

# LET THE SELLER BEWARE: THE SLOW DEMISE OF CAVEAT EMPTOR IN REAL PROPERTY TRANSACTIONS AND OTHER RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY LAW\*

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This Article takes a topical approach to the notable real property cases in this survey period, October 1, 2003 through September 30, 2004, beginning with an in-depth analysis of the disclosure requirements imposed upon transactions involving the sale and purchase of residential real estate in the State of Indiana. The Article then discusses some of the noteworthy reported opinions concerning Indiana law issued during the survey period in each of the following areas: (1) developments in the common law of property; (2) relationships between private parties; (3) title and recording issues; (4) land use law; and (5) eminent domain law.

## I. RESIDENTIAL REAL ESTATE SALES DISCLOSURES

The State of Indiana now requires the seller of residential real estate to provide a Residential Real Estate Sales Disclosure Form (a “Disclosure Form”) to the buyer of the property stating any defects in the home of which the seller is aware. As this is a fairly new requirement and is contrary to the formerly established rule of caveat emptor in real estate transactions in the State of Indiana, cases will undoubtedly arise testing the parameters of this new regimen. One such case has arisen during this survey period.

In *Verrall v. Machura*,<sup>1</sup> the Indiana Court of Appeals was presented with an opportunity to consider the effect of the completion by a seller of residential real property of the Disclosure Form<sup>2</sup> now required of most such sellers throughout the State of Indiana. The facts of this case are not atypical. Our story begins with the Verralls, our sellers, buying a home in Crown Point, Indiana, in 1997. Shortly after the purchase, the Verralls discovered that the basement suffered a good deal of water seepage. The couple from whom the Verralls purchased the home had dutifully, or so one imagines, disclosed in their Disclosure Form that one corner of the basement leaked a bit during heavy rains. Apparently sensing themselves abused, the Verralls initiated litigation that was eventually settled.<sup>3</sup>

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\* The views and opinions expressed are solely those of the authors and not necessarily those of their respective employers.

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1. 810 N.E.2d 1159 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 982 (Ind. 2004).

2. See *infra* notes 18-36 and accompanying text.

3. 810 N.E.2d at 1160.

The Verralls lived in the home for several more years, during which time their neighbors rerouted the discharge line of a sump pump. The Verralls noticed that the basement deluge subsided and that no repairs were necessary. They then remodeled the basement. In 2002, the Verralls decided to sell the home and, like most homeowners, contacted a real estate agent to list the property.<sup>4</sup>

Mr. Machura noticed the listing, toured the property a few times and decided to submit an offer. The Verralls signed and delivered a Disclosure Form in which the Verralls affirmatively responded to the Form's question "[a]re there moisture and/or water problems in the basement or crawl space area."<sup>5</sup> They also added the following statement: "During heavy rainfall, possible light seepage in SE/SW corner of basement."<sup>6</sup> Mr. Machura made further inquiry regarding this issue and the Verralls provided some waterproofing quotes. The Verralls did not, however, discuss with Mr. Machura the previous water damage that they had suffered or the litigation with the prior owners.

Apparently satisfied, Mr. Machura elected not to have the home inspected and proceeded to closing. As fate would have it, less than two months after buying the home, the basement flooded on two separate occasions. In the course of making repairs, a pegboard wall was removed which revealed a crack in the basement wall. Mr. Machura then demanded of the Verralls reimbursement for the repairs to the wall, as well as other items not relevant to our inquiry, which demand was, naturally, refused.<sup>7</sup>

Litigation ensued and the Verralls moved for summary judgment on the argument that the Buyer could not state a cause of action for fraud on the basis of the Verralls' statements made in the Disclosure Form. The trial court disagreed and denied summary judgment. An interlocutory appeal was then taken and the court of appeals affirmed the denial.<sup>8</sup>

Until recently, *caveat emptor*<sup>9</sup> had always been the rule of law in the State of Indiana in the buying and selling of real estate. A seller of real property was generally not required to disclose any facts regarding the condition of property he or she was selling unless there existed some relationship between the seller and buyer for which the law imputed some duty of disclosure.<sup>10</sup> However, once a buyer made an inquiry regarding the condition, characteristics, or qualities of the property, the law provided that such a relationship was created and the seller was then under a duty to disclose any and all problems associated with the

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4. *Id.*

5. *Id.* at 1161.

6. *Id.*

7. *Id.*

8. *Id.* at 1162.

9. *Caveat emptor, qui ignorare non debuit quod jus alienum emit.*—Let a purchaser, who ought not to be ignorant of the amount and nature of the interest he is about to buy, exercise proper caution. HERBERT BROOM, A SELECTION OF LEGAL MAXIMS: CLASSIFIED AND ILLUSTRATED 769 (8th ed. 1882).

10. See, e.g., *Choung v. Iemma*, 708 N.E.2d 7 (Ind. Ct. App. 1999); *First Bank of Whiting v. Schuyler*, 692 N.E.2d 1370 (Ind. Ct. App. 1998).

subject of the buyer's inquiry.<sup>11</sup> The statements then made or omitted by the seller can create the basis for a fraud action against the seller. In Indiana, "[t]o constitute a valid claim for fraud the party must prove there was a material misrepresentation of past or existing facts made with knowledge or reckless ignorance of its falsity, and the misrepresentation caused reliance to the detriment of the person relying upon it."<sup>12</sup>

In the name of consumer protection, inroads have been made into the effect of the rule of caveat emptor with respect to purchase of new homes from a merchant builder of the home by implying a warranty of merchantability.<sup>13</sup> Indeed, the rule of caveat emptor seems misplaced in relation to a transaction involving the acquisition of a new home from one in the business of building new homes. However, the rule does not seem to be misplaced in connection with the transfer of an older home from one homeowner to the next. The selling homeowner is not in the business of building or developing homes and generally would lack any special ability to discern problems with the home. Nevertheless, some jurisdictions began to make further consumer-protectionist inroads into the rule in these transactions by requiring sellers to disclose to buyers any material latent defects of which the seller had knowledge.<sup>14</sup> This was an inroad that the courts of Indiana had never made.

Nevertheless, litigation in other jurisdictions finding sellers liable for failure to disclose material latent defects increasingly included the seller's listing brokers in the action on the theory that as the seller's agent, they had independent duties of disclosure as well. Of course, pointing out defects rarely levels the road from contract signing to closing, so brokers, as well as sellers, are reluctant to make the disclosures. However, as the specter of judgments against brokers become more real, brokers devised a strategy to combat this potential liability. Brokers initially required their clients to disclose to them in writing all known defects in the property. If the seller did not disclose it to the broker, then the broker could resist liability on the theory that the seller breached its disclosure obligation to the broker. Sellers, on the other hand, often resisted this voluntary disclosure out of a reluctance to admit any defects.<sup>15</sup>

Although this tactic proved to be somewhat helpful, brokers would still be involved in litigation and the disclosures merely gave them a defense. In addition, there was still the question of what needed to be disclosed to buyers. Brokers also worried about meticulously honest sellers losing transactions to sellers who were much less forthcoming. The solution to their problems lay with

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11. *Choung*, 708 N.E.2d at 14 (citing *Thompson v. Best*, 478 N.E.2d 79, 84 (Ind. Ct. App. 1985); *Ind. Bank & Trust Co. of Martinsville v. Perry*, 467 N.E.2d 428, 431 (Ind. Ct. App. 1984)).

12. *Fimbel v. DeClark*, 695 N.E.2d 125, 127 (Ind. Ct. App. 1998) (citing *Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054, 1058 (Ind. 1992)).

13. *Theis v. Heuer*, 280 N.E.2d 300 (Ind. 1972).

14. George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from Caveat Emptor to "Seller Tell All,"* 39 REAL PROP. PROB. & TR. J. 193, 198-99 (2004).

15. *Id.* at 213-18.

the legislature. If the state would require disclosure to buyers of real property of everything by every seller, then the brokers would not seem to be the source of the problem in the eyes of the sellers and the brokers would be removed from any disputes. In addition, brokers could be even more removed from any disputes if the legislature could specifically state that brokers are not responsible for any disclosure actually made or any failure to make a disclosure regarding any condition of the property.

Accordingly, the National Association of Realtors has been very active in lobbying efforts to pass seller-mandated disclosure laws for single-family residential real estate throughout the country.<sup>16</sup> They have been successful in about two-thirds of the states.<sup>17</sup> Indiana joined those ranks in the mid 1990s with the passage of its law.<sup>18</sup> The law requires nearly all sellers<sup>19</sup> of residential real estate<sup>20</sup> to complete, sign, and deliver to any buyer of that property a Disclosure Form as promulgated by the Indiana Real Estate Commission.<sup>21</sup> The form contains a lengthy list of common<sup>22</sup> components of single family homes and requests the seller to check a box indicating that the home does not contain such feature, that it is defective, that it is not defective, or that the seller does not know about the condition of the feature. The form also has a series of questions for the seller to answer regarding whether there are any problems with various features or systems of the property.

The statute further requires that several notices be placed on the form. Of particular interest is one that states: "The representations in this form are the representations of the owner and are not the representations of the agent, if any. This information is for disclosure only and is not intended to be a part of any contract between the buyer and the owner."<sup>23</sup>

We learn several things from this notice. First, this notice seemingly makes clear that the responses made by the seller in the Disclosure Form are representations of the seller—albeit for "disclosure" purposes only. One could

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16. *Id.* at 213.

17. *Id.* at 199.

18. IND. CODE §§ 32-21-5 to -13 (2004).

19. The following transfers are exempt from the disclosure requirements under IND. CODE § 32-21-5-1(b): (a) transfers by order of court; (b) transfers by a mortgagee following foreclosure or a deed in lieu of foreclosure; (c) transfers by a fiduciary in the administration of a trust or estate; (d) transfers among co-owners; (e) transfers made to spouses or decedents; (f) transfers made due to the owner's failure to pay taxes; (g) transfers involving any governmental entity as a buyer or seller; (h) transfers of the first sale of a dwelling that has not been occupied; and (i) transfers to a living trust.

20. Residential real estate for this purpose excludes any property that contains more than four (4) dwelling units. *Id.* § 32-21-5-1(a).

21. *Id.* at § 32-21-5-7. A copy of the form currently issued by the Indiana Real Estate Commission is available at <http://www.in.gov/icpr/webfile/formsdiv/46234.pdf>.

22. More uncommon features are also included in the list, such as saunas and built-in vacuum systems.

23. IND. CODE § 32-21-5-7(3).

glean from the foregoing that there are different types of representations, one that is for disclosure purposes, and perhaps one for general or some other purposes. Second, the notice also seemingly makes clear that whatever the representations are, they are not intended to be a part of the contract between the two parties. However, the statute further provides that “an accepted offer is not enforceable against the buyer until the owner and the prospective buyer have signed the disclosure form.”<sup>24</sup> Therefore, while the intent is that the Disclosure Form not be a part of the contract, it clearly affects the rights of the parties to the contract in very significant ways.<sup>25</sup>

In addition, the statute provides that the “disclosure form is not a warranty by the owner”<sup>26</sup> and that it “may not be used as a substitute for any inspections or warranties that the prospective buyer or owner may later obtain.”<sup>27</sup> The Disclosure Form repeats this language as well. The typical party to a residential real estate transaction, and probably most attorneys too, will likely not appreciate the difference between a “representation” and a “warranty.” The distinction between the two is not often the subject of any litigation as represented by the lack of any recent case law discussing the difference. However, the Indiana courts have addressed the issue and have drawn a clear distinction between the two. A warranty is a statement of fact made or implied by one party to a contract to the other party which, although “collateral to the principle purposes of the contract,”<sup>28</sup> is an element of the contract and part of the consideration for the transaction.<sup>29</sup> A representation, then, is a statement of fact that does not rise to the level of a warranty and an action for recovery for misrepresentations lies in tort, i.e., fraud.<sup>30</sup> The principal difference between the two is that to recover for a breach of representation one needs to prove fraud and show that the misrepresentation was material, the seller knew or was recklessly ignorant of the falsity of the statement, and that the buyer relied on the misstatement,<sup>31</sup> whereas for a breach of warranty, one merely needs to show that the statement was made or implied and that it was false.<sup>32</sup>

Therefore, it is apparent that the intent and result of the residential real estate disclosure statute was to abolish the rule of caveat emptor in transactions for the transfer of residential real estate by requiring full and complete disclosure from the sellers of residential real estate and making such sellers, and not their agents, liable to their buyers for the failure to disclose information regarding the

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24. *Id.* § 32-21-5-10(c).

25. It is interesting to note that the buyer has to sign the disclosure form to be liable prior to closing under the contract—an act clearly outside of the contract yet having, under the statute, the ultimate effect on the buyer’s obligations under the contract. *Id.* § 32-21-5-10(a).

26. *Id.* § 32-21-5-9.

27. *Id.*

28. *McCarty v. Williams*, 108 N.E. 370, 372 (Ind. App. 1915).

29. *Id.*

30. *Id.* (quoting *Rose v. Hurley*, 39 Ind. 77 (1872)).

31. *Fimbel v. DeClark*, 695 N.E.2d 125, 127 (Ind. Ct. App. 1998).

32. *See, e.g., McCarty*, 108 N.E. 372.

condition of the home. The statute does provide, however, a safe-harbor from this seller liability by specifically exempting a seller from liability for any error or omission if:

(1) the error, inaccuracy, or omission was not within the actual knowledge of the owner or was based on information provided by a public agency or by another person with a professional license or special knowledge who provided a written or oral report or opinion that the owner reasonably believed to be correct; and

(2) the owner was not negligent in obtaining information from a third party and transmitting the information.<sup>33</sup>

Accordingly, in an action against the seller for fraud based on an error or omission in the Disclosure Form, the seller has two possible defenses:<sup>34</sup> (1) that the seller did not actually know of the defect alleged,<sup>35</sup> or (2) that the seller had a repair or inspection of a particular item done by a qualified person on which the seller can reasonably rely.

Prior to *Verrall v. Machura*, the case from our survey period, there had been only one reported decision construing the disclosure statute, *Kashman v. Haas*.<sup>36</sup> The dispute in *Kashman* involved a claim by the buyer of a home that the home contained extensive termite damage which the sellers failed to disclose, although the sellers did provide a Disclosure Form as required by law. The evidence in that case showed that the sellers had on three separate occasions during the seven years prior to the time the sellers sold the property discovered termite damage and contacted a professional to treat the house and repair any damage. The last such occasion happened in the year prior to the sale. At that time the sellers received a report from the professional that all known termite damage had been repaired and that there was no evidence of present infestation.<sup>37</sup>

The buyer also had the home inspected for termite infestation and damage prior to the sale and received a clean report, just as the sellers had one year

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33. IND. CODE § 32-21-5-11 (2004). An anomaly presented by this wording is that for the seller to escape liability under this section on the basis that the seller has no actual knowledge, the seller will first have to prove a negative (rarely an easy task), i.e., that seller actually did not know, *and* that the seller did not negligently obtain or transmit information to the buyer. It is difficult to understand how those two factors are related.

34. These would be in addition to any defenses based upon the lack of the buyer to prove each element of the fraud case, i.e., that the misrepresentation or omission was material and that the buyer could reasonably rely on the statement or omission.

35. This provision makes the seller's defense in the fraud action a bit easier because under a general fraud action the fraudfeasor needs to have either actual knowledge or be reckless in the falsity of the statements made. See *Fimbel*, 695 N.E.2d at 127. Under the statute, the seller can try to show that he or she did not actually know. The buyer will still have to show either actual knowledge or recklessness.

36. 766 N.E.2d 417 (Ind. Ct. App. 2002).

37. *Id.* at 422.

previously. The sellers even gave the buyer a copy of the termite protection plan sellers had previously received from the professional who examined the home.<sup>38</sup> Despite all this investigation, repair, and confirmation, the buyer discovered termite damage to the home some time after closing and brought suit against the seller claiming breach of contract and fraud. The trial court granted sellers summary judgment and the buyer appealed. The buyer's fraud claim was based on the Disclosure Form completed and delivered by the sellers. The court of appeals focused on two factors in affirming the grant of summary judgment.<sup>39</sup> First, the court of appeals considered the level of knowledge, or the absence of knowledge, that sellers seemed to have regarding the alleged defect.<sup>40</sup> The court discussed the disclosure statute's provision that a seller is not liable for errors in the form if the seller either has no actual knowledge of the defect or that the seller reasonably relied on a statement from a professional.<sup>41</sup> The court found that there was no evidence that sellers actually knew of any termite damage and that sellers had relied on a report from the termite professional.<sup>42</sup> The court noted that the buyer had failed to produce any evidence that the seller had any actual knowledge regarding the defect; therefore, the buyer did not do so, the buyer's claim must fail under the statute.<sup>43</sup>

The second factor considered by the court was the manner of buyer's investigation of the condition of the home.<sup>44</sup> The court pointed out, as described above, that the statute itself cautions that the Disclosure Form is not a warranty and cannot be used as a substitute for an inspection of the home.<sup>45</sup> The court also noted a "well settled" rule of law that "[a] purchaser of property has no right to rely upon the representations of the vendor of the property as to its quality, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities."<sup>46</sup> Because the buyer in this case did have the opportunity to inspect the home, and actually had it inspected, the sellers were entitled to summary judgment.

This second factor considered by the court of appeals in *Kashman* would seem to create the most significant obstacle for a disgruntled buyer in a residential real estate transaction in pursuing a fraud claim against his or her seller based on representations made in the required Disclosure Form. As stated above, one of the elements for a fraud action is that the victim of the fraud show that the misrepresentation was relied on to the detriment of the victim.<sup>47</sup> Under

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38. *Id.* at 419.

39. *Id.* at 422.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* See also *supra* notes 26-32 and accompanying text.

46. *Kashman*, 766 N.E.2d at 422 (quoting *Pennycuff v. Fetter*, 409 N.E.2d 1179, 1180 (Ind. Ct. App. 1980)) (alteration in original).

47. *Fimbel v. DeClark*, 695 N.E.2d 125, 127 (Ind. Ct. App. 1998).

*Kashman*'s second factor, that reliance cannot be present where the representation is one made in the Disclosure Form—the statute clearly provides that it is no substitute for an inspection by the buyer.

We turn our attention back to the dispute between the Verralls and Mr. Machura. The trial court denied the Verralls' motion for summary judgment on the ground that "the Disclosure Form is not a warranty and cannot be the basis for a fraud claim."<sup>48</sup> The Verralls understandably rely heavily on *Kashman* as it is the only guiding precedent on the construction of the statute. Indeed, in light of the second factor discussed in *Kashman*, the conclusion arrived at by the Verralls seems obvious. Unfortunately, the court of appeals did not consider the second factor discussed in *Kashman*. Instead, the court focused on the evidence that was submitted at the summary judgment hearing regarding the knowledge that the Verralls had concerning the leaking basement and the root cause of the problem. The court held that the denial of summary judgment was proper because there was a material question of fact regarding the level of the Verralls' knowledge.<sup>49</sup>

The conduct of the buyer, Mr. Machura, in the *Verrall* case would seem to be provide even more reason to consider whether an allegedly aggrieved party can rely on the representations made in a Disclosure Form. In that case, the Verralls disclosed that there was some seepage in the basement. Instead of inspecting the home and investigating the matter further, Mr. Machura elected to buy the property without any inspection at all.<sup>50</sup> The precedent established in *Kashman* seems to militate directly against finding any fraud in this situation as the buyer cannot waive the right to inspect the home and then pursue a fraud claim based on a misrepresentation in the Disclosure Form.

By ignoring the buyer's conduct in failing to conduct his own inspection, especially in light of the disclosure that was made to him by the sellers, by ignoring the plain provisions of the disclosure statute, and by ignoring the well settled rule of law expounded by the *Kashman* court, the court of appeals has made that which seemed clear to now be debatable. However, the issue of the extent to which a party may rely on these statutorily required Disclosure Forms should not lie with the courts, but with the legislature.

Because our legislature has sought to undo the effect of caveat emptor in the purchase of older homes from one homeowner to another, it should do so only in a clear and understandable manner. By stating clearly that the Disclosure Form is not to serve as a substitute for an inspection, the *Kashman* court is correct in refusing to hold a seller responsible in fraud for an error in the Disclosure Form. But if that is the case, what good is the Disclosure Form? It is clearly and specifically made not a part of the contract between the buyer and seller and it is not the basis of a warranty from seller to buyer. It serves at most as a representation of certain facts, limited to the actual knowledge of the seller. As such, the only seemingly possible action that may lie for a misrepresentation

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48. *Verrall v. Machura*, 810 N.E.2d 1159, 1163 (Ind. Ct. App. 2004).

49. *Id.* at 1164.

50. *Id.* at 1161.

made in the Disclosure Form is a fraud action. But if *Kashman* is correct and the seller cannot be held accountable for his or her misrepresentations in the Disclosure Form, then of what use is the Disclosure Form?

## II. COMMON LAW

In two cases during the survey period, the court of appeals addressed common law issues relating to the creation of easements. Both cases demonstrated that the common law often follows common sense. In the first case, the court emphasized that easements may only be created in the absence of a written document by stringent application of the common law requirements. In the second, the court allowed for equitable reformation to correct a mutual mistake of fact in the document that had created the easement.

In *Wolfe v. Gregory*,<sup>51</sup> the court of appeals reviewed whether a trial court decision refusing to find that an access easement had been created by prescription or necessity was contrary to the law. In 1977, a seventy-acre tract was divided between five siblings into five parcels of land. County roads ran along the northern and southern boundaries of the larger tract, but access to some of the interior parcels was provided by an “old farm road” which connected to the county road on the south. A few months after the division took place, Margie Cornett built a road which connected her parcel to the county road on the north. Her brother, Marvin Lagle asked for and received permission to use Cornett’s road to reach his parcel. In 2000, Lagle sold his parcel to his niece, Brooke Gregory, who in turn divided it in two and conveyed five acres to her brother, Dustin Wolfe. Cornett denied Wolfe use of her road. Shortly thereafter, Wolfe filed a complaint seeking to establish that he had the right to use Cornett’s road via a prescriptive easement or, in the alternative, an easement by necessity. The trial court entered judgment against Wolfe and he appealed. The court of appeals upheld the decision of the trial court, noting that, in the absence of a written document, easements by prescription or necessity are only created at common law if the requirements are strictly adhered to.<sup>52</sup>

The court reiterated the common law rule that to establish the existence of a prescriptive easement, the evidence must show an actual, hostile, open, notorious, continuous, uninterrupted, and adverse use for twenty years under a claim of right.<sup>53</sup> Although one may “tack on” a previous owner’s period of adverse use to reach the twenty year period, the court noted that Lagle’s use of the road was not adverse or hostile, but expressly permitted by Cornett. Because Wolfe failed to meet the required time period of adverse use, the court did not examine whether any of the other elements of the test were satisfied.<sup>54</sup>

The court then turned to Wolfe’s claim that he had the right to use Cornett’s road under an easement of necessity. The court reiterated the common law rule

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51. 800 N.E.2d 237 (Ind. Ct. App. 2003).

52. *Id.* at 240-42.

53. *Id.* at 240.

54. *Id.*

that “an easement of necessity will be implied when ‘there has been a severance of the unity of ownership of a tract of land in such a way as to leave one part without access to a public road.’ An easement of necessity may arise, if ever, only at the time that the parcel is divided and only because of inaccessibility then existing.”<sup>55</sup> On the facts of this case, the court found that evidence existed that the “old farm road” was in current use by several owners, including Wolfe. Although the court noted that Wolfe’s access to his parcel would be more convenient if he was able to use Cornett’s road, “Wolfe’s convenience is not relevant in determining whether to imply an easement of necessity.”<sup>56</sup>

In *S&S Enterprises v. Marathon Ashland Petroleum, LLC*,<sup>57</sup> Ramada Inns, the owner of a parcel of land near the Indianapolis airport, carved out a smaller parcel and sold it to Marathon Oil Company for the construction of a gas station. After the conveyance, Ramada gave Marathon a written easement, which provided that Marathon would have a non-exclusive twenty-five foot easement on the West property line of the Marathon parcel so that the two owners could share a common access drive. Ramada then amended the easement with a rider, which had identical language, except that it substituted the word “East” instead of “West.” Along the eastern property line of the Marathon parcel is a steep drainage ditch with a nineteen foot drop. Along the western property line of the Marathon parcel, a driveway with curb cuts into both the service station and the hotel was built and used by both owners from 1972 until 1984. Subsequently, Ramada management erected large concrete barricades to close off access to the hotel parking lot, but to not the gas station, from the driveway. The Ramada parcel was sold to S&S in 1986. The next year, the Ramada Inn was destroyed by a United States Air Force jet. In 1999, the Marathon was damaged by fire and had to be rebuilt. During the rebuilding process, Marathon’s counsel sent a letter to S&S asking it to remove the concrete barriers so that it would have complete access to its easement area. S&S gave permission for Marathon to move the barriers and a few months later filed an action for trespass and injunctive relief. The trial court granted summary judgment to Marathon. S&S appealed.

The trial court granted Marathon summary judgment on the theory that the designated evidence showed that a mutual mistake occurred when Ramada executed the rider and that the easement, not the rider, correctly provides the location of the access easement.<sup>58</sup> Because of the mutual mistake, the trial court granted Marathon relief under the doctrine of reformation, which the court of appeals characterized as “an extreme equitable remedy.”<sup>59</sup> Because S&S and Marathon both agreed that the remedy of reformation should not be available if S&S were a bona fide purchaser, the court of appeals approached that issue first.

To qualify as a bona fide purchaser, the court reminded us, one has to purchase in good faith, for a valuable consideration, and without notice of the

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55. *Id.* at 241 (quoting *Cockrell v. Hawkins*, 764 N.E.2d 289, 292 (Ind. Ct. App. 2002)).

56. *Id.*

57. 799 N.E.2d 18 (Ind. Ct. App. 2003).

58. *Id.* at 22.

59. *Id.*

outstanding rights of others.<sup>60</sup> Since both the easement and the rider were recorded, the issue discussed by the court was whether S&S had any notice that the legal description in the rider was inaccurate. It concluded that the designated evidence, including the location of the steep drainage ditch along the eastern edge of the Marathon parcel, established that S&S had inquiry notice of the disconnect between the language of the rider and the reality of the site.<sup>61</sup> The standard under Indiana common law, is whether the facts are such as to put a “reasonably prudent person upon inquiry.”<sup>62</sup>

The court then turned to the question of whether the trial court erred when it granted summary judgment to Marathon and reformed the language in the rider. The court discussed the designated evidence that likely led to the mistake, particularly a statement by the surveyor that the survey was not prepared to show North as “up,” but rather that the survey was oriented toward the public road serving the site.<sup>63</sup> In addition, the court focused on a statement by the representative of Ramada who had executed the easement and rider in which he stated that “[Ramada] would not have intentionally conveyed an easement to Marathon that was not [useable].”<sup>64</sup> Based upon the designated evidence, the court of appeals found that the trial court did not err when it granted summary judgment to Marathon on the theory of mutual mistake.<sup>65</sup>

The most interesting issue in *S&S Enterprises* is the one that was not discussed by the court of appeals, namely, whether the trial court had the discretion to grant an equitable remedy without considering whether or not Marathon had an adequate remedy at law. The court did not mention any of the cases in the previous survey period that debated this issue and were discussed at length in last year’s article.<sup>66</sup> Although the court cited *Estate of Reasor v. Putnam County*<sup>67</sup> for the proposition that the doctrine of reformation is an “extreme” equitable remedy, it did not mention the more recent case by the Indiana Supreme Court that stated that if an adequate remedy at law exists, equitable relief should not be granted.<sup>68</sup> *S&S Enterprises* is therefore most notable because it continues to highlight that the “well-settled rules of equity” rest on shaky foundations.<sup>69</sup>

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60. *Id.*

61. *Id.* at 23-24.

62. *Id.* at 25.

63. *Id.* at 26-28.

64. *Id.* at 28.

65. *Id.*

66. See Tanya Marsh, “*We Just Saw It from a Different Point of View*”: *Recent Developments in Indiana Real Property Law*, 37 IND. L. REV. 1307, 1309-14 (2004).

67. 635 N.E.2d 153 (Ind. 1994).

68. Ind. Family & Soc. Servs. Admin. v. Walgreen Co., 769 N.E.2d 158, 162 (Ind. 2002).

69. See *Kesler v. Marshall*, 792 N.E.2d 893, 896 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 795 (Ind. 2004) (The discretion to award equitable remedies “is not arbitrary, but is governed by and must conform to the well-settled rules of equity.”).

## III. RELATIONSHIPS BETWEEN PRIVATE PARTIES

## A. Buyer and Seller

Disputes between purchasers and sellers of real estate often arise over the description of the property in a purchase agreement or the understanding of the parties regarding that description or the property to be acquired and sold. This survey period brings another such case in *Perfect v. McAndrew*.<sup>70</sup> The Perfects owned land in Dearborn County, Indiana, which they thought, based on their deed for the property, contained 81.1 acres. Mr. McAndrew made the Perfects an offer to purchase the property, which was described as "Anderson Rd, 81.1 acres owned by Perfects,"<sup>71</sup> for \$250,000. The Perfects countered that offer for a purchase price of \$252,500.<sup>72</sup> Mr. McAndrew then viewed the property with the Perfects during which the parties inspected the boundaries and the Perfects described the location of the boundaries and the extent of the property. The parties never discussed the acreage of the property and McAndrew then accepted the Perfects' counteroffer.<sup>73</sup>

Mr. McAndrew obtained a survey of the property during the course of his due diligence. The survey revealed that the property consisted of over ninety-two acres instead of the eighty-one acres which the Perfects thought they owned. After noting that fact, the Perfects decided to try to renegotiate the purchase agreement. When those attempts proved fruitless, the Perfects sought to terminate the purchase agreement through a claim that Mr. McAndrew had not timely provided notice of the receipt of a commitment to obtain his financing.<sup>74</sup> The Perfects then simply refused to close and Mr. McAndrew filed suit for specific performance.

The trial court entertained a bench trial of the action and entered judgment for specific performance in Mr. McAndrew's favor finding that there was a meeting of the minds of both parties regarding the land to be purchased under the contract and that an "in gross" sale of land was contemplated.<sup>75</sup> The Perfects appealed arguing that the trial court's determination that the sale was in gross was erroneous. The court of appeals disagreed and affirmed the judgment of the trial court.<sup>76</sup>

The first issue to be discussed in this case concerned whether the agreement called for the property to be sold in gross, where the property is "sold in a lump, and for a gross sum,"<sup>77</sup> or on a per acre basis. The court held that the agreement set forth an in gross calculation and that the parties clearly understood what

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70. 798 N.E.2d 470 (Ind. Ct. App. 2003).

71. *Id.* at 472.

72. *Id.*

73. *Id.* at 473.

74. *Id.*

75. *Id.* at 474-75.

76. *Id.* at 480.

77. *Id.* at 476.

property was to be conveyed and that the number of acres was not a consideration.<sup>78</sup> The seller's misunderstanding of the actual number of acres was not relevant. The seller in this case argued that the lack of the phrase "more or less" in relation to the description of the acreage of the property in the agreement took the agreement out of the "in gross" category and put it on a per acre basis. The court of appeals, relying on an 1890 Indiana Supreme Court case,<sup>79</sup> found that while that phrase may be helpful in determining the nature of the agreement in question, the presence or absence of the expression is not conclusive.<sup>80</sup>

After finding that the agreement was on "in gross" basis, the court of appeals also addressed the issue of mutual mistake which was raised by the seller in this case. If there was a true mutual mistake of an essential fact, then the agreement would be avoidable by either party.<sup>81</sup> However, the evidence presented was clear that there was no mistake on either party's part about what land was to be sold under the agreement, only about what the acreage was. Because the court had already determined that the agreement was on in gross, this fact was not "one that is 'of the essence of the agreement'"<sup>82</sup> and that the parties were mistaken of it was not controlling. Therefore, the trial court's granting of judgment to Mr. McAndrew for specific performance was affirmed.<sup>83</sup>

Another interesting case regarding the relationship between buyer and seller which arose during the survey period involved the construction of provisions in a contract in which the seller retained a "right of residency" in a farm house on the property sold. In *Krieg v. Hieber*,<sup>84</sup> Krieg conveyed his farm to Heiber under a warranty deed which provided that the conveyance was "[s]ubject to right of residency of the Grantor in the house, garage, apartment and land thereto, including use of the driveway."<sup>85</sup> About a month after the transfer of the property subject to this right, the seller cancelled his insurance policy covering the property and the buyer acquired an insurance policy. A year later the house burned down and became uninhabitable. The buyer made a claim against his insurance policy for the loss and then elected to use the proceeds to reduce his mortgage on the property rather than rebuild the house.<sup>86</sup>

The seller objected to this expenditure of the insurance proceeds and initially sought to impose a constructive trust on the proceeds. At the trial, the seller changed his requested relief to recover damages for the lost value of his retained

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78. *Id.* at 478.

79. *Hayes v. Hayes*, 25 N.E. 600 (Ind. 1890).

80. 798 N.E.2d at 477-78.

81. *Id.* at 478.

82. *Id.* at 479 (citing *Bowling v. Poole*, 756 N.E.2d 983, 989 (Ind. Ct. App. 2001)).

83. Although this remedy is clearly one in equity, there is no indication that the court considered whether an adequate remedy at law existed. *See supra* notes 68-69 and accompanying text.

84. 802 N.E.2d 938 (Ind. Ct. App. 2004).

85. *Id.* at 941.

86. *Id.* at 942.

life estate.<sup>87</sup> Following a bench trial, the court entered judgment for the buyer and the seller appealed. The court of appeals agreed with the seller, reversed the trial court and remanded for further proceedings to determine the value of the life estate so retained.<sup>88</sup>

For our purposes, the discussion of the court of appeals regarding the rights reserved by the seller in this transaction is instructive. First of all, the court of appeals disagreed with the trial court in holding that a life estate in the house, garage, apartment, land, and the use of the driveway was created by the deed.<sup>89</sup> The trial court refused to recognize that a life estate was created but that a right of residency was reserved which was apparently similar to a life estate. The court of appeals clarified that the actual words "life estate" were not required, but that the estate may be created by any "equivalent and appropriate language."<sup>90</sup> The court of appeals further found that in creating the life estate in this manner, the seller limited his rights to his own residency therein, i.e., he could not sell his life estate or allow others to live at the property in his absence.<sup>91</sup>

Having thus determined that a life estate was created, the court of appeals then turned to the question of the entitlement of the life tenant to insurance proceeds obtained by the remainderman. The court discussed a prior court of appeals case holding that a life tenant generally is entitled to the entire proceeds of insurance procured by the life tenant even if those proceeds are greater than the value of the life tenant's interest unless the instrument creating the life estate requires that such proceeds be shared or the parties make some agreement as to the sharing of any proceeds.<sup>92</sup> Of course, the issue at hand is the opposite, i.e., whether the remainderman is entitled to the entire proceeds even if they exceed the value of the remainderman's interest. The court of appeals held that where the remainderman acquires insurance on property subject to a life estate, he "necessarily insured the property for the benefit of [the life tenant's] limited life estate."<sup>93</sup> The court of appeals further found that, notwithstanding such holding, there was some evidence that the parties had agreed that the remainderman had acquired insurance to protect both parties.

### B. Liens

One of the more intriguing cases of the survey period involves a dispute over the priority of competing liens on a piece of property—a mortgage and a mechanic's lien. In *Provident Bank v. Tri-County Southside Asphalt, Inc.*,<sup>94</sup> the court of appeals considered the relative priority of a mortgage, recorded against

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87. *Id.*

88. *Id.* at 947.

89. *Id.* at 945.

90. *Id.*

91. *Id.* at 945-46.

92. *Ellerbusch v. Meyers*, 683 N.E.2d 1352 (Ind. Ct. App. 1997).

93. 802 N.E.2d at 946.

94. 804 N.E.2d 161 (Ind. Ct. App. 2004).

the property in December 1999, and a mechanic's lien, for work commenced in June 2000. When the mechanic's lien holder failed to receive payment for an asphalt driveway it had constructed on the property, it filed an action to foreclose on the mechanic's lien. The trial court entered summary judgment to the mechanic's lien holder, finding that it had priority over all liens but tax liens.<sup>95</sup> The mortgage holder appealed and the court of appeals reversed the trial court.<sup>96</sup>

In so doing, the court of appeals analyzed the effect of two sections of the Indiana Code. The first section plainly states that "[a] conveyance, mortgage, or lease takes priority according to the time of its filing."<sup>97</sup> Because the mortgage at issue in this case was recorded some seven months prior to the time the first work was performed giving rise to the mechanic's lien, the mortgage lien has priority under this section. The second section is in the mechanic's lien statute and provides that where property which is subject to a mechanic's lien is also encumbered by a mortgage, then the mechanic's lien "is not impaired by . . . foreclosure of mortgage. The buildings may be sold to satisfy the lien and may be removed not later than ninety (90) days after the sale by the purchaser."<sup>98</sup> As such, the mechanic's lien holder is protected by giving him priority in the improvement itself. Accordingly, the holder of the mechanic's lien "may sell the improvements to satisfy the lien and remove them within ninety days of the sale date."<sup>99</sup>

One may question the extent of the used driveway market in central Indiana; however, after this decision, that market increased by one. The court of appeals acknowledged the mechanic's lien holder's assertion that the "practical ramifications" of removal and sale of the driveway and noted that although it is not the ideal solution, "[r]emoval, however, is not impossible and is the solution that effects the intent behind both"<sup>100</sup> of the above-referenced sections of the Indiana Code.

Judge Sharpnack filed a dissenting opinion in this case. His solution would have been to allow the mechanic's lien holder to foreclose its lien on the property subject to the rights of the mortgage holder and then to give the mechanic's lien holder priority "up to the amount of its interest with respect to the driveway."<sup>101</sup> That may indeed be a more sensible approach than the majority opinion, but it clearly ignores the effect of the general priority statute that gives the first recorded lien priority. Allowing the mechanic's lien holder to have priority up to the amount of its interest is tantamount to giving that lien holder priority, which is clearly not envisioned by the statutes discussed in the majority opinion.

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95. *Id.* at 163.

96. *Id.* at 166.

97. IND. CODE § 32-21-4-1(b) (2004).

98. *Id.* § 32-28-3-2.

99. 804 N.E.2d at 165.

100. *Id.* at 165.

101. *Id.* at 170 (Sharpnack, J., dissenting).

### C. Restrictive Covenants

In *King v. Ebrems*,<sup>102</sup> the court of appeals examined the language and circumstances necessary to create restrictive covenants. In 1979, the Smiths purchased a 101-acre tract that they intended to divide into lots for single-family residential development. At that time, the Smiths did not have a specific configuration or timetable in mind. In 1980, the Smiths sold a lot to the Kings by a deed that contained various restrictive covenants, including that no structure other than a single-family residence and attached garage may be built on the lot. The deed also provided that “[t]hese restrictions may be modified and exception made thereto, if 80% of the owners of similarly-situated land and the grantor, should he own adjacent land, even though unrestricted, so agree.”<sup>103</sup> The concept of “similarly-situated land” was not defined.

In 1993, the Smiths platted their three remaining lots together as the Don Smith Subdivision, in order to comply with Franklin County’s Unified Zoning Ordinance. The plat of the subdivision contained restrictions substantially the same as those contained in the King deed. Although the King lot appears on the plat, apparently because it abuts the subdivision, it is not part of the subdivision. In 2001, the Ebrems, owners of a lot in the subdivision, received permission from Franklin County to construct a pole barn on their lot. After the Ebrems began construction, the Kings objected and asserted that the Ebrems were in violation of the restrictive covenant. The Ebrems completed their barn and the Kings and the owners of an adjoining parcel, the Stuckeys, filed a complaint for injunctive relief. The trial court dismissed the complaint, finding that the Kings and the Stuckeys had no standing because they were not owners of lots in the subdivision.<sup>104</sup> The homeowners appealed.

The court of appeals affirmed the trial court, finding that the Kings and the Stuckeys were not beneficiaries of the restrictive covenant burdening the Ebrems lot and therefore that they had no standing to sue.<sup>105</sup> The core issue was whether the method in which the Smiths divided their land and purported to impose restrictive covenants on the lots was sufficient to actually create an integrated system of restrictive covenants. Because this case dealt with a restriction on a lot in the platted subdivision, the analysis was relatively straightforward—the King and Stuckey lots were not in the subdivision and their reference to “similarly-situated land” was not clear enough to encumber the subdivision, whose plat contained no reference to the restrictions in their deeds. Judge Baker dissented, arguing that the facts show that the Smiths had a common plan of development for the land including the King, Stuckey, and Ebrems lots, and that the Kings and Stuckeys would therefore have standing to enforce the restrictive covenant on the Ebrems lot.<sup>106</sup>

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102. 804 N.E.2d 821 (Ind. Ct. App. 2004).

103. *Id.* at 823-24.

104. *Id.* at 824.

105. *Id.* at 834.

106. *Id.* at 832-33 (Baker, J., dissenting).

The court of appeals did not discuss whether the Ebrems were bona fide purchasers without notice of the restrictive covenants in the King and Stuckey deeds. Such analysis would have been interesting, particularly in light of Judge Baker's statement in his dissent that "the Ebrems were not without notice. All the parcels at issue here were part of Smith's original tract. The deeds from the lots that made up the original tract could have been inspected to determine which lots were within Smith's original common plan."<sup>107</sup> The suggestion by Judge Baker that inquiry notice would require the purchaser of a lot in a platted subdivision to examine the deeds of surrounding parcels to determine if they were carved out from a larger original tract which may have had a common plan is strikingly more burdensome on a purchaser than the standard articulated in *S&S Enterprises*, which states that a purchaser is on inquiry notice if the facts are such as to put a "reasonably prudent person upon inquiry."<sup>108</sup>

Also delayed for another day is the larger question of whether the language in the King and Stuckey deeds was sufficient to create any restrictive covenants at all because it does not contain a description of the "similarly-situated land."

#### IV. TITLE AND RECORDING

In *Bank of New York v. Nally*,<sup>109</sup> discussed in last year's article, the court of appeals somewhat muddied Indiana common law regarding the nature and scope of constructive notice. The Indiana Supreme Court granted transfer during the survey period, vacated the lower court opinion, and provided much-needed clarity on the central issue of the case.<sup>110</sup>

On a single day, three documents were executed: (1) a deed from Owens to Nally (the "Deed"); (2) a mortgage for the majority of the purchase price to Amtrust Financial Services (the "Amtrust Mortgage"); and (3) a mortgage for the remainder of the purchase price from Nally to Owens, which was expressly subordinate to the Amtrust Mortgage (the "Owens Mortgage"). The Owens Mortgage was recorded ten days after the closing, and the Deed and the Amtrust Mortgage were recorded a month later. Nearly two years later, Nally refinanced with EquiVantage to pay off the Amtrust Mortgage, but not the Owens Mortgage. EquiVantage's title search did not reflect the Owens Mortgage. EquiVantage later assigned its mortgage, and the Bank of New York relied upon EquiVantage's title work. In 2000, the Bank of New York sued to foreclose its mortgage. Four months later, the Owens intervened as third party plaintiffs and sought to foreclose on their mortgage, which they claimed was superior to the Bank's. The Bank of New York responded that it was a bona fide purchaser without notice of the Owens Mortgage.

Since the Owens Mortgage was recorded before the Deed, but the two

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107. *Id.* at 833 (Baker, J., dissenting).

108. *S&S Enters. v. Marathon Ashland Petroleum, LLC*, 799 N.E.2d 18, 25 (Ind. Ct. App. 2003).

109. 790 N.E.2d 1071 (Ind. Ct. App. 2003).

110. *Bank of New York v. Nally*, 820 N.E.2d 644 (Ind. 2005).

documents were executed on the same day, the central question in this case is the meaning of “chain of title” and the purchaser’s duty to search the mortgagor-mortgagee index. The court cited authority that “[t]he period of notice, and hence the period of search, extends as to a particular owner from the date that he acquires title (not the date at which the transfer is recorded) to the date of the recording of a conveyance by him.”<sup>111</sup> The fact that the Owens Mortgage was recorded before the Deed, the court held, did not

relieve EquiVantage of its duty to search the mortgagor-mortgagee index back to December 16, 1996, the date of Nally’s deed according to the public record. Because the Owens mortgage was recorded after the date the deed to Nally was executed, the mortgage was within the chain of title at the time EquiVantage made its mortgage. EquiVantage was therefore on constructive notice of its existence.<sup>112</sup>

*Dreibelbiss Title Company v. Fifth Third Bank*<sup>113</sup> involved a situation in which in 1998, Cynthia Blevins obtained an open-ended fifteen-year line of credit with Fifth Third’s predecessor. In 1999, Blevins apparently refinanced her home and Dreibelbiss handled the closing. Fifth Third provided the title company with a payoff form that instructed the title company to have Blevins sign a letter authorizing Fifth Third to close her home equity account and release the mortgage securing it. The title company prepared a letter that Blevins signed and forwarded to Fifth Third along with the amount specified in the payoff form, but the letter did not instruct Fifth Third to close the account and release the mortgage. In 2000, Blevins took another advance on her line of credit. The title company demanded that Fifth Third release the mortgage in accordance with Indiana Code section 32-28-1-1. Fifth Third moved for and received summary judgment on the argument that the line of credit agreement and the payoff form clearly and unambiguously required Blevins to submit a written request to close the line of credit account. The court of appeals agreed with the trial court that by failing to submit such written request, the title company and Blevins failed to meet Fifth Third’s condition for release of the mortgage.<sup>114</sup>

## V. LAND USE

In *Fulton County Advisory Plan Commission v. Groninger*,<sup>115</sup> the Indiana Supreme Court vacated an earlier decision by the court of appeals.<sup>116</sup> The Groningers applied for preliminary plat approval for a residential subdivision that would enter and exit onto County Road 300 South, a highway. The Fulton County Advisory Plan Commission (the “Commission”) refused to approve the

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111. *Id.* at 650 (quoting 4 AMERICAN LAW OF PROPERTY § 17.19 (1952)).

112. *Id.* at 651.

113. 806 N.E.2d 345 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 978 (Ind. 2004).

114. *Id.* at 349-50.

115. 810 N.E.2d 704 (Ind. 2004).

116. 790 N.E.2d 541 (Ind. Ct. App. 2003).

plat because it did not comply with the Vision Clearance Standards articulated in the Fulton County Zoning Ordinance.<sup>117</sup> The Vision Clearance Standards contain three standards—two of which state specific conditions under which a curb cut will not be permitted (i.e., a minimum of x feet from the crest of a hill, with a specific slope and speed limit) and a third catch-all: “The visibility to or from the desired location is determined to be impaired by the Zoning Administrator.”<sup>118</sup> The court of appeals found that this standard was not sufficient to give a member of the public notice of what the “Plan Commission will consider when reviewing a plat application to determine if highway visibility is impaired” and upheld the trial court’s decision to mandate the Commission to grant plat approval.<sup>119</sup> The Indiana Supreme Court granted transfer and vacated the decision of the court of appeals.

The court cited Indiana Code section 36-7-4-702(b), which provides that a subdivision control ordinance “must specify the standards by which the commission determines whether a plat qualifies for primary approval.”<sup>120</sup> The court of appeals decision rested on the theory that the Fulton County Zoning Ordinance did not define the vision clearance standards with “sufficient precision” to meet the requirements of the Indiana Code. The determination of this issue, stated the court, “turns upon whether the language and requirements of the ordinance can be understood with ‘reasonable certainty,’” citing previous decisions that held that a valid ordinance must be “concrete” and “precise, definite, and certain in expression.”<sup>121</sup>

The Groningers argued that the court should view each of the three standards separately, and that if the third “catch-all” standard were viewed in isolation, it would not be sufficiently precise to comply with Indiana Code section 36-7-4-702(b). The court found this reading of the ordinance to be “contrary to its plain language.”<sup>122</sup> Instead, the court emphasized that the first two standards set forth minimum standards that would only be acceptable if, pursuant to the third standard, the Zoning Administrator did not find some other impediment to visibility, such as foliage, or the grade or shape of the road.<sup>123</sup> The court noted that the court of appeals has previously upheld zoning ordinances with similar requirements.<sup>124</sup>

The *Miller v. St. Joseph County Area Board of Zoning Appeals*<sup>125</sup> decision is interesting because while it rejected the appellant’s petition, the result granted the appellant what he had sought in the first place. Robert Miller owned a residential parcel adjacent to a childcare center owned by Michael Garatoni,

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117. 810 N.E.2d at 705-06.

118. *Id.* at 706.

119. 790 N.E.2d at 546.

120. 810 N.E.2d at 707.

121. *Id.* at 707-08.

122. *Id.* at 708.

123. *Id.*

124. *Id.* at 709.

125. 809 N.E.2d 356 (Ind. Ct. App. 2004).

Growing Kids. Garatoni sought a variance so that he could build an addition to his center in the setback area of his projects that adjoins Miller's property. Garatoni and Miller privately negotiated conditions upon which Miller would agree to not oppose the variance request, including the maintenance of a sixteen-foot buffer along the length of the property line and the planting of some additional trees. On December 4, 2002, the Board of Zoning Appeals granted Garatoni's variance and ordered that the conditions agreed upon by Garatoni and Miller were to be incorporated into the decision of the Board. Miller filed a motion to correct error with the Board, noting several errors in the Board's description of the conditions. In response, the Board issued a revised order on February 5, 2003, which stated that Garatoni's buffer must run a minimum of approximately 275 feet from the north property line. Miller filed a motion for review with the St. Joseph Superior Court on March 7, 2003. Indiana Code section 36-7-4-1003 permits a party aggrieved by a decision of the board of zoning appeals to file a verified petition within thirty days after the decision of the board.<sup>126</sup> Miller's petition was filed more than thirty days after both orders, therefore, the court of appeals upheld the decision of the trial court that his challenges to those orders cannot be considered.

However, the court of appeals noted that in his appellee's brief, Garatoni "conceded that the second order did not change the requirement that he maintain a sixteen-foot buffer along the entire western property line."<sup>127</sup> Given his concession that "[t]he Board did not mean to limit the buffer requirement to the northernmost 275 feet," the court of appeals concluded that "Garatoni is judicially estopped from asserting a contrary position in any future legal proceeding."<sup>128</sup> Since Miller's lawsuit is presumably based upon his concern that the inconsistencies between the first and second order may lead to an infringement of the conditions agreed upon by Garatoni and Miller, the court of appeals decision, while dismissing his claim, also has the effect of granting Miller what he originally bargained for.

The opinion *Borsuk v Town of St. John*,<sup>129</sup> was issued by the court of appeals during the survey period. After the survey period, the Indiana Supreme Court granted transfer and vacated the opinion.<sup>130</sup> Borsuk owned a parcel of land at the intersection of 109th Street and U.S. 41 in the town of St. John. Half of the parcel was zoned commercial and half was zoned residential. The remainder of the block was zoned commercial and the comprehensive plan called for Borsuk's real estate to be rezoned as commercial. Borsuk petitioned to rezone his parcel to commercial. Remonstrators, including the principal of the local elementary school, appeared citing traffic and congestion concerns. The Plan Commission denied the rezone request, finding that it would not promote the health and safety

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126. IND. CODE § 36-7-4-1003 (2004).

127. 809 N.E.2d at 359.

128. *Id.* at 360.

129. 800 N.E.2d 217 (Ind. Ct. App. 2003), *trans. granted*, 812 N.E.2d 806 (Ind. 2004), *aff'd in part, vacated in part*, 820 N.E.2d 118 (Ind. 2005).

130. *Id.*

of the Town. The Town Council adopted the Plan Commission's recommendation. Borsuk appealed. The Town submitted two affidavits to the trial court as evidence, one from an engineer which stated that Borsuk could erect a commercial building on the half of the parcel currently zoned commercial, and one from the president of the Plan Commission, which purported to state what issues were considered by the Commission. The trial court found in favor of the Town, finding that Borsuk could use the half of his parcel zoned commercial for a "reasonable and viable commercial purpose."<sup>131</sup> Borsuk appealed on two grounds: (1) that the affidavits were not competent evidence and should not have been admitted by the trial court and (2) that the trial court's decision was arbitrary and capricious. The court of appeals agreed that the affidavits were improperly admitted because Indiana common law provides that "[e]vidence outside of the board's minutes and records that the board presumed to act in its official capacity is not competent evidence to substitute for the minutes and records of regular board action."<sup>132</sup> In addition, the court found that the engineer's affidavit was contrary to both the administrative record and the town ordinances. Finding that the Town is required to make rezoning decisions in accordance with the comprehensive plan, the court of appeals held that the Plan Commission's denial of Borsuk's rezoning petition was arbitrary and capricious.<sup>133</sup>

## VI. EMINENT DOMAIN

The Indiana Supreme Court addressed two matters of first impression in *State v. Bishop*<sup>134</sup> involving the taking by the State of Indiana of property in Hendricks County, Indiana, for the purposes of constructing a cloverleaf exchange at Interstate 70. In December 1996 the State commenced an action to take the land in question consisting of a little over one acre of land owned by the Bishops upon which were located four billboard signs. The court-appointed appraisers determined that the fair market value of the property was \$191,510 to which the State promptly filed objections. The Bishops never filed any objections.<sup>135</sup> The State then deposited that amount with the court, which was then, without objection from the State, paid over to the Bishops. The Bishops also around this time sold the billboards that were located on the property to an outdoor advertising company for \$2000 and granted an easement in the Bishop's remaining property to that company in order to place the signs for approximately \$598,000. The parties undertook discovery and then attempted to mediate their differences but no settlement occurred. A little over two years after the

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131. *Id.* at 222.

132. 800 N.E.2d at 221 (quoting *Scott v. City of Seymour*, 695 N.E.2d 585, 590 (Ind. Ct. App. 1995)).

133. *Id.* at 223.

134. 800 N.E.2d 918 (Ind. 2003).

135. *Id.* at 920.

appraisers made their report as to the fair market value of the property, the State moved the court to withdraw its objections to the report and enter judgment to the State.<sup>136</sup> The court denied that motion. A trial was then held in the matter and the jury returned a verdict establishing the fair market value of the property at \$595,000, and awarded the property owners approximately \$102,000 in interest.

The court of appeals affirmed the trial court and the supreme court accepted transfer. The State's first attack against the verdict consisted of an objection to the trial court's denial of the State's motion to withdraw its objections to the appraisers' report. The withdrawal of the exceptions is an extremely important issue because where only one party has made objection to the appraisers' report and those objections are withdrawn, then there are no further issues for the trial court to pass upon and the matter is concluded.<sup>137</sup> Because the Bishops never filed objections to the appraisers' report, if the State would have been permitted to withdraw its objections, the case would have been concluded and the verdict would be void. The State argued that a party has the unilateral and absolute right to withdraw its previously made objections.

The supreme court noted that several decisions of the court of appeals have restricted a party's ability to withdraw objections by pretrial order. That being the case, the supreme court, relying principally on the 1998 court of appeals decision in *Daugherty v. State*, held that the trial court has the discretion to permit a party to withdraw its objections.<sup>138</sup> The supreme court also adopted the *Daugherty* court's four factors for a trial court to consider in permitting a party to withdraw objections, emphasizing that the list was not exclusive. Those four factors are: (1) the time period between the making of the objection and the attempt to withdraw; (2) how close to the time set for trial that the party is attempting to withdraw the objections; (3) whether that non-objecting party has put the trial court and the objecting party on notice that it too is dissatisfied with the appraisers' report; and (4) "the extent of trial preparation that has already occurred."<sup>139</sup> The supreme court then noted that based on these factors, the trial court did not abuse its discretion in denying the State's motion to withdraw.

The next issue for consideration by the supreme court was the determination of the value of the billboards on the property taken. The court noted that this was a case of first impression for it on this issue. The court noted that the general measure of damages in any takings case is the fair market value of the property so taken. The court also noted that there were generally three different approaches to determine the fair market value, any or all of which could be used to make that determination: (1) the reproduction cost approach; (2) the market data comparison approach; and (3) the income approach.<sup>140</sup> The trial court in this case permitted the Bishops to introduce evidence of the income producing

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136. *Id.* at 921.

137. *See* *State v. Redmon*, 186 N.E. 328 (Ind. 1933).

138. 800 N.E.2d at 922 (citing *Daugherty v. State*, 699 N.E.2d 780 (Ind. Ct. App. 1998)).

139. *Id.*

140. *Id.* at 923-24.

potential of the property taken.

The supreme court found error in permitting the Bishops to introduce evidence of the income producing potential of the billboards as that approach is irrelevant in determining the fair market value of billboards taken in this case.<sup>141</sup> The court reviewed the holdings of cases from other jurisdictions weighing in on the issue. As a general rule, improvements on realty “are compensable to the extent they enhance the value of the land as a whole.”<sup>142</sup> The court also pointed out that proof of the income to be derived from billboards is rarely admissible unless the owner of the property can show that such owner cannot “relocate a sign within the same market area.”<sup>143</sup> Further, the court cited cases holding that the “income approach is also limited to situations where the property is being operated as a going concern, is in good condition, and is capable of producing the income to be capitalized.”<sup>144</sup>

Based on these principles, the supreme court specifically held that “billboards on condemned property are compensable to the extent that they enhanced the value of the property on the day of the take but not for any ‘lost income’ based on potential future leases.”<sup>145</sup> This approach to billboard valuation makes a good deal of sense and can avoid situations such as the one with the Bishops, where the property owner can simply move the billboards back off of the taken property and still lease or otherwise profit from billboards on that slightly removed location.

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141. *Id.* at 924-25.

142. *Id.* at 924 (quoting Annotation, *Eminent Domain: Determination of Just Compensation for Condemnation of Billboards or other Advertising Signs*, 73 A.L.R.3d 1122, 1125 (2004)).

143. *Id.* at 925.

144. *Id.* at 926.

145. *Id.* at 925.

