

THE STAGNATION OF INDIANA REAL PROPERTY LAW

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Each year in this issue, an attempt is made to summarize the noteworthy developments affecting real property law in the state of Indiana. It touches on subjects including real estate transactions, landlord/tenant law, liens and mortgages, land use, statutory law, and the common law of property, including concepts like adverse possession and servitudes. At the end of this article, we will summarize some notable cases that became a part of the law between October 1, 2008, and September 30, 2009.¹ First, however, we will more broadly address the state of Indiana real property law in the year 2010.

I. THE STATE OF INDIANA REAL PROPERTY LAW

In the Anglo/American legal system, scholars have described land as the “darling” of the law.² Indiana is no exception. Although private “property rights are not absolute,”³ Indiana law consistently holds that real property is special. Judges have described land as “more than [a] physical object”⁴ and includes among the rights associated with it, the right “to acquire, possess, use and dispose of it without control or diminution save by the law of land.”⁵ Each parcel of land is unique.⁶ A landowner “may use his own land as he pleases,” subject to the rights of his neighbors and the community.⁷

Given the stated importance of real property in the Anglo/American legal system, it would follow that the law of real property would be vibrant and reflect the changes in an evolving economy. But in Indiana, that is not the case in either statutory or common law.

A. Statutory Law

Statutory property law in Indiana has changed little in the past three decades, and large sections of it have been in place since the 1850s. Since the foundation of the state, the Indiana General Assembly has taken a conservative approach to property law, largely relying on the common law except in administrative matters

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1. A thorough survey of Indiana case and statutory law during the survey period is available at Marcia A. Reddick, *Recent Developments in Indiana Real Property and Related Areas of Law*, 43 IND. L. REV. 937 (2010).

2. Nancy Perkins Spyke, *What's Land Got to Do With It?: Rhetoric and Indeterminacy in Land's Favored Legal Status*, 52 BUFF. L. REV. 387, 420 (2004).

3. Bd. of Zoning Appeals v. Leisz, 702 N.E.2d 1026, 1032 (Ind. 1998).

4. Dep't of Fin. Insts. v. Holt, 108 N.E.2d 629, 634 (Ind. 1952).

5. *Id.*

6. Tri-Prof'l Realty, Inc. v. Hillenburg, 669 N.E.2d 1064, 1069 (Ind. Ct. App. 1996).

7. Trs. of Wabash & Erie Canal v. Spears, 16 Ind. 441, 442 (1861).

that require a statutory structure.

The Indiana Code addresses real property in titles 32 and 36. "Property" is the name of title 32 and it is logically the primary source for statutory real property law in Indiana.⁸ In addition, two sections of title 36, entitled "Local Government," concern real property topics. Chapter 36-2-11 addresses the office of the County Recorder and includes statutes relevant to "instruments that are proper for the recording."⁹ Finally, article 36-7 of the Indiana Code addresses government regulation of real property, including topics such as planning and zoning,¹⁰ historic preservation,¹¹ building commissions, and redevelopment of blighted areas.¹²

Although the legislature has modernized the language of title 32 on several occasions, much of title 32 has remained substantively static since the 1850s.¹³ For example, Indiana Code section 32-21-1-13 states that:

Except for a bona fide lease for a term not exceeding three (3) years, a conveyance of land or of any interest in land shall be made by a deed that is:

- (1) written; and
- (2) subscribed, sealed, and acknowledged by the grantor (as defined in IC 32-17-1-1) or by the grantor's attorney.¹⁴

Prior to the 2002 recodification, this concept was found in section 32-1-2-4, which read: "Conveyances of lands, or of any interest therein, shall be by deed in writing, subscribed, sealed, and duly acknowledged by the grantor, or by his attorney; except bona fide leases for a term not exceeding three (3) years."¹⁵ The legislature originally introduced that section to the Indiana Code in 1852, it and remained unchanged until the recodification 150 years later. A related statute, section 32-21-4-1, states that all conveyances of land, mortgages, and leases for more than three years "must be recorded in the recorder's office of the county where the land is situated."¹⁶ That statute was also introduced to the Indiana Code in 1852 in substantively the same form, although it was tweaked in 1875,

8. In its 2002 regular session, the Indiana General Assembly recodified title 32 of the Indiana Code (the "Code") through Senate Enrolled Act 57 (the "Act"). The 450-page Act made tens of thousands of changes to the Code, the vast majority of which were technical. The purpose of the Act, by its very terms, was to "recodify prior property law in a style that is clear, concise, and easy to interpret and apply." IND. CODE § 32-16-1-2 (2008).

9. IND. CODE § 36-2-11-8 (2007).

10. IND. CODE § 36-7-4 (2007 & Supp. 2009).

11. IND. CODE § 36-7-11 (2007).

12. IND. CODE § 36-7-14 (2008).

13. The legislature recodified Title 32 in 2002, but the recodification explicitly intended to have no substantive impact on the "operation and effect of the prior property law." IND. CODE § 32-16-1-2 (2008).

14. *Id.* § 32-21-1-13.

15. IND. CODE § 32-1-2-4 (2001) (current version at IND. CODE § 32-21-1-13 (2008)).

16. IND. CODE § 32-21-4-1 (2008).

1913, 1921, and 1923.

Together, these two statutes require that all conveyances of land (including leases for more than three years) must be in writing, signed by the grantor, notarized, and recorded. They must also be “subscribed [and] sealed,”¹⁷ although those terms do not appear to be defined in the Indiana Code. Sections 32-31-2-1 and 32-31-2-2, originally added to the code in 1897, establish the consequences for violating these statutes—leases in excess of three years that are not recorded within forty-five days after execution shall be void against future purchasers and mortgagees.¹⁸ These statutes illustrate one of the significant problems that nearly 160-year-old statutes cause—they are ignored. Few leases in Indiana are notarized, let alone “subscribed [and] sealed.”¹⁹ Although certain sophisticated commercial tenants may insist upon recording a memorandum of lease in order to give the world notice of their leasehold interest,²⁰ they are the minority and the modern practice of real estate law in Indiana does not include the recordation of leases themselves. Indeed, confidentiality provisions in many leases expressly forbid their recordation or disclosure of their terms. Despite the conflict between the statutes and practice, a *détente* has emerged where the two simply ignore one another. Of course, this *détente* is dangerous—a purchaser could easily invoke the statutes to void a below-market lease or rid itself of a troublesome tenant. A court could hardly invalidate the statutes because they have been ignored for nearly 160 years.

The same situation has arisen with respect to the recording statutes. Chapter 36-2-11 of the Indiana Code describes a paper-based indexing system including an entry book,²¹ grantor-grantee indexes,²² and separate indexes for deeds and mortgages.²³ This recording system has its origins in the earliest days of the state. It was part of the Code before the 1851 Constitutional Convention and was again added in 1852.²⁴ Of course, most Indiana counties have now switched to computerized recording and indexing systems.²⁵ The Indiana Code makes no explicit mention of these modern systems, neither permitting nor forbidding them. But some of the statutes, with their references to “entry books”²⁶ and

17. *Id.* § 32-21-1-13.

18. *Id.* §§ 32-31-2-1 to -2 (original version at Ind. Acts 1897, ch. 106, § 1).

19. *Id.* § 32-21-1-13.

20. Tenants which may insist upon a memorandum of lease would include ground lease tenants, sale/leaseback tenants or other occupants of single-tenant buildings, retail tenants which occupy an “anchor” position in a shopping center or mall, and office tenants which occupy a significant portion of a building. Indiana Code 36-2-11-20 (2007) permits the recording of a memorandum of lease rather than the lease itself.

21. IND. CODE 36-2-11-9 (2007).

22. *Id.* § 36-2-11-12.

23. *Id.*

24. *See, e.g.*, 1852 Ind. Acts, 1RS, ch. 91, §§ 1-3.

25. *See* Tanya D. Marsh, *The Limits of Constructive Notice: A Call to Reform Indiana’s Recording Statutes*, 46 RES GESTAE 20 (Oct. 2002).

26. *See* IND. CODE § 36-2-11-9 (2007) (“The recorder shall keep an entry book in which he

“printed forms for record books”²⁷ simply do not apply to a non-paper-based system. This disconnect between the Code and practice creates an opportunity to argue that an instrument recorded and indexed in a computerized system does not provide good notice because the system does not conform to the statutory requirements.

The legislature added a number of other significant sections of title 32 of the Indiana Code in the 1800s that have remained substantively unchanged, including chapters on partition,²⁸ easements by prescription,²⁹ landlord-tenant relations,³⁰ and mortgages.³¹ Of course, the General Assembly added some new substance during the twentieth century, including articles regarding condominiums,³² liens,³³ and planning and zoning.³⁴ But many of these changes took place in the 1920s, 1940s, and 1970s. The General Assembly has not made significant changes to the Indiana Code regarding real property since the early 1980s.

The changes implemented by the General Assembly in 2009 are typical of the incremental progress in Indiana statutory real property law. In the most significant change, the legislature added a new chapter to penalize the owners of vacant and abandoned properties.

B. Common Law of Property

When researching property law in Indiana, it is a common occurrence to find that the most recent opinion issued on a particular point dates to the 1980s, or even the 1880s. On many points, the precedent is so old and disconnected to the modern role of real estate in the economy that it is of questionable application.

shall enter the date on which he received each instrument for recording, the names of the parties to the instrument, a description of the premises affected by the instrument, and the fees for recording the instrument.”).

27. *See id.* § 36-2-11-11 (“A county recorder may use printed forms for record books only for the recording of instruments presented by persons who presented fifty (50) or more instruments for recording during the preceding year.”).

28. IND. CODE §§ 32-17-4-1 to -24 (2008) (formerly codified in scattered sections of IND. CODE § 32-4 (2001)).

29. *Id.* §§ 32-23-1-1 to -4 (formerly codified as IND. CODE §§ 32-5-1 to -4 (2001)).

30. The legislature added most of the “General Provisions” of the “Landlord-Tenant Relations” article of the Code were added in 1881. *See id.* §§ 32-31-1-1 to -18.

31. The legislature added many fundamental provisions of the “Mortgages” article to the Indiana Code in 1852. *See, e.g., id.* § 32-29-1-2; *id.* § 32-29-1-8.

32. The legislature largely created Indiana Code 32-25, titled “Condominiums,” in 1963, revised in 1977, and recodified in 2002. *See, e.g., id.* § 25-1-1; *id.* § 32-25-4-2.

33. The legislature created the statutes in Indiana Code 32-28, titled “Liens on Real Property,” between 1909 and 1945, revised a few times and recodified in 2002. *See, e.g., id.* § 32-28-1-1; *id.* § 32-28-3-2.

34. The legislature created Indiana Code 36-7, titled “Planning and Development,” in the late 1960s with minor changes in the last twenty years. *See, e.g.,* IND. CODE § 36-7-2-2 (2007); *id.* § 36-7-2-3; *id.* § 36-7-9-13.

This problem is particularly acute with respect to commercial real estate, where it is more difficult to make parallels between an opinion from decades or century ago (which likely dealt with farmland or a simple commercial property) and modern real estate, with complex arrangements between adjacent owners, lenders/borrowers, landlord/tenants, and purchasers/sellers.

Commercial real estate leasing is an especially neglected area of the Indiana common law of property. In Indiana, few if any statutes apply to commercial (as opposed to residential) leases. Few appellate cases in modern times shed light on what rules may apply to these landlord/tenant relationships. For example, in 2005, the Indiana Court of Appeals considered a commercial lease that included a clause that provided for a particular tenant remedy but which did not expressly limit the tenant's remedies.³⁵ The court was forced to reach back to 1911 and 1917 for relevant precedent to address this fairly standard commercial lease provision.³⁶

This broad lack of relevant precedent in commercial leasing leads to a litany of unanswered questions. For example, the remedies available at law and equity to a commercial landlord and tenant in the event of breach by the other are fuzzy. Under what circumstances can the landlord evict the tenant? May it do so for a non-material breach? If a departing tenant leaves personal property in the premises, under what circumstances may the landlord take possession of it? If the tenant defaults, may the landlord accelerate all rent due for the remaining term? If so, can it then re-let the premises to another tenant? If a portion of the premises is uninhabitable, can the tenant successfully argue constructive eviction of the entire premises? Can it recover damages, or must it terminate the lease? The number of appellate cases that address these issues is minuscule compared to the number of commercial landlord/tenant disputes that actually occur.

Because of this disconnect between law and reality, commercial leases have become lengthy creatures of contract, designed to resolve as many issues as possible without appealing to the law. This reliance on contract law is expensive because it requires the expertise of attorneys. It can also cause predictable problems when contracts are unclear or fail to address possible outcomes. For example, a landlord enters into a long-term lease with a retail tenant. During the tenancy, tenant decides to cease operations and assign the lease to another retailer. Landlord consents and the three parties enter into a contract that assigns the lease but requires the original tenant to remain financially liable in the event that the assignee defaults in its obligations to landlord. After a period of time, the assignee stops paying rent. Landlord notifies original tenant, who makes

35. *Simon Prop. Group, L.P. v. Mich. Sporting Goods Distribs., Inc.*, 837 N.E.2d 1058 (Ind. Ct. App. 2005).

36. *Id.* at 1074 (citing *Strauss v. Yeager*, 93 N.E. 877, 882 (Ind. App. 1911) ("A contract which excludes some remedy given by law should be so definite and positive in its terms as to show the clear intention of the parties to do so."); *Whitcomb v. Indianapolis Traction & Terminal Co.*, 116 N.E. 444, 445 (Ind. App. 1917) ("Therefore, even if a lease provides a specific remedy, a landlord has not been deprived 'of any rights given by law, unless the terms thereof expressly restricted the parties to such specified remedy.'").

good on the unpaid rent. Assignee eventually stops operating and abandons the premises. Unfortunately, the assignment contract fails to contemplate this turn of events. Who now takes control of the premises? The landlord or the original tenant, who has no reversionary interest under the assignment agreement? Indiana law is silent. If the landlord and the original tenant both take a pragmatic approach and work together, they can figure out an answer, but the law provides none.

Commercial real estate transactions are another weak spot in the Indiana common law of property. For example, what remedies are available to the seller if the purchaser breaches a real estate contract? A purchaser, which has contracted for a unique parcel of land, has a clear right to equitable relief—specific performance of the contract. Even though the doctrine of mutuality of remedies has been discredited,³⁷ is the converse true as well? Or is the seller limited to money damages because, after all, it only bargained for money, which is hardly unique?

It has been historically true that the remedy of specific performance has been “as freely available to vendors as it is to purchasers.”³⁸ Although modern treatises and casebooks note that courts grant specific performance to sellers “as a matter of course,”³⁹ only select jurisdictions, including Indiana, affirmed that concept in modern times. In 2003, the court of appeals reaffirmed the availability of specific performance as a remedy for a non-breaching seller.⁴⁰ The court’s reasoning was interesting:

It is a matter of course for the trial court to grant specific performance of a valid contract for the sale of real estate. . . . It is true that the number of cases in Indiana in which a vendor has been awarded specific performance of a contract is rather small. . . . We have found no law which changes this time honored principle. . . . While the reasons for awarding specific performance to vendors may be less compelling than the reasons for awarding specific performance to purchasers following a vendor’s breach, the remedy is available nonetheless.⁴¹

The court cited only two cases for the principle that a seller has a right to specific performance in Indiana—one from 1999⁴² and one from 1906.⁴³ The

37. 25 WILLISTON ON CONTRACTS § 67:40 (4th ed. 2010).

38. *Perron v. Hale*, 701 P.2d 198, 202 (Idaho 1985) (citing *Tombari v. Griep*, 350 P.2d 452, 454-55 (Wash. 1960)).

39. MILTON R. FRIEDMAN, *FRIEDMAN ON CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 7:1.4 (2009) (“Specific performance is generally given the seller as a matter of course. . . . The right to damages at law nevertheless remains.”).

40. *Humphries v. Ables*, 789 N.E.2d 1025, 1034-35 (Ind. Ct. App. 2003).

41. *Id.* (citations omitted).

42. *Id.* at 1035 (citing *Salin Bank & Trust Co. v. Violet U. Peden Trust*, 715 N.E.2d 1003 (Ind. Ct. App. 1999)).

43. *Id.* (quoting *Migatz v. Stieglitz*, 77 N.E. 400 (Ind. 1906) (holding that a “vendor must likewise be permitted in equity to compel the acceptance of his deed and the payment of the

1999 case is not on point because the purchaser did not contest and so the court did not address the underlying principle.⁴⁴ It appears that only two other cases in Indiana legal history address the point—one case in 1982,⁴⁵ and one in 1883.⁴⁶ Thus, in the past 126 years, an Indiana appellate court has discussed whether equitable remedies are available to the vendors of real estate on only five occasions. In the most recent cases, it appears that the court upheld the doctrine simply because of the earlier precedent even though it found the justifications “less compelling.”⁴⁷

Many other states have been willing to revisit the historical rationales and challenge the time-honored principle. An oft-cited case is the New Jersey appellate opinion in *Centex Homes Corp. v. Boag*.⁴⁸ In 1972, Mr. and Mrs. Boag entered into a purchase agreement for a condominium unit under construction in a high-rise development. Soon after, Mr. Boag learned that he was to be transferred to Chicago and informed the seller that he would be unable to complete the transaction. The seller sued for specific performance or, in the alternative, for liquidated damages in the amount of the deposit.⁴⁹

The court briefly discussed the principles behind granting specific performance and noted that

at the time this branch of equity jurisdiction was evolving in England, the presumed uniqueness of land as well as its importance to the social order of that era led to the conclusion that damages at law could never be adequate to compensate for the breach of a contract to transfer an interest in land.⁵⁰

The court questioned the application of this reasoning to the breach of a purchase agreement by the buyer:

While the inadequacy of the damage remedy suffices to explain the origin of the vendee’s right to obtain specific performance in equity, it does not provide a *rationale* for the availability of the remedy at the instance of the vendor of real estate. Except upon a showing of unusual circumstances or a change in the vendor’s position, such as where the vendee has entered into possession, the vendor’s damages are usually measurable, his remedy at law is adequate and there is no jurisdictional

stipulated consideration’’).

44. *Salin Bank*, 715 N.E.2d at 1007-08.

45. *Ridenour v. France*, 442 N.E.2d 716 (Ind. Ct. App. 1982) (holding that “the trial court abused its discretion in not granting . . . specific performance” in favor of vendors, even though a fire destroyed the property after the contract consummated but before closing).

46. *Stephenson v. Arnold*, 89 Ind. 426 (1882).

47. *Humphries v. Ables*, 789 N.E.2d 1025, 1035 (Ind. Ct. App. 2003).

48. 320 A.2d 194, 196-97 (N.J. Super. Ct. Ch. Div. 1974).

49. *Id.* at 195.

50. *Id.* at 196.

basis for equitable relief.⁵¹

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[L]oss of interest is readily measurable and can be recovered in an action at law, and to the extent that the vendor has sustained no economic injury, there is no compelling reason for equity to grant to him the otherwise extraordinary remedy of specific performance.⁵²

Stability and predictability in the common law are important principles, but the common law can only remain relevant if the appellate courts are willing to challenge the well-settled rules from time to time and question whether they are still appropriate. The economic role of real property has seen fundamental and epic changes since the 1800s. The law needs to adapt to those shifts.

One reason that the common law of property has failed to develop in Indiana is article 7, section 4 of the Indiana Constitution. In 1970, the legislature amended the provision to provide for direct appeals to the Indiana Supreme Court for all criminal sentences longer than ten years.⁵³ The change had a disastrous impact on the court's ability to address civil appeals. By 1986, criminal appeals and direct transfers constituted ninety-three percent of the high court's docket.⁵⁴ The legislature amended the provision in 1988 to limit direct appeals only for sentences of life imprisonment or for a term of greater than fifty years.⁵⁵ The benefits of that change were meaningful but relatively short-lived. By 1999, criminal appeals constituted more than seventy percent of the Indiana Supreme Court's docket.⁵⁶ On November 7, 2000, Indiana voters modified the provision once more, limiting the Indiana Supreme Court's direct jurisdiction in criminal appeals to sentences of death.⁵⁷ Although the removal of most criminal direct transfers has helped more civil cases reach the state's highest court, the chances for the court to consider a property case are still slim. In 2008, the Indiana Supreme Court issued ninety-six opinions; fifty-two were in civil cases.⁵⁸

Although Indiana seems particularly resistant to change, or has been especially limited in its opportunities to effect change, the problem is not limited to this state. More broadly, the stagnation of the common law of property results from a combination of factors. Transactional attorneys view the litigation process as unworkable, particularly in the real estate context, for three key reasons: (1) the cost; (2) the length of time until resolution; and (3) the uncertain outcome. If neither the common law nor statutory law provide easy answers to

51. *Id.*

52. *Id.* at 196-97 n.2.

53. IND. CONST. art. VII, § 4 (as amended 1970).

54. Randall T. Shepard, *Why Changing the Supreme Court's Mandatory Jurisdiction is Critical to Lawyers and Clients*, 33 IND. L. REV. 1101, 1102 (2000).

55. IND. CONST. art. VII, § 4 (as amended 1988).

56. Shepard, *supra* note 54, at 1104.

57. IND. CONST. art. VII, § 4 (as amended 2000).

58. Mark J. Crandley & P. Jason Stephenson, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2008*, 42 IND. L. REV. 773, 775 (2009).

an issue, the parties are likely to conclude that they are better off resolving their differences out of court than spending time and money to achieve an unpredictable result. This situation is a classic Catch-22—the parties to real estate disputes refuse to bring their cases to the appellate courts in part because of the failure of the courts to modernize the Indiana common law of property, but the appellate courts of Indiana have limited opportunities to modernize the law because of the failure of parties to modern disputes to allow their cases to be heard.

II. LANDLORD/TENANT LAW

A. *Security Deposit Statute*

During this survey period, the Indiana courts continued to address and resolve certain ambiguities and conflicts arising under Indiana's Security Deposits Statute.⁵⁹ In *Klotz v. Hoyt*,⁶⁰ the Indiana Supreme Court clarified the meaning of the term “damages” under the Security Deposits Statute and held that a failure by a property owner to timely mail a tenant an itemized list of damages, only precludes a landlord from recovering damages for physical harm to the rented premises and does not bar recovery of unpaid rent and other damages to which the landlord may be entitled.⁶¹

Klotz rented certain premises to Hoyt and Kornmann (together, “Tenant”) pursuant to a residential lease agreement, which commenced on July 1, 2006, and expired on June 30, 2007.⁶² Tenant paid rent through the middle of August, moved out without notifying Klotz, and thereafter stopped paying rent. Klotz notified Tenant in November 2006 of his intention to evict, and after receiving no response, Klotz filed an action in small claims court against Tenant.⁶³ The trial court evicted Tenant on February 20, 2007 and set a damages hearing for March 16, 2007.⁶⁴ Klotz did not mail written notice of damages to Tenant or return a portion of the security deposit to Tenant as required by the Security Deposits Statute. Instead, at the damages hearing, Klotz presented in evidence an exhibit detailing unpaid rent, late fees, damages to the premises, and attorney fees. Following the damages hearing, the trial court entered judgment against Klotz denying Klotz recovery of any damages and ordered Klotz to return all of the security deposit to Tenant.⁶⁵ Klotz appealed.

On appeal, Holt argued that the “no damages are due” language set forth in section 15 of the Security Deposits Statute⁶⁶ meant that Klotz's failure to provide

59. IND. CODE § 32-31-3-1.1-19 (Supp. 2009).

60. 900 N.E.2d 1 (Ind. 2009).

61. *Id.* at 5.

62. *Id.* at 2.

63. *Id.*

64. *Id.*

65. *Id.* at 2-3.

66. IND. CODE § 32-31-3-15 (2008).

Tenant with adequate notice, barred Klotz from recovering any damages resulting from Tenant's breach of the lease, including unpaid rent, and that such failure required "remittance of the full security deposit and reasonable attorney fees" to Tenant.⁶⁷ Klotz, relying on section 12(c) of the Security Deposits Statute, which provides: "This section does not preclude the landlord or tenant from recovering other damages to which either is entitled"⁶⁸ argued that failure to provide adequate notice did not preclude it from seeking unpaid rent and other damages to which it was entitled under the lease.⁶⁹ The court of appeals agreed with Klotz and reversed the trial court's decision. In reversing the trial court, the court of appeals concluded that the Security Deposits Statute in "no way affects or hampers the landlord's ability and right to sue the tenants for the rent that they are contractually obligated to pay."⁷⁰ In its decision, the court of appeals noted existing Indiana case law to the contrary and the conflicting sections of the Security Deposits Statute relating to damages.⁷¹

The Indiana Supreme Court granted transfer to resolve the conflict. Using standard rules of statutory construction, the court found that the Tenant's reading of section 15 would render section 12(c) meaningless, and that a landlord's failure to deliver adequate notice only precludes the landlord from recovering damages for *physical* harm to the rented premises, and does not bar recovery of unpaid rent and other damages.⁷²

Although, not determinative of the outcome of the case, the court went on to express its "disapproval of considering a landlord's trial exhibit itemizing damages as equivalent to the statutory notice of damages," required by the Security Deposits Statute.⁷³ Justice Sullivan issued a dissenting opinion in this case. Based on his statutory analysis, Justice Sullivan interpreted section 12(c) of the Security Deposits Statute to mean that a property owner may recover more than the amount of the security deposit if the evidence supports such determination.⁷⁴ But he interpreted section 15 of the Security Deposit Statute to mean that if a property owner failed to comply with the statutory notice requirement, then a property owner would not be entitled to any damages and would be required to return all of the security deposit to its tenant.⁷⁵

Justice Sullivan noted in his dissent that this interpretation of the Security Deposits Statute was supported by the Indiana Supreme Court's decision in *Lae v. Householder*,⁷⁶ where the court held that "[f]ailure to refund and supply the itemized list results in a waiver of any claim for damages and exposes the

67. *Klotz*, 900 N.E.2d at 5.

68. IND. CODE § 32-31-3-12 (2008).

69. *Klotz*, 900 N.E.2d at 5.

70. *Id.* at 4 (quoting *Klotz v. Hoyt*, 880 N.E.2d 1234, 1236 (Ind. Ct. App. 2008)).

71. *Id.*

72. *Id.* at 5.

73. *Id.* at 6.

74. *Id.* at 7-8 (Sullivan, J., dissenting).

75. *Id.* at 8.

76. 789 N.E.2d 481 (Ind. 2003).

landlord to liability for the tenant's attorney fees."⁷⁷

In *Bergerson v. Bergerson*,⁷⁸ the court of appeals addressed whether a property owner provided adequate notice of itemized damages to his residential tenants in accordance with the Security Deposits Statute. The court determined based on its statutory analysis of the Security Deposits Statute and the purpose and intent of the Security Deposits Statute, that written notice delivered to tenants prior to the termination of a residential lease agreement was sufficient for purposes of the Security Deposits Statute.⁷⁹

The court of appeals held in *Bergerson v. Bergerson* that, although it may be unusual for a property owner to provide notice of damages to a tenant before the termination of a residential lease agreement, nothing in section 12 of the Security Deposits Statute states that such notice cannot be given before termination.⁸⁰ The court of appeals further held that "[p]roviding notice prior to the termination of the rental agreement does not harm the tenant and serves the statute's purposes of facilitating timely return of the security deposit and providing information to the tenant."⁸¹

It is interesting to note that the court of appeals in *Bergerson v. Bergerson* also held that certain documentation submitted into evidence by property owner at trial, which itemized how the tenant's security deposit was applied, provided, in part, sufficient notice of damages to the tenant for purposes of the Security Deposits Statute.⁸² This appears to be in conflict with the dicta in *Klotz v. Hoyt* where the Indiana Supreme Court indicates that an exhibit itemizing damages submitted at trial would not be adequate for purposes of providing notice to a tenant as required by the Security Deposits Statute.⁸³

B. Inverse Condemnation: Exhaustion Rule

In *Jacobsville Developers East, LLC v. Warrick County*,⁸⁴ the Indiana Court of Appeals addressed whether a developer's voluntary dismissal of a certiorari action resulted in a failure by the developer to exhaust its available administrative remedies and therefore precluded the developer from filing an inverse condemnation action.⁸⁵

Jacobsville Developers East, LLC (JDE) filed an application seeking approval of a subdivision plat with the Warrick County Area Planning Commission (the "Plan Commission"). The Plan Commission denied JDE's application on the grounds that the proposed plat failed to comply with the

77. *Klotz*, 900 N.E.2d at 8 (quoting *Lae*, 789 N.E.2d at 484) (Sullivan, J., dissenting).

78. 895 N.E.2d 705 (Ind. Ct. App. 2008).

79. *Id.* at 712-13.

80. *Id.* at 712-13 & n.6.

81. *Id.* at 713 n.6.

82. *Id.* at 711-12.

83. *Klotz v. Holt*, 900 N.E.2d 1, 6 (Ind. 2009).

84. 905 N.E.2d 1034 (Ind. Ct. App. 2009).

85. *Id.* at 1036-37.

County Subdivision Control Ordinance that required the plat designate a fifty-foot strip as a public right-of-way in accordance with the County's Thoroughfare Plan.⁸⁶ JDE filed a certiorari action alleging that the required dedication was not reasonably or rationally related to the impact of the proposed subdivision and that the denial of the proposed plat constituted an unconstitutional exaction without just compensation.⁸⁷ Subsequently, JDE dismissed the certiorari action and filed a second application for plat approval, which included the fifty-foot public right-of-way dedication. The Plan Commission approved the second plat filing.⁸⁸

Thereafter, JDE filed an inverse condemnation action alleging that the ordinance's dedication requirement constituted a taking without just compensation.⁸⁹ The trial court dismissed JDE's claim for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.⁹⁰ JDE appealed the trial court's decision.

On appeal, JDE argued that it had exhausted the administrative remedies available to it by obtaining a final decision by the Plan Commission and thus, was not required to complete the certiorari review process before initiating the inverse condemnation action.⁹¹ JDE further argued that it was not required to exhaust administrative remedies because the certiorari court could only affirm, modify or reverse the Plan Commission's action and could not provide a compensatory remedy.

In deciding the case, the court of appeals discussed the exhaustion rule and set forth that in Indiana, "the general rule is that a party is not entitled to judicial relief for an alleged or threatened injury until the prescribed administrative remedy has been exhausted."⁹² The court of appeals then discussed the futility exception to the exhaustion rule argued by JDE and indicated that in order to satisfy the requirements of the futility exception a party must demonstrate that review would have been "impossible or fruitless or that the agency would have been *powerless* to effect a remedy."⁹³

In making its determination, the court of appeals analyzed the remedies that the certiorari court could have affected in connection with JDE's action. Referencing Indiana Code section 36-7-4-1009, the court of appeals noted that a certiorari court does not have the right to impose a compensatory remedy and, therefore, if JDE were seeking monetary compensation at the time JDE filed its

86. *Id.* at 1037.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1036.

92. *Id.* at 1038 (quoting *Austin Lakes Joint Venture v. Avon Utils., Inc.*, 648 N.E.2d 641, 644 (Ind. 1995)).

93. *Id.* at 1039 (citing *LHT Capital, LLC v. Ind. Horse Racing Comm'n*, 895 N.E.2d 124, 126 (Ind. Ct. App. 2008)).

certiorari action, the futility exception would apply.⁹⁴ Conversely, if JDE was seeking a declaratory judgment to reverse the Plan Commission's decision when it brought its certiorari action, the certiorari court would of had the ability to provide an effective remedy.⁹⁵

Based on its review of the facts of the case, the court of appeals determined that at the time JDE sought certiorari review, it was seeking to reverse the Plan Commission's decision and to avoid the dedication requirement and not to be compensated for an actual taking.⁹⁶ Thus, if JDE had pursued its certiorari action, the court could have reversed or modified the Plan Commission's decision and approved the first plat without the right-of-way dedication, thereby obviating the need for JDE to file the inverse condemnation action in the first place. The court of appeals held that by failing to fully pursue the judicial review remedy in the certiorari action, JDE failed to exhaust its available administrative remedies and, as a result, the trial court lacked subject matter jurisdiction.⁹⁷

C. Standing: Aggrieved Party Status

During this survey period, the Indiana courts reviewed several zoning cases to address whether a party had standing⁹⁸ as an aggrieved party to challenge a zoning decision. In *Benton County Remonstrators v. Board of Zoning Appeals*,⁹⁹ the court of appeals determined whether certain remonstrators had standing to challenge special exceptions granted by the Benton County Board of Zoning Appeals (BZA) permitting the location and operation of two confined animal feeding operations within the jurisdiction. The trial court ruled that the remonstrators did not have standing as aggrieved persons to challenge the BZA's decision.¹⁰⁰

In its review of the case, the court of appeals stated that under Indiana law in order to have standing to seek judicial review of the BZA decision, the remonstrators must have been "aggrieved" by the decision.¹⁰¹ Citing the Indiana

94. *Id.* (referencing IND. CODE § 36-7-4-1009 (2007) which provides: "The court may determine the sufficiency of the statements of illegality contained in the petition, without further pleadings, and may make its determination and render its judgment with reference to the legality of the decision of the board of zoning appeals, on the facts set out in the return to the writ of certiorari. . . . In passing on the legality of the decision of the board, the court may reverse, affirm, or modify the decision of the board brought up for review.").

95. *Id.*

96. *Id.*

97. *Id.*

98. See *Vectren Energy Marketing & Services v. Executive Risk Specialty Insurance Co.*, 875 N.E.2d 774, 777 (Ind. Ct. App. 2007), where court of appeals sets forth: "[s]tanding is a judicial doctrine that focuses on whether the complaining party is the proper party to invoke the trial court's jurisdiction."

99. 905 N.E.2d 1090 (Ind. Ct. App. 2009).

100. *Id.* at 1093.

101. *Id.* at 1097.

Supreme Court's decision in *Bagnall v. Town of Beverly Shores* and Indiana Code section 36-7-4-1003(a), the court of appeals stated that to be aggrieved, the remonstrators must have experienced a substantial grievance, a denial of some personal or property right, or the imposition of a burden or obligation, and the remonstrators must show some special injury other than that sustained by the community as a whole.¹⁰²

In reaching its opinion in the case, the court of appeals focused on the fact that the group of remonstrators in the case included adjoining landowners.¹⁰³ Citing existing case law, the court of appeals held that the adjoining landowners could validly claim to be an aggrieved party because their opinion as to the future devaluation of their property was sufficient to establish special injury and potential pecuniary harm, and therefore the adjoining landowners had standing to file the petition challenging the BZA's decision.¹⁰⁴

III. TAKINGS/EMINENT DOMAIN LAW

A. *The Indiana Right to Farm Act: Unconstitutional Taking*

In this survey period, the court of appeals reviewed and determined whether the Indiana Right to Farm Act (the "Act"),¹⁰⁵ which was enacted in an attempt to limit the circumstances under which agricultural operations could become subject to nuisance suits, was an unconstitutional taking.¹⁰⁶

In 1998, Donald J. Lindsey and Jacquelyn Lindsey (together, "Lindsey") built a house on property located in Andrews, Indiana, which was located adjacent to unimproved agricultural property.¹⁰⁷ On June 24, 2002, Degroot Dairy, LLC ("DeGroot") commenced operation of a large dairy on the adjacent agricultural property.¹⁰⁸ On December 9, 2003, Lindsey sued Degroot seeking to enjoin the dairy and for compensation for nuisance, negligence, trespass, criminal mischief, and intentional infliction of emotional distress.¹⁰⁹ Degroot successfully moved for summary judgment. In its summary judgment order, the trial court determined that the Act was constitutional and that it barred Lindsey's

102. *Id.* at 1097-98 (citing *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782, 786 (Ind. 2000) and IND. CODE § 36-7-4-1003(a) (2007 & Supp. 2009) which states: "[e]ach decision of the legislative body under section 918.6 of this chapter or the board of zoning appeals is subject to review by certiorari. Each person aggrieved by a decision of the board of zoning appeals or the legislative body may file with the circuit or superior court of the county in which the premises affected are located, a verified petition setting forth that the decision is illegal in whole or in part and specifying the grounds of the illegality.").

103. *Id.*

104. *Id.* (quoting *State v. Hamer*, 199 N.E. 589, 595 (Ind. 1936)).

105. IND. CODE § 32-30-6-9 (2008).

106. *Lindsey v. DeGroot*, 898 N.E.2d 1251 (Ind. Ct. App. 2009).

107. *Id.* at 1255.

108. *Id.*

109. *Id.* at 1256.

nuisance claims.¹¹⁰

In reliance on an Iowa Supreme Court case, Lindsey argued on appeal that the Act amounted to an unconstitutional taking because the Act essentially allowed an easement over Lindsey's property without just compensation.¹¹¹ The court of appeals rejected this argument, stating that nothing in Indiana law suggested that the right to maintain a nuisance is an easement and that Lindsey failed to provide any reason for the court to adopt such a rule.¹¹²

After rejecting Lindsey's argument and determining that the Act was in fact constitutional, the court of appeals reviewed the statutory provisions of the Act and found that because Lindsey had brought the claim later than one year following commencement of operations of the dairy, Lindsey could only prevail by showing either (1) that there had been a significant change in the type of operation, (2) the dairy would have been a nuisance at the time the dairy began in its locality, or (3) the nuisance resulted from the negligent operation of the dairy.¹¹³ The court of appeals went on to determine that Lindsey failed to assert at the trial court level that there had been any significant change in the operation of the dairy or that the dairy would have been a nuisance at the time the operation began at the trial court, and thus waived such claim on appeal.¹¹⁴

Turning to whether the nuisance resulted from the negligent operation of the dairy, Lindsey's claim of negligence was based exclusively on Degroot's alleged violations of an Indiana Department of Environmental Management regulation related to manure runoff that may have contaminated a stream one mile downstream from the Lindsey's property.¹¹⁵ Given that two separate tests of the water supply provided no evidence of contamination; the court of appeals determined that Lindsey failed to show that the violations were the proximate cause of the claimed injury and therefore failed to prove negligence.¹¹⁶

B. Compensable Damages: Loss of Access

The Indiana Supreme Court addressed whether losses incurred due to impaired access resulting from a taking were compensable in the case of *State v. Kimco of Evansville, Inc.*¹¹⁷ Kimco of Evansville, Inc. owned a shopping center in Evansville known as Plaza East. The Plaza's primary access was from two separate points on the Plaza's west side from an adjacent public road called

110. *Id.*

111. *Id.* at 1258 (citing *Bormann v. Bd. of Supervisors in and for Kossuth County*, 584 N.W.2d 309, 313 (Iowa 1998)).

112. *Id.* at 1259.

113. *Id.*

114. *Id.* at 1259-60.

115. *Id.*

116. *Id.* at 1260-61.

117. 902 N.E.2d 206 (Ind. 2009), *reh'g denied*, No. 82S01-0806-CV-308, 2009 Ind. LEXIS 625 (Ind. May 13, 2009), *cert. denied*, No. 82S01-0806-CV-308, 2010 U.S. LEXIS 572 (Jan. 19, 2010).

Green River Road (the "Road").¹¹⁸ The Plaza's southernmost access point from the Road had full access (i.e., left-in, left-out, right-in, right-out), and the northernmost access point had nearly full access (i.e., left-in, right-in, right-out, but no left-out). In 2000, the State of Indiana filed a complaint to acquire a 0.154 acre strip of land along the western border of the Plaza to widen the Road.¹¹⁹ The State also sought the "permanent extinguishment of all rights and easements of ingress and egress to, from and across" the Road along the length of the acquired property.¹²⁰ As a practical matter, this precluded the Plaza from adding new entrances from the Road or widening the existing access points.

In October 2000, the trial court issued an Order of Appropriation permitting the State to go forward with the condemnation.¹²¹ Sometime thereafter, Kimco requested a jury trial on the issue of damages.¹²² During the following years, the State modified the Road in such a manner that southbound motorists were unable to use the southern entrance at all due to a new median (i.e. right in, right out only), and northbound motorists could only access the southern entrance by performing a difficult merger with traffic entering onto the Road from an expressway onto a new merger lane. The northern entrance gained a left-out, giving it full access.

At the jury trial for damages, Kimco presented evidence that (1) the median and merger lane restricted access to the southernmost entrance, (2) the impaired access at the southern entrance created unsafe congestion at the northern entrance, (3) the road reconfigurations made the Plaza undesirable to retail tenants, and (4) the Plaza's occupancy had dropped by nearly forty percent due to access issues.¹²³ The State requested judgment on the evidence at the close of Kimco's case on the basis that impaired access is not compensable, and was denied.¹²⁴ At the close of evidence, the State again objected to the "submission of the issue of compensability of access rights to the jury."¹²⁵ The trial court denied the objection and instructed the jury that it could award damages if it found that Kimco "suffered a particular, private injury resulting from a substantial and material interference with Kimco's rights of ingress and egress which are special and peculiar to this property and when no other reasonable means of access are available."¹²⁶ Thereafter, the jury awarded Kimco \$2.3 million in damages.¹²⁷

The State appealed. On appeal, the State argued that the trial court erred by admitting Kimco's loss of access evidence and giving the jury instruction

118. *Id.* at 208.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 208-09.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 210.

referenced above.¹²⁸ The court of appeals held that the trial court properly admitted the loss of access evidence, concluding that the sum of the State's roadway improvements "amounted to more than mere inconvenience, and that Kimco suffered a taking of its access rights as a matter of law."¹²⁹

In its discussion of the case and relevant law, the Indiana Supreme Court reaffirmed its view that state and federal takings clauses are textually indistinguishable and are to be analyzed identically.¹³⁰ Citing *Lingle v. Chevron*, the supreme court stated that an inverse taking is compensable if it deprives an owner of all or substantially all economic or productive use of his or her property.¹³¹ The supreme court then stated that the factors to be considered in connection with such inverse taking analysis as adopted in *Lingle* included: (1) "the economic impact of the regulation on the property owner," (2) "the extent to which regulation has interfered with distinct investment-backed expectations, and" (3) "the character of the government action."¹³² The supreme court briefly reviewed other Indiana case law where the Indiana courts had considered whether takings were "special" or "peculiar" injuries that exceeded mere inconvenience, and then determined that such additional analysis would be subsumed within the *Lingle* test and did not add any value to the case at hand.¹³³

The supreme court also reviewed certain statutory rights conferred by the Indiana legislature, and noted that the same only provided for the measure of damages resulting from a taking, and did not create a right to compensation where no taking had occurred.¹³⁴

After the supreme court's discussion of the *Lingle* test, the supreme court determined that "[t]he effects of the road improvements on Plaza East, if viewed separately from the taking of the 0.154-acre strip, plainly do not meet the *Lingle* test."¹³⁵ The court proceeded to decide the case based on the supreme court's decision in *State v. Ensley*, where the supreme court held that a median installation that caused a retail facility to lose direct access from an adjacent public street did not entitle defendants to compensation because "acts done in the proper exercise of governmental powers and not directly encroaching on private property, although their consequences may impair its use or value, do not constitute a taking."¹³⁶

The supreme court rejected the distinction made by the court of appeals from the facts of *Ensley*. The court of appeals noted that (1) not only had a median been installed, but that (2) the right-in/right-out drive was not impacted, and (3) merge lane added to the Road created unsafe congestion problems at Kimco's

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 211 (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40 (2005)).

132. *Id.*

133. *Id.* at 211-12.

134. *Id.* at 212 (citing IND. CODE § 32-24-1-9(c) (2004)).

135. *Id.* at 211-12.

136. *Id.* at 212 (quoting *State v. Ensley*, 164 N.E.2d 342, 346 (Ind. 1960)).

north entrance.¹³⁷ The supreme court agreed that these facts were present, but noted that Kimco had no property right in the free flow of traffic past its premises. Therefore, further impairment by these additional improvements were of no consequence.¹³⁸

In response to Kimco's argument that the "permanent extinguishment of all rights and easements of ingress and egress' along the appropriated strip" precluded it from enhancing its points of access, the supreme court stated that "a 'property owner is not entitled to unlimited access to abutting property at all points along the highway.'"¹³⁹

Kimco also argued that under *State v. Peterson*, if there is a change in the highest and best use due to a change in access, the same may be compensable.¹⁴⁰ The supreme court countered that the Plaza remained a shopping center, and therefore no compensable taking resulted from the change in access.¹⁴¹

Relying on *Ensley*, the supreme court found that "although an elimination of rights of ingress and egress constitutes a compensable taking, the mere reduction in or redirection of traffic flow to a commercial property is not a compensable taking of a property right."¹⁴² In keeping with this analysis, the supreme court held that losses resulting from impaired access are not compensable and reversed the trial court's decision deeming the \$2.3 million verdict excessive as a matter of law.¹⁴³

IV. LIENS AND MORTGAGES

A. *Equitable Subrogation*

In *Neu v. Gibson*,¹⁴⁴ the court of appeals analyzed Indiana's equitable subrogation law and addressed the rights and remedies available to an equitable subrogation lien holder in connection with a mortgage foreclosure action. Specifically, the court of appeals addressed whether such a lien holder could recover interest and attorneys' fees and whether such lien holder is entitled to a sheriff's sale of the real estate encumbered by its lien.¹⁴⁵ The appeal addressed in this opinion follows the court's 2007 ruling in the same dispute regarding the priority of the lien rights of each of the parties involved in the case.¹⁴⁶

In April 2004, Irwin Mortgage Corporation loaned \$506,900 to John Nowak,

137. *Id.* at 214.

138. *Id.* at 215.

139. *Id.* at 214-15 (quoting *Ensley*, 164 N.E.2d at 348).

140. *Id.* at 215 (citing *State v. Peterson*, 381 N.E.2d 83 (Ind. 1978)).

141. *Id.*

142. *Id.* at 214.

143. *Id.* at 216.

144. 905 N.E.2d 465 (Ind. Ct. App. 2009), *superseded*, 928 N.E.2d 556 (Ind. 2010).

145. *Id.* at 468.

146. *See Gibson v. Neu*, 867 N.E.2d 188 (Ind. Ct. App. 2007).

which loan was secured by a first mortgage on Nowak's residence.¹⁴⁷ In September 2004, Nowak bought a business from Brett T. Gibson for \$350,000, which was paid via a promissory note from Nowak payable to Gibson and secured by a second mortgage on Nowak's residence.¹⁴⁸ Thereafter, without notifying Gibson, Nowak sold the residence to Thomas and Elizabeth Neu (together, the "Neus").¹⁴⁹ The Neus used their funds and funds borrowed from Washington Mutual Bank to purchase the residence.¹⁵⁰ The funds borrowed from Washington Mutual were secured by a mortgage on the residence. The purchase transaction resulted in the pay off of the Irwin mortgage.¹⁵¹ The title search performed by the title company handling the closing for the purchase transaction did not disclose Gibson's second mortgage.

In June 2005, Nowak defaulted on the promissory note and second mortgage granted to Gibson.¹⁵² Thereafter, Gibson filed a complaint against Nowak, the Neus, and Washington Mutual for a judgment on the promissory note and to foreclose on the residence. A few months later Nowak filed for bankruptcy.¹⁵³ At the time of the bankruptcy filing, both the promissory note and the second mortgage in favor of Gibson remained unpaid. At some point, Wells Fargo took assignment of the Washington Mutual loan. In the 2007 opinion relating to this matter, the court of appeals ruled that Gibson's mortgage was subordinate to the equitable lien of the Neus and Wells Fargo (together, "Appellants").¹⁵⁴

Following the 2007 appeal, Appellants filed a motion requesting that the trial court "award them interest and attorney's fees in addition to the lien that they had obtained through equitable subrogation and order a sheriff's sale of the real estate to satisfy the liens in their proper order of priority."¹⁵⁵ On November 21, 2007, the trial court entered an order granting judgment to Gibson in the amount of \$380,438.57, foreclosing Gibson's mortgage, reiterating its earlier ruling that the Appellants' lien amount was \$506,016.34, and denying the Appellants' request for a sheriff's sale of the residence.¹⁵⁶ In connection with such denial, the trial court stated that it could not "order a foreclosure sale when there [was] no foreclosure."¹⁵⁷ But the trial court determined that Gibson could request a sheriff's sale of the residence based on his foreclosure judgment.¹⁵⁸

On appeal, the Appellants contended that they should have the right to foreclose on the equitable subrogation lien that was granted in their favor and the

147. *Neu*, 905 N.E.2d at 468.

148. *Id.*

149. *Id.*

150. *Id.* at 469.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 470.

155. *Id.* at 471.

156. *Id.* (quotation omitted).

157. *Id.*

158. *Id.*

right to recover interest and attorneys' fees pursuant to the Irwin mortgage. The Appellants argued that if they were not granted these rights, their lien would be worthless.¹⁵⁹

The court of appeals rejected the Appellants' argument that it should have the right to foreclose its equitable foreclosure lien. The court of appeals held that Appellants failed to demonstrate that they had "any right to foreclose [on the Irwin mortgage] against Nowak."¹⁶⁰ The court stated that equitable subrogation allows one paying the debt of another to succeed to the priority of the debt paid. But the assumption of the first mortgagee's priority status did not permit Appellants to foreclose under the terms of the Irwin mortgage. The court went on to hold that Nowak satisfied any default under the first mortgage when Nowak repaid the loan in connection with the sale to the Neus.¹⁶¹ Moreover, the court noted that Wells Fargo made no claim that it was going to foreclose on the Neu's mortgage as the Neus had consistently paid their mortgage indebtedness to Wells Fargo.¹⁶²

The court of appeals also rejected the Appellants' argument that they were entitled to interest payments or attorneys' fees as set forth in the Irwin mortgage. The court of appeals noted that "Wells Fargo, as the new lender, [was] subrogated to the lien of the Irwin Mortgage only as security for Wells Fargo's debt owed by the Neus and not as security for the debt owed by Nowak."¹⁶³ The court further noted that Wells Fargo had already received interest payments on the debt from the Neus and "that the Neus had no expectation of receiving interest and attorney's fees when they bought the real estate."¹⁶⁴ But the court of appeals determined that the Appellants' were entitled to some interest based on the post-judgment statutory rate calculated from the date of the Irwin mortgage payoff.¹⁶⁵

On appeal, citing Indiana's quiet title statute, the Appellants also asserted that they should be permitted to request a sheriff's sale of the residence.¹⁶⁶ The court of appeals agreed and reversed the trial court's decision denying the Appellants' right to enforce their lien through a sheriff's sale.¹⁶⁷ The court noted that Indiana law permits any person who may enforce a foreclosure judgment to request a sheriff's sale. Moreover, the court appeals cited Indiana Code section 32-30-12-2, which states that, in a foreclosure action, "the sale of the mortgage property *shall* be ordered in all cases."¹⁶⁸ The court found that, if the legislature desired to permit only the prevailing party to request a sale, it could have drafted

159. *Id.* at 475.

160. *Id.* at 475-76.

161. *Id.* at 476.

162. *Id.*

163. *Id.* at 477.

164. *Id.* at 476.

165. *Id.* at 477.

166. *Id.* (citing IND. CODE § 32-30-2-20 (2008)).

167. *Id.* at 479.

168. *Id.* at 478 (quoting IND. CODE § 32-30-2-20).

more specific statutory language. Instead, the court of appeals noted that the legislature chose more general language that likely reflects “the nature of judgments in foreclosure proceedings, which often adjudicate the rights of numerous parties.”¹⁶⁹

B. Notary Statute/Failure to Produce Promissory Note

In *Bonilla v. Commercial Services of Perry, Inc.*,¹⁷⁰ the court of appeals addressed whether a party had successfully rebutted the presumption, under Indiana law,¹⁷¹ that the party had signed a mortgage where a notary public did not notarize the signature on the mortgage. The court of appeals further addressed whether damages were owed to a mortgagee where the mortgagee was unable to produce the promissory notes evidencing the terms and conditions relating to the debt.

Ceasario Bonilla was chairman and CEO of Industrial National Bank (the “Bank”) and owned a gas station.¹⁷² On March 16, 1984, Ceasario secured a \$60,500 mortgage against the gas station from the Bank. The mortgage bore the signatures of Ceasario and his wife Alicia Bonilla.¹⁷³ On April 20, 1985, Ceasario secured a second mortgage from the Bank on the same property for \$82,000, which again included the signatures of Ceasario and Appellant.¹⁷⁴ Subsequently, the Federal Deposit Insurance Corporation took over the Bank, and its assets, including the Bonilla mortgages, were transferred to Commercial Services of Perry, Inc. (“Perry”).¹⁷⁵ On March 31, 2000, Perry filed a foreclosure action for failure of the Bonillas to pay any amounts due to anyone at any time under either of the mortgages.¹⁷⁶

Ceasario died in 1991, which meant Appellant was the sole remaining signatory to the mortgages at the time of Perry’s complaint.¹⁷⁷ Appellant denied ever signing either mortgage. At trial, Appellant presented handwriting samples that appeared to indicate that her signature was different than the signatures set forth on the mortgages.¹⁷⁸ But the trial court also determined that Appellant, through her own repeated admissions, knew about the debts and the mortgages, and that she benefited from the funds received from the Bank.¹⁷⁹ The trial court

169. *Id.*

170. 900 N.E.2d 22 (Ind. Ct. App. 2009).

171. Indiana Code § 33-42-2-6 (2008) provides: “The official certificate of a notary public, attested by the notary’s seal, is presumptive evidence of the facts stated in cases where, by law, the notary public is authorized to certify the facts.”

172. *Bonilla*, 900 N.E.2d at 23.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 23-24.

177. *Id.* at 24.

178. *Id.*

179. *Id.* at 25.

found in favor of Perry, and Appellant appealed.

In deciding whether Appellant rebutted the legal presumption that she signed the mortgages, the court of appeals stated that under Indiana Code section 33-42-2-6, “[t]he official certificate of a notary public, attested by the notary’s seal, is presumptive evidence of the facts stated in cases where, by law, the notary public is authorized to certify the facts.”¹⁸⁰ The court of appeals stated that such presumption applies to notarized mortgages and imposed the burden to meet or rebut the presumption on the party against whom it was directed.¹⁸¹ Relying on the supreme court’s decision in *Schultz v. Ford Motor Co.*, the court of appeals further stated that a finder of fact is required to find the presumption to be fact unless the opponent can persuade the fact finder otherwise.¹⁸² The court of appeals then noted that the trial court found that Appellant’s testimony and handwriting samples were not enough to overcome the presumption and declined to reweigh the evidence presented at trial; therefore, holding that Appellant failed to rebut the presumption contained in Indiana Code section 33-42-2-6.¹⁸³

In determining whether Perry was entitled to the damages ordered by the trial court, the court of appeals noted that in the first appeal of the case, a different panel of the court had already held that Perry did not need to produce the signed promissory notes in order to recover the debt.¹⁸⁴ The court of appeals noted that the panel reached this conclusion in reliance on the Indiana Supreme Court’s findings in *Yanoff v. Muncy*,¹⁸⁵ and its interpretation of Indiana Code section 26-1-3.1-309, which provides that

[a] person not in possession of an instrument is entitled to enforce the instrument if: (1) the person was in possession of the instrument was entitled to enforce the instrument when loss of possession occurred; . . . (2) the loss of possession was not the result of a transfer by the person or a lawful seizure; and (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.¹⁸⁶

The Indiana Court of Appeals further noted that the statute also provides that a person seeking to enforce an instrument without the actual instrument must prove the terms of the instrument and the person’s right to enforce the instrument, and if such proof is made, then, pursuant to the statute, the person seeking

180. *Id.* at 27 (quoting IND. CODE § 33-42-2-6 (2008)).

181. *Id.*

182. *Id.* (referencing *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 982 (Ind. 2006)).

183. *Id.* at 28.

184. *Id.* at 28-29 (citing *Commercial Servs. of Perry, Inc. v. Bonilla*, 45A03-0511-CV-536, slip op. at 5-6 (Ind. Ct. App. Sept. 6, 2006)).

185. *Id.* at 29 (citing *Yanoff v. Muncy*, 688 N.E.2d 1259, 1261-62 (Ind. 1997)).

186. IND. CODE § 26-1-3.1-309 (Supp. 2009).

enforcement is deemed to have produced the instrument.¹⁸⁷

The court rejected Appellant's argument that the trial court erred in determining the damages owed to Perry because without the promissory notes and the other loan documents, payment record, etc., there was no way to determine the terms of the loans with respect to term, amounts owed and whether a default had occurred.¹⁸⁸ The court found, based on the mortgages submitted at trial that the trial court record contained undisputed evidence of the terms and conditions of the loans, and that Appellants' concession that no payments had ever been made on the loans for over twenty years provided a reasonable inference that a default had occurred.¹⁸⁹ Based on these findings, the court of appeals reaffirmed the trial court's decision relating to the damages owed to Perry.¹⁹⁰

Several months later, the court addressed another case involving a mortgagee's inability to produce a signed promissory note evidencing the debt owed to it. In *Baldwin v. Tippecanoe Land & Cattle Co.*,¹⁹¹ the court was asked to resolve whether the failure of a mortgagee to provide a signed copy of a promissory note signed by the mortgagor prevented the mortgagee from foreclosing on its mortgage lien.¹⁹²

Tippecanoe Land & Cattle Company held a second mortgage on certain real property owned by Brian B. Baldwin, an attorney.¹⁹³ Tippecanoe Land sought to foreclose the second mortgage and filed a complaint with a mortgage document and an attached promissory note that was unsigned but indicated that Baldwin prepared the document.¹⁹⁴ Baldwin filed a general denial and signed the answer but did not include an oath.¹⁹⁵ In response to Tippecanoe Land's motion for summary judgment, Baldwin, representing himself pro se in the matter, argued that the note was unenforceable because it had not been signed.¹⁹⁶ The trial court granted summary judgment in favor of Tippecanoe Land and Baldwin appealed.¹⁹⁷

On appeal, Tippecanoe Land argued that, pursuant to Indiana Trial Rule 9.2(B), execution of the promissory note by Baldwin had been established.¹⁹⁸ As noted by the court, Trial Rule 9.2(b) provides that a written instrument attached to a complaint shall be deemed executed unless execution of the instrument is

187. *Bonilla*, 900 N.E.2d at 29.

188. *Id.* at 30.

189. *Id.* at 29-30.

190. *Id.* at 30.

191. 912 N.E.2d 902 (Ind. Ct. App. 2009), *reh'g denied*, No. 55A01-0902-CV-52, 2009 Ind. App. LEXIS 2516 (Ind. Ct. App. Nov. 13, 2009).

192. *Id.* at 904.

193. *Id.* at 903.

194. *Id.*

195. *Id.*

196. *Id.* at 904.

197. *Id.*

198. *Id.*

denied under oath in a responsive pleading or by an affidavit.¹⁹⁹ Because Baldwin did not verify or otherwise include an oath in his general denial answer, Tippecanoe Land argued that the note was deemed executed.²⁰⁰

The court agreed with Tippecanoe Land's position and affirmed the trial court's entry of summary judgment in favor of Tippecanoe Land.²⁰¹

C. Judgment Liens

In *Johnson v. Johnson*,²⁰² the Indiana Court of Appeals determined whether a trial court had the authority to subordinate a judgment lien after a final decree had been entered in connection with a divorce proceeding. Gina Johnson (the "wife") and Robert Johnson (the "husband") entered into a settlement agreement in connection with their divorce, pursuant to which the court granted the husband title to the couple's real estate and ordered him to make regular payments to the wife.²⁰³ The husband and wife had operated a farming business on the real estate and maintained a business line of credit secured by a mortgage on the real estate.²⁰⁴ After the settlement agreement was signed, the husband later sought to renew and refinance the line of credit, but the husband's lender identified the judgment lien arising out of the settlement agreement and required that the wife subordinate her lien to that of the lender.²⁰⁵ The wife refused and the husband filed for declaratory relief.²⁰⁶ The trial court ordered the wife to subordinate her judgment lien to that of the lender and the wife appealed.²⁰⁷

On appeal the wife, contended, among other matters, that the trial court lacked authority to subordinate her judgment lien after the final decree in the divorce proceeding had been entered.²⁰⁸ The wife argued that a trial court may order the modification of the lien as part of its division of the marital property but only at the time of the final decree.²⁰⁹

In reaching its decision, the court noted that, under Indiana law, a judgment lien is purely statutory.²¹⁰ It also noted Indiana Code section 34-55-9-2 which provides that "all final judgments for the recovery of money or costs . . . constitute a lien upon real estate and chattels real liable to execution in the county where the judgment had been duly entered and indexed."²¹¹ The court

199. *Id.* (citing IND. TRIAL R. 9.2(b) (2009)).

200. *Id.*

201. *Id.* at 905.

202. 902 N.E.2d 830 (Ind. Ct. App. 2009), *superseded*, 920 N.E.2d 253 (Ind. 2010).

203. *Id.* at 831-32.

204. *Id.* at 832-33.

205. *Id.*

206. *Id.*

207. *Id.* at 833.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* (quoting IND. CODE § 34-55-9-2 (2008)).

of appeals then cited the supreme court's decision in *Franklin Bank & Trust Co. v. Reed*,²¹² where the "Supreme Court determined that where one spouse is ordered to pay the other spouse money in installments, such final judgment automatically creates a judgment lien, 'except where the exercise of the court's discretion would specifically eliminate it.'"²¹³

Finally, after further review and discussion of the *Franklin* case, the court rejected the wife's argument that *Franklin* mandated that the trial court can only exercise its authority to modify a judgment lien at the time the final decree is entered by "express positive action," and held that although it is true that a court "may exercise its inherent power and eliminate a judgment lien only by positive action," nothing in *Franklin* precluded the court from modifying or subordinating a judgment lien by positive action after the entry of the final decree.²¹⁴

Several months later, the court addressed another case involving a wife's judgment lien against marital property. In *Lobb v. Hudson-Lobb*,²¹⁵ the Indiana Court of Appeals decided whether a money judgment awarded to a wife in a divorce proceeding constituted a judgment lien against certain real estate distributed to the husband in the divorce proceeding.²¹⁶

In April 2004, Kevin Lobb (the "husband") filed for divorce from Melissa Hudson-Lobb (the "wife").²¹⁷ At the divorce hearing in March 2005, the husband and wife presented an oral settlement agreement to the court.²¹⁸ Thereafter, the court ordered the dissolution of the marriage and directed that a proposed decree be prepared and submitted.²¹⁹ On June 22, 2005, the husband executed a mortgage, secured by the marital residence in favor of his parents (the "Lobbs").²²⁰ A month later the dissolution decree was entered. It provided that possession of the marital residence was to go to the husband subject to the wife's right to an immediate \$50,000 payment plus a second \$50,000 payment within ninety days of wife's departure from the marital residence, or upon the sale of the marital residence.²²¹ The initial payment was made; however, the husband never paid and the wife never received the second payment.²²² The husband later sold the marital residence to the Lobbs.²²³ In connection with their acquisition of the marital residence, the Lobbs obtained a title search, which revealed the marital dissolution decree, but listed only the lien filed by the wife's attorney for

212. *Franklin Bank & Trust Co. v. Reed*, 508 N.E.2d 1256 (Ind. 1987).

213. *Id.* (quoting *Franklin*, 508 N.E.2d at 1259).

214. *Id.* at 833-34 (quoting *Franklin*, 508 N.E.2d at 1259).

215. 913 N.E.2d 288 (Ind. Ct. App. 2009).

216. *Id.* at 289.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 290.

221. *Id.*

222. *Id.* at 292.

223. *Id.*

payment of attorney's fees and not the money judgment in favor of the wife.²²⁴ After the sale, the wife sought to foreclose her judgment lien for the husband's non-payment of the amount owed under the dissolution decree against the marital residence, and the Lobbs objected.²²⁵ The trial court found in favor of the wife and ordered the sale of the marital residence to satisfy her lien.²²⁶ The Lobbs appealed.²²⁷

On appeal, the Lobbs asserted that the money judgment ordered to the wife in connection with the divorce did not constitute a judgment lien because the dissolution decree had not been recorded.²²⁸

Citing the Indiana Supreme Court's decision in *Franklin*, the court stated that a judgment lien is created automatically in divorce situations wherein one spouse is ordered to pay the other a sum of money.²²⁹ The court also noted that although the title search only mentioned the decree generally, and the attorney's lien specifically, the wife's lien had priority because the Lobbs knew that payment to the wife had been ordered but not paid.²³⁰ Based on the foregoing determinations, the court held that the wife's judgment lien was enforceable against the Lobbs, and affirmed the trial court's decision ordering the sheriff's sale of the marital residence.²³¹

D. Guarantors

In *TW General Contracting Services, Inc. v. First Farmers Bank & Trust*,²³² the Indiana Court of Appeals addressed the obligations of guarantors with respect to renewal promissory notes executed in favor of a lender after the date of the guarantors' initial guaranties. On May 11, 2005, TW General Contracting Services, Inc. ("Borrower") obtained a loan from First Farmers Bank & Trust ("Lender") and delivered two notes (the "May 2005 Notes") in favor of Lender that were secured by certain real property located in Tipton, Indiana.²³³ Although the May 2005 Notes did not reference the existence of any guaranties, two identical guaranties (each a "Guaranty" and together as "Guaranties"), executed by Jack and Carolyn Taylor (the "Taylors") and Harland and Delores Wendorf (the "Wendorfs") (the Taylors and the Wendorfs, collectively as the

224. *Id.* at 293.

225. *Id.* at 292.

226. *Id.* at 294.

227. *Id.*

228. *Id.* at 294-95.

229. *Id.* at 295 (citing *Franklin Bank & Trust Co. v. Reed*, 508 N.E.2d 1256, 1259 (Ind. 1987)).

230. *Id.* at 296.

231. *Id.*

232. 904 N.E.2d 1285 (Ind. Ct. App. 2009), *reh'g denied*, No. 80A04-0901-CV-5, 2009 Ind. App. LEXIS 735 (Ind. Ct. App. June 12, 2009).

233. *Id.* at 1286.

“Guarantors”), were delivered to Lender as security for the mortgage loan.²³⁴

Under the terms of the Guaranties, the Guarantors guaranteed to Lender “the payment and performance of each and every debt, liability or obligation of every type and description which Borrower may now or any time hereafter owe to Lender.”²³⁵ Additionally, the Guaranties authorized Lender to “enter into transactions resulting in the creation or continuance of indebtedness, without any consent or approval by the [Guarantors].”²³⁶

Borrower renewed the second May 2005 note three times in 2006 and 2007 and delivered two additional notes to Lender in 2007 (the “2006/2007 Notes”).²³⁷ Alleging Borrower’s default on the terms of the 2006/2007 Notes, Lender filed a complaint on February 25, 2008, seeking foreclosure of the 2006/2007 Notes against the Borrower and Guarantors.²³⁸ On September 16, 2008, the trial court entered an order granting Lender judgment for \$387,594.73, plus various costs and fees.²³⁹

Borrower and Guarantors appealed the trial court’s decision.²⁴⁰ On appeal, Guarantors asserted that the Guaranties did not secure the 2006/2007 Notes, and further asserted that once the May 2005 Notes were satisfied, new guaranties would have been necessary to secure the 2006/2007 Notes.²⁴¹ The Guarantors also argued that the 2006/2007 Notes constituted a material alteration of the underlying debt obligation secured by the Guaranties, thereby relieving the Guarantors of their obligations.²⁴²

In its review of the case, the court noted that the same rules applicable to other contracts govern the interpretation of a guaranty agreement and that the court was to give effect to the intentions of the parties as demonstrated by the language of the Guaranties in light of the surrounding circumstances.²⁴³ The court further stated that “the terms of a guaranty should neither be so narrowly interpreted as to frustrate the obvious intent of the parties, nor so loosely interpreted as to relieve the guarantor of a liability fairly within their terms.”²⁴⁴ The court proceeded to examine the language of the Guaranties themselves, finding that the Guarantors “offered their absolute and unconditional Guaranties to the Lender to ‘induce’ it to make loans to [Borrower] ‘at any time.’”²⁴⁵

234. *Id.*

235. *Id.* at 1288 (emphasis deleted).

236. *Id.* at 1289.

237. *Id.* at 1286.

238. *Id.*

239. *Id.* at 1287.

240. *Id.* at 1286.

241. *Id.* at 1287.

242. *Id.*

243. *Id.* at 1288 (citing *Kruse v. Nat’l Bank of Indianapolis*, 815 N.E.2d 137, 144 (Ind. Ct. App. 2004)).

244. *Id.* (quoting *Bruno v. Wells Fargo Bank, N.A.*, 850 N.E.2d 940, 945-46 (Ind. Ct. App. 2006)).

245. *Id.* at 1290.

The court rejected the Guarantors contention that the Guaranties were inapplicable to the 2006/2007 Notes merely because said notes did not reference the Guaranties, reminding the Guarantors that the May 2005 Notes did not specifically mention the Guaranties either.²⁴⁶ Instead, the court held that the broad nature of the Guaranties themselves should have served as notice to the Guarantors that the 2006/2007 Notes would be considered “a logical continuation of the mutually beneficial lender-borrower-guarantor arrangement.”²⁴⁷

Citing *S-Mart, Inc. v. Sweetwater Coffee Co.*,²⁴⁸ the court also rejected the Guarantors’ argument that they were relieved from their obligations due to the material alteration of the debt secured as evidenced by the 2006/2007 Notes.²⁴⁹ Based on the clear, all-encompassing language of the Guaranties and the facts of the present case, the court found the *S-Mart* case inapposite.²⁵⁰ The court affirmed the trial court’s judgment in favor of Lender, noting that the Guaranties extended to the 2006/2007 Notes because the provisions of the Guaranties assured payment of “each and every debt” which Borrower owed to Lender.²⁵¹ Guarantors beware.

VI. QUIET TITLE ACTIONS

In *Capps v. Abbott*,²⁵² the Indiana Court of Appeals resolved a boundary line dispute between adjacent landowners and addressed whether a landowner retained a prescriptive easement right for use of an access road. Coy L. Capps and Margaret M. Capps (the “Capps”) and Jeffrey A. Abbott and Teresa J. Abbott (the “Abbotts”) were adjacent landowners. The only access to Abbotts’ land to and from the nearest public right-of-way, known as State Road 19, was via a private drive known as Walnut Street, located partially on Capps’ land.²⁵³ Since at least the early 1970s, “the Abbotts, their predecessors-in-title, and their invitees [had] continuously used Walnut Street for ingress and egress from their property.”²⁵⁴ In 1990, the Capps and the Abbotts performed a survey to determine the boundary line between their properties and constructed a fence along the boundary line denoted by the survey.²⁵⁵ But a subsequent survey performed in 2006 showed inconsistencies with the 1990 survey and revealed that the Capps actually owned a .021 acre tract of land on the other side of the fence.²⁵⁶ The new survey also disclosed that Walnut Street had never been

246. *Id.*

247. *Id.*

248. *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580 (Ind. Ct. App. 2001).

249. *Id.* at 1291 n.3 (citing *S-Mart*, 744 N.E.2d 580).

250. *Id.*

251. *Id.* at 1290-91.

252. 897 N.E.2d 984 (Ind. Ct. App. 2008).

253. *Id.* at 985.

254. *Id.*

255. *Id.* at 986.

256. *Id.*

platted or publicly dedicated and thus was strictly a private access road. Because the new 2006 survey, the Cappses requested that the Abbotts no longer use Walnut Street to access their land.

Thereafter, the Abbotts filed a complaint to quiet title to the .021 acre tract and requested that they continue to have the right to use Walnut Street for access purposes.²⁵⁷ The trial court found in favor of the Abbotts and entered an order granting the Abbotts their requested relief.²⁵⁸ The trial court held that the Abbotts had acquired title to the .021-acre tract through both the theory of estoppel and the theory of adverse possession, and that they had the right to use Walnut Street pursuant to a prescriptive easement.²⁵⁹ The Cappses appealed the ruling of the trial court asserting that the evidence was insufficient for the trial court to conclude that the Abbotts had acquired ownership of the .021-acre tract, or that they had the right to use Walnut Street by means of a prescriptive easement.

In reviewing the case, the court of appeals cited *Freiburger v. Fry*, where the court of appeals held that when parties “agree to erect a fence and treat it as a boundary line they are estopped from denying” that the fence line is the boundary line.²⁶⁰ Applying this to the case at hand, the court of appeals concluded that the Cappses were estopped from denying that the fence constituted the legal boundary line for the properties and affirmed the trial court’s finding.²⁶¹ This determination by the court of appeals made an analysis of the adverse possession claim unnecessary.²⁶²

Using a factual analysis, the court of appeals also determined that the Abbotts had satisfied the elements for a prescriptive easement. Citing Indiana Code section 32-23-1-1, the court of appeals noted that “the right-of-way, air, light, or other easement from, in, upon, or over land owned by a person may not be acquired by another person by adverse use unless the use is uninterrupted for at least twenty (20) years.”²⁶³ The court of appeals stated that “Indiana cases have also required that the evidence demonstrate an actual, hostile, open, notorious, continuous, uninterrupted, and adverse use for twenty (20) years under a claim of right, *or* such continuous, adverse use with knowledge and acquiescence of the owner.”²⁶⁴ Citing the Indiana Supreme Court’s opinion in *Wilfong v. Cessna Corp.*, the court of appeals further noted that a prescriptive easement would not be established if the party claiming such right had been granted permission to use the land.²⁶⁵

257. *Id.*

258. *Id.*

259. *Id.* at 987.

260. *Id.* at 987-88 (quoting the trial court (citing *Freiburger v. Fry*, 439 N.E.2d 169, 172 (Ind. Ct. App. 1982))).

261. *Id.* at 988.

262. *Id.*

263. *Id.* (quoting IND. CODE § 32-23-1-1 (2008)).

264. *Id.* (citations omitted).

265. *Id.* (citing *Wilfong v. Cessna Corp.*, 838 N.E.2d 403, 406-08 (Ind. 2005)).

Upon review of the trial record, the court of appeals held that the Abbotts and their predecessors-in-title had continuously used Walnut Street for a period of at least twenty years without permission, and that such use was adverse to the Cappses and their predecessors-in-title, thereby affirming the trial court's ruling that the Abbotts had obtained a prescriptive easement for the use of Walnut Street.²⁶⁶

In *Timberlake, Inc. v. O'Brien*,²⁶⁷ the court of appeals resolved a quiet title action involving a railroad right-of-way. In 1973, Timberlake, Inc. purchased forty acres of real estate.²⁶⁸ At the time of Timberlake's purchase, a right-of-way easement in favor of CSX, a railroad company, encumbered the property over a ninety-nine-foot wide strip of land (the "Railroad Property") that ran in a northwestern direction over Timberlake's property as part of a railroad corridor.²⁶⁹ CSX's predecessor-in-interest had obtained the right-of-way easement over the Railroad Property pursuant to three separate deeds (the "1881 Deeds").²⁷⁰ In July 1988, CSX filed a notice with the Interstate Commerce Commission (the "ICC") indicating its intent to abandon the railroad running over Timberlake's property.²⁷¹ In June 1990, "before it had removed its rails, ties, and ballast, CSX conveyed its interest in the Railroad Property by quitclaim deed to O'Brien, who already owned a nearby golf course and parcels of land adjacent to the Railroad Property."²⁷²

In March 2004, O'Brien cleared part of the Railroad Property and placed a large metal barrier on the land, blocking Timberlake's access to its property.²⁷³ Subsequently, Timberlake sued O'Brien to quiet title to the Railroad Property and for trespass, requesting both that Timberlake be declared to have an easement by necessity and that O'Brien be enjoined from blocking access to Timberlake's property. The trial court held that the 1881 Deeds only conveyed an easement to CSX, rather than a fee simple interest in the Railroad Property.²⁷⁴ The trial court further held that CSX did not abandon its operations over the Railroad Property prior to executing and delivering the quitclaim deed to O'Brien and that O'Brien's use of the Railroad Property was limited to use as a railroad right of way as set forth in the 1881 Deeds.²⁷⁵

Both Timberlake and O'Brien appealed the trial court's decision.²⁷⁶ On appeal, Timberlake asserted that the trial court erred when it determined that CSX conveyed a railroad right-of-way easement to O'Brien. Timberlake argued

266. *Id.* at 990.

267. 902 N.E.2d 843 (Ind. Ct. App. 2009).

268. *Id.* at 845.

269. *Id.*

270. *Id.*

271. *Id.* at 847.

272. *Id.*

273. *Id.* at 848.

274. *Id.*

275. *Id.*

276. *Id.* at 849.

that CSX had abandoned the Railroad Property before the conveyance and thus, could not convey any interest to O'Brien. On cross-appeal, O'Brien requested a reversal the trial court's ruling, and that he be adjudged as the fee simple owner of the Railroad Property. In the alternative, O'Brien asserted that he, at a minimum acquired a general easement for ingress and egress "to pass and repass . . . engines, cars, horses, cattle, carts, wagons, and other vehicles," as set forth in the 1881 Deeds.²⁷⁷

* In reaching its decision, the court of appeals noted that under Indiana law, the general rule is that a conveyance to a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put or in other ways limiting the estate conveyed, is to be construed as passing an estate in fee, but reference to a right-of-way in such conveyance typically leads to its construction as conveying only an easement.²⁷⁸

The court further noted that the language in the 1881 Deeds were "for a right of way" and were limited to purposes connected with the use of a railroad.²⁷⁹ The court of appeals then held that based on the clear language of the 1881 Deeds which indicated the conveyance of a right-of-way, and due to the limitations on use set forth in the 1881 Deeds, that only an easement right had been conveyed, and therefore CSX could not of conveyed fee simple title to O'Brien; thereby, the court affirmed the trial court's decision.²⁸⁰

The court of appeals rejected Timberlake's claim that CSX had abandoned the Railroad Property when it filed its notice with the ICC, before its quitclaim deed to O'Brien, and that the easement should therefore be extinguished, and Timberlake should have the right to reclaim the Railroad Property free of the easement.²⁸¹ The court of appeals, citing Indiana Code section 8-4-35-4(a), noted that a railroad right-of-way is deemed abandoned when the ICC issues a certificate authorizing the abandonment and the railroad removes the rails, switches, and ties from the right of way.²⁸² The court of appeals found that, although CSX filed its notice with the ICC, the ICC did not issue a certificate authorizing the abandonment and it did not remove its tracks until after delivery of the deed to O'Brien. Therefore, the Railroad Property had not been abandoned prior to delivery of the quitclaim deed to O'Brien.²⁸³

277. *Id.* at 849.

278. *Id.* at 850 (citing *L & G Realty & Constr. Co. v. City of Indianapolis*, 139 N.E.2d 580, 585 (Ind. Ct. App. 1957)).

279. *Id.* at 851.

280. *Id.*

281. *Id.* at 852.

282. *Id.*

283. *Id.* at 853.

Finally, the court of appeals rejected O'Brien's argument that he had acquired broad access easement rights over the Railroad Property. Based on the express provisions set forth in the 1881 Deeds, the court of appeals determined that the easement granted was restricted to an easement for a railroad right-of-way, and affirmed the trial court's decision.²⁸⁴

284. *Id.*