciding on the nature of the listing agreement, the court of appeals “look[ed] to the particular language of the contract.”⁸³ The court applied “well-settled principles of contract interpretation” to that language “as with any other contract.”⁸⁴ Finding no ambiguity in the contract language, the court of appeals sought to apply the contract as the parties had agreed, especially the language in paragraph six. That paragraph provided first that Rogier was “the exclusive agent with and exclusive listing.” This language supports the existence of an exclusive agency agreement but does not grant an exclusive right to sell. For that right to have been conferred on Rogier, it would have to be found in the remaining language in paragraph six, which provided that “all prospective buyers shall send copies of all correspondence and purchase offers to [ATEC] and to [Rogier].”

The court of appeals concluded that the “plain and ordinary meaning” of this clause was that “Rogier shall be informed of and shall participate in negotiations with *all* prospective buyers, without exception and regardless of how they were procured.”⁸⁵ Because ATEC had agreed to involve Rogier in negotiations with all prospective buyers, the court of appeals concluded that it had relinquished its right to exclude him from negotiations with any buyer, which had the effect of conferring on Rogier an exclusive right to sell and of depriving ATEC of the ability to sell its business on its own. Once exclusive sale rights were found in Rogier, he no longer needed to be the procuring cause of a sale to earn a commission.⁸⁶

The *Rogier* opinion confirms the validity of exclusive right-to-sell listing agreements and reaffirms the rule that for a commission to be deemed earned under such an agreement, the broker need not have been the procuring cause of the sale. Accordingly, the law gives a specialized meaning to the word “earn.” Taken together, *Rogier* and *Samar* provide reassurance to brokers that once a

81. *Id.*

82. The court of appeals concluded that Rogier could not recover damages from ATEC from his inability to make a sales presentation to Baker, and thereby earn an immediate two percent commission, because such damages were not foreseeable at the time Rogier and ATEC entered into their listing agreement. The terms of the Rogier—Baker agreement differed significantly from the terms of the Rogier—ATEC agreement, and ATEC would have had no way at the time of contracting with Rogier that its actions would have resulted in a loss to him under a contract to be executed in the future with an unknown party. *See id.* at 613-14.

83. *Id.* at 616.

84. *Id.*

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

86. *See id.*

commission has been earned, as defined in the listing agreement, sellers are not likely to escape the obligation to pay.

The remainder of the *Rogier* opinion considered whether the exclusive right-to-sell agreement was "otherwise valid" in light of challenges raised by ATEC based on uncertainty of duration, lack of mutuality of obligation, lapse due to passage of time, and waiver. While the opinion contains a good review of the rules pertaining to each of these issues, the waiver arguments are interesting because they raise questions about the nature of disclosure that a broker must make to a seller concerning the exclusive right to sell clause and about the nature of the understanding by the seller of the impact of that right on the seller's ability to sell his property on his own.

ATEC argued that Rogier waived any exclusive right to sell because he never "discussed" the exclusivity of their relationship with ATEC. The court of appeals rejected this argument by stating that "[i]rrespective of what Rogier 'discussed' with ATEC, the clear and unambiguous language of their exclusive listing agreement conferred upon him an exclusive and unequivocal right to sell ATEC's business."⁸⁷ This conclusion exemplifies often taken by the law in transactions involving commercial parties. In such transactions, the parties are presumed to be able to protect themselves and are not thought to need any extra assistance from the law. This presumption does not apply to transactions involving individuals, and the law often requires that certain contract terms be brought to the special attention of individuals, such as requiring the term to be printed in conspicuous type or by requiring the term to be typed on a separate paper that must then be signed by the individual.⁸⁸ It could reasonable be presumed that ATEC, a business worth "eight figures," was guided by sophisticated managers. Can the same assumption always be made whenever a business is a party to a listing agreement? Are individuals who form a closely held corporation as their first business venture or to operate a "mom and pop" company automatically vested on commencing business with sophistication? Under the right facts in a future case a reasonable argument could be made that a broker should be required to make some degree of disclosure and discussion of the nature and effect of an exclusive right-to-sell agreement to the seller for that agreement to be enforceable.

III. LANDLORD-TENANT RELATIONS

The field of landlord-tenant relations law was dominated in 1999 by the Indiana Supreme Court's decision in *Johnson v. Scandia Associates, Inc.*,⁸⁹ in which the court held that a warranty of habitability to support a personal injury action could not be implied as a matter of law into all residential real estate

87. *Id.* at 620.

88. *See, e.g.*, IND. CODE §§ 32-15-7-9 and 24-5-11.5-13 (2000) (stating the requirements for waiver of implied warranties in new home construction and improvement of exiting homes).

89. 717 N.E.2d 24 (Ind. 1999).

leases.⁹⁰ *Johnson*, which was reviewed and analyzed in the 2000 survey issue of this law review,⁹¹ considered the proper roles of tort law principles and contract law warranty principles in residential leases. The supreme court refused to imply a warranty of habitability into all residential leases because it considered such a warranty to be a creature of contract and contract terms must be based on agreement of the parties. Although the court acknowledged that a warranty of habitability could arise by express agreement, or could be implied in fact by course of dealing or ordinary practices in the trade, it refused to otherwise imply a warranty.⁹² The court concluded that to do so would violate the contract law principle that “[c]ontracts are private, voluntary allocations by which two or more parties distribute specific entitlements and obligations” and would impose an involuntary risk distribution more appropriate under tort law.⁹³

One appellate opinion issued during this survey period, *Zawistoski v. Gene B. Glick Co., Inc.*,⁹⁴ continues the debate over the place of implied warranties in residential leases. Two other cases, *City of Indianapolis Housing Authority v. Pippin*⁹⁵ and *Schoknecht v. Hasemeier*,⁹⁶ address two additional landlord-tenant issues: premises liability in tort for landlords for personal injuries sustained by tenants at the hands of third-party non-residents and landlord compliance with Indiana’s Security Deposits statute.⁹⁷

*A. Breach of Warranty Claims: Zawistoski v. Gene B. Glick Co., Inc.*⁹⁸

Zawistoski implements and reinforces the analysis, originating in the supreme court’s opinion in *Johnson v. Scandia Associates, Inc.*,⁹⁹ of the inapplicability of breach of warranty theory to claims filed against landlords by lessees of residential real estate for personal injuries sustained on the leased property.¹⁰⁰ The facts of the *Zawistoski* case are relatively simple. In 1991, Zawistoski and Glick entered into a lease agreement for an apartment in a complex in Bloomington, Indiana. Glick had advertised the apartment complex as designed for individuals sixty-two years of age and older and as accessible for individuals with disabilities or limited mobility. After residing in the complex for six years, Zawistoski tripped on a raised portion of a sidewalk in a common area and sustained a fractured neck.

Zawistoski sued Glick and asserted claims based on negligence and breach

90. *See id.* at 32.

91. *See Wilson, supra* note 4, at 1447-52.

92. *See Johnson*, 717 N.E.2d at 31.

93. *Id.* at 29.

94. 727 N.E.2d 790 (Ind. Ct. App. 2000).

95. 726 N.E.2d 341 (Ind. Ct. App. 2000).

96. 735 N.E.2d 299 (Ind. Ct. App. 2000).

97. *See* IND. CODE § 32-7-5-14 (2000).

98. *Zawistoski*, 727 N.E.2d at 790.

99. 717 N.E.2d 24 (Ind. 1999).

100. *See Zawistoski*, 727 N.E.2d at 791.

of contract. She later amended her complaint to add a breach of warranty count. Glick moved for summary judgment on the breach of warranty and breach of contract claims. The trial court granted Glick's motion, concluding that the lease agreement did not create an express warranty that Glick would ensure that the common areas were in a safe condition.¹⁰¹ After Glick prevailed on the negligence claim at trial, Zawistoski appealed the grant of Glick's motion for summary judgment on the breach of warranty and breach of contract claims.¹⁰²

Zawistoski's breach of warranty claim was based on her theory that a provision of the lease agreement created an express warranty. Alternatively, she argued that an express warranty was created by the content of Glick's promotional advertisements. The lease provision in which Zawistoski saw an express warranty was paragraph 10(a), which stated: "The Landlord agrees to . . . maintain the common areas and facilities in a safe condition."¹⁰³ The court of appeals concluded that this lease provision simply restated the existing common law that a "landlord has a duty of reasonable care that the common ways and areas are maintained in a reasonably fit and safe condition."¹⁰⁴ The court of appeals contrasted this duty with the duty imposed by a warranty, which is "a promise relating to a past or existing fact that incorporates a 'commitment by the promisor that he will be responsible if the facts are not as manifested.'"¹⁰⁵ The court of appeals found the existence of a warranty commitment that defects will never exist to be inconsistent with other provisions of the lease, such as provisions that imposed on tenants a duty to report the existence of defects and that imposed on Glick the obligation to make necessary repairs.¹⁰⁶ Such provisions have meaning only if paragraph 10(a) is read as a restatement of the common law rule.

The court of appeals also rejected Zawistoski's argument that Glick's advertisements referring to the apartment complex as accessible for the elderly created an express warranty by stating that there was no evidence that she did not receive the benefit of the advertised amenity or that she gave any consideration for it.¹⁰⁷ Zawistoski had, after all, been content with the amenities of the apartment complex as, by the time of her accident, she had renewed her lease to reside there for a total of six years.

Zawistoski is perhaps as noteworthy for the line of reasoning it uses, and the line of reasoning it rejects, as for its result. The tenant in *Johnson* urged the supreme court to imply a warranty of habitability into leases for residential property. The supreme court refused to imply such a warranty and relied on an analysis that viewed a lease in the same manner as any other contract and viewed obligations voluntarily assumed by agreement of the parties as the heart of a lease

101. *See id.* at 792.

102. *See id.*

103. *Id.* at 793.

104. *Id.*

105. *Id.* (quoting *Johnson v. Scandia Assocs., Inc.*, 717 N.E.2d 24, 28 (Ind. 1999)).

106. *See id.*

107. *See id.* at 794.

contract.¹⁰⁸ The supreme court acknowledged that warranties could arise with regard to residential leases but said they would have to be expressly stated or be implied from the landlord's conduct.¹⁰⁹

Zawistoski tried to argue that a lease provision created an express warranty. The court of appeals, in its analysis of that claim, signaled an emphasis on the presence of an express bargained-for agreement between the parties. This emphasis, which is consistent with the supreme court's analysis in *Johnson*, means that express warranties in residential leases will have to be clearly stated to be enforceable and that such warranties will not be found to exist by inference from ambiguous or non-specific lease terms.

*B. Determining the Scope of a Landlord's Duty of Care:
City of Indianapolis Housing Authority v. Pippin*¹¹⁰

In *Pippin*, the court of appeals was called upon to determine the scope of a landlord's duty to use reasonable care to protect a tenant from harm in the common areas of residential apartment complexes. In deciding the case, the court of appeals rejected a narrow view of a landlord's duty that would impose liability only where the events that actually occurred were themselves foreseeable and instead utilized a broader view of duty that permits liability to be imposed when a category of events, which includes the events that actually occurred, was foreseeable.¹¹¹

The City of Indianapolis Housing Authority (Housing Authority) operated a residential apartment complex and the Pippin family occupied one of the apartments in the complex. One day, fourteen-year-old Angela Pippin was playing basketball with friends at a portable basketball goal set up in the area of the apartment complex that was paved for vehicular traffic. On that same day, a twelve-year-old boy used a screwdriver to start an abandoned car that had been left in the apartment complex parking lot. The boy lost control of the car and struck several children, including Angela who died from her injuries. Angela's parents filed a wrongful death suit against the Housing Authority. They alleged that the Housing Authority was negligent in failing to provide a safe area for resident children to play and in failing to address a persistent problem of stolen vehicles being abandoned on the property.

The Housing Authority filed a motion for summary judgment contending that as a matter of law the Pippins could not establish that it owed any duty to Angela and that its actions were not the proximate cause of her death. The trial court denied the Housing Authority's motion, and the case was tried to a jury.¹¹² At the close of the Pippins' case, the Authority moved for judgment on the evidence,

108. See *Johnson*, 717 N.E.2d at 29.

109. See *id.* at 30-31.

110. 726 N.E.2d 341 (Ind. Ct. App. 2000).

111. See *id.* at 346.

112. See *id.* at 344.

which was denied.¹¹³ The jury found in favor of the Pippins and awarded \$163,000 in damages.¹¹⁴ The Housing Authority appealed.

The court of appeals began its analysis by reaffirming basic principles of tort law. It restated the fundamental position of duty in tort analysis by noting that “[a]bsent a duty owed to a plaintiff by the defendant, there can be no actionable negligence,” and that “[w]hen found to exist, the duty is to exercise reasonable care under the circumstances.”¹¹⁵ This duty “never changes,” but “the standard of conduct required to meet that duty varies based on the circumstances.”¹¹⁶ Determining of the existence of a duty in a particular case requires a court to “balance three factors: 1) the relationship between the parties; 2) the reasonable foreseeability of harm to the person injured; and 3) public policy concerns.”¹¹⁷

The first factor was easily established because the Pippins had lived in the apartment complex for approximately four years prior to the events that resulted in Angela’s death. As a result of the landlord-tenant relationship, the Housing Authority had “a duty of reasonable care to see that the common areas or areas under [its] control [were] reasonably fit.”¹¹⁸ This factor, the court concluded, weighed in favor of finding a duty on the part of the landlord to protect Angela from harm when she used the basketball goal.¹¹⁹

With regard to the foreseeability of harm, the Housing Authority argued that it was not foreseeable that a twelve-year-old boy would use a screwdriver to start a stolen car and then lose control of that car and cause injury. The court of appeals said that the Housing Authority’s view of both the identity of the plaintiff and the nature of the harm was too “cramped.”¹²⁰ A more appropriate view of the foreseeability factor “requires a general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence.”¹²¹ Here, that broad analysis would be whether it was foreseeable that a child (not necessarily Angela) playing basketball at a goal erected and maintained by the Housing Authority in a paved area designed for vehicular traffic (not necessarily stolen vehicles) might be struck and injured by a vehicle (not necessarily driven erratically by a twelve-year-old boy). The conclusion, the court said, did not stretch the imagination and weighed in favor of the existence of a duty for the Housing Authority in this case.¹²²

The court of appeals also found that public policy considerations supported imposing a duty on the Housing Authority in this case because such a duty would be consistent with existing notions of a landlord’s duty to use reasonable care to

113. *See id.*

114. *See id.*

115. *Id.* at 345.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See id.*

120. *Id.* at 346.

121. *Id.*

122. *See id.*

see that common areas under its control are reasonably fit.¹²³ Specifically, the court concluded that “[s]uch a duty would require all multi-family housing complexes to consider the safety of the areas in which resident children play.”¹²⁴ For the court, all three factors used to determine the existence of a duty weighed in favor of finding a duty owed to Angela by the Housing Authority.

The court also found that the issue of proximate cause was appropriately left to the jury.¹²⁵ Foreseeability in the context of establishing proximate cause does not require that a similar act have occurred in the past to put the Housing Authority on notice that injury might occur in the future. Other circumstances in existence prior to a particular injury can be sufficient to support foreseeability. Here, such support came from the fact that the Housing Authority had control over the paved area where the basketball goal was located, that management of the apartment complex knew prior to Angela’s death that the goal was in a paved area, and that the goal had been present in the paved area for several months. Unless only one conclusion can be drawn from such circumstances, the presence of proximate cause is a matter for the finder of fact and cannot be resolved on a motion for summary judgment.¹²⁶

*C. Content and Purpose of the Security Deposits Statute’s
Notice Provisions: Schoknecht v. Hasemeier*¹²⁷

In *Schoknecht*, compliance with landlord notice provisions of Indiana’s Security Deposits statute¹²⁸ was at issue. This statute sets forth specific circumstances under which a landlord can retain money deposited by a tenant as a security deposit. A landlord may not deduct any sum from a security deposit that is not identified in section 13 of the statute.¹²⁹ Further, a landlord must mail to a tenant within forty-five days after the termination of the tenant’s occupancy an itemized list of damages that the landlord claims may be deducted from the security deposit, “including the estimated cost for each damaged item and the amounts and lease on which the landlord intends to assess the tenant.”¹³⁰ If the landlord complies with the statutory notice provision, he may “retain the tenant’s security deposit and apply it towards ‘the amount of damages that the landlord has or will reasonably suffer by reason of the tenant’s non-compliance with the law or rental agreement.’”¹³¹ If the landlord fails to comply with the notice provisions, the absence of notice “constitutes agreement by the landlord that no

123. *See id.*

124. *Id.*

125. *See id.* at 346-47.

126. *See id.* The court of appeals used the same foreseeability analysis to reject the Authority’s appeal of the denial of its motion for judgment on the evidence. *See id.* at 347-48.

127. 735 N.E.2d 299 (Ind. Ct. App. 2000).

128. IND. CODE § 32-7-5-14 (1989).

129. IND. CODE § 32-7-5-13 (1989).

130. *Schoknecht*, 735 N.E.2d at 302.

131. *Id.* (quoting IND. CODE § 32-7-5-12(a)(2) (1995)).

damages are due, and the landlord must remit to the tenant immediately the full security deposit."¹³² The purpose of the statute is to restrict a landlord's set-off claims against a tenant's security deposit to only those items approved by the legislature and to provide for a timely return of the tenant's deposit if none of the approved uses is present.

Schoknecht, the landlord, and Hasemeier, the tenant, entered into a lease agreement for residential property, which included a \$750 security deposit. Landlord claimed that tenant subsequently defaulted by committing waste on the property and by failing to make lease payments when they became due. Landlord became entitled to possession of the leased property on May 1, 1997, by virtue of a judgment entered on a complaint for damages that the landlord had filed against tenant. On June 12, tenant requested the return of her security deposit. Landlord replied on June 13 by letter in which landlord claimed damages in excess of the amount of tenant's security deposit. Landlord's letter contained an itemized list of damages and the estimated cost of repair.

Following procedural maneuverings not relevant to the issue raised on appeal, tenant filed a motion for summary judgment against landlord's damages claim. Tenant argued that landlord's June 13 letter failed to comply with the notice requirements of the Security Deposits statute because it contained damages that landlord was not legally entitled to deduct from tenant's security deposit. The trial court granted tenant's motion, and landlord appealed.¹³³

Landlord liability for failure to comply with the notice requirements of the statute arises: where "1) that landlord erroneously calculates the tenant's damages, 2) the tenant resorts to legal action to collect all or part of his deposit, and 3) the tenant was entitled to a return to a refund of all or part of the tenant's deposit."¹³⁴ Hasemeier argued that Schoknecht failed to comply with the statute because the notice letter contained items that the landlord was not entitled to deduct and he failed to substantiate the estimated costs of repair. Accordingly, the court of appeals was required to decide what content of a notice letter is sufficient to satisfy the statutory requirements.¹³⁵

In determining that Schoknecht's June 13 letter did not violate the security deposits statute, the court of appeals noted that the statute applies only to claims made against security deposits and that Indiana Code section 32-7-5-12(c) does not preclude a landlord from asserting other claims against a tenant.¹³⁶ The court concluded that landlord had a right, under the terms of the lease agreement, to seek recovery for items that could not be recovered under the statute and that the landlord did not violate that statute by including the contractually permitted items with the statutorily permitted items in one letter.¹³⁷ In other words, the notice letter content requirements of Indiana Code section 32-7-5-14 do not

132. *Id.* (quoting IND. CODE § 32-7-5-15 (1989)).

133. *See id.*

134. *Id.* (citing *Rueth v. Quinn*, 659 N.E.2d 684, 689 (Ind. Ct. App. 1996)).

135. *See id.* at 302-03.

136. *See id.* at 303.

137. *See id.*

require that a letter be sent for purpose of statutory compliance only, to the exclusion of other matters pertaining to the landlord-tenant relationship.

Consistent with this reasoning, the court of appeals concluded that inclusion of items of alleged damage outside the scope of the statute could not constitute an erroneous calculation of damages to meet the test developed in *Reuth*.¹³⁸ Further, the court stated that there was no requirement for the landlord to separate the damages within the scope of the statute from those outside its scope.¹³⁹ Finally, the court rejected tenant's claim that landlord's letter did not comply with the statute because it failed to substantiate the alleged damages. The court concluded that the statute does not require a landlord to substantiate his damages; it only requires him to itemize the damages and estimate the cost of repair.¹⁴⁰ Substantiation of those items is a matter left for trial.

Schoknecht makes it clear that the notice requirements of the security deposits statute are intended merely to make a tenant aware that the landlord is asserting a claim against tenant's security deposit. That notice must be specific enough to set forth an itemized list of damages and an estimated cost of repair for each, but the substantive rights of the parties under the lease, the factual support or lack of factual support for claims asserted, and the substantiation of damage amounts are left for further proceedings.

IV. PREMISES LIABILITY OF LANDOWNERS TO THE PUBLIC

*Miles v. Christensen*¹⁴¹ is closely related to *Pippin*, in that both cases involved premises liability for owners of real estate and the establishment of limits of that liability based upon foreseeability analyses. However, *Pippin* occurred in the context of an on-going landlord-tenant relationship with the plaintiff's injury occurring on the defendant's land, whereas *Miles* considered a landowner's liability to the public at large for injuries that occurred off the landowner's land on an adjoining roadway. The court of appeals in *Miles* refused to approve a foreseeability test based solely on the status of the land as urban or rural but instead made the intensity of the use of roads abutting the real estate just one factor in a broader test of foreseeability of harm to users of that road.¹⁴²

The court identified one issue on appeal: "whether owners of rural land abutting a public road owe a duty to care for or remove decaying or dead trees located on their land so as to protect people traveling on the public highway."¹⁴³ The Mileses owned land abutting a state highway approximately one mile east of the City of Peru. On March 13, 1995, twenty-one-year-old Jason Christensen rode his motorcycle on that highway and a dead elm tree, which was located on

138. *See id.*

139. *See id.*

140. *See id.*

141. 724 N.E.2d 643 (Ind. Ct. App. 2000).

142. *See id.* at 646.

143. *Id.* at 644.

the Mileses' land fell and struck him. Jason died as a result of the injuries he sustained. Apparently "the tree had been dead for years and was visible from the perimeter of the property."¹⁴⁴

Jason's parents filed a wrongful death action against the Mileses, alleging that the Mileses were "negligent in failing to maintain their real estate in a reasonably safe condition and in failing to inspect their land and correct the danger caused by dead or dying trees."¹⁴⁵ The Mileses filed a motion for summary judgment contending that they owed no duty to Jason and therefore could not be liable for his death. The trial court denied the Mileses' motion, and they appealed.¹⁴⁶

The starting point for the court of appeals in analyzing what duty, if any, a landowner has with regard to trees and other natural conditions of his land, was the Indiana Supreme Court's opinion in *Valinet v. Eskew*.¹⁴⁷ *Valinet* noted the "general rule of nonliability [of landowners] for natural conditions on land"¹⁴⁸ and explained the modifications made to that rule over time. The general rule was said to have arisen at a time when land was largely unsettled and, absent actual knowledge of a dangerous natural condition, "the burden imposed on a landowner to inspect it for safety was held to exceed the societal benefit of preventing possible harm to passersby."¹⁴⁹ Later, a rule evolved that imposed a duty to inspect on landowners in more heavily populated areas, in an attempt to prevent unreasonable risk of harm to persons using the roadway. The rationale for this rule was that "the risk of harm to highway users is greater and the burden of inspection on landowners is lighter in such populated areas."¹⁵⁰ As a result, the *Valinet* court approved "differing duties placed on owners of land with respect to differing demographics."¹⁵¹

For the Mileses, the distinction between "differing demographics" became rigidly compartmentalized into two classifications, urban versus rural. The Mileses found support for their argument in section 363 of the Restatement (Second) of Torts,¹⁵² which distinguishes between "urban" and other kinds of land and "imposes liability for harm only when the land is urban in nature."¹⁵³

The majority opinion in *Miles*¹⁵⁴ rejected an analysis of landowner liability based on an urban versus rural distinction on two grounds. First, the court of appeals found no language in *Valinet* indicating that a determination of a

144. *Id.* at 645.

145. *Id.*

146. *See id.*

147. 574 N.E.2d 283 (Ind. 1991).

148. *Miles*, 724 N.E.2d at 645 (quoting *Valinet*, 574 N.E.2d at 285).

149. *Id.* (quoting *Valinet*, 574 N.E.2d at 285).

150. *Id.* (quoting *Valinet*, 574 N.E.2d at 285).

151. *Id.* (quoting *Valinet*, 574 N.E.2d at 285).

152. RESTATEMENT OF TORTS (SECOND) § 363 (1965).

153. *Miles*, 724 N.E.2d at 646.

154. Judge Mattingly wrote the opinion for the court and was joined by Judge Bailey. Judge Baker concurred in the result and wrote a separate, brief opinion.

landowner's duty depends solely on this distinction. In fact, the court determined that "*Valinet* calls for a more sophisticated analysis of the duty question, requiring a consideration of factors such as traffic patterns and land use in the relevant area."¹⁵⁵ The court found that the urban-rural distinction merely provides a starting point for analysis.¹⁵⁶

Second, the court of appeals examined the public policy considerations implicated in the scope of duty question.¹⁵⁷ The court noted the extended network of developed roadways in Indiana and the pervasiveness of motor vehicle travel, two factors that combine to expose "a significant portion of the public . . . to danger insofar as natural conditions of property may menace travelways and threaten the passage of motor vehicles."¹⁵⁸ As such, the court concluded, "sound public policy dictates that 'in light of our increasingly mobile society, highways must be kept free from obstructions and hazards.'"¹⁵⁹ Implementing this policy required recognizing a rule that a "landowner may, under certain circumstances, owe a duty of reasonable care as to those who, while outside of the land, suffer harm from the land's natural conditions."¹⁶⁰

Against this backdrop, the court of appeals engaged in a foreseeability analysis that focused on the location of the property adjacent to a road suitable for public travel and the expectation of regular public "visitation" on the road. These factors create "a duty [of landowners] to care for or remove natural conditions such as a decaying or dead tree located on their land so as to protect those who might be traveling on the road."¹⁶¹ The court concluded that whether the *Mileses* breached that duty was a question for the jury to decide.

There are two notable features about *Miles*. The first is its demonstration of the need to look behind the labels sometimes developed by courts, or drafters of resources like the Restatement, in creating "tests" that are often embodied in legal rules. Such tests, like the urban-rural test discussed in *Miles*, are useful as shorthand expressions of more complicated thought processes, but there is a danger that, over time, the tests can take on a life of their own and can supplant the analysis that they describe. *Miles* is a useful reminder to guard against such "shortcut" thinking.

Second, *Miles* demonstrates the common law at its best as the case shows the ability of the common law to adapt to changed conditions while still remaining faithful to the case law reasoning process. The urban-rural distinction originated at a time when traffic on roadways was less prevalent than today, both in terms of the sheer number of developed roadways and various types of motor vehicles and drivers on them. Even though the analysis of foreseeability in cases from a less mobile era may not seem particularly appropriate for modern society, the

155. *Miles*, 724 N.E.2d at 646.

156. *See id.*

157. *See id.*

158. *Id.*

159. *Id.* (quoting *Fritz v. Parkinson*, 397 N.W.2d 714, 715 (Iowa 1986)).

160. *Id.*

161. *Id.* at 647.

rule of foreseeability has remained unchanged. The only thing that has changed is the circumstances that fit the rule. A quote from Justice Benjamin Cardozo's classic opinion in *McPherson v. Buick Motor Co.*¹⁶² is readily applicable to the *Miles* decision. Justice Cardozo wrote:

Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be [foreseeable] does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.¹⁶³

As recognized by scholars like Pound, such adaptability and adherence to that precedent is the "chief cause of success" of the common law, and the process is evident in *Miles*.¹⁶⁴

V. ISSUES AFFECTING MORTGAGEES

The duties and liabilities of mortgagees in three different situations were the subject of appellate court opinions during the survey period. The first case considered the extent of a mortgagee's duty to protect a material supplier's interest in being paid for work performed in constructing a house when the mortgagee controlled the disbursement of funds at a loan closing. The second case dealt with the order in which a foreclosing mortgagee must pursue its collection remedies against the mortgagor. The third case addressed the effect of a mortgagor's redemption rights on a bona fide purchaser who bought the mortgaged property at a public foreclosure sale after the debtor had redeemed.

A. Scope of a Mortgagee's Duty to Protect Interests of Third Parties:

*Town & Country Homecenter of Crawfordsville, Indiana, Inc. v. Woods*¹⁶⁵

Town & Country Homecenter is an interesting case for several reasons. First, it struggles with the existing law concerning the presence or absence of a duty on the part of a mortgage lender to protect third party material suppliers who have an interest in the mortgaged real estate because they have not been paid when that lender conducts the loan closing. Second, it contains a majority opinion, a concurring opinion that decries the result the author feels compelled to follow by virtue of Indiana Supreme Court precedent, and a dissenting opinion that decries the result and finds a way to interpret existing precedent to allow a decision contrary to the one reached by the majority. Each of the three opinions has differing views about the creation of duties between the parties.

In *Town & Country Homecenter*, Lynn Fellows executed a contract with Ronald Woods for Woods to build a house for Fellows.¹⁶⁶ Fellows paid \$10,000

162. 111 N.E. 1050 (N.Y. 1916).

163. *Id.* at 1053.

164. POUND, *supra* note 3, at 182.

165. 725 N.E.2d 1006 (Ind. Ct. App. 2000).

166. *See id.* at 1008.

to Woods and applied for a mortgage with National City Bank (NCB) for the balance of the construction cost, which was to be paid at closing. Woods purchased building materials from Town & Country Homecenter of Crawfordsville, Indiana, Inc. (Town & Country). Fellows subsequently received a pre-lien notice letter from Town & Country which stated that Town & Country could file a lien against Fellows' property if it did not receive payment for the materials it supplied. Fellows brought the pre-lien notice letter to the attention of the NCB representative handling the mortgage. The representative told Fellows that similar situations arose "all the time" and that Town & Country's letter would be addressed at closing. Those statements by NCB's representative form the heart of the legal issues considered by the appellate court.

The closing on Fellows' house occurred about three weeks after the date of Town & Country's pre-lien notice letter. During that time, no one from Town & Country communicated with anyone at NCB. At the closing, NCB's representative asked Woods about the existence of any liens against the property. Woods acknowledged the existence of a mortgage against the property and confirmed that he had not completed payment of money owed to Town & Country for materials it had supplied to the project. Woods stated, however, that he would pay Town & Country from the check he would receive from the closing.

The NCB representative then required Woods to sign a vendor's affidavit stating that "there were no liens on the property and that there were 'no unpaid claims for labor done upon or materials furnished for the real estate in respect of which liens have been or may be filed,'"¹⁶⁷ even though the representative knew both statements to be untrue. NCB then issued one check to the existing mortgagee to extinguish its lien and one check in the amount of \$59,229.17 payable solely to Woods. No other provision was made for sums owed to Town & Country.

Approximately two months later, Town & Country filed a mechanic's lien against Fellows' property and alleged that it was owed \$32,866.12 for materials supplied to construct Fellows' house. Just short of a year later, Town & Country filed a complaint to foreclose on its mechanic's lien. The lien was later released because Town & Country did not provide the statutorily-required pre-lien notice letter to Fellows within the time required by statute. A trial was conducted on Town & Country's non-mechanic's lien claims, including a claim that it was a third-party beneficiary of the mortgage agreement between Fellows and NCB. The trial court considered evidence submitted by stipulation and in the form of deposition testimony and entered judgment against Town & Country and in favor of NCB.¹⁶⁸ Thereafter, Town & Country appealed.¹⁶⁹

Town & Country's third-party beneficiary claim was based on its contention that NCB had a fiduciary duty to exercise reasonable care to see that Town & Country was paid and that NCB breached that duty when it disbursed loan

167. *Id.* at 1003 (quoting Record at 141-42).

168. *See id.*

169. *See id.*

proceeds to Woods with the knowledge that Woods had not paid Town & Country. The court of appeals' analysis of this argument began with a recitation of the generally accepted elements of a third-party beneficiary claim. These elements are:

- (1) A clear intent by the actual parties to the contract to benefit the third party;
- (2) A duty imposed on one of the contracting parties in favor of the third party; and
- (3) Performance of the contract terms is necessary to render the third party a direct benefit intended by the parties to the contract.¹⁷⁰

The court, in a majority opinion written by Judge Baker, concluded that the statement of NCB's representative to Fellows that Town & Country's pre-lien notice letter would be addressed at closing, was not a promise to Town & Country that it would be paid.¹⁷¹ At most, the court considered this statement to be a promise to Fellows to protect *his* interest, an interest which was in fact protected when NCB's representative secured Fellows' consent to distribute funds to Woods even though Town & Country had not been paid.¹⁷² The court of appeals similarly rejected both the existence of any clear intent to benefit Town & Country and Town & Country's creditor beneficiary theory.¹⁷³

Finally, the court of appeals also rejected Town & Country's argument that existing Indiana case law creates a duty for NCB to protect Town & Country's interests. The case relied upon by Town & Country, *Prudential Insurance Co. of America v. Executive Estates, Inc.*,¹⁷⁴ concerned only the liability of the mortgagee to the mortgagor and not to third parties. Accordingly, the *Town & Country* court held:

[W]e cannot find that a mortgage lender has a duty to oversee the repayment of all contractors and suppliers. Indeed, our supreme court held in *Executive Estates* that, generally, a lender has no obligation to protect even the interests of its borrower unless bound to do so by an agreement.¹⁷⁵

Thus, the trial court did not err when it determined that NCB owed no duty to Town & Country.¹⁷⁶

170. *Id.*

171. *See id.*

172. *See id.* Fellows also suffered no harm by NCB's actions because Town & Country's mechanic's lien was declared invalid because it was not timely filed. *See id.* at 1010.

173. *See id.*

174. 369 N.E.2d 1117 (Ind. App. 1977).

175. *Town & Country Homecenter*, 725 N.E.2d at 1010.

176. *See id.* The court of appeals also used the absence of any relationship between NCB and Town & Country to reject the latter's constructive fraud claim against NCB. *See id.* The court identified the first element of constructive fraud as including "a duty existing by virtue of the relationship between the parties." *Id.* at 1011. Finally, the court rejected Town & Country's

In a separate opinion concurring in the result, Judge Sullivan analyzed the "incongruity" of the state of the law that would relieve NCB from liability for its conduct that led to "clearly foreseeable harm to a known and totally innocent party."¹⁷⁷ Judge Sullivan also included *dicta* in footnotes to his opinion that will undoubtedly resurface in a future case with the right fact pattern.¹⁷⁸

Judge Sullivan used strong language to express his contempt for the conduct of NCB's representative, calling such conduct reprehensible, indefensible, and "a total disregard for the interests of persons known to have an interest in the proceeds of the real estate closing."¹⁷⁹ Judge Sullivan, however, saw his power to address the injustice done to Town & Country limited by the Indiana Supreme Court's decision in the analogous case of *McAdams v. Dorothy Edwards Realtors, Inc.*¹⁸⁰ In that case,

our Supreme Court held that a real estate agent, responsible for disbursing trust account funds following a real estate closing, was not liable to the purchaser for negligent disbursement resulting in failure to extinguish a lien because the real estate broker was the agent of the seller and therefore owed no duty to the purchaser.¹⁸¹

Despite the holding of *McAdams*, Judge Sullivan found in that case "the seeds for reviewing and revising the law as to the matter of liability in real estate closing situations."¹⁸² Rather than viewing the realtor in charge of the closing in *McAdams* as simply serving as the agent of the seller, and thus owing no duty to the buyer, Judge Sullivan quoted approvingly a characterization of the closing process contained in a prior survey volume of this law review which viewed the agent as "the moving force in the real estate closing."¹⁸³ If removed from the restrictions of strict agency law principles, the actions of a person who undertakes to conduct a closing involving parties with differing interests could, for Judge Sullivan, be evaluated by standard tort principles.¹⁸⁴ Thus, liability would be judged on the existence of a duty that is created by foreseeability of the harm. For purposes of this case, "NCB's breach of its duty to Fellows may be said to give rise to tort liability for the negligent disbursement of funds with regard to the persons who would be foreseeably injured by such negligence."¹⁸⁵ Twice in his concurring opinion Judge Sullivan calls for the issue to be

criminal deception claim against NCB on the ground that Indiana Code section 35-43-5-3(a) requires misapplication of entrusted property, which did not exist in this case because the mortgage proceeds were NCB's own funds and were not funds entrusted by another. *See id.*

177. *Id.* at 1012 (Sullivan, J., concurring).

178. *See id.* at 1012 nn.5-6.

179. *Id.* at 1013.

180. 604 N.E.2d 607 (Ind. 1992).

181. *Town & Country Homecenter*, 725 N.E.2d at 1013 (Sullivan, J., concurring).

182. *Id.* at 1014.

183. *Id.* at 1013 (citation omitted).

184. *See id.*

185. *Id.*

“revisited” and for the Indiana Supreme Court to “reopen the matter and resolve it in a manner not unfair to any party to such financial and fiduciary transactions.”¹⁸⁶

Judge Staton dissented from the majority’s result and issued a separate opinion. Judge Staton did not see the court’s analytical options of a duty as limited to agency principles. He noted that “courts will find a duty where . . . reasonable persons would recognize it and agree that it exists,”¹⁸⁷ and he found the source of that duty in traditional tort principles. Using the same three factor balancing test used by the court in *Pippin* discussed above, Judge Staton looked to “the relationship of the parties,” “the reasonable foreseeability of the harm,” and “public policy concerns”¹⁸⁸ to determine whether NCB in its function as loan closer owed a duty to Town & Country as an unpaid material supplier.

With regard to the existence of a relationship, Judge Staton noted that “[a] relationship that gives rise to a duty does not necessarily have to emanate from a contract.”¹⁸⁹ Non-contractual duties can arise depending upon the nature of the parties’ relationship and the knowledge possessed by the party accused of negligence.¹⁹⁰ In this case, NCB clearly had knowledge that Woods had not been paid, and that knowledge was relevant to a loan closing where the borrower’s funds are to be used to pay for construction of the house for the borrower. In such a context, Judge Staton found it to be a departure from custom and practice to disburse loan proceeds to a general contractor without making provision for payment to unpaid material suppliers.¹⁹¹ Accordingly, there was a relationship between the parties that weighed in favor of finding a duty.

With regard to the foreseeability of harm factor, Judge Staton concluded that both the type of harm and the identity of the harmed party were foreseeable to NCB. The identity of the harmed party was actually known to NCB as a result of Town & Country’s pre-lien notice letter to Fellows, which he brought to the attention of NCB’s loan officer, and as a result of the loan officer’s direct questions to Woods at closing. The type of harm, non-payment of the material supplier by Woods, was also foreseeable given that Woods did not pay Town & Country in a timely manner as construction progressed and NCB provided the opportunity for Woods to continue to avoid payment. Thus, the foreseeability of the harm component also weighed in favor of finding a duty owed by NCB.

Finally, Judge Staton concluded that a public policy interest would be furthered by finding a duty of care in this case for at least two reasons. First, NCB’s closing agent acted with “a total disregard for the interests of persons known to have an interest in the proceeds of the real estate closing.”¹⁹² Second,

186. *Id.* at 1014.

187. *Id.* (quoting *Gariup Constr. Co. v. Foster*, 519 N.E.2d 1224, 1227 (Ind. 1988)) (Staton, J., dissenting).

188. *Id.*

189. *Id.*

190. *See id.*

191. *See id.*

192. *Id.* at 1015.

NCB's conduct "flies in the face of well established custom and practice in the lending industry."¹⁹³ As closing agent, NCB was in the best position to prevent the harm that Town & Country suffered, and that harm would have been prevented if NCB had utilized standard construction loan techniques to insure the absence of liens. The simplest technique NCB could have employed at the loan closing to avoid harm would have been to issue a check payable jointly to Woods and Town & Country. Woods would not have been able to negotiate such a check on his own and could not have dissipated the funds without paying Town & Country. NCB would have incurred no burden in the process of preventing harm. Thus, the third component of foreseeability was also established to support the existence of a duty from NCB to Town & Country. Judge Staton would have reversed the decision of the trial court and remanded the case for a trial to determine breach of duty, proximate causation and damages.

The *Town & Country* case raises difficult questions about the circumstances in which it is appropriate to impose a duty of one party in favor of another. These questions certainly arise in the context of a purchase of real estate, as in *McAdams*, and in loan closings for the improvement of real estate, as here, but they can also arise in other multi-party contexts where the participants' interests differ and one party occupies a role that affects each of the others. The scope of the duty of the party in control of the closing has traditionally been limited by contract principles, with duties being found by express agreement, implied from conduct, or based on third-party beneficiary rules, or by agency principles, with duties limited to the principal-agent relationship. Judges Staton and Sullivan would add negligence principles as an additional source of duty.¹⁹⁴

Is such a source of duty advisable? Why should NCB be charged with a duty to look out for the interests of anyone besides itself and its customer simply because it is the source of money that several people may wish to have access to? If one examines the parties involved in a typical loan closing, and the already existing means each has to protect its interests, the answers may not be immediately clear. The interest of the borrower is to receive the real estate and any improvements that may have been constructed thereon free and clear of all but permitted liens or claims and to have the loan proceeds used to achieve this result. The land owner (or buyer) can achieve this result in several ways. He can insist on a no-lien contract with the general contractor; he can insist that the general contractor post payment and completion bonds; he can insist on lien waivers from all laborers and material suppliers at the time of each progress payment and at final closing; he can insist on the issuance of check payable jointly to the general contractor and laborers or material suppliers; he can insist on a retainage to have resources on hand to pay unexpected claims. While each of these techniques will not be available in every case, the landowner does have the means to protect himself.

The lender's interest in insuring free and clear title to the real estate on which

193. *Id.* (quoting *id.* at 1013 (Sullivan, J. concurring)).

194. Judge Staton also refers to "justifiable reliance" in the opening paragraph of his dissenting opinion. *Id.* at 1014.

it will hold a mortgage to secure repayment of the owner's promissory note is in many ways similar to the owner's interest. Often a lender will insist on one or more of the techniques described above even if the owner would be willing to forego them. A lender can also insist on a lender's policy of title insurance insuring against the existence of mechanic's liens. Such coverage may not be the easiest item to obtain, but it is available. In short, the lender too can protect its interests.

Material suppliers, like Town & Country, also have existing mechanisms to protect their interests. Initially, Town & Country, as vendor, had the ability to structure its credit relationship with Woods, as customer, in a way that protected Town & Country against a default by Woods. Even after credit was extended, Town & Country had several techniques to protect its interests. It could have requested an express agreement with NCB for jointly payable checks or for progress payments paid directly to it based upon appropriate documentation. Town & Country could have protected its interests by complying with the clear requirements of the mechanic's lien statute. It could have pursued Fellows under the owner's liability provisions of the mechanic's lien statute for any construction loan proceeds not yet disbursed to the general contractor. The issue of NCB's liability to Town & Country would never have arisen if Town & Country had not failed to implement every protective device available to it.

Such an individualistic interest view of a multi-party closing would lead to the conclusion that, absent the express representation by NCB's representative to Fellows that Town & Country's unpaid bills would be handled at closing, NCB had an interest in protecting only its own position and was not obligated to be concerned with the interest of other parties. It is this philosophical view that underlies the holding of the court in *Prudential Insurance Co. v. Executive Estates, Inc.*,¹⁹⁵ that "generally, a lender has no obligation to protect even the interests of its borrower unless bound to do so by an agreement."¹⁹⁶ If the parties' interests and obligations are to be evaluated in this manner, how can a lender have a duty to protect the interests of an unpaid material supplier if that lender has no duty even to its borrower?

As proposed by Judges Baker, Sullivan, and Staton, the time has come to broaden the scope of parties' duties beyond strictly private contract and agency arrangements and to acknowledge the existence of duties owed on the basis of social considerations instead. In this case, once NCB acquired actual knowledge that Town & Country had not been paid and NCB had the means to prevent harm, its duties ceased to be measured solely by its private interests in the loan transaction. It then acquired duties to a party with which it had no other interest other than a generalized interest in not causing harm to a foreseeable victim.

But what should NCB have done at the closing if Fellows had directed that the closing proceed as it did, with Town & Country unpaid and only with Woods' promise to pay Town & Country from the check he would receive at closing? If

195. 369 N.E.2d 1117 (Ind. Ct. App. 1977).

196. *Town & Country Homecenter*, 725 N.E.2d at 1010 (citing *Prudential Ins. Co.*, 369 N.E.2d at 1123).

NCB had fully informed Fellows of the potential problems that could arise from paying loan proceeds solely to Woods and Fellows had still insisted that closing proceed, should we expect NCB to have refused to close? Such a situation does not differ in effect from the facts of the case as Fellows suffered no harm from any breach of duty NCB may have owed to him because Town & Country forfeited all of its claims against Fellows. The harm to Town & Country is no less foreseeable in the hypothetical situation, but to impose a duty on NCB in favor of Town & Country would pit the lender against the wishes of the only party to the closing with whom it has a direct relationship, the borrower, and would be so to benefit a party with whom it has no direct relationship and which has other self-protection devices at its disposal.

The individualistic view of a multi-party closing, in which each party, including the lender, has the means to protect its own interests and is expected to do so, and the social view, in which a lender may have duties to other parties quite apart from its self-interests in the deal, can be reconciled if the lender's foreseeability based duties to others is restricted to circumstances in which the lender assumes the role of managing the closing. In effect, a lender that controls the closing of a construction loan voluntarily assumes two roles—lender and closing agent. These roles differ significantly, and the duties associated with each cannot be treated as coextensive. In a situation where the closing is conducted by a person or entity not a party to the deal, such as a title company representative, a lender's duties to others should continue to be measured by contractual agreement and agency principles. Third party interests can be protected by the independent closing agent. However, in a situation where the lender undertakes to conduct the closing, it should be compelled to look beyond its individual interests and to act in a manner that avoids the unreasonable risk of harm to foreseeable third parties. Evaluating a lender's duties in this way would both give effect to existing customs and practices of the construction and lending industries and prevent injustice arising from foreseeable harm to known and innocent parties.

*B. Sequencing Collection Remedies: National City Bank v. Morris*¹⁹⁷

In *National City Bank*, the court of appeals reviewed rules relating to the relationship of collection mechanisms available to a mortgagee who has both an in rem foreclosure judgment against the debtor's property and an in personam judgment against the debtor individually. The facts of the case are convoluted and involve three mortgage foreclosure actions against the debtors' property and three complaints for money judgment against the debtors individually. After resolving an issue concerning standing of the various creditors, the court of appeals confronted a dispute between creditors National City Bank and Lovold, to whom National City Bank (NCB) had assigned an Equity Reserve Agreement and Mortgage that secured part of a judgment that NCB had obtained against the debtors. Subsequently, Lovold obtained an Agreed Judgment and Order of

197. 717 N.E.2d 934 (Ind. Ct. App. 1999).

Foreclosure against the debtors. After filing a praecipe for a sheriff's sale, Lovold also obtained an Agreed Final Order of Garnishment, which subjected the debtors' wages to garnishment in Lovold's favor. NCB, which did not assign all of its claims against the debtors, filed a motion to have the garnishment order set aside on the ground that Lovold had not obtained a deficiency judgment because the foreclosure sale had not yet occurred. The trial court denied NCB's motion, and NCB appealed.¹⁹⁸

The appellate court began its analysis of NCB's motion by stating:

The issue of whether the trial court was correct in denying NCB's motion to set aside the agreed garnishment order turns upon both an interpretation of certain sections of Title 32 dealing with the payment of debt where there is an express written agreement for the payment of money secured by a mortgage and an interpretation of the case law explicating these sections.¹⁹⁹

The statutory provisions that the court said were implicated in this issue are Indiana Code sections 32-15-6-3, -6-5, -6-6, and -6-7.²⁰⁰ These four statutes establish a procedure whereby: 1) in rendering a judgment of foreclosure courts shall give a personal judgment against any party, including the mortgagor, who may be "liable upon any agreement . . . for the payment of any sum . . . of money secured by the mortgage";²⁰¹ 2) the court shall order the mortgaged property "to be first sold before levy of execution upon other property of the defendant";²⁰² 3) the court shall order that the balance due on the mortgage and costs which may remain unsatisfied after the sale of the mortgaged premises "shall be levied on any property of the mortgage-debtor";²⁰³ 4) the sheriff shall "forthwith proceed to levy the residue of the other property of the defendant" if any part of the judgment remains unpaid after sale of the mortgaged property;²⁰⁴ and 5) "a creditor shall not [(a)] proceed to foreclose a mortgage while 'prosecuting any other action for the same debt or matter which is secured by the mortgage' or [(b)] 'prosecute any other action for the same matter' while foreclosing the mortgage or prosecuting a judgment of foreclosure."²⁰⁵

The trial court concluded that none of these statutory provisions were violated because the garnishment order sought by Lovold was supplemental or auxiliary to the foreclosure action and, therefore, was not the "any other action" prohibited by section 32-15-6-7 nor was the garnishment action a levy of execution within the scope of section 32-15-6-3.²⁰⁶ Accordingly, the trial court

198. *See id.* at 935-36.

199. *Id.* at 936.

200. *See id.* at 936-37.

201. *Id.* at 937 (quoting IND. CODE § 32-15-6-3 (1998)).

202. *Id.* (quoting IND. CODE § 32-15-6-3).

203. *Id.* (quoting IND. CODE § 32-15-6-5).

204. *Id.* (quoting IND. CODE § 32-15-6-6).

205. *Id.* (quoting IND. CODE § 32-15-6-7).

206. *See id.* at 937-39.

concluded that it was proper for a creditor to seek an order of garnishment after it obtained an order of foreclosure but before the foreclosure sale had been completed and the amount of the deficiency, if any, was established.

The court of appeals found no error in the trial court's analysis of section 32-15-6-7. Instead it said that the "central issue" was "whether the legislature, in mandating in Ind. Code [section] 32-15-6-3 that the mortgaged property must be sold before 'levy of execution' on other property of the defendant, intended that the phrase of 'levy of execution' should include garnishment actions."²⁰⁷ After reviewing the definitions of key terms and the supreme court's interpretation of predecessor statutes for evidence of legislative intent, the court of appeals concluded that "levy of execution" does include garnishment proceedings.²⁰⁸

The rationale for the court's decision in *National City Bank* is found in its reference to a trio of Indiana Supreme Court decisions issued between 1876 and 1898.²⁰⁹ In each of these decisions, the supreme court held that other property of the debtor cannot be levied until after the foreclosure sale of mortgaged property is completed. Each court reasoned that until the foreclosure sale is completed the amount of deficiency to be collected by levy of execution is uncertain. The court of appeals in *National City Bank* concluded that the same need to determine the amount of a deficiency judgment applied to a creditor's use of garnishment proceedings and, therefore, such proceedings fall within the statutory prohibition against "levy of execution" in Indiana Code section 32-15-6-3 against.²¹⁰ Specifically the court of appeals said:

[O]nce a creditor obtains a judgment of foreclosure, it is necessary to wait until the sale and concomitant determination of the deficiency, if any, before levying on any other property. Thus, although a creditor may pursue both judgment on the note and a judgment of foreclosure at the same time, once she obtains a judgment of foreclosure, she may not execute upon any other property of the debtor until the foreclosure sale has occurred and a deficiency has been determined.²¹¹

Accordingly, the court of appeals held that the trial court erred in issuing a garnishment order before the foreclosure sale had occurred.

National City Bank recognizes the principle that property that has been pledged as collateral to secure repayment of a debt should be made to stand for that debt before other assets of the debtor are levied upon and in so doing raises at least indirectly the proper balance of powers between mortgagees and mortgagors. Indiana law suspends levy of execution only if the mortgagee first obtains a judgment of foreclosure. If the mortgagee decides to forego execution on the mortgaged property, he can pursue collection of a personal judgment by

207. *Id.* at 938.

208. *Id.*

209. See *Mitchell v. Ringle*, 50 N.E. 30 (1898); *Thomas v. Simmons*, 2 N.E. 203 (1885); *Willson v. Binford Adm'r*, 54 Ind. 569 (1876).

210. *National City Bank*, 717 N.E.2d at 938.

211. *Id.*

all available means, including garnishment. In some states, no such election of remedies exists and the mortgagee must proceed against the real estate first.²¹² Only if a deficiency remains and the state does not have an anti-deficiency judgment statute,²¹³ may the creditor pursue other collection procedures. Despite the prohibition of garnishment proceedings until after the amount of a deficiency is established by a foreclosure sale, creditors in foreclosure proceedings in Indiana still occupy a comparatively favorable position as they enjoy powers and options not available in some other states.

*C. The Equity of Redemption and the Recording System: Finucane v. Union Planters Bank, N.A.*²¹⁴

Finucane not only confirms priority rules to resolve competing claims of ownership of land but it also impliedly demonstrates the principles underlying the equity of redemption and even addresses the integrity of the recording process. In this case, Union Planters Bank filed a complaint to foreclose on a mortgage on real estate owned by Secrest and others. The trial court entered a personal money judgment against Secrest in favor of the bank and issued a decree foreclosing the bank's mortgage and directing the sheriff to sell the property to satisfy the judgment. The sheriff's sale was scheduled for March 25, 1999.

Three days before the scheduled sale, Secrest sold the property to Hamilton Proper North for \$150,000. The bank received sufficient proceeds from the sale, \$83,877.49, to pay the judgment against Secrest in full. However, neither counsel for the bank nor the sheriff received notice of the private sale until after March 25, and the foreclosure sale took place as scheduled. Finucane was the successful bidder at the foreclosure sale and purchased the property for \$91,000. Finucane received a sheriff's deed on March 26, and he recorded that deed on March 30. Even though Secrest had given a warranty deed to Hamilton Proper on March 22, that deed was not recorded until March 31, which meant it was not discoverable in the public records when Finucane recorded his deed. The bank filed a motion to vacate the sheriff's sale and to set aside the sheriff's deed on the ground that Secrest had paid the loan balance in full on March 22, which rendered the foreclosure action moot. Finucane filed a motion to intervene and argued that his sheriff's deed was superior to the deed to Hamilton Proper because Finucane was a bona fide purchaser who recorded his deed first. The trial court granted the bank's motion, vacated the sheriff's sale, and ordered the county clerk to refund Finucane's money; Finucane appealed.²¹⁵

The court of appeals concluded that the bona fide purchaser concept is an

212. See, e.g., N.Y. Real Prop. Acts Law §§ 1301, 1401 (McKinney 1979).

213. See, e.g., N.C. Gen. Stat. § 45-21.38 (1976); Robert M. Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843 (1980).

214. 732 N.E.2d 175 (Ind. Ct. App. 2000).

215. See *id.* at 176.

equitable doctrine and that is within the discretion of the trial court to balance it against other equitable factors involved in the case.²¹⁶ Here, the trial court's discretion to set aside the sheriff's sale was supported both by absence of communication about the sale to Hamilton Proper and by the law relating to mortgage indebtedness.

An unseverable attribute of a mortgage is the mortgagor's equity of redemption. At any time up to the moment that the sheriff strikes off the sale of the foreclosed property to a buyer, the mortgagor has the absolute right to redeem the property from foreclosure by paying to the mortgagee the full amount of the unpaid principal, accrued interest, and allowable expenses. Secrest exercised this right by way of his sale to the property to Hamilton Proper.

Once this sale was completed and the mortgagee's interest in the property was satisfied, the foreclosure proceedings became moot. The appellate court noted that there can be no foreclosure proceeding without a mortgage and that, as a matter of law, there cannot be a mortgage without an underlying indebtedness. The court stated: "It is well settled that 'the mortgage is a mere security for the debt' [and that] there must be some obligation for the [mortgage] lien to secure. When that obligation is discharged the mortgage becomes *functus officio* and legally dead."²¹⁷ The result is that the legal justification for the sheriff's sale ceases to exist.²¹⁸

Finucane argued that the bank's judgment had not been released on the judgment docket of the clerk and therefore had not been extinguished. As a result, the public document recording system indicated to Finucane that the property was still subject to foreclosure on the sale date. The appellate court rejected this argument by stating that it is the payment of the underlying indebtedness that effects the release of the judgment, not the recording of the release.²¹⁹ The recording merely gives notice of the release to third parties.

Under most circumstances, one who qualifies as a bona fide purchaser will be considered to have the superior interest in property, and here Finucane purchased the property for value and without notice of the private sale. Further, the maxim that "first in time is first in right" is a fundamental concept of real estate law, and Finucane recorded his sheriff's deed ahead of Hamilton Proper's deed. Nonetheless, it should always be remembered that foreclosure proceedings are actions in equity and not at law, and courts always retain their equitable powers to reach a "just" result, even if doing so affects other generally accepted principles and displays a gap in the reliability of the recording procedures for persons dealing with a parcel of real estate.

VI. THE IMPACT OF THE STATUTE OF FRAUDS ON TRANSFERS OF REAL ESTATE

Two opinions issued by the court of appeals in the survey period considered

216. *See id.* at 177.

217. *Id.* at 177 (quoting *Egbert v. Egbert*, 132 N.E.2d 910, 918 (Ind. 1956)).

218. *See id.*

219. *See id.* at 177-78.

the application of the statute of frauds to real estate transfers. The statutes of frauds in American law can be traced to the passage of a statute enacted by the British Parliament in 1677.²²⁰ This statute, and all of its progeny, recognize the danger of fraudulent testimony and the difficulties of proof inherent in allegations of a breach of an oral contract and seek to eliminate the opportunity for such fraud by requiring that contracts involving certain types of matters must be in writing to be enforceable. One type of contract that has been within the scope of the statute of frauds from the beginning is an agreement for the sale of real estate.

Indiana has multiple statutes of frauds, including a general statute²²¹ and several specialized statutes, at least two of which are relevant to transfers of interests in real estate.²²² Indiana's general statute of frauds provides:

[N]o action shall be brought . . . upon any contract for the sale of lands . . . [u]nless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. . . .²²³

This statute was interpreted in two Indiana appellate court decisions published during this survey period. The first opinion considered the scope of the statute of frauds, that is, the types of real estate transactions that are covered by its provisions. The court of appeals' decision is likely to surprise, and possibly dismay, many readers because it adopts an extremely restrictive interpretation of the scope of the statute that excludes many types of transactions previously considered to be well within the statute's reach. Even though this opinion was vacated by a grant of petition for transfer, it still merits discussion both on the legal principles involved and on the methodology (or lack of it) used by the court to reach its decision. The second case considered the availability of the part-performance doctrine as an alternative to a writing as a means of satisfying the statute of frauds, thereby rendering an oral promise to convey an interest in real estate enforceable.

220. 29 Car. 2 (1677). The short title of the British Statute of Frauds is "An Act for prevention of Frauds and Perjuries."

221. See IND. CODE § 32-2-1-1 (1998).

222. The specialized statutes of frauds that are relevant to real estate transfers are Indiana Code section 32-2-2-1 (promises to pay a real estate commission must be in writing to be valid) and section 32-2-1.5-1 to -1.5-5 (promises to extend credit, which could include credit to pay for construction of, or improvements, on real estate must be in writing to be valid). Other specialized statutes of frauds include the requirement under article 2 of the Uniform Commercial Code that contracts for the sale of goods, or for modifications of contracts for the sale of goods, in excess of \$500 must be in writing to be valid. See IND. CODE § 26-1-2-201 (2000).

223. *Id.* § 32-2-1-1.

A. *Scope of the Statute of Frauds for Real Estate "Sales":*
*Brown v. Branch*²²⁴

Brown provides a model setting for the statute of frauds' concern with the difficulty of relying on allegations of oral promises in real estate matters. The case involves a romantic relationship that vacillates between affection and anger, between union and break-up, between living together in Indiana and living apart in different states. Emotions and motivations of the parties were bound to run high.

It is unfortunate that the court of appeals' analysis neglects to identify any of the competing policies involved in favor of applying either the statute of frauds or the exception to that rule provided by promissory estoppel principles. The inadequacy of the analysis raises serious concerns about the opinion, both as it directly affects the parties involved and as it would have affected other people in the future, had the opinion been permitted to stand, who would have been compelled to look at *Brown* as a source of common law. There is much for the Indiana Supreme Court to make right in this case.

Clifford Brown and Rhonda Branch were involved in a stormy romantic relationship over a ten-year period. Brown owned a house in which he and Branch lived for some unspecified time. During that period, the relationship reached a point where Branch moved out of Brown's house and moved to Missouri. At an unspecified time during Branch's residency in Missouri, she and Brown had a telephone conversation in which Brown stated that if Branch would move back to Indiana she would "always have the . . . house."²²⁵ Branch first testified that she had decided to return to Indiana prior to Brown's statement about the house, but she later "clarified" her testimony to mean that Brown's promise about the house was "a major influence and factor in her decision to return to Indiana."²²⁶

Following Branch's return to Indiana, the relationship ended again, and when Brown refused to convey ownership of the house to Branch, she sued to compel that conveyance on the theory of promissory estoppel. Brown moved for summary judgment on the ground that any promise he had made to Branch was unenforceable under the statute of frauds. His motion was denied, and following trial, the court concluded that the elements of promissory estoppel had been met.²²⁷ As a result, Brown was ordered to convey title of the house to Branch.²²⁸

On Brown's appeal, the court of appeals was faced with two issues: first, was Brown's promise that Branch "would always have . . . the house" within the scope of the statute of frauds, and second, did Branch establish the elements of

224. 733 N.E.2d 17 (Ind. Ct. App.), *trans. granted*, 741 N.E.2d 1259 (Ind. 2000). As of the date this Article was sent to the printer, the Indiana Supreme Court had not acted further on this case.

225. *Id.*

226. *Id.*

227. *See id.* at 20.

228. *See id.*

promissory estoppel. With regard to the first issue, both the court of appeals' decision and its analytical process are disturbing.

Indiana's statute of frauds includes "any contract for the sale of lands."²²⁹ In analyzing Brown's promise, the court of appeals recited several maxims of statutory interpretation but relied most heavily on the rule that even though "[t]he legislature's definition of a word binds us . . . 'when the legislature has not defined a word, we give the word its common and ordinary meaning.'"²³⁰ The decision in this case, and an important principle of property law, depended on an analysis of the scope of the meaning of the word "sale" as used in the statute of frauds. Brown contended that "sale" is meant to mean "conveyance," while Branch contended that the term is restricted solely to an exchange of money for title. The court's *entire* analysis of the scope of transactions within the statute of frauds consists of one paragraph in which the sole authority cited is Black's Law Dictionary.²³¹

The court quoted the dictionary as defining the word "sale" to mean "[a] contract between two parties, called, respectively, the 'seller' . . . and the 'buyer,' . . . by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and possession of property."²³² The court concluded that because Branch did not enter into a contract for Brown's house wherein she "agreed to pay for or purchase the property," Brown's "promise of the . . . house to [Branch] was not a 'sale.'"²³³

Further, the court stated that although Branch's promise to return to Indiana "may have been consideration for the promise of the house," that consideration "certainly was not the type of consideration contemplated when property is sold."²³⁴ The court never explains why this conclusion is "certain," and its *sole* source of authority for the differentiation between sufficient and insufficient consideration was, once again, limited to one definition from Black's Law Dictionary. The definition chosen for the word "sale" by the court of appeals was restricted to include a "transfer of property for a fixed price in money or its equivalent . . . [and a] contract whereby property is transferred from one person to another for consideration of value."²³⁵ Having created a major premise based on these definitions, the court of appeals concluded that "the Statute of Frauds does not apply to this case because there was not a sale of land."²³⁶ Thus, "no

229. IND. CODE § 32-2-1-1 (2000).

230. *Brown*, 733 N.E.2d at 22 (quoting *Citizens Action Coalition of Ind., Inc. v. Ind. Statewide Ass'n of Rural Elec. Corps.*, 693 N.E.2d 1324, 1327 (Ind. Ct. App. 1998)). The court also notes, in a footnote, that "the Statute of Frauds does not use the terms sale and conveyance interchangeably." *Id.* at 21 n.2. The significance of this statement is not explained.

231. *See id.* at 22.

232. *Id.* (quoting BLACK'S LAW DICTIONARY 1337 (6th ed. 1990)).

233. *Id.*

234. *Id.*

235. *Id.* (quoting BLACK'S LAW DICTIONARY 1337 (6th ed. 1990)).

236. *Id.*

writing was necessary and the Statute of Frauds is not an appropriate defense"²³⁷ for *Brown*.

There are at least two significant problems with the court of appeals' analysis. First, the opinion completely ignores a rich history of Indiana Supreme Court and Indiana Court of Appeals opinions, both recent and long-standing, that have applied the statute of frauds to many situations other than a "contract between two parties, called, respectively, the 'seller' . . . and the 'buyer,' . . . by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and possession of property."²³⁸ For example, Indiana appellate courts have found the statute of frauds to be applicable to: (1) an agreement to grant a mortgage on real estate;²³⁹ (2) an alleged oral agreement for a grantor to continue in possession of real estate after title to that real estate had been conveyed to grantee by deed;²⁴⁰ (3) an antenuptial agreement whereby two persons agree that upon the death of either of them, the survivor will not assert a claim against the decedents' real property;²⁴¹ (4) an oral option contract for the purchase real estate;²⁴² (5) a parol gift of land;²⁴³ (6) an oral agreement to reconvey real estate;²⁴⁴ and (7) an oral agreement to bequest and devise a share of real property to an illegitimate child in exchange for a promise by the child's mother to forebear filing a paternity suit.²⁴⁵ None of these transfers, long considered to be within the scope of the statute of frauds, would meet the overly constrictive concept of "sale" used by the court of appeals in *Brown*.

Had the *Brown* court consulted these existing precedents it would have been precluded from adopting its constrained definition of the statutory term "sale."

237. *Id.*

238. *Id.* (quoting BLACK'S LAW DICTIONARY 1337 (6th ed. 1990)).

239. *See Brown v. Stapleton*, 24 N.E.2d 909, 911 (Ind. 1940) ("[A]n oral promise to give a mortgage on real estate is within the statute of frauds and can not be enforced . . .").

240. *See Guckenberger v. Shank*, 37 N.E.2d 708, 713 (Ind. App. 1948) (en banc) ("It is the law that a right to the possession of real estate is an interest therein, and any contract which seeks to convey an interest in land is required to be in writing.") (emphasis added)).

241. *See Rainbolt v. East*, 56 Ind. 538, 539 (1877) ("[The] part of the contract [dealing with claims against real estate] is within that clause of the statute [of frauds], which prohibits an action upon a contract for the purchase of real estate . . . unless the contract is in writing.").

242. *See Hilker v. Curdes*, 133 N.E. 851, 853 (Ind. App. 1922) (an option to purchase land, if accepted, "would not afford a basis for a decree of specific performance, as it would be within the statute of frauds").

243. *See Osterhouse v. Creviston*, 111 N.E. 634, 636-37 (Ind. App. 1916) ("A parol gift . . . of land, may be taken out of the statute of frauds [only] by clear and definite proof of the . . . gift followed by full possession, use, and control of the land.").

244. *See Lux v. Schroeder*, 645 N.E.2d 1114, 1117 (Ind. Ct. App. 1995), *trans. denied* ("Lux cites no . . . authority for the proposition that an agreement to reconvey real estate is not a contract for the sale of land subject to the statute of frauds, nor does our research reveal any.").

245. *See Hurd v. Ball*, 143 N.E.2d 458, 463 (Ind. App. 1957) ("[S]uch a contract has been held to be within the inhibition of the Statute of Frauds.").

The definition chosen by the court will certainly permit more actions to proceed on the basis of oral allegations alone than was previously thought possible, and the evidentiary and fraud prevention functions of the statute of frauds will be frustrated.

The court of appeals' view of the statute also enabled it to sidestep any analysis of whether the statute of frauds could be satisfied by way of a non-writing substitute. Indiana law recognizes that a promise that would otherwise be subject to the statute of frauds can be removed from its operation through promissory estoppel.²⁴⁶ Courts that have used promissory estoppel to take an oral promise out of the statute of frauds recognize that "[a] statute that was designed to prevent fraud cannot be used as an instrument of fraud."²⁴⁷ A claim of estoppel cannot remove a case from the operation of the statute of frauds, however, "where the promise relied upon is the very promise that the Statute declares unenforceable if not in writing."²⁴⁸ In addition, if the promisor's refusal to carry out the oral promise must result not only in the denial of the benefit of the oral bargain but must also result in "the infliction of an unjust and unconscionable injury and loss,"²⁴⁹ before a court can enforce the oral promise notwithstanding the statute of frauds.²⁵⁰

The court evades this issue entirely in *Brown* by stating that:

because we hold that [Brown's] oral promise of the . . . house to Rhonda does not constitute a contract for the sale of land and thus, the Statute of Frauds does not apply, we need not discuss whether the injury was such that the claim would otherwise be removed from the Statute of Frauds.²⁵¹

By failing to analyze the "unjust and unconscionable injury and loss" element and the requirement that the plaintiff's actions are "referable" to the oral promise,²⁵² the *Brown* court missed the opportunity, and obligation, to examine the proper balance between the policies furthered by the statute of frauds and the policies furthered by the exception. The choices involved are not easy to make, but they deserve to be addressed.

The statute of frauds aims to guard against the temptation to commit fraud and against the weaknesses of fallible memories by requiring certain promises to be in writing before they can be enforced. With its emphasis on evidentiary reliability, the operation of the statute can in some instances result in the unenforceability of promises that were actually made. Any apparent harshness of the statute is ameliorated by the exceptions to the statute that a court can

246. *Wabash Grain, Inc. v. Bank One, Crawfordsville, NA*, 713 N.E.2d 323 (Ind. Ct. App. 1999).

247. *See Whiteco Indus., Inc. v. Kopani*, 514 N.E.2d 840, 844 (Ind. Ct. App. 1987).

248. *Brown*, 733 N.E.2d at 21 (quoting *Ohio Valley Plastics, Inc. v. Nat'l City Bank*, 687 N.E.2d 260, 264 (Ind. Ct. App. 1997)).

249. *Id.* at 22 (quoting *Wabash Grain, Inc.*, 713 N.E.2d at 326).

250. *See id.*

251. *Id.*

252. *Perkins v. Owens*, 721 N.E.2d 289 (Ind. Ct. App. 1999).

utilize in appropriate cases. The promissory estoppel exception seeks to prevent a promisor from using the statute of frauds as a shield to insulate himself from responsibility for unwritten promises that would result in injustice if the promise is not enforced.

Perhaps the element of promissory estoppel that "injustice can be avoided only by enforcement of the promise"²⁵³ examined by the *Brown* court leads to the same result as the statute of fraud exception requirement that the promisee's reliance produce "an unjust and unconscionable result."²⁵⁴ Also, perhaps the "reasonable reliance"²⁵⁵ element of promissory estoppel is analogous to the "referable to the oral promise"²⁵⁶ requirement of the exception to the writing requirement. Then again, the two analyses may not be interchangeable, and the evidentiary functions served by the factors that must be shown for an exception to the writing requirement of the statute of frauds may not be adequately advanced by an alternative analysis.

That part of the *Brown* opinion that examines the parties' words and actions in the context of the elements of promissory estoppel also lacks any case law analysis, and this absence of case law reasoning is the second significant problem with the *Brown* opinion. The opinion contains no reference to precedent and fails to analogize or distinguish the facts of previous cases and the current one. The *Brown* court's substantive analysis of Branch's promissory estoppel claim consists of nearly three pages. In those three pages, the court analyzed whether Brown made a promise, whether Branch's reliance on Brown's promise was reasonable given his drinking problems and the "tumultuous" nature of their relationship, whether Branch's reliance was definite and substantial, and whether injustice would result if Branch was not awarded ownership of the house. For all of these issues, the court cites only one case, *Weinig v. Weinig*,²⁵⁷ and only then to identify the elements of promissory estoppel.²⁵⁸

The facts of this case disclose that Branch had once before quit her schooling and job in Missouri and had moved back to Indiana to be with Brown without any promise pertaining to the house. Further, Branch testified that she had decided to move back to Indiana to be with Brown the last time before he made any statements about the house. Given those facts, the analysis of the elements of promissory estoppel merited more discussion than a repetition of the facts before the trial court and a conclusory statement that the appellate court would not reweigh that evidence. The appellate court should have established the case law standards by which the trial court's conclusion could be judged as proper or improper. Unfortunately, that was not done.

253. *Brown*, 733 N.E.2d at 23.

254. *Id.* at 22 (citing *Wabash Grain, Inc.*, 713 N.E.2d at 326).

255. *Id.* at 23.

256. *Perkins*, 674 N.E.2d at 292.

257. 674 N.E.2d 991 (Ind. Ct. App. 1996).

258. *See Brown*, 733 N.E.2d at 23. The court referred to *Weinig* one additional time, but only in the context of quoting from Branch's appellate brief, in which she referred to *Weinig* in support of her reliance argument. *See id.* at 24.

Although the common law has the ability to change to meet changed conditions, case law reasoning is built upon predictability, which is inherent in the principle of *stare densis*. Given similar facts, a case to be decided today will have the same result as a case decided in the past. This stability informs the party to litigation that the decision resolving their disputed claims is fair, and therefore acceptable even to the loser. In the absence of any meaningful case law analysis, this function of the common law is not fulfilled by the *Brown* opinion.

Closely related to the fairness assurance arising from predictability is the idea that case law reasoning serves as a check on the idiosyncracies of judges. An individual judge is hindered by the press of precedent cases from substituting (or being perceived as substituting) her chosen result for a result shaped by the decisionmaking process employed by other judges. The comfort of objectivity is lost in the absence of application of precedent, as in *Brown*.

Finally, judge-made common law supplies a basis for people to choose to act, or to refrain from acting, in a particular way in the future. Decided cases enable people to predict whether conduct they are contemplating will be permissible or subject to court intervention. Separated as it is from any sequence of prior decisions, the *Brown* opinion engenders uncertainty, not certainty, in ordering future conduct.

The functions of common law are inseparable from the form of case law reasoning. Selection of appropriate precedent cases and thoughtful analysis of those precedents, resulting in either analogy to or distinction from the case under consideration, are not optional. Any other approach does not do justice to "the Grand Tradition of the Common Law [which] is our rightful heritage."²⁵⁹

B. *The Part-Performance Doctrine: Perkins v. Owens*²⁶⁰

Perkins contains an analysis of a contention that the part-performance exception to the statute of frauds should operate to make an oral promise to convey an interest in land enforceable. Two property owners, Owens and Leedy, purchased separate lots in 1978 from Stottlemeyer Lumber Company. These lots were contiguous to lots that Owens and Leedy already owned. Stottlemeyer retained ownership of a thirty-foot strip of land that it needed to provide access to its property. In 1992, Perkins purchased land from the same piece of property out of which Owens' and Leedy's lots had been subdivided. The deed from Stottlemeyer to Perkins included the thirty-foot strip.

Owens and Leedy filed a complaint to have that portion of the Stottlemeyer-Perkins deed that contained the thirty-foot strip declared void. Owens and Leedy contended that they had a prior oral agreement with Stottlemeyer that obligated it to transfer title of the strip to them once it had sold all of the remaining lots created from its property, and they sought an order of specific performance of that oral agreement. The trial court entered a general judgment in favor of

259. LEWELLEN, *supra* note 1, at 189.

260. 721 N.E.2d 289 (Ind. Ct. App. 1999).

Owens and Leedy, and Perkins and Stottlemeyer appealed.²⁶¹ The court of appeals reversed the trial court's decision in a memorandum decision and remanded the case to the trial court with instructions to enter findings of fact and conclusions of law sufficiently specific to satisfy a request for special findings that had been filed at trial.²⁶² The trial court entered a subsequent order in favor of Owens and Leedy on the basis that the oral agreement between them and Stottlemeyer was taken out of the statute of frauds by the part-performance doctrine.²⁶³ The court of appeals, which retained jurisdiction over the case, then reviewed the trial court's second order. The court of appeals reversed the trial court's decision and remanded with instructions to enter a judgment in favor of Perkins.²⁶⁴

In the latter *Perkins* opinion, the court of appeals recognized the rule that "[o]ral contracts may be excepted from the statute of frauds by the doctrine of part performance."²⁶⁵ To qualify under the part-performance exception, the party seeking to enforce the oral agreement must show "some combination of the following: payment of the purchase price or a part thereof; possession; and lasting and valuable improvements on the land."²⁶⁶ The parties did not contest the issue of payment for the thirty-foot strip because such payment was considered to have been included in the purchase price of the two original lots.

The court of appeals analyzed the possession and improvements requirements and found both to be lacking. Between the dates of Owens' and Leedy's purchase of land from Stottlemeyer in 1978, and Stottlemeyer's sale to Perkins in 1992, Owens and Leedy had used the thirty-foot strip by landscaping it, by placing a utility barn on it, by using it for a garden and as a place to store firewood. The court of appeals concluded that these uses did not sufficiently evidence the unequivocal possession required by the part performance doctrine, especially when such acts began prior to the alleged oral promise.²⁶⁷ Additionally, the appellate court noted that the possession yielded from one party to the other must be "referable to the contract."²⁶⁸ Again, because Owens and Leedy began their uses of Stottlemeyer's property prior to their purchase dates, their possession of it was not "referable to" the alleged oral promise. "Finally, the appellate court concluded that Owens' and Leedy's uses of the thirty-foot strip did not constitute "valuable and lasting" improvements.²⁶⁹ With only the payment element satisfied which "standing alone, is insufficient to remove a case from the statute of frauds,"²⁷⁰ the court of appeals concluded that Owens and Leedy had not established part-performance to take Stottlemeyer's oral promise

261. *See id.* at 291.

262. *See id.*

263. *See id.*

264. *See id.* at 294.

265. *See id.* at 292.

266. *Id.*

267. *See id.*

268. *Id.* at 292-93.

269. *Id.* at 293.

270. *Id.* at 292.

out of the statute of frauds.

Perkins provides a ready contrast to *Brown* as the former contains a recognition of the valid policies supporting the statute of frauds that is wholly missing from the latter. In *Perkins*, the court recognized that the statute of frauds "is intended to preclude fraudulent claims which would probably arise when one person's word is pitted against another's and which would 'open wide those ubiquitous flood-gates of litigation.'"²⁷¹ In other words, the writing does not prove the contents of the parties' alleged agreement; it merely provides some assurance that an agreement may have been made. At the same time, the court also acknowledged in *Perkins* that circumstances exist which can substitute for a writing and still fulfill the evidentiary safeguards that underlie the statute of frauds. One of those writing substitutes is part performance. However, to be acceptable as a writing substitute a party's part performance must provide some assurance that an agreement was made. This assurance comes from satisfaction of the three required elements. In this manner, the "validity of the rationale behind the statute of frauds"²⁷² is preserved, even "rather strictly adhered to,"²⁷³ while still permitting avoidance of "the infliction of an unjust and unconscionable injury and loss"²⁷⁴ where a trier of fact may conclude that they exist. The identification and balancing of competing policy interests and the use of precedent distinguishes this case from *Brown*.

CONCLUSION

The law of property developed in Indiana in 2000 displays some of the wide diversity of issues that affect the ownership, transfer, and financing of real property and improvements. The court of appeals issued opinions relating to several stages of property ownership, from retaining a broker to acquire real property to foreclosure procedures. The court's opinions also considered different estates in real property, from leasehold interests to fee simple ownership. In addition to subject matter, the development of the law of property in 2000 serves as a reminder that the reasoning process used to make a decision is as much a part of the common law as the rules themselves—so much so that the process has been said to have "come to represent the very meaning of our law."²⁷⁵

271. *Id.* (quoting *Summerlot v. Summerlot*, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980)).

272. *Id.*

273. *Id.*

274. *Brown v. Branch*, 733 N.E.2d 17, 22 (Ind. Ct. App. 2000).

275. ALFRED H. KNIGHT, *THE LIFE OF THE LAW* 41 (1996).

