

1992 Developments in Indiana Property Law

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I. CONCURRENT OWNERSHIP

A. Joint Bank Accounts

In 1976, Indiana enacted the Non-Probate Transfers Act to govern multiple-party accounts.¹ The Act defines a "joint account" as a contract of deposit established in a financial institution payable on request to any one or more of the parties.² During the lifetime of all the parties the account belongs to the parties in proportion to each party's net contributions to the sums on deposit, absent clear and convincing evidence of a different intent.³ Sums on deposit at the death of a party belong to the surviving parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account was created.⁴ A case of first impression arose during this survey period involving the right of survivorship where one party, prior to his death, removed the name of the other party from a certificate of deposit (CD) without her consent.

In *Voss v. Lynd*,⁵ the husband (Willard) had his wife's (Lennice's) name removed from five certificates of deposit (CDs) totalling \$55,500, after her admission to a health care center with Alzheimer's disease. Willard went to the bank that had issued four of the CDs and orally requested removal of Lennice's name. Following standard procedures, the bank simply marked through Lennice's name. Lennice's name was also crossed out on a CD issued by another bank. Willard died in November 1989.⁶ Lennice died in January 1990.

In May 1991, Lennice's estate filed a complaint asserting ownership of the five CDs by right of survivorship. Willard's estate cross-claimed against the banks, alleging negligent failure to advise him of the proper

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1. IND. CODE §§ 32-4-1.5-1 to 15 (Supp. 1992). Fourteen of these 15 sections were taken from UNIF. PROBATE CODE art. VI, § 8 U.L.A. 520 (1983).

2. IND. CODE § 32-4-1.5-1(1), (4) (Supp. 1992).

3. *Id.* § 32-4-1.5-4 (Supp. 1992).

4. *Id.*

5. 583 N.E.2d 1239 (Ind. Ct. App. 1992).

6. *Id.* at 1240-41.

procedure to change the form of the accounts.⁷ The trial court ruled that four of the CDs belonged to Lennice's estate and the attempt to remove her name from the CDs was invalid.⁸ The trial court also concluded the banks were not negligent in failing to advise Willard that Indiana Code section 32-4-1.5-5 required a written order be given to a financial institution to change the form of a joint account, and entered judgments in their favor on Willard's estate's cross-claim. Willard's estate appealed.⁹

The court of appeals first discussed whether the banks were negligent in not advising Willard to comply with Indiana Code section 32-4-1.5-5. The trial court found that the request to remove Lennice's name was not a "transfer" requiring a written order, and that the banks could act on the *oral* instructions of any of the parties named on the certificate.¹⁰ The court of appeals concluded that use of a written order to the banks would not have changed the result of the case, even assuming *arguendo* that a written order was required:

A joint account can be terminated only by mutual agreement of the joint tenants. *Moreover, one joint tenant of money in a joint bank account cannot divest the other of his joint ownership by withdrawing the money without the other's knowledge and consent.* Neither joint tenant can dispose of the interest of the other in life. It follows that the striking of one of the joint tenant's names from the account is ineffectual.

Lennice's estate would still have acquired the CDs by right of survivorship. The banks' failure to inform Willard to make his request in writing did not cause the result of the CDs being given to Lennice's estate.¹¹

Thus, the majority of the court concluded that the right of survivorship cannot be destroyed by one party removing the other party's name from the account or by withdrawing all the funds and closing the account, unless the other party consents to the termination of the joint ownership.¹²

7. *Id.* at 1241. Indiana Code § 32-4-1.5-5 provides that rights of survivorship are to be determined by the form of the account at the death of a party and that the form of the account may be changed by a written order given by a party to the financial institution.

8. *Voss*, 583 N.E.2d at 1241. The trial court found that one CD, originally issued in Willard's name only, belonged to Willard's estate because Willard had deposited all the money. This ruling was not appealed. *Id.*

9. *Id.* at 1241.

10. *Id.*

11. *Id.* at 1242 (emphasis added) (citations omitted).

12. Although the case involves only the removal of the name of a party from the

In a concurring opinion, Judge Sullivan disagreed with the majority's conclusion that a written order pursuant to Indiana Code section 32-4-1.5-5, without Lennice's consent, would have been ineffective to change the form of the account. Judge Sullivan observed that because section 32-4-1.5-5 permits one party to change the form of a joint account by a written order to the financial institution, and the right of survivorship is determined by the form of the account at the death of a party, a valid change in the form of the account is "a divestment of the survivorship interest held by the other joint tenant."¹³

Finally, Judge Sullivan observed that the question of ownership rights in joint accounts "is one deserving of the attention of our Supreme Court" because "I.C. 32-4-1.5-5, passed in 1976, rendered obsolete the 1948 holding in *Clausen v. Warner* (1948) 118 Ind. App. 340, 78 N.E.2d 551, or at least diluted it substantially."¹⁴

Judge Sullivan's statement is correct—enactment of Indiana's Non-Probate Transfer Act substantially altered Indiana law regarding joint accounts. The *Clausen* decision, relied upon heavily in the majority opinion, described the parties to a joint bank account as "joint tenants" who hold "by the half and by the whole," and held that the husband's withdrawal of the funds in the joint account without his wife's knowledge or consent could not divest her of her "joint ownership."¹⁵ The Act takes a very different approach to the ownership interests of the parties in a multiple-party account. Section 32-4-1.5-3(a) provides: "A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent."¹⁶

The Official Comments of the Indiana Probate Study Commission indicate that the statute assumes the owners of such joint accounts intend "no present change of beneficial ownership," and that the theory underlying the joint account sections of the statute is that the holders of such joint accounts, while alive, have individual ownership of "values attributable to their respective deposits and withdrawals," so that the right of survivorship to such an account "really is a right . . . which the survivor receives for the first time at the death" of the other account owner.¹⁷ Thus, the right of survivorship arises only at the death of the other party and is determined by the form of the account at death. No

account, the wording of the opinion suggests the same result would have been reached if one of the parties had removed the funds from the account without the other's consent.

13. *Voss*, 583 N.E.2d at 1242-43 (Sullivan, J., concurring).

14. *Id.* at 1243.

15. *Clausen v. Warner*, 78 N.E.2d 551 *passim* (Ind. Ct. App. 1948).

16. IND. CODE § 32-4-1.5-3(a) (1979).

17. *Id.* (Official Comments follow § 32-4-1.5-3).

joint tenancy is created during the lives of the parties. However, termination of the account by the withdrawal of all the funds by one of the parties without the consent of the other party does not destroy the other party's individual interest in the funds. While parties to a joint account have a right to remove their individual funds, if they withdraw more than their moiety of the funds, the other party can bring an action to recover their individual interest improperly withdrawn.¹⁸

Finally, courts do not agree as to the legal effect of an attempt by one party to terminate a joint account by removing the other party's name or by withdrawing all of the funds.¹⁹ Many decisions suggest that such action ends the "joint ownership" and destroys any right of survivorship.²⁰ Other decisions hold that one party's withdrawal of more than their "interest" in the account is wrongful and as a result a right of survivorship still exists in the funds removed.²¹ However, even in these states, where a party does not remove more than their moiety such action is not wrongful and the right of survivorship ceases as to the funds removed.²²

B. Conveyance of Real Estate to Unmarried Persons "as Husband and Wife"

In Indiana, a conveyance to a husband and wife without limiting words creates a tenancy by the entirety.²³ However, a conveyance to persons not husband and wife cannot create an estate by the entirety because this form of ownership can exist only between husband and

18. See, e.g., *Kleinburg v. Heller*, 345 N.E.2d 592 (N.Y. 1976); *In re Estate of Kohn*, 168 N.W.2d 812 (Wis. 1969).

19. "The law . . . has been in a state of morass, many of the cases which arise being treated very much on an *ad hoc* basis." *Kleinburg*, 345 N.E.2d at 592. See also *In re Guardianship of Medley*, 573 So. 2d 892, 902 (Fla. Dist. Ct. App. 1990). Part of the problem has been the use of at least four different theories by the courts to sustain such accounts. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 115-16 (3d ed. 1989).

20. *Wiggins v. Parson*, 446 So. 2d 169 (Fla. Dist. Ct. App. 1984) (The "better rule" is that the withdrawal of all the funds by one of the parties destroys any right of survivorship); see also *McEntire v. Estate of McEntire*, 590 S.W.2d 241 (Ark. 1979); *Bealert v. Mitchell*, 585 S.W.2d 417 (Ky. 1979); *Hoffman v. Vetter*, 192 N.E.2d 249 (Ohio Ct. App. 1962); *In re Estate of Kohn*, 168 N.W.2d 812 (Wis. 1969).

21. *Wallace v. Riley*, 74 P.2d 800 (Cal. Ct. App. 1938); *In re Guardianship of Medley*, 573 So. 2d 892 (Fla. Dist. Ct. App. 1990); *In re Will of Filfiley*, 313 N.Y.S.2d 793, *aff'd*, 353 N.Y.S.2d 400 (1970); *Gatewood v. Griffin*, 549 P.2d 829 (Okla. Ct. App. 1976).

22. *Medley*, 573 So. 2d at 892; *Kleinburg v. Heller*, 345 N.E.2d 592 (N.Y. 1976).

23. *Chandler v. Cheney*, 37 Ind. 391 (1871); *Hadlock v. Gray*, 4 N.E. 167 (Ind. 1886).

wife.²⁴ At common law, a conveyance to two or more persons, not husband and wife, without words limiting the estate was presumed to create a joint tenancy.²⁵ This presumption has been changed by statute in most states, including Indiana, and today a conveyance to two or more persons not husband and wife will create a tenancy in common unless the instrument expressly states that the parties hold title as joint tenants with right of survivorship, or the intent to hold title as joint tenants manifestly appears from the tenor of the instrument.²⁶ An interesting problem arises when an unmarried man and woman take title to real estate by a deed purporting to convey the land to them "as husband and wife." Are these words sufficient to overcome the statutory presumption of tenancy in common, *i.e.*, are these words sufficient to show an intent to create a right of survivorship?

In *Perez v. Gilbert*,²⁷ Emma Perez and James Yocum took title to residential property "as husband and wife" on July 8, 1959.²⁸ While James and Emma had been dating since 1958, and living together since March 1959, at the time of the conveyance Emma was still married to Joseph Perez, Sr. In 1960, Emma and Joseph were divorced, and Emma married James. Emma died in 1990, and three of her children brought this action to determine ownership of the real estate.²⁹ The trial court awarded James title in fee simple absolute. The children appealed.³⁰

The trial court concluded that because James and Emma intended to hold the title as husband and wife, a joint tenancy with right of survivorship was created.³¹ The court of appeals reversed. Section 32-1-

24. *Pittsburg, C., C. & St. L. Ry. Co. v. O'Brien*, 41 N.E. 528 (Ind. 1895); *Eilts v. Moore*, 68 N.E.2d 795 (Ind. Ct. App. 1946).

25. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 5.3 (1984).

26. *Id.* at 204. Indiana Code § 32-1-2-7 provides:

All conveyances and devises of lands . . . made to two (2) or more persons [other than husband and wife], shall be construed to create estates in common and not in joint tenancy; unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy.

IND. CODE § 32-1-2-7 (Supp. 1992).

27. 586 N.E.2d 921 (Ind. Ct. App. 1992).

28. *Id.* at 923. James' and Emma's names also appeared on a mortgage on the real estate as husband and wife. *Id.*

29. *Id.* James did not have any children by Emma, but James did adopt two of Emma's children, James Petty and Pamela (Petty) Gilbert. The children who brought this action are Joseph Perez, Jr., Susan Williams and James Petty. Pamela (Petty) Gilbert is named as a defendant in the action. *Id.*

30. *Id.* at 923-24.

31. *Id.* at 923. The trial court found that at the time of the conveyance Emma and James held the residence as tenants in common, but since they intended to hold as

2-7 of the Indiana Code requires that the intent to create a joint tenancy be expressly stated in the instrument or manifestly appear from the tenor of the instrument.³² James tried to distinguish several earlier Indiana decisions which held a conveyance to unmarried persons "as husband and wife" created a tenancy in common, on the grounds that the parties in those cases did not subsequently marry.³³ In refusing to find a distinction, the court of appeals observed that the intent of the parties must be determined from the actual language used in the deed, not from their subjective intent.³⁴

James argued that use of the phrase "as husband and wife" was sufficient to show an intent to create a right of survivorship, citing cases from other jurisdictions holding that a conveyance to two persons not legally married "as husband and wife" created a right of survivorship.³⁵ The court observed, however, that in addition to the phrase "as husband and wife" the instruments in those cases included language indicating that the grantees held "by the entireties" or "by the entireties with rights of survivorship" or "by the entireties and not as tenants in common." Such language was deemed sufficient to expressly indicate an intent to create a joint tenancy with right of survivorship. Here the deed contained no additional language from which the court could "glean from the 'four corners' of the instrument" an intent to create a joint tenancy.³⁶ Thus the trial court erred in concluding that James and Emma had held title as joint tenants, and that James now held title in fee simple absolute as the surviving joint tenant. The parties had held title to the property as tenants in common, each taking a one-half interest in the whole, and Emma's interest did not pass to James by right of survivorship at her death.³⁷

II. EASEMENTS AND RESTRICTIVE COVENANTS

A. Implied Easements³⁸

In *Hvidston v. Eastridge*,³⁹ the Hvidstons owned an apartment building, and Louis and Ann Eastridge and Charles Pedigo (collectively "the

husband and wife it became a joint tenancy. *Id.* It is not clear from the opinion what circumstances caused the form of ownership to change after the time of the conveyance from a tenancy in common to a joint tenancy. Possibly it was the subsequent marriage that convinced the trial court of their intent to hold title as husband and wife.

32. IND. CODE § 32-1-2-7 (Supp. 1992).

33. *Perez*, 586 N.E.2d at 925.

34. *Id.* at 924-25.

35. *Id.* at 925.

36. *Id.*

37. *Id.* at 925-26. Other issues in the case unrelated to the type of ownership created by the deed are not discussed.

38. An implied easement can arise in two distinct ways. First, it can arise from

Eastridges'') owned a house and lot west of the Hvidstons' property. The properties were once part of a larger tract. When the tract was severed in 1937, a driveway ran north and south between the Hvidstons' apartment building and the house on the Eastridge property. The boundary line between the lots bisected the driveway. In 1977, the Eastridges' predecessor in interest (Schaler) sued the Hvidstons to quiet title to the driveway. The 1977 decision recognized an easement by necessity to permit access to the garage at the rear of the Eastridges' property, and granted the Hvidstons use of the easement for repair and maintenance of the apartment building. In describing the dimensions of "the existing driveway," the court relied chiefly on a 1974 survey, which did not include a "disputed area" at the southeastern corner of "the existing driveway."⁴⁰

In 1985, the Hvidstons sued for damages and rescission of the easement, and the Eastridges counterclaimed for damages. When the Hvidstons failed to respond to the counterclaim, the trial court granted the Eastridges' motion for a default judgment and dismissed the suit with prejudice. The present suit was filed by the Hvidstons in 1987 for damages and to vacate the easement, claiming that the Eastridges and their tenants had improperly expanded the use of the easement beyond the scope of the 1977 decree. After obtaining a default judgment (apparently because of inadequate service upon the Eastridges), Dean Hvidston installed posts at the entrance to the driveway preventing access to the garage. The Eastridges obtained an emergency order requiring Hvidston to remove the posts. Hvidston complied, but a few months later he erected fence posts and drove stakes in or near the easement.⁴¹

When the default judgment was set aside, the Hvidstons filed an amended complaint and the Eastridges counterclaimed for damages. Following a bench trial the court held that the driveway easement included

a prior use of the property, where, during the unity of title, a permanent and obvious servitude was imposed on one part of the land for the benefit of the other, and at the time of the severance its continued use is reasonably necessary for the enjoyment of the dominant estate. *E.g.*, *John Hancock Mut. Life Ins. Co. v. Patterson*, 2 N.E. 188 (Ind. 1885); *Kruger v. Beecham*, 61 N.E.2d 65 (Ind. Ct. App. 1945). For a discussion of the implied easement based on prior use see CUNNINGHAM ET. AL, *supra* note 25, § 8.4. Second, an implied easement can arise by way of necessity where 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 except over the other portion of the tract conveyed or retained by the grantor. *E.g.*, *Shandy v. Bell*, 189 N.E. 627 (Ind. 1934); *Dudgeon v. Bronson*, 64 N.E. 910 (Ind. 1902). For a discussion of the implied way of necessity see CUNNINGHAM ET. AL, *supra* note 25, § 8.5.

39. 591 N.E.2d 566 (Ind. Ct. App. 1992).

40. *Id.* at 567-68.

41. *Id.* at 568.

the "disputed area" at the southern end of the driveway east of the Eastridges' garage, and modified the 1977 decree to allow the parking of vehicles on the easement. The court also prohibited the Hvidstons from driving stakes or poles along the boundary of the easement or performing any type of maintenance to the driveway. The Hvidstons appealed.⁴²

With regard to whether the easement included the disputed area, Donald Pedigo testified that for as long as he could remember, tenants of the Eastridge property had used the disputed area at the southeastern corner of the driveway to turn their cars around. Photographs submitted by the Hvidstons showed automobiles parked in the supposed unused portion of the driveway. Nevertheless, the court held that the easement did not include the disputed area. As the court observed, an implied easement by necessity arises simultaneously with the conveyance severing the larger tract into separate parcels because of circumstances then existing. The 1977 decree stated that the driveway was the sole means of egress to the garage and parking area at the rear of the Schaler property and that Schaler and his predecessors had acquired a permanent easement of necessity to use "the existing driveway" within the boundaries of the Hvidstons' property. The 1977 decree did not create the easement but "merely affirmed its existence and defined its boundaries" as it existed when the tract was severed in 1937. Events occurring after 1937 were irrelevant in determining the size and extent of the easement by necessity.⁴³

Finally, the court rejected the Eastridges' contention that the tenants will experience difficulty in turning their vehicles around unless the disputed area is included in the easement. The court found that turning could be accomplished without encroaching upon the disputed area, either by increasing the number of turns or enlarging the parking area by extending it to the west into the Eastridges' backyard.⁴⁴

The second issue addressed by the court was whether the trial court should have modified the decree to allow parking for reasonable periods

42. *Id.*

43. *Id.* at 568-69. In another case decided during this survey period involving an implied easement arising by necessity, *Tippmann v. Stoutland Associates*, 594 N.E.2d 515 (Ind. Ct. App. 1992), the court reaffirmed the rule that an implied easement by necessity arises simultaneously with the severing conveyance "because of the circumstances then existing, e.g., inaccessibility," and not from circumstances occurring subsequent to the conveyance. *Id.* at 517 (quoting *Hvidston*, 591 N.E.2d at 566). In *Tippmann* the court, in denying a request for a preliminary injunction, found that an alteration in a structure on the alleged dominant estate subsequent to the severance of the two tracts created the accessibility problem. At the time the property was severed there was no need for an easement. *Tippmann*, 594 N.E.2d at 517.

44. *Hvidston*, 591 N.E.2d at 572.

of time on the easement, provided someone was available to move the vehicle upon the request of the other party. The court found no change of circumstances which would justify amending the 1977 decree to permit parking. On the other hand, the court made it clear that this opinion should not be construed to prohibit the parties from stopping their vehicles in the driveway to unload groceries, pick up or drop off a tenant, or unload materials used to repair the apartment building.⁴⁵

The third issue addressed on appeal was the trial court's prohibition against the Hvidstons installing or maintaining stakes or poles of any kind along the eastern boundary of the easement. While agreeing that the Hvidstons should be allowed to place guard rails or similar structures on their property to prevent harm, the court concluded that it was not error for the trial court to enjoin the Hvidstons from erecting stakes or poles in the easement or along its boundaries that would obstruct, interfere with or impede the use of the easement.⁴⁶

Finally, the Hvidstons objected to the trial court's ruling that only the Eastridges could maintain the easement, and argued that they should have a right to make reasonable repairs, alterations and improvements. In rejecting this contention, the court of appeals noted that the Eastridges and their tenants are the primary users of the easement and that the "improvements" envisioned by Dean Hvidston had to do with improvement of the dominant estate and not with the use of the easement.⁴⁷

The court of appeals affirmed the portion of the trial court's decree prohibiting placement of stakes or poles interfering with the use and enjoyment of the easement and vesting maintenance responsibilities solely in the Eastridges. However, the court reversed the judgment to the extent it held that the disputed area was part of the easement and that the parties could park on the easement.⁴⁸

In *Whitt v. Ferris*,⁴⁹ the court addressed the "necessity" requirement for an implied easement. In 1968, the Kumpfs, who owned approximately eighty acres of land, subdivided most of the land, calling the subdivision

45. *Id.* at 572-73 n.7. The court felt compelled to articulate this distinction in view of the animosity between the parties and the fear that further hostilities or confrontations would take place unless these rights were clarified. *Id.*

46. *Id.* at 573. *See* *Hunter v. McDonald*, 254 N.W.2d 282, 286 (Wis. 1977) (holding that the owner of the servient estate could not place rocks and posts alongside a ten foot wide easement to prevent vehicles from occasionally straying beyond the narrow boundaries).

47. *Hvidston*, 591 N.E.2d at 573-74. Evidence at the trial revealed Dean Hvidston had threatened to "bulldoze" the easement and had once ordered his apartment manager to dig trenches in the direction of the Eastridges' property to carry water away from his building. This may explain the court's reluctance to allow Hvidston to "repair" or "improve" the easement. *Id.* at 574.

48. *Id.*

49. 596 N.E.2d 230 (Ind. Ct. App. 1992).

Beechwood County Estates (Beechwood). One of the platted roads, "Tulip Drive," was planned as a street 60 feet wide and 1050 feet long, but only a strip 20 feet wide was graded, with 20 foot strips of grass on each side. For tax reasons, the Kumpfs vacated all the platted lots and streets except lots 1 through 6, which abut a public road, "Kings Road." Kings Road runs north and south and lots 5 and 6 abut the intersection of King Road and the former Tulip Drive on the northwest and southwest corners, respectively. Lot 7 abuts lot 6 to the west and lot 8 abuts lot 5 to the west and both lots 7 and 8 abut Tulip Drive, but neither lot is part of Beechwood Subdivision as currently platted. Ferris owns Lots 5 and 8, Jones owns Lot 6 and Stettler owns Lot 7. The disputed parcel is the 20 foot wide dirt and gravel road and the 20 foot wide strips of grass on each side now owned by Whitt. In 1982, Stettler began using the road on the disputed area as his only means of ingress and egress to Lot 7. Jones also uses the road for access to the back of Lot 6, and Ferris, Jones and Stettler have all used the grassy area for parking. Whitt constructed a fence along the disputed area and the appellees brought suit to prevent Whitt from interfering with their use of the disputed area. The trial court granted each of the appellees an implied easement 60 feet wide and 380 feet long to be used in the same manner as a public road, and Whitt appealed.⁵⁰

With regard to the way of necessity the court of appeals observed that a way of necessity arises where the severance of the unity of ownership of land occurs in such a way as to leave one part of the land without access to a public road. Lot 7 was at one time a part of a larger tract of land which included the disputed area, and the disputed area has been used for ingress and egress since the severance. However, the court found that the trial court erred in granting a sixty-foot-wide easement because easements should be limited to the purpose for which they are created. The court limited the easement to the twenty foot roadway and sufficient footage over the grassy area to allow access to Stettler's driveway.⁵¹ Whitt argued that a way of necessity does not exist where the terms of the conveyance show the parties did not intend the grantee to have an easement over the grantor's property. The court appears to have conceded that parties can explicitly exclude a way of necessity from the conveyance, but found the language in the Brown and Stettler deeds stating that "access to this parcel is not included in the above description," was ambiguous and extrinsic evidence indicated that the words were "merely cautionary" and did not prevent the court from finding a way of necessity in favor of Lot 7.⁵²

50. *Id.* at 232-33.

51. *Id.* at 233-34.

52. *Id.* The drafter of the deed to William Brown testified that the language was

The court next addressed the issue of whether an easement was created by reference to the plat map and observed that the portion of the plat which included the disputed area had been vacated before any of the lots were sold. Under the then-existing statute the vacation destroyed the force and effect of any part of the plat declared to be vacated. Thus, at the time the lots were sold the Kumpfs held fee simple title to the disputed area free of any easements.⁵³ Any reference to the old subdivision in the deeds was for the purpose of showing the location of the lots and not to reinstate the vacated plat or recreate easements to roads in the nonexistent part of the old subdivision.⁵⁴

Finally, the court addressed the issue of whether an implied easement existed based on a use of the land at the time of the severance. The court observed that:

[A]n easement will be implied where (1) there was common ownership at the time the estate was severed, (2) the common owner's use of part of his land to benefit another part (a quasi-easement) was apparent and continuous, (3) the land was transferred, and (4) at severance it was necessary to continue the preexisting use of the benefit of the dominant estate.⁵⁵

While the "necessity" is not the strict necessity required to create a way of necessity, the court noted that some necessity is still required and that one seeking an access easement in Indiana "when only a portion of the land is inaccessible, faces a heavy burden."⁵⁶ Here lots 5 and 6 abut a public highway and there is no need to use the easement. When lots 5 and 8 were transferred to Ferris, access to lot 8 was reasonably accomplished from Lot 5. The garage and driveway on lot 8 were built after the severance from the disputed area.⁵⁷ Thus, the trial court was reversed in part and affirmed as to the way of necessity across lot 7.⁵⁸

B. Restrictive Covenants—Unenforceability Caused by Changed Character of Surrounding Area and Acquiescence

In *Hrisomalos v. Smith*,⁵⁹ the Smiths were interested in purchasing lots 7 and 8 located on the southern edge of Hillsdale First Addition

used to inform the purchaser that there was no public access included within the description.
Id.

53. *Id.* (citing IND. CODE ANN. § 48-901 (Burns 1963) (current version at IND. CODE § 36-7-3-10 (Supp. 1992)).

54. *Whitt*, 596 N.E.2d at 234-35.

55. *Id.* at 235.

56. For a discussion of the "necessity" required to create an implied easement based on prior use see Walter W. Krieger, *Recent Developments in Property Law*, 25 IND. L. REV. 1375, 1380-83 (1992).

57. *Whitt*, 596 N.E.2d at 236.

58. *Id.*

59. 600 N.E.2d 1363 (Ind. Ct. App. 1992).

(Hillsdale) to operate a dentist's office on the property. The Smiths brought this action for declaratory judgment asking that a covenant limiting the use of structures in Hillsdale to single family dwellings be declared invalid as to lots 7 and 8. The owner of lots 7 and 8 later joined in the petition the Petitioners referred to collectively by the court as the "Smiths"). Several neighbors (Intervenors) opposed the Smiths' petition. The trial court found the covenant unenforceable with regard to lots 7 and 8 and the Intervenors appealed.⁶⁰

The trial court found the covenant unenforceable on two grounds: first, the restrictive covenant was invalid because of radical changes within and surrounding the subdivision; and second, the Intervenors were barred from enforcing the covenant under the doctrine of acquiescence. Both issues were addressed on appeal.

With regard to the change in the character of the area surrounding Hillsdale, the court of appeals agreed with the trial court that there had been extensive commercialization of the area and a substantial increase in traffic on a street bordering Hillsdale. However, the court of appeals did not concur in the trial court's conclusion that there had been a dramatic and compelling change within Hillsdale itself of such a weight as to preclude enforcement of the covenant. Despite considerable commercialization outside Hillsdale, only two activities within Hillsdale itself were not in conformity with the covenant. In 1953, a church bought and began operating on property within Hillsdale with the unanimous consent of those then owning lots in Hillsdale. The court questioned whether this use violated the covenant because the church was built pursuant to an agreed modification of the covenant between it and the landowners. The second nonconformity was the operation of a chiropractic office by Dr. Norman Houze on his property on the southern edge of Hillsdale. No lot owner opposed Dr. Houze's use of his land.⁶¹

The court observed that changes in the character of a neighborhood will not invalidate a restrictive covenant unless the "original purpose of the covenant has been defeated."⁶² In determining whether such radical changes have occurred, little weight should be given to changes outside the subdivision. The focus should be upon the effect of the changes on the purpose of the covenant.⁶³ The trial court's own findings refuted

60. *Id.* at 1365.

61. *Id.* at 1365-67.

62. *Id.*

63. *Id.* In support of this position the court cited *Cunningham v. Hiles*, 395 N.E.2d 851 (Ind. Ct. App. 1979), *order modified on reh'g*, 402 N.E.2d 17. In *Cunningham* the court held that a residential covenant prohibiting commercial activities within the subdivision was still enforceable despite commercialization outside the subdivision which had caused a dramatic increase in the traffic on the border of the neighborhood. The only change

the claim that the change was so radical in nature as to defeat the purpose of the covenant:

Although there has been considerable commercialization outside the addition, residents within the Addition have steadfastly maintained their residential way of life. Within the addition neighbors still gather, and children still play, all in keeping with the residential mandate imposed by the covenant.⁶⁴

The court next addressed the acquiescence theory relied upon by the trial court in finding the covenant unenforceable as to lots 7 and 8. The trial court determined that the Intervenor, by allowing the chiropractic office to operate without protest or action since 1985, had acquiesced in the violation of the restrictive covenant. Those seeking to enforce a restrictive covenant "must do so immediately and consistently." The trial court did not find the consent to the operation of the church to be a waiver or acquiescence of the covenant: "[B]ecause the church was built pursuant to an agreed modification of the restrictive covenant between it and the landholders, it was to be considered a change outside the area covered by the restrictive covenant."⁶⁵ The court of appeals agreed with the trial court that the church property was not a factor in this case. It was dissimilar to, and a less substantial violation than, the operation of a professional office.⁶⁶

Thus, the question of acquiescence turned upon the Intervenor's failure to object to Dr. Houze's office. The court found three factors significant to the analysis:

- 1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property upon which a nonconforming use has been allowed, 2) the similarity of the prior nonconforming use to the nonconforming use sought to be enjoined, and 3) the frequency of prior nonconforming uses.⁶⁷

The court observed that while Dr. Houze's office and the use proposed by the Smiths were virtually indistinguishable, Dr. Houze's

within the subdivision itself was an office building that protruded into one corner of the subdivision causing an increased amount of traffic within that corner. *Id.*

64. *Hrisomalos*, 600 N.E.2d at 1365.

65. *Id.* at 1367 n.2.

66. *Id.* at 1368. The court cited *Cowling v. Colligan*, 312 S.W.2d 943 (Tex. 1958), holding that the operation of a church in violation of a restrictive covenant limiting the use of the land to residential purposes was so trivial that failure to complain was not a waiver of the right to enforce the covenant against subsequent business or commercial development. *Hrisomalos*, 600 N.E.2d at 1369.

67. *Id.* at 1368.

office was not in the same block as the lots in issue or any of the property owned by the Intervenors, whereas there was a close proximity between the lots in issue and the land of the Intervenors. In addition, this subdivision did not have a long history of multiple and long-standing noncompliance with the covenant. Instead, there was but a single similar act of nonconformity in a different area. The failure of the Intervenors to object to the more distant nonconforming use did not induce reasonable reliance on the part of others that the covenant would not be enforced, nor was there a lack of benefit in the enforcement of the more proximate nonconforming use. The court of appeals reversed the trial court with direction that judgment be entered for the Intervenors.⁶⁸

III. LAND CONTRACTS

A. *Contractual Rights and Duties*

The installment land contract is an alternative to the more traditional method of conveying real estate.⁶⁹ Under the traditional method, the contract for sale anticipates a transfer of legal title within a few months (time for the buyer to obtain financing and the seller to produce evidence of good title). Normally, the buyer makes a downpayment when the contract is signed and agrees to pay the balance of the purchase price at the closing. In most cases the buyer needs to obtain a loan to pay the balance at the closing. The buyer will sign a promissory note and execute a purchase money mortgage on the real estate. At the closing, the seller will convey title to the real estate by deed and the buyer will pay the seller the balance. The deed and the purchase money mortgage are then recorded and the buyer becomes the legal owner of the land subject to the lender's security interest.

Under the installment land contract, legal title remains in the seller until all contract payments are made (often fifteen or twenty years). If the land contract is silent, the seller is not required to produce marketable title until the installment contract is completed. Thus, the prudent buyer should insist that the seller produce evidence of the status of the title before signing the land contract. The purchaser should also insist upon a provision in the contract providing that any liens on the property maintained by the seller shall not exceed the unpaid installments under the contract.

68. *Id.* at 1369.

69. For a more complete discussion of the installment land contract see Grant S. Nelson & Dale A. Whitman, *Installment Land Contracts—The National Scene Revisited*, 1985 B.Y.U. L. REV. 1.

The status of the seller's title at the signing of the land contract, the seller's right to place or maintain a mortgage on the real estate, and the duty of the real estate agent at the signing of the land contract were all raised in *McAdams v. Dorothy Edwards Realtors, Inc.*⁷⁰ The Parnells, the sellers under a land contract, had borrowed \$31,000 (apparently a purchase money mortgage) from First Federal Saving and Loan Association of Kokomo secured by a note and a mortgage containing a due-on-sale clause.⁷¹ In November 1980, the Parnells entered into an exclusive listing agreement with Dorothy Edwards Realtors, Inc. to sell the property. Gary Taylor, the principal owner of Edwards Realtors, was the Parnells' real estate agent. Through Taylor, the Parnells and the McAdamses entered into a purchase agreement on June 12, 1981, which provided for a sale of the property on an installment land contract for \$72,500. The McAdamses were to pay \$40,000 down and the balance of \$32,500 in monthly installments of \$500. The purchase agreement provided that "title shall be subject to easements, and restrictions of record, if any, and free and clear of all other liens and encumbrances except as herein stated." First Federal's mortgage was not listed.

Before the signing on June 24, 1981, First Federal orally agreed to the sale and did not declare the unpaid balance due and owing. Taylor delivered an abstract of title to the McAdamses' attorney, who issued a title opinion. The opinion concluded that the Parnells had marketable title and indicated that the two existing liens would be satisfied and released at the closing.⁷² The McAdamses' attorney and real estate agent

70. 591 N.E.2d 612 (Ind. Ct. App. 1992). After the survey period had ended, the Indiana Supreme Court granted transfer, set aside the court of appeals opinion, and affirmed the trial court judgment in favor of Dorothy Edwards Realtors. *McAdams v. Dorothy Edwards Realtors*, 604 N.E.2d 607 (Ind. 1992). The court opined that "this case turns on the question of the duty owed to a buyer by the seller's broker," and concluded that no authority could be found "for the proposition that the seller's agent owes a buyer a duty to act in the buyer's best interest." *Id.* at 611. Thus, an agent who negligently fails to perform duties owed the principal is not liable for harm caused to a third person. *Id.* at 612. This simplistic approach to the duty of the real estate broker at the closing appears to overlook the custom (common practice) in Howard County where real estate brokers rather than attorneys attend and apparently preside over closings, and where attorneys give title opinions directly to the broker rather than to their clients. *Id.* at 609. The fact that the broker placed the downpayment into the "Edwards Realtors trust account," *Id.* at 609, further indicates that the broker had assumed duties beyond those of the seller's agent. Attorneys, lenders and others dealing with real estate brokers in matters involving real estate closings should reconsider current practices in light of this decision, which will be discussed fully in next year's Survey issue.

71. If the Parnells sold the property without the bank's consent First Federal could declare the note immediately due and payable. *Id.* at 614.

72. The court is using the term "closing" to indicate the formal signing of the

were not present at the closing. However, Taylor was present at the closing and was aware that the mortgage should have been released. Taylor placed the \$40,079.68 down payment into the Edwards Realtors' trust account and used \$6000 to satisfy another lien on the real estate.⁷³ One day after the closing, the Parnells paid \$10,000 on their debt to First Federal and the terms of the remaining \$20,000 loan were modified. The interest rate was increased and the Parnells agreed to make payments of \$400 a month beginning July 1981. However, no payments were made under this agreement until April 1983 and First Federal never notified the McAdamses that the Parnells were in default on the loan. The McAdamses discovered in February 1984 that the balance of the mortgage exceeded the balance due on the land contract.⁷⁴ First Federal declared the Parnells in default in July 1984, and the McAdamses filed suit against the Parnells, Edwards Realtors and First Federal in October 1984.⁷⁵

The trial court awarded First Federal the balance on the land contract which the McAdamses had deposited with the court (\$6,248.69) and ordered that this amount would discharge First Federal's lien, in effect finding the mortgage subordinate to the McAdamses' interest. Further, the trial court entered judgment for the McAdamses against Edwards Realtors and First Federal in the amount of \$7500 for attorney fees and costs. However, while the trial court concluded that Taylor had acted improperly as the Parnells' agent, and as the real estate broker closing the transaction, the trial court did not award a judgment against Edwards Realtors for the misapplication of trust funds. Both Edwards Realtors and First Federal appealed.⁷⁶

On the first appeal the award of attorney fees was reversed and the court of appeals held that the trial court had erred in refusing to allow First Federal to foreclose on the mortgage. The case was remanded with instructions to direct an order of foreclosure in favor of First Federal. Following the first appeal, the McAdamses entered into an agreement with First Federal. In exchange for the McAdamses' payment of \$46,565.32 and their agreement not to seek a transfer to the Indiana Supreme Court, First Federal agreed not to execute upon an order of foreclosure entered by the trial court.⁷⁷

land contract, the delivery of the downpayment and the releases of the liens, and not the legal closing on "law day" when the deed is to be delivered and legal title transferred to the purchaser upon completion of the land contract.

73. The facts indicate that part of the money in the trust account was used to pay the Parnells' unsecured obligations to Edwards Realtors and others, and that the remaining funds were paid to the Parnells. *Id.* at 615, 618.

74. Each month that the Parnells did not make a payment, First Federal capitalized the interest and added it to the outstanding balance. *Id.* at 615.

75. *Id.* at 614-15.

76. *Id.* at 615-16.

77. *Id.* at 616.

On remand, the McAdamses moved the trial court to enter judgment against Edwards Realtors in the sum of \$40,316.63 (\$46,565.32 mortgage lien less \$6,248.69 deposited with the court). The trial court, however, entered judgment for Edwards Realtors and against the McAdamses.⁷⁸

On appeal by the McAdamses several issues were raised. First, the McAdamses argued that the trial court had committed reversible error by not entering judgment of foreclosure on First Federal's mortgage. Apparently, they were concerned that an order of foreclosure might be viewed as a prerequisite to establishing damages against Edwards Realtors. However, the remark by the court of appeals that the McAdamses were not prejudiced by the failure of the trial court to enter the order foreclosing the mortgage, and the remand to the trial court to determine the damages arising from the agent's misapplication of trust money, indicate that the court viewed the agreement with First Federal as triggering the right of the McAdamses to assert their claim against Edwards Realtors.⁷⁹ Furthermore, the opinion clearly contemplates that upon remand the trial court will find Edwards Realtors liable to the McAdamses for the \$46,565.32 paid to First Federal together with interest thereon.⁸⁰

Edwards Realtors contended that the McAdamses had waived their claim to damages by failing to challenge in the first appeal the trial court's denial of a judgment against Edwards Realtors sufficient to satisfy the mortgage. In rejecting this contention, the court observed that the trial court had found Taylor in breach of his duty to disburse trust account monies in a manner that would comply with the Parnells' obligations under the purchase agreement. However, when the first judgment held First Federal's mortgage was satisfied by payment of the contract balance owed by the McAdamses, there was no need to enter judgment against Edwards Realtors for misapplication of trust funds. But, when the judgment was reversed and foreclosure of the mortgage ordered, it then became necessary to determine the amount of Edwards Realtors' liability.⁸¹

Next, the court addressed Edwards Realtors' contention that in this second appeal it could still challenge the trial court's determination that its agent had a duty to apply the trust funds to satisfy the First Federal mortgage and that it misapplied the funds by paying them to the Parnells. The court found it had not yet "determine[d] whether the finding of a misapplication of trust funds was supported by the evidence," and that Edwards Realtors was not barred by the law of the case from challenging the finding as supported by insufficient evidence.⁸²

78. *Id.* at 617.

79. *Id.* at 617-18, 622-23 (Sullivan, J., concurring).

80. *Id.* at 623 (Sullivan, J., concurring).

81. *Id.* at 618-19.

82. *Id.* at 620-21. However, as Judge Sullivan points out, the court then proceeds

The court then addressed the issue of “[w]hether the trial court’s original determination that Edwards Realtors’ agent misapplied trust and the realty company should account for that misapplication, was supported by sufficient evidence.”⁸³ The trial court originally found the Parnells had a duty to convey title free of First Federal’s mortgage because both the Exclusive Right to Sell Agreement and the Purchase Agreement required the Parnells to furnish an abstract prior to closing showing merchantable title in the Parnells free and clear of all mortgage liens. Further, the trial court determined that the Parnells’ duty was transferable to Edwards Realtors and that, as the Parnells’ agent and the real estate agent closing the transaction, Taylor had the duty to disburse monies from the trust account in a manner that would accomplish the performance of the Parnells’ obligations under the Purchase Agreement.⁸⁴

Edward Realtors argued that this conclusion was in error because the Purchase Agreement incorporated by reference Paragraph 13 of the land contract which provided that: “The seller may, at his election, place or maintain a mortgage on said premises for an amount not in excess of the then unpaid balance of the sale price.” The McAdamses pointed out, however, that Paragraph 13 provided substantial protection to the buyer. Should the seller “hereafter elect to place such a mortgage on the premises he shall before the execution thereof” give written notice to the buyer containing the name of the mortgagee, the principal amount and the rate of interest and the buyer at his election may reduce the unpaid balance under the contract to the unpaid balance of the mortgage and demand a warranty deed requiring the buyer to assume the mortgage. These protections could be circumvented if Paragraph 13 were interpreted to allow the sale of the property with pre-existing mortgages. The McAdamses also contended that the order in which the words “place or maintain” appear in Paragraph 13 is significant. Use of the word “place” before “maintain” indicated that the title had to be free from mortgage liens at the time of the execution of the contract. The majority of the court agreed with the McAdamses’ interpretation of Paragraph 13 and concluded that the reference to the seller’s right to place or maintain a mortgage on the premises can have reference only to mortgages placed or maintained on the premises subsequent to the closing.⁸⁵

to make this determination in issue four, thus making the holding in issue three moot. *Id.* at 623 (Sullivan, J., concurring).

83. *Id.* at 621.

84. *Id.*

85. *Id.* at 621-22. Judge Sullivan did not agree with the majority’s interpretation of paragraph 13. In his opinion, the words “place or maintain” were clear and unambiguous and did not indicate that the seller was limited to “maintaining” mortgages created only after the execution of the land contract. Nevertheless, Judge Sullivan observed that the

The court ordered the judgment vacated and that upon remand the trial court should hold a hearing to determine the amount Edwards Realtors owes the McAdamses for its agent's misapplication of the trust funds.⁸⁶

B. Spouse of Purchaser Acquiring Vendor's Interest at Tax Sale

If the land contract is silent, the purchaser has the duty to pay taxes on the real estate.⁸⁷ However, the seller still must make certain that the purchaser is paying the taxes, or the land might be sold at a tax sale for nonpayment of taxes. A rather unusual situation arose in *Kettery v. Heck*,⁸⁸ where the buyer failed to pay the taxes and the buyer's wife subsequently acquired title to the property from the purchaser at a tax sale. The question became whether the buyer and his wife should be allowed to take the property free and clear of the land contract.

In *Kettery*, Terry and Karen Kettery and Julie Heck agreed in 1981 to exchange real estate. Heck received the Ketterys' residence in Indianapolis and the Ketterys received Heck's residence and one acre of land in Shelby County. The Ketterys also agreed to purchase another 4.13 acres of Shelby County land from Heck by land contract. In 1982, the Ketterys were divorced and Terry purchased Karen's interest under the land contract. Terry was unable to make the balloon payment due in 1985, and Heck and Terry negotiated a new land contract. The new contract provided that Terry would pay all real estate taxes. Terry failed to do so, and the notice of tax delinquency and tax sale was sent to Heck at her old address. The land was purchased by the Kochers at a tax sale in 1985. In 1986, Terry married Lisa Kettery and in October 1987, Lisa purchased the 4.13 acres from the Kochers. In November 1987, the Ketterys' attorney notified Heck of the tax sale and that the Ketterys no longer considered themselves bound by the contract because Heck no longer held title to the land. The letter also demanded restitution of the payments made under the contract since Heck could no longer perform her obligations. Heck responded by filing a two count complaint.

parties intended that an existing mortgage could be maintained only so long as it did not exceed the amount due under the contract and that on remand the trial court might well find that the growth of the mortgage was at least in part due to the failure of Edwards Realtors to properly apply the trust moneys. In addition, there was evidence from which the trial court could have found an obligation to apply the trust fund money to satisfy the mortgage "premised upon the title opinion which directed that the mortgage lien 'should be satisfied and released of record upon payment at closing.'" *Id.* at 623-24 (Sullivan, J., concurring).

86. *Id.* at 622-23.

87. *E.g.*, Stark v. Kreyling, 188 N.E. 680 (Ind. 1934).

88. 587 N.E.2d 1365 (Ind. Ct. App. 1992).

Count I alleged breach of the land contract and sought to foreclose a mortgage on the one acre tract. Count II alleged a conspiracy to defraud on the part of Terry and Lisa by intentionally concealing from her the fact that the real estate taxes had not been paid and by deeding the property to Lisa, making it impossible for Heck to perform under the contract. The trial court found in favor of Heck for \$22,304.92 reduced by the amount Lisa had paid to the Kochers. The Ketterys appealed.⁸⁹

Terry alleged the trial court was in error when it concluded that his failure to pay the taxes was the proximate cause of the real estate being sold at the tax sale. Instead he argued that under the contract Heck had a duty to "forward or cause to be forwarded to Purchaser a copy of all statements for real estate taxes on the Real Estate payable by Purchaser, as received." Terry contended that he was to pay the real estate taxes only "as received" from Heck. The court, however, refused to impose upon Heck a duty to obtain the tax statements, and concluded that the words "as received" referred to the statements actually received by Heck. Since she had received no tax statements, she had breached no contractual duty. Further, the court found Terry had breached his contractual duty to pay "the real estate taxes due and payable on November, 1981, and all installments of taxes payable thereafter."⁹⁰

With regard to Count II, the Ketterys claimed there was no evidence of any fraud or conspiracy to support a legal or equitable theory for relief. The court disagreed. Terry and Lisa made no attempt to notify Heck of the tax sale or the tax deed to the Kochers until after Lisa had obtained the Kochers' interest. The court cited by analogy a number of cases holding that a mortgagor in possession or those occupying a position of trust and confidence can not acquire title through a tax deed, particularly where the party is under a duty to pay the taxes.⁹¹

The court concluded that since Lisa was able to purchase the property because Terry had failed to pay the taxes in breach of his contractual duty, it would be unconscionable to allow Lisa to keep the property. The trial court's decision was affirmed.⁹²

IV. LANDLORD AND TENANT⁹³

A. *Scope of Covenant to Repair*

In *Quebe v. Davis*,⁹⁴ the Quebes leased a commercial building to Paul Parks in July 1986. The parties were aware that the roof leaked,

89. *Id.* at 1366-67.

90. *Id.* at 1367-68.

91. *Id.* at 1368-69.

92. *Id.* at 1369-70.

93. During this survey period three decisions were issued involving the landlord's

and the lease required Parks to repair the roof to the satisfaction of the Quebes by August 1, 1986. Parks assigned the lease to Lloyd and Thomas in March 1987, and they assigned the lease to Davis in November 1988. Davis was aware of the leaking roof at the time of the assignment and attempted to make repairs. However, the attempts to repair proved unsuccessful and Davis was advised that the roof needed to be "replaced." The leaky roof damaged Davis' property, and he was forced to vacate part of the building. Davis filed suit against the Quebes for damages caused by their failure to replace the leaking roof. The Quebes counterclaimed for damages for breach of the lease, claiming the lease obligated Davis to maintain the roof. The trial judge found for Davis and awarded \$12,170 damages and \$1000 in attorney fees. The Quebes appealed.⁹⁵

The trial court ruled that it must assume the provision requiring the original tenant to repair the roof to the satisfaction of the Quebes had been complied with on August 1, 1986. In addition, the trial court concluded that "repair and maintenance is different from construction or replacement especially in the case of major structural items and [the Quebes] are responsible for the roof replacement."⁹⁶ The Quebes argued that the trial court erred in describing the work to be done on the roof as a "replacement" chargeable to the lessor rather than a "repair" chargeable to the lessee, noting that the term "replacement" was never used in the lease and that "repair" can include "restoration to a sound or good state after decay, dilapidation, injury, loss, waste, etc."⁹⁷ Thus, they contended that the problem with the roof was covered by the

tort liability for injuries resulting from defective conditions on the leased premises: Pitcock v. Worldwide Recycling, Inc., 582 N.E.2d 412 (Ind. Ct. App. 1991) (business invitee of tenant injured on raised portion of floor); Houin v. Burger, 590 N.E.2d 593 (Ind. Ct. App. 1992) (infant fell through a window in a second-floor apartment); Rogers v. Grunden, 589 N.E.2d 248 (Ind. Ct. App. 1992) (lessee's employee injured when he came in contact with uninsulated electric line on landlord's property). All three decisions continued to follow the common law rule that the landlord is immune from tort liability for injuries caused by defective conditions on the leased premises where the landlord has surrendered complete control and possession of the premises to the tenant. See generally Olin L. Browder, *The Taming of a Duty—Tort Liability of Landlords*, 81 MICH L. REV. 99 (1982). For a discussion of the landlord's tort immunity in Indiana see Walter W. Krieger, *Recent Developments in Property Law*, 24 IND. L. REV. 1065, 1085-90 (1991).

94. 586 N.E.2d 914 (Ind. Ct. App. 1992).

95. *Id.* at 916.

96. *Id.* at 917 (quoting from trial court record).

97. *Id.* at 916, 919. Although the Quebes made much to do about the meaning of the term "repair" in part 4 of the lease, the court observed that the term is also used in part 5 of the lease in defining the lessor's duty to "repair and restore" premises "damaged or destroyed by fire or other cause." Thus the Quebes' argument on "the scope of 'repair' turns back on them." *Id.* at 919.

“repair” language in part 4 of the lease that: “Tenant shall make all repairs necessary to maintain the Leased Premises in the same condition as they are now. . . . Tenant shall not be obligated . . . to repair any injury to the Leased Premises resulting from fire or other casualty.”⁹⁸

Davis argued that the problem was covered by part 5 of the lease:

If the Leased Premises should be damaged or destroyed by fire or other cause . . . [and] the cost of repairs and restoration is less than thirty (30%) percent [of the building’s replacement cost], then this Lease shall not terminate and the Landlord shall at its expense promptly repair and restore the Leased Premises to substantially the same condition they were in prior to the damage or destruction.⁹⁹

In ruling against the Quebes, the court determined that the total replacement of the roof made necessary by its deterioration over time was not a “repair” under part 4 of the lease. The court also rejected the Quebes’ argument that destruction under part 5 of the lease applied only to damages caused by a single occurrence. Instead the court found that a roof can be damaged or destroyed by exposure “to the blistering sun of some twenty or thirty Augusts, the ice and snow of as many Januarys, and the rainfalls of April upon April.”¹⁰⁰ Thus, it was not error for the trial court to conclude that the Quebes had breached the lease.

The court also addressed the question of whether the trial court erred in ruling that the provision requiring Park to repair the roof must be presumed to have had been complied with on August 1, 1986.¹⁰¹ In upholding the trial court’s ruling, the court of appeals observed that, in the absence of a specific agreement to the contrary, an assignee is not liable for breaches occurring prior to the assignment or for obligations due under the lease before the assignment. The court found that Davis’ promise in the assignment agreement to make all payments and perform all covenants and conditions in the lease was not a specific undertaking to assume an obligation which the original lessee was required to perform more than two years before the assignment.¹⁰²

98. *Id.* at 917-18.

99. *Id.* at 918.

100. *Id.* at 919.

101. Although the Quebes had not directly challenged this ruling, they had alleged all parties were aware the roof leaked at the time the lease was executed and that Parks was obligated under the lease to repair the roof to the satisfaction of the Quebes by August 1, 1986. Thus the court decided to address this issue since it was “raised to some degree.” *Id.* at 918.

102. *Id.*

The Quebecs also contended that the damages awarded by the trial court were excessive because they included the cost of repairing the roof, which the lessee was not obligated to pay. In rejecting this contention, the court observed that while the amount of damages awarded by the trial court was identical to the bid from McGath Construction to replace the roof, ceiling and carpet (\$12,170), the damages were "sustainable under a theory of loss of rental value."¹⁰³ Davis, who operated a tavern on the leased premises, was forced to vacate the half of the building containing a stage and dance floor seating 120. Davis continued to pay the full amount of the rent, which totalled \$25,000 from the date of the abandonment to the date of trial. The Quebecs could have requested special findings of fact and conclusions of law and expressed their perception of error through a motion to correct errors. Since they did not, the court refused to reverse the award of damages "based on no more than an inference from a coincidence."¹⁰⁴

Finally, the Quebecs argued that Davis should not be awarded damages for the cost of replacing the ceiling and carpet because these were consequential damages that the tenant could have avoided. The Quebecs quoted *Sigsbee v. Swathwood*, for the rule that: "[D]amages for injury to the tenant or his property from continued failure to make repairs cannot ordinarily be recovered because under the rule of avoidable consequences the tenant should have made the repairs himself and recovered their cost from the landlord."¹⁰⁵ In response, Davis cited *T & W Building Co. v. Merrillville Sport & Fitness, Inc.*, which held that: "[W]here the party whose duty it is to perform has equal opportunity for performance and equal knowledge of consequences of nonperformance he cannot, while the contract is subsisting, be heard to say that plaintiff might have performed for him."¹⁰⁶

In affirming the judgment, the court of appeals observed that *Sigsbee* involved "minor repairs at 'slight expense,' such as replacing 'a few window panes,' not replacing a major component of a building, such as an entire roof."¹⁰⁷ Under the circumstances the court found "the rule from *T & W Bldg. Co.* more appropriate than that from *Sigsbee*."¹⁰⁸ Where a dispute of this nature arises, the court found it more reasonable to hold that the party with the greater interest in the property, the

103. *Id.* at 920.

104. *Id.* at 919-20.

105. *Id.* at 920 (quoting *Sigsbee v. Swathwood*, 419 N.E.2d 789, 798 (Ind. Ct. App. 1981)).

106. *Quebe*, 586 N.E.2d at 920-21 (quoting *T&W Bldg. Co. v. Merrillville Sport & Fitness, Inc.*, 529 N.E.2d 865, 867 (Ind. Ct. App. 1988), *trans. denied*).

107. *Quebe*, 586 N.E.2d at 921.

108. *Id.*

lessor, should step forward to prevent further deterioration. The judgment was affirmed.¹⁰⁹

B. *Security Deposits Act*

Indiana enacted a Security Deposits Act in 1989.¹¹⁰ The centerpiece of the Act is the notice provision, requiring the landlord, within forty-five days after termination of the rental agreement and delivery of possession, to give written notice to the tenant if the landlord is holding any portion of the security deposit.¹¹¹ Failure of the landlord to comply with the written notice of damages requirement constitutes an agreement by the landlord that no damages are due, and the landlord must remit the full security deposit to the tenant.¹¹² Two decisions during this survey period addressed the landlord's duty to provide written notice of reasons for not returning the tenant's security deposit.

In *Skiver v. Brighton Meadows*,¹¹³ the court of appeals concluded that the failure of the landlord to comply with the notice of damages provisions of the Security Deposits Act barred the landlord's recovery of past due rent. The tenant (Skiver) signed a one-year lease ending April 30, 1991. Skiver gave the landlord (Brighton Meadows) a security deposit of \$250 and an additional \$100 pet security deposit. In June 1990, Skiver vacated the premises, paying only \$100 for the month of June and nothing thereafter. Brighton Meadows kept the security deposit but did not send Skiver the required written notice listing the obligations to which the security deposit was being applied. The landlord filed suit in a small claims court in November 1990, for back rent and attorney fees, and requesting judgment for \$3000 (the jurisdictional limit of the court). The trial court awarded the landlord \$2650 (\$3000 minus the \$350 security deposit). The trial court concluded that the landlord was not required to send the written notice of damages since the landlord had not alleged any damage to the apartment unit.¹¹⁴

In reversing the trial court, the court of appeals concluded that the forty-five day notice to the tenant was required. Section 14 of the Act provides:

109. *Id.*

110. IND. CODE §§ 32-7-5-1 to -19 (Supp. 1992).

111. *Id.* § 32-7-5-12 (Supp. 1992). Such notice shall include an itemized list of damages claimed for which the security deposit is being applied, including the estimated cost of repair for each damaged item. The list must be accompanied by a check for the difference between the damages claimed and the amount of the security deposit held by the landlord. *Id.* § 32-7-5-14 (Supp. 1992).

112. *Id.* § 32-7-5-15 (Supp. 1992).

113. 585 N.E.2d 1345 (Ind. Ct. App. 1992).

114. *Id.* at 1345-46.

In case of damage to the rental unit *or other obligation against the security deposit*, the landlord shall mail to the tenant, within forty five (45) days after the termination of occupancy, an itemized list of damages claimed for which the security deposit may be used as provided in section 13 of this chapter.¹¹⁵

Because the landlord failed to provide written notice to the tenant, "no damages are due, and the landlord must remit to the tenant immediately the full security deposit."¹¹⁶

While this decision may come as a shock to landlords who have not read the Security Deposit Act closely, the decision appears to follow both the letter and spirit of the Act. The entire security deposit is to be returned to the tenant except for any amount applied to obligations against the security deposit as itemized in a written notice delivered to the tenant together with a check for the amount due the tenant within forty-five days after termination of the rental agreement and delivery of possession.¹¹⁷ Since this was not done, the tenant was entitled to the return of his full security deposit and the landlord was not entitled to any damages.¹¹⁸

One problem not addressed by the court is the variation in the wording of the sections of the Act with regard to when the forty-five day period for giving the notice to the tenant begins to run. Under section 12(a) the forty-five day period begins upon "termination of the rental agreement and delivery of possession." In sections 14 and 15 it begins at "termination of occupancy," and in section 16 it begins at "termination of the tenancy."¹¹⁹ If written notice must be given to the tenant within forty-five days after termination of occupancy, then it is possible that the landlord would be required to give notice within forty-five days of the abandonment of the premises by the tenant. On the other hand, if the written notice is not required until forty-five days after "termination of the rental agreement" or "termination of the tenancy," then it can be argued that the unilateral action of the tenant in vacating the premises prematurely should not start the forty-five day period running. Non-payment of rent or abandonment by the tenant does not automatically terminate a rental agreement.¹²⁰

115. IND. CODE § 32-7-5-14 (Supp. 1992) (emphasis added). One of the obligations for which the landlord may withhold the security deposit is "all rent in arrearage under the rental agreement, and rent due for premature termination of the rental agreement by the tenant." IND. CODE § 32-7-5-13 (Supp. 1992).

116. IND. CODE § 32-7-5-15 (Supp. 1992).

117. *Id.* § 32-7-5-12(a) (Supp. 1992).

118. *Skiver*, 585 N.E.2d at 1347.

119. IND. CODE §§ 32-7-5-12, -14-16 (Supp. 1992).

120. *See, e.g., CUNNINGHAM ET AL., supra* note 25, at 278-80.

In the second decision, *Duchon v. Ross*,¹²¹ the tenants (Duchon and McIlvenna) leased a house from the landlords (Ross and Harris) for a term of one year and paid a \$490 security deposit. The tenants dealt almost exclusively with Ross with regard to the house.¹²² They negotiated the lease with her, sent her the rental payments, and contacted her when problems arose. The tenants were notified by Ross that when the lease expired on February 28, 1991, it would not be renewed. The tenants vacated and advised Ross to send all future correspondence to Duchon's business address. On March 8, 1991, Ross sent Duchon a letter stating that a carpet needed to be shampooed, that the locks had been re-keyed, that a washer and dryer were missing, and that the backyard had been damaged by vehicle parking and needed to be reseeded. The letter advised the tenants that once the costs were ascertained they would receive a final accounting. A dispute arose as to the damages, and the tenants filed suit to recover their security deposit, attorney fees and court costs. The landlords counterclaimed for damage to the house. The tenants moved for summary judgments based on the landlords' failure to comply with the notice requirement of the Security Deposit Act. The trial court denied the motion and certified the denial of the summary judgment for interlocutory appeal.¹²³

On appeal, the court observed that this was the first time the sufficiency of the written notice had been questioned. The court began with a discussion of the duties of the landlord to return the security deposit to the tenant under the Act. It observed that the landlord must return the entire security deposit except for any amount applied to the payment of accrued rent, damages that the landlord has or will reasonably suffer by reason of the tenant's noncompliance with the law or the rental agreement, and unpaid utility or sewer charges the tenant is obligated to pay under the rental agreement: "all as itemized by the landlord in a written notice delivered to the tenant together with the amount due within forty-five (45) days after termination of the rental agreement and delivery of possession."¹²⁴

With regard to damages to a rental unit or any ancillary facility that are not the result of ordinary wear and tear, the notice is to include the estimated cost of repair for each damaged item and the amount the landlord intends to assess the tenant. The itemized list must be accompanied by a check for the difference between the damages claimed and

121. 599 N.E.2d 621 (Ind. Ct. App. 1992).

122. *Id.* at 622. The facts indicate that both Duchon and Ross are attorneys at law. *Id.* n.1.

123. *Id.* at 622-23.

124. IND. CODE § 32-7-5-12(a) (Supp. 1992).

the amount of the security deposit held by the landlord.¹²⁵ The landlord's failure to comply with the notice of damages requirement "constitutes agreement by the landlord that no damages are due"¹²⁶ and the landlord is liable to the tenants for the amount of the security deposit withheld together with reasonable attorney fees and court costs.¹²⁷

Next, the court examined Ross' letter of March 8, 1991, because it was the only letter sent within forty-five days after termination of the tenancy, to see if it complied with the statute. The tenants point out that the letter did not include the estimated cost of repair for each damaged item and was not accompanied by a check for the difference between the damages claimed and the security deposit. The court agreed that the statute is clear and unambiguous, and that the letter failed to provide the itemized estimated costs of repair and payment of the excess deposit. The court refused to accept the landlords' defense that the dispute over the cost of repairs relieved them of this statutory duty.¹²⁸ In addition, the landlords argued that section 12 does not prevent the landlord or tenant from recovering "other damages" to which either is entitled. However, the court observed that under section 15 there are no "other damages" unless the security deposit is returned or the statutory notice is sent to the tenant. The judgment was reversed with directions to the trial court to enter summary judgment for the tenants and to assess costs and attorney fees.¹²⁹

V. MORTGAGEE: CONTRACTUAL DUTIES

In *Wehling v. Citizens National Bank*,¹³⁰ the Wehlings purchased a parcel of property in Upland, Indiana, and financed the purchase through the United Bank of Upland, Citizens National Bank's predecessor in interest. The Wehlings paid the bank a fee to record the deed. The Bank recorded the deed, but failed to place the Wehlings' mailing address in the transfer book. Instead, it listed the address of the property. After paying the May 1981 real estate taxes in May 1982, the Wehlings assumed the Bank had set up an escrow account and was paying the real estate taxes as indicated by the terms of the mortgage. In fact, the Bank had not set up an escrow account nor had it paid the real estate taxes. A notice of delinquency was mailed by the Grant County Auditor to the address listed in the transfer book, and, in July of 1984, a notice of

125. *Id.* § 32-7-5-14 (Supp. 1992).

126. *Id.* § 32-7-5-15 (Supp. 1992).

127. *Id.* § 32-7-5-16 (Supp. 1992).

128. *Duchon*, 599 N.E.2d at 625.

129. *Id.* at 624-25.

130. 586 N.E.2d 840 (Ind. 1992).

tax sale was sent by mail to the address of the property and the address of the former owner. The Wehlings did not receive either of these notices, and the property was subsequently purchased at a tax sale on August 13, 1984. There was no indication that the Wehlings were aware a tax deed had been executed by the county auditor on October 28, 1986. Apparently, the Wehlings first became aware in 1987, when they attempted to sell the property, that the property had been sold for nonpayment of taxes. The Wehlings then filed a complaint attempting to quiet title against the tax sale purchasers and to set aside the deed. The Bank was added in an amended complaint alleging negligent recording of the deed and failure to escrow and pay the taxes. The trial court entered a summary judgment in favor of the Bank, finding that it had breached no duty to the Wehlings. The court also granted a summary judgment in favor of the purchaser at the tax sale.¹³¹

The court of appeals affirmed the summary judgment in favor of the Bank on the ground that the statute of limitations had run on the Wehlings' claim. The Indiana Supreme Court granted transfer. On the statute of limitations issue the court of appeals concluded that the applicable six year statute of limitation¹³² had expired between the recording of the deed and the filing of the complaint. The supreme court, however, agreed with the Wehlings' contention that the "discovery rule" applied and the statute begins to run when the resultant damage of a negligent act is "susceptible of ascertainment."¹³³ The court concluded that the "discovery rule" does not differ from the "ascertainment rule" announced in earlier Indiana decisions, and that "the cause of action of a tort claim accrues and the statute of limitations begins to run when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another."¹³⁴

With regard to the summary judgment issue, the trial court had held that the duty to provide the county auditor with the correct mailing address rested solely with the owner. The supreme court disagreed, holding that the trier of fact could reasonably find that when the Bank contractually agreed to record the deed for a fee, this duty included providing the county auditor with the Wehlings' correct mailing address by placing it in the transfer book. Furthermore, the court determined that the question of negligence in failing to escrow money for the payment of the real estate taxes was a question of fact. Language in the mortgage

131. *Id.* at 840-41.

132. IND. CODE § 34-1-2-2(1) (Supp. 1992).

133. *Duchon*, 586 N.E.2d at 842-43.

134. *Id.* at 842-43.

specifically provided for such an escrow arrangement. Thus these factual issues precluded the entry of summary judgment. The opinion of the court of appeals was vacated and the case was remanded to the trial court.¹³⁵

VI. REAL ESTATE CLOSINGS: CONTRACTUAL DUTIES¹³⁶

In *Lawyers Title Insurance Corp. v. Pokraka*,¹³⁷ Joseph and Joan Pokraka (collectively "Pokraka") sold a two flat apartment building to Dwaine Paradis. Pokraka agreed to accept back a mortgage which would be secondary to a \$5000 first mortgage needed by Paradis to finance part of the purchase price. The \$5000 was to be paid to Pokraka immediately following the closing. Employees of Lawyers Title Insurance Corporation, including Antonovitz, handled the closing. Sometime prior to the closing, Paradis asked Lawyers Title to delay the recording of Pokraka's mortgage for a period of ninety days. Antonovitz authorized the delay. During this period Paradis obtained a mortgage in the principal amount of \$15,000 from a commercial lender which was recorded before the Pokraka mortgage. When Paradis stopped making payments on the commercial mortgage Pokraka was forced to obtain a commercial mortgage to pay off the one taken by Paradis. Pokraka then filed this suit, and the trial court awarded a judgment against Antonovitz and Lawyers Title of \$18,985.34 compensatory damages and \$50,000 punitive damages.¹³⁸

In a memorandum decision, the court of appeals reversed the trial court's judgment against Lawyers Title. The court found no misrepresentation of past or existing facts which amounted to fraud, that Pokraka had no right to rely on the representations, and that no damage was sustained as a result of any misrepresentation because Pokraka had agreed to take a second mortgage. The supreme court granted transfer because it concluded Pokraka is entitled to the judgment.¹³⁹

Lawyers Title argued that the trial court's conclusions were contrary to law because neither theory was properly pleaded, no duty was breached, and the elements of fraud or breach of contract were not proven. The supreme court observed that allegations of fraud appeared in the complaint and that Pokraka's pre-trial "contentions" made specific reference

135. *Id.* at 841-43.

136. In addition to the case discussed under this topic, two other decisions discussed earlier also involve the contractual duties of the parties at a real estate closing. *See supra* text accompanying notes 70-85, 130-35.

137. 595 N.E.2d 244 (Ind. 1992).

138. *Id.* at 245-46.

139. *Id.*

to an oral contract which obligated Lawyers Title to follow the customs of title companies in northwest Indiana when acting as a closing agent. Thus, contract and fraud were part of Pokraka's case.¹⁴⁰

The court first examined the question of whether Lawyers Title was obligated to promptly record Pokraka's mortgage. Expert testimony established that it was customary for title insurance companies in northern Indiana to record as soon as possible after closing all legal documents requiring recordation. Thus, the trial court found it was Lawyers Title's duty to promptly record the mortgage or notify Pokraka of any delay. The court also rejected Lawyers Title's contention that since Pokraka had agreed to a second mortgage no damages resulted from the delay. Pokraka had agreed to a first mortgage in the amount of \$5000, not \$15,000. Had the mortgage been recorded immediately, Pokraka would have been protected from a superior mortgage in excess of \$5000. Because the relationship between Lawyers Title and Pokraka was contractual, its failure to fulfill its obligations gave rise to an action for breach of contract.¹⁴¹

The court agreed with Lawyers Title that the trial court had erroneously concluded that fraud occurred. There was no evidence that Antonovitz acted with the intent to mislead Pokraka. Nevertheless, Pokraka was still entitled to judgment because the trial court's judgment may be affirmed under any legal theory supported by the findings even if different than the one used by the trial court. Here the trial court's findings support the conclusion that Lawyers Title breached its oral contract to record the mortgage promptly or to advise Pokraka of the delay.¹⁴²

Finally, the court reversed the award of punitive damages, noting that punitive damages generally are not recoverable for breach of contract. There was no finding that Antonovitz acted maliciously, fraudulently, oppressively or with gross negligence.¹⁴³

VII. RIPARIAN RIGHTS

The natural resources and scenic beauty of Indiana are a public right. The public has a vested right to the preservation and protection of all public freshwater lakes in their present state and the right to use such waters for recreational purposes. The state has full power and control of all public freshwater lakes in trust for the recreational use of all its citizens, and no person owning lands abutting a public freshwater

140. *Id.* at 247-48.

141. *Id.* at 248.

142. *Id.* at 249.

143. *Id.* at 250.

lake has an exclusive right to use such waters or any part thereof.¹⁴⁴ At the same time, Indiana recognizes riparian rights of owners of lands bordering freshwater lakes.¹⁴⁵ These competing interests of the riparian landowner and the right of the public to use the waters often conflict. Such a conflict occurred during this survey period and the court provided additional guidelines for resolving future disputes.

In *Zapffe v. Srbeny*,¹⁴⁶ the owners of land adjacent to Bass Lake (the Zapffes) sought an injunction to prevent the defendants (collectively referred to as "Srbeny") from interfering with their riparian rights. The trial court enjoined Srbeny from installing a pier on the Zapffes' riparian tract, but refused to rule with regard to the legality of Srbeny's boat mooring devices located in the lake beyond the Zapffes' pier. This was more than a dispute between two riparian owners—it involved the rights of the public to use freshwater lakes for recreational purpose. The State of Indiana, through its Department of Natural Resources (DNR), should make the first determination regarding the public right to use Indiana's freshwater lakes for recreational purposes, including the location of boat moorings and no judgment should be issued on this point without the State being made a party.¹⁴⁷

The trial court defined the Zapffes' riparian rights as an extension of their boundary line "to a distance of fifty (50) feet out from the meander line of Bass Lake into the waters of Bass Lake." The facts indicate that none of the boat moorings are closer than 100 to 120 feet from the shore. In affirming the decision of the trial court, the court of appeals observed that in *Bath v. Courts*,¹⁴⁸ the court recognized that the onshore boundaries of the riparian owner extend into the lake in a line perpendicular to the shore where the shoreline approximates a straight line and that, should the lake naturally recede, title to the new land would vest in the riparian owner by the extension of their shore boundaries. While the court in *Bath* did not indicate how far into the lake the riparian rights extend, in *Stoner v. Rice*,¹⁴⁹ it was held that riparian rights do not extend to the middle of the lake. The court agreed with Srbeny's position that *Bath* proscribes the extension of the riparian

144. IND. CODE § 13-2-11.1-2 (1988).

145. *E.g.*, *Stoner v. Rice*, 22 N.E. 968 (Ind. 1889); *Bath v. Courts*, 459 N.E.2d 72 (Ind. Ct. App. 1984). Indiana Code § 32-4-2-5 allows riparian owners to build "piers, wharves, docks or harbors in aid of navigation and commerce" on the riparian owners premises or "upon the submerged lands beneath the waters." IND. CODE § 32-4-2-5 (Supp. 1992).

146. 587 N.E.2d 177 (Ind. Ct. App. 1992).

147. *Id.* at 178.

148. 459 N.E.2d at 72.

149. 22 N.E. at 968.

tract to a point where it would interfere with the use of the lake by others. However, the court of appeals observed that the *Bath* decision does not suggest the location of the "finite point."¹⁵⁰

The Zapffes argued that the riparian tract should be extended to the five foot level of the lake because the five foot level would be necessary to safely navigate some boats belonging to the Zapffes' guests. In rejecting this contention, the court noted that there was no evidence in the record to support this claim. The claim is even more questionable in light of the fact that the Zapffes currently do not maintain a pier.¹⁵¹

The Zapffes next argued that the riparian rights should extend 200 feet from shore, noting that Indiana Code section 14-1-1-29 requires that no person operate a motorboat within 200 feet of the shoreline of a lake or channel 500 feet or more wide except for trolling or for leaving or approaching a dock, pier, wharf or the shore of such lake or channel.¹⁵² The court was quick to point out, however, that the statute does not totally prohibit a boat from operating within 200 feet of shore, and extending riparian rights 200 feet from the shoreline would clearly interfere with other persons' use of the lake.¹⁵³

Instead of a rigid formula for determining the exact location of riparian rights by distance or depth, the court indicated that a "reasonableness" test might be employed, taking into consideration such factors as water level, number of riparian owners, purpose of the pier, and effects on other users. The court observed that in this case other riparian owners had installed piers, none of which extended more than fifty feet into the lake. Therefore, the court concluded that under a reasonable use test the trial court did not err in fixing the boundary of the Zapffes' riparian tract at a length of fifty feet from the meander line of Bass Lake. Thus, the boat moorings did not encroach upon the Zapffes' riparian rights.¹⁵⁴

Finally, the court refused to address the Zapffes' claim that Indiana Code sections 13-2-4-5 and 13-2-11.1-2¹⁵⁵ prohibit non-riparian owners from maintaining piers or boat moorings in the lake bed. Only the State, acting through the DNR, has the authority to enforce these statutes. The court expressed no opinion on whether the Srbenys' boat moorings encroached upon the public's rights in the waters of Bass Lake since the Zapffes lacked standing to raise this issue.¹⁵⁶

150. *Zapffe*, 587 N.E.2d at 179-80.

151. *Id.* at 180.

152. IND. CODE § 14-1-1-29 (Supp. 1992).

153. *Zapffe*, 587 N.E.2d at 180-81.

154. *Id.* at 181.

155. IND. CODE §§ 13-2-4-5, -11.2-2 (1988).

156. *Id.*