SURVEY OF RECENT DEVELOPMENTS IN REAL PROPERTY LAW

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INTRODUCTION

This Article addresses recent developments in Indiana real property law by describing and analyzing Indiana Supreme Court and Indiana Court of Appeals cases handed down during the survey period.[1] Rather than relate an exhaustive list of all cases decided during the period, this Article highlights those cases most worthy of notation for legal professionals.

I. CONVEYANCES AND PURCHASE AGREEMENTS

A. Sales Disclosure Form

The survey period began with a monumental decision from the Indiana Court of Appeals which chose to abrogate portions of Indiana common law dating back to 1881.[2] In *Hizer v. Holt*, the court was asked to determine the relationship between the Sales Disclosure Form requirements set out in Indiana Code chapter 32-21-5 and the common law doctrine of caveat emptor.[3] Dating back to the 1881 Indiana Supreme Court decision in *Cagney v. Cuson*, Indiana law definitively "held that a purchaser has no right to rely upon the representations of the vendor as to the quality of the property, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities."[4]

The Hizers entered into an agreement to purchase the Holts' home in the summer of 2008.[5] At the closing, the Holts completed the Sales Disclosure Form required by Indiana Code section 32-21-5-7.[6] The Holts disclosed "that the microwave oven and ice maker in the refrigerator did not work."[7] The Hizers later discovered numerous problems with the home, including extensive mold

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1. The survey period runs from October 1, 2010 to September 30, 2011.

2. *See* Hizer v. Holt, 937 N.E.2d 1 (Ind. Ct. App. 2010).

3. *Id.*

4. *Id.* at 4 (quoting Cagney v. Cuson, 77 Ind. 494, 497 (1881)) (internal quotations and further citations omitted).

5. *Id.* at 2.

6. *Id.*

7. *Id.*

and polybutal water supply pipes in the house that were subject to recall.[8] While seeking a quote for the mold problem, the Hizers contacted James Johnson, a home inspector hired by a prior prospective purchaser to inspect the Holts' home.[9] Johnson informed the Hizers that he had disclosed the mold problem and the polybutal pipes to the Holts at the time of his inspection. The Hizers filed a complaint against the Holts "alleging that the Holts had committed fraud in misrepresenting the condition of the house and breach of contract."[10] The trial court granted summary judgment in favor of the Holts on both counts and the Hizers appealed.[11]

On appeal, the court faced a dilemma—how to rectify the Sales Disclosure Form requirements with existing case law.[12] The court noted that earlier cases setting out the rule that a purchaser cannot rely upon a seller's representations where the purchaser has an opportunity to examine the property were the product of a time in which "Indiana was almost exclusively an agrarian state, and pertain[ed] to the quality of farm land."[13] The court also recognized that the state has become more urban with residential real estate transactions now including "unsophisticated" buyers.[14] It was in light of this shift in the Hoosier lifestyle that the court examined Indiana Code chapter 32-21-5.[15]

The Indiana Code requires that "sellers of certain residential real estate"[16] must provide prospective purchasers with a Sales Disclosure Form intended to "disclos[e] . . . the kinds of defects that will most significantly affect the value and use of a home."[17] The code also provides:

> The owner is *not liable* for any error, inaccuracy, or omission of any information required to be delivered to the prospective buyer under this chapter if:
> (1) the error, inaccuracy, or omission was not within the actual knowledge of the owner or was based on information provided by a public agency or by another person with a professional license or special knowledge who provided a written or oral report or opinion that the owner reasonably believed to be correct; and
> (2) the owner was not negligent in obtaining information from a third party and transmitting the information.[18]

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8. *Id.* There were several other issues with the house but are not important to the holding.
9. *Id.*
10. *Id.* at 2-3.
11. *Id.* at 3.
12. *Id.* at 3-4.
13. *Id.* at 4.
14. *Id.*
15. *Id.*
16. *Id.* (quoting IND. CODE § 32-21-5-7(1) (2011)).
17. *Id.* (quoting Dickerson v. Strand, 904 N.E.2d 711, 717 (Ind. Ct. App. 2009) (Vaidik, J., dissenting)).
18. *Id.* at 5 (quoting IND. CODE § 32-21-5-11)).

Though Indiana Code has required a Sales Disclosure Form since 1993, in 2009 the Indiana Court of Appeals, in a 2-1 decision, held that the common law approach of the caveat emptor doctrine was still binding.[19] However, the majority in the *Dickerson v. Strand* opinion did not address the impact of Indiana Code chapter 32-21-5.[20] While the majority remained silent on the role of the Sales Disclosure Form, Judge Vaidik in her dissenting opinion determined that the "General Assembly 'expressly contemplated that the disclosure form statute would create liability for sellers under certain circumstances.'"[21]

The Indiana Court of Appeals, now with the issue of chapter 32-21-5 squarely before it, agreed with Judge Vaidik's dissent.[22] The court found no reason for the existence of the Sales Disclosure Form absent an intention to hold sellers liable for fraudulent misrepresentations.[23] As such, the court held that "chapter 32-21-5 abrogates any interpretation of the common law that might allow sellers to make written misrepresentations with impunity regarding the items that must be disclosed to the buyer on the Sales Disclosure Form."[24] In applying this new view of the law, the court reversed the grant of summary judgment and remanded the case to the trial court.[25]

Although it is natural to fear uncertainty about the present state of Indiana law, as the court of appeals reversed itself in just over a year, the matter appears now to be a fairly settled issue. *Hizer* provided the basis for two other decisions in the survey period and thus appears to be firmly entrenched.[26]

Hizer and its progeny were not the only development in chapter 32-21-5 case law.[27] The court of appeals also weighed in on a more technical aspect of the chapter's applicability. In *Breeden Revocable Trust v. Hoffmesiter-Repp*, the court, as a matter of first impression, sought to determine whether chapter 32-21-5 applies to transfers to a living trust.[28] The crux of the issue was that Indiana Code section 32-21-5-1(b) provides: "This chapter does not apply to the

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19. *See id.* at 3-4, 6.

20. *Id.* at 7.

21. *Id.* (quoting *Dickerson*, 904 N.E.2d at 717 (Vaidik, J., dissenting)).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 8.

26. *See* Wise v. Hayes, 943 N.E.2d 835, 839-44 (Ind. Ct. App. 2011) (the majority opinion was authored by Judge Vaidik, whose dissenting opinion from *Dickerson* was adopted by the majority in *Hizer*, and was briefed prior to the decision in *Hizer*); Vanderwier v. Baker, 937 N.E.2d 396, 400-01 (Ind. Ct. App. 2010) (the majority opinion, like *Hizer*, was written by Judge Mathias and was decided only nineteen days after *Hizer*).

27. *See* Breeden Revocable Trust v. Hoffmeister-Repp, 941 N.E.2d 1045 (Ind. Ct. App. 2010).

28. *Id.* at 1050-52.

following: . . . (9) Transfers to a living trust."[29]

In *Hoffmesiter-Repp*, the purchaser, a living trust, contended that by plain meaning of the language in the statute chapter 32-21-5 did not apply to the seller.[30] The seller argued that the language of the statute was ambiguous and to find otherwise "would permit purchasers of Indiana real estate to avoid the terms of the statute simply by creating a living trust and having that trust act as the purchaser."[31] The court agreed with the seller and determined that the language of the statute was ambiguous.[32] Ultimately, the court settled upon an interpretation which would give meaning to the exception without permitting a gigantic loophole. The court held that the living trust exception "only applies when the transfer occurs between a seller and the seller's own living trust."[33]

B. Escrow

In addition to the Sales Disclosure Form cases, the Indiana Court of Appeals was required to conduct a foray into uncharted waters in the realm of escrows.[34] As an issue of first impression the court was asked to determine whether an escrow can be created absent an escrow agreement and fee.[35] In *Meridian Title Corp. v. Pilgrim Financing, LLC*, Meridian Title Corporation sought to overturn a decision in favor of Pilgrim Financing, finding Meridian liable for negligent failure to transmit the closing proceeds balance.[36] On appeal Meridian argued that it did not owe a duty to Pilgrim because there was no existing relationship between the parties that would impose such a duty.[37] Pilgrim contended that Meridian assumed a duty in escrow despite the lack of either an escrow agreement or an escrow fee.[38] In answering this issue, the court first looked to whether an escrow arrangement existed between the parties and second whether such an arrangement would impose "a duty between the parties to the escrow."[39]

To determine whether an escrow can be created absent an escrow agreement or fee, the court looked to the factual circumstances of prior cases.[40] Based on

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29. *Id.* at 1050-51.

30. *Id.* at 1051. The Trust argued that the chapter did not apply so as to avoid the requirement of establishing that the seller had actual knowledge of any error or inaccuracy in the Sales Disclosure Form.

31. *Id.*

32. *Id.*

33. *Id.* at 1052.

34. *See* Meridian Title Corp. v. Pilgrim Fin., LLC, 947 N.E.2d 987, 990-93 (Ind. Ct. App. 2011).

35. *Id.*

36. *Id.* at 990.

37. *Id.* at 991.

38. *Id.*

39. *Id.*

40. *Id.*

an analysis of two prior cases,[41] the court determined that "Indiana has not traditionally required an escrow agreement or fee to establish an escrow, and we do not see a reason to adopt such a requirement here . . . ."[42] After determining that Indiana did not require an escrow agreement and fee to create an escrow, based on the specifics of the case, the court found that Meridian held an escrow on behalf of Pilgrim.[43]

In further expanding the realm of escrow case law, the court also determined that "parties to an escrow bear a duty towards one another to act with due care."[44] The court noted that in previous decisions it has been established that "one who assumes 'to act as a depositary in escrow occupies a fiduciary relationship to each of the parties.'"[45] Looking to other jurisdictions, the court determined that such duties "include the responsibilities to comply with the instructions of the principals and to exercise ordinary skill and diligence."[46] The court also held, in response to Meridian's argument, that an escrow holder can be an agent of both parties to the escrow.[47]

II. LAND USE

Land use encompasses a variety of topics. The more complex our society becomes, the more we look to land use controls to help shape our living arrangements. Because of the breadth of this topic, it has been divided and subdivided into several categories.

A. Servitudes

Indiana appellate courts decided only a handful of cases dealing with servitudes during the survey period. None of the decisions radically moved Indiana law in a new direction, but a few are worthy of brief attention.

1. Covenants.—In *City of Indianapolis v. Kahlo*,[48] the Indiana Court of Appeals, interpreting restrictive covenants contained in a project agreement for

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41. *See* Freeland v. Charnley, 80 Ind. 132 (1881); Yost v. Miller, 129 N.E. 487, 488 (Ind. App. 1921).

42. *Meridian*, 947 N.E.2d at 992.

43. *Id.*

44. *Id.*

45. *Id.* (quoting *In re* Marriage of Glendenning, 684 N.E.2d 1175, 1178 (Ind. Ct. App. 1997)).

46. *Id.* (citing Webster v. US Life Title Co., 598 P.2d 108 (Ariz. Ct. App. 1979); Kirk Corp. v. First Am. Title Co., 270 Cal. Rptr. 24 (Ct. App. 1990)).

47. *Id.* at 992-93 (citing *In re Marriage of Glendenning*, 684 N.E.2d at 1178).

48. 938 N.E.2d 734 (Ind. Ct. App. 2010), *reh'g denied*, 2011 Ind. App. LEXIS 399 (Feb. 23, 2011), *trans. denied*, 462 N.E.2d 641 (Ind. 2011). *Kahlo* is not limited to a discussion of restrictive covenants. The court also addressed conveyance issues and statutory requirements for redevelopment plans as opposed to project agreements. Only the aspects of the case targeting covenants are included in this survey Article. Readers interested in the other aspects of this case are encouraged to read pages 744 through 749 of the opinion.

the redevelopment of property in downtown Indianapolis, held that the covenants conferred third-party beneficiary status on the public to enforce the agreement and that the covenants did not terminate upon amendment to the underlying agreement.[49] In 1981, the Metropolitan Development Commission ("Commission") adopted a plan that targeted portions of the southern half of downtown Indianapolis for revitalization.[50] In 1985, the Commission authorized Indianapolis's Department of Economic and Housing Development to purchase a block known as Square 88.[51] Shortly thereafter, the Commission authorized the transfer of that property by warranty deed to a private entity—the Indiana Sports Corporation (ISC). Along with the transfer of the property, the City of Indianapolis, acting through the Commission, entered into a project agreement with the ISC for the private redevelopment of Square 88.[52] The agreement required the ISC to build a plaza of at least 88,000 square feet along with an underground parking facility and offices above the plaza spanning at least 100,000 square feet. The agreement contained restrictive covenants.

> 2.8 *Plaza Restrictive Covenants*. Upon closing, [the ISC] shall subject not less [than] 88,000 square feet of the Project Area located above the plane of the top of the parking garage to the Restrictive Covenant. The Restrictive Covenant shall be for a term of thirty (30) years . . . . The Redeveloper and its successors and assigns shall retain title, possession, use, control and responsibility for such portion of the Project Area, but *the use of such area by the public . . . shall not be unreasonably withheld or delayed*.[53]

The covenant also included a buyout provision for termination of the restrictions after twenty years. If ISC wished to terminate the restrictions after twenty years but before thirty years, ISC was obligated to pay Indianapolis three million dollars.[54]

In 2007, twenty-two years after the execution of the agreement, the City of Indianapolis, through the Commission, negotiated with ISC to amend the agreement. The City agreed to reduce the plaza area subject to unrestricted public access from 88,000 square feet to 10,000 square feet in exchange for ISC agreeing that the 10,000 square feet of public space would not terminate automatically in any period of time and would only terminate upon ISC paying the City three million dollars.[55] Two citizens filed suit against the City, the Commission, and the ISC on behalf of themselves and others similarly situated challenging the amended agreement on several grounds. Defendants pursued a motion for judgment on the pleadings. The trial court, treating the motion as one

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49. *Id.* at 749-50.
50. *Id.* at 738.
51. *Id.*
52. *Id.*
53. *Id.* (first alteration in original).
54. *Id.*
55. *Id.* at 739-40.

for summary judgment, determined, among other things, that the restrictive covenants gave plaintiffs standing to sue and that a genuine issue of fact existed—whether the amendment triggered the buyout provision of the restrictive covenant.[56]

On interlocutory appeal, the court of appeals agreed with the trial court's standing analysis but denied that there was any issue of the amendment triggering the buyout provision of the restrictive covenant.[57] As for the standing issue, the court considered the language of the covenant and the recitals in order to determine whether the contracting parties intended to benefit third parties such that they could enforce the contract.[58] Looking to the covenants, the court held that "the contracting parties intended to create rights in favor of the public, namely, the right to reasonable use of the plaza for no fee excepting reasonable fees for maintenance, security, and insurance."[59] Defendants contended that the covenant language was passive, creating no affirmative duty on the ISC to benefit the public. The court disagreed and held "[t]hat the obligation is written in passive rather than active voice is of no moment. The meaning of the restrictive covenant is clear: the City and the ISC agreed that 88,000 square feet of the project area would be set aside for a plaza to be 'accessible to the public.'"[60]

In considering whether the restrictive covenant was terminated upon amendment to the underlying agreement, the court again looked to the language of the covenant itself. The court noted that "the covenant provides for a buyout in the event of early termination, but not in the event of a modification."[61] Although the court could "envision a scenario where the reduction in plaza size might create a question of fact as to whether the restrictive covenant had been effectively terminated,"[62] there were no facts to indicate that the amendment was anything more than a material alteration to the covenant. According to the court, a material alternation is not a termination.[63]

2. Easements.—The Indiana Court of Appeals revisited easement by necessity in *William C. Haak Trust v. Wilusz*.[64] In that case, the Trust possessed a landlocked parcel of land.[65] In its quiet title action, the Trust sought an easement by necessity.[66] The trial court denied the easement, reasoning that the Trust failed to take advantage of opportunities to arrange for an easement in the past.[67] On appeal, the Trust argued that the trial court misapplied Indiana law on

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56. *Id.* at 740-41.
57. *Id.* at 750.
58. *Id.* at 742-43.
59. *Id.* at 743.
60. *Id.*
61. *Id.* at 749.
62. *Id.*
63. *Id.* at 749-50.
64. 949 N.E.2d 833 (Ind. Ct. App. 2011).
65. *Id.* at 835.
66. *Id.*
67. *Id.*

easement by necessity. The Indiana Court of Appeals began by reiterating the standard for an easement by necessity:

> An easement of necessity will be implied only when there has been a severance of the unity of ownership of a tract of land in such a way as to leave one part without any access to a public road. On the other hand, an easement of prior use will be implied "where, during the unity of title, an owner imposes an apparently permanent and obvious servitude on one part of the land in favor of another part and the servitude is in use when the parts are severed . . . if the servitude is reasonably necessary for the fair enjoyment of the part benefited." Unlike a landowner requesting an easement by necessity, a landowner requesting an easement by prior use does not need to show absolute necessity. The focus of a claim for an easement by prior use is the intention for continuous use, while the focus of a claim for an easement by necessity is the fact of absolute necessity.[68]

The court further noted that transfer of ownership, even if involuntary, does not constitute a loss of a landowner's right to assert an easement by necessity.[69]

Applying the facts to the law, the court of appeals reversed the trial court's decision.[70] The court held that the Trust possessed a parcel of land that had been in unity of ownership at the time it was separated from a route of ingress and egress.[71] As the successor in interest, the Trust could validly assert an easement by necessity.[72]

In *Kwolek v. Swickard*,[73] the Indiana Court of Appeals reaffirmed that an easement for ingress and egress does not give the easement holder a right to park vehicles in the easement.[74] The Kwoleks had previously granted the Swickards an easement that was explicitly "non-exclusive and [was] intended to grant to the [Swickards] an ingress and egress to their property jointly with the [the Kwoleks]."[75] The Swickards built a garage on their property along with a concrete apron and gravel parking area next to the garage. A portion of the gravel parking area was located within the easement.[76] The Kwoleks used the gravel portion of the easement to turn their vehicles around after retrieving their mail. When the Swickards had visitors who parked in the gravel, the Kwoleks were unable to use the easement. Agitated, the Kwoleks erected no parking signs, metal posts, landscape timbers, and several evergreen trees to stop the

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68. *Id.* at 836 (citing Hysell v. Kimmel, 834 N.E.2d 1111, 1114-15 (Ind. Ct. App. 2005); Wolfe v. Gregory, 800 N.E.2d 237, 241 (Ind. Ct. App. 2003)).

69. *Id.*

70. *Id.* at 839.

71. *Id.* at 838-39.

72. *Id.*

73. 944 N.E.2d 564 (Ind. App. 2011).

74. *Id.* at 574.

75. *Id.* at 572 (second and third alterations in original).

76. *Id.* at 568.

Swickards from parking in the gravel portion of the easement.[77]

The Swickards filed a declaratory judgment action against the Kwoleks in attempt to have the parking barriers removed. The trial court awarded relief to the Swickards, finding that the Swickards had been parking in the easement for several years and the Kwoleks had acquiesced.[78] Additionally, the trial court held that the Kwoleks, by erecting barriers, had materially interfered with the Swickards' enjoyment of the easement.[79]

On appeal, the Kwoleks argued that the plain language of the easement allows only for ingress and egress, which does not include parking.[80] After considering the language of the easement, the court of appeals agreed with the Kwoleks.[81]

B. Annexation

As municipalities continue to search for ways to expand their tax bases and increase revenue, annexation continues to be an extremely important topic. While the number of annexation cases handed down during the survey period is limited, the cases are chock-full of important issues.

In *City of Kokomo ex. rel. Goodnight v. Pogue*,[82] the Indiana Court of Appeals held that remonstrators who sought to stop Kokomo's proposed annexation failed to obtain the appropriate number of signatures.[83] In 2008, the City of Kokomo passed an ordinance to annex 3742 parcels of land.[84] In opposition to the annexation, remonstrators obtained 2543 landowners' signatures—approximately sixty-eight percent of the parcels.[85] Kokomo filed a motion to dismiss the remonstrators' petition, contending that in fact several of the signatories had waived their right to remonstrate in exchange for the benefit of hooking up to the city's sewer system. Subtracting these signatures would leave the remonstrators with less than the statutorily required sixty-five percent[86] needed to challenge Kokomo's proposed annexation.[87] More specifically Kokomo made two alternative arguments. First, 375 of the signatures came from landowners whose property had been owned previously by different landowners who had signed a remonstrance waiver. Second, 137 of the signatures were provided by landowners who were also parties to contracts waiving their right to

77. *Id.* at 569.
78. *Id.*
79. *Id.* at 570.
80. *Id.* at 572.
81. *Id.*
82. 940 N.E.2d 833 (Ind. Ct. App. 2010).
83. *Id.* at 841.
84. *Id.* at 835.
85. *Id.*
86. IND. CODE § 36-4-3-11(a)(1) (2011).
87. *Pogue*, 940 N.E.2d at 835.

remonstrate.[88] The remonstrators made several counterarguments. First, though the statute required service of notice by certified mail,[89] Kokomo used the United States Postal Service's "signature confirmation" service.[90] Second, for the 375 landowners whose predecessors in interest had signed the remonstrance waiver, the waivers were not properly recorded in the chain of title.[91] Third, for the 137 landowners who were parties to a contract with Kokomo, they either lacked proper notice or the language of the contracts referred broadly to "city services" rather than specifically sewer services, rendering those signatures valid.[92] The trial court denied Kokomo's motion to dismiss.

In reversing the trial court, the court of appeals addressed two of the remonstrators' three arguments. First, the court of appeals held that using the United States Postal Service's "signature confirmation" service sufficiently satisfied the statute.[93] An affidavit signed by the Kokomo City Engineer indicated that "signature confirmation" provides better service than certified mail.[94] The remonstrators also argued that, as roughly 800 notices were returned undelivered, the notice was insufficient and they should have been remailed.[95] The court of appeals disagreed. According to the court, Indiana Code section 36-4-3-2.2(e) "clearly states that a landowner's failure to receive actual notice of a proposed annexation is not fatal, so long as the statute's provisions regarding mailing were followed" and "[t]he statute also contains no requirement that undelivered notices be remailed."[96]

The court of appeals declined to decide the chain of title issue for the 375 parcels whose landowners were not directly parties to a contract with Kokomo.[97] Instead, the court focused on the issue of the 137 signatures of landowners who were direct parties to a contract that included a remonstrance waiver.[98] The court looked to *Doan v. City of Fort Wayne*[99] for the proposition that, while generally landowners may not prospectively waive their right to remonstrate against future annexation, contracts exchanging sewer services for remonstrance waivers are acceptable.[100] The remonstrators argued that sixty-four of the 137 signatures by landowners directly contracting with Kokomo were not specifically for sewer services because the contracts were for "city services."[101] The court disagreed

88. *Id.* at 936.
89. IND. CODE § 36-4-3-2.2(b).
90. *Pogue*, 940 N.E.2d at 837.
91. *Id.* at 839.
92. *Id.* at 840.
93. *Id.* at 838.
94. *Id.* at 837-38.
95. *Id.* at 838.
96. *Id.*
97. *Id.* at 839.
98. *Id.* at 840.
99. 252 N.E.2d 415 (Ind. 1969).
100. *Pogue*, 940 N.E.2d at 838-39.
101. *Id.* at 840.

and held that the evidence indicated the only services contracted for were in fact sewer services.[102] "The language of the waivers in that regard is clear and unambiguous; that is, the signatories were clearly advised and had actual knowledge of the fact that they were waiving their right to remonstrate in exchange for connecting to the Kokomo sewer system."[103] Because of this, the remonstrators did not have the required sixty-five percent of parcels represented and the city's motion to dismiss should have been granted.[104]

In an equally important annexation case,[105] the Indiana Court of Appeals addressed three issues: (1) Whether, when determining if sixty-five percent of parcels object to annexation, tax-exempt parcels should be included in the count; (2) Whether the landowners of targeted parcels had standing to bring a declaratory judgment action; and (3) Whether, when determining if sixty-five percent of parcels object to annexation, parcels abutting public roadways but not specifically included in the targeted territory should be included in the count.[106] This Article focuses on the first and third issues.

On July 7, 2008, Boonville passed an ordinance annexing 1165 acres of real estate. The annexed area was bordered by two public roadways.[107] Remonstrators filed a complaint and declaratory judgment action against Boonville, arguing that well over sixty-five percent of the owners of parcels in the proposed annexed area objected to the annexation.[108] Boonville filed a motion to dismiss, arguing that the remonstrators failed to meet the sixty-five percent requirement.[109] In support of its argument, Boonville contended that tax-exempt parcels should be counted in determining the total parcels in the proposed area, landowners of property abutting roadways that border the annexed property should not be counted,[110] and a declaratory judgment action is not appropriate if Boonville wins its motion to dismiss.[111] The trial court found in favor of the landowners on the tax-exempt and declaratory judgment issues and in favor of Boonville on the public highway issue.[112] Boonville sought, and the court of appeals granted, an interlocutory appeal.[113]

The court of appeals first addressed the tax-exempt parcel issue. Indiana Code section 36-4-3-11 states:

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102. *Id.* at 840-41.

103. *Id.* at 841.

104. *Id.*

105. City of Boonville v. Am. Cold Storage, 950 N.E.2d 764 (Ind. App. 2011), *reh'g denied* (Aug. 25, 2011).

106. *Id.* at 765.

107. *Id.* at 766.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (quoting IND. CODE § 36-4-3-11 (2011)).

112. *Id.*

113. *Id.*

> (a) Except as provided in section 5.1(i) of this chapter and subsections (d) and (e), whenever territory is annexed by a municipality under this chapter, the annexation may be appealed by filing with the circuit or superior court of a county in which the annexed territory is located a written remonstrance signed by:
>
> (1) at least sixty-five percent (65%) of the owners of land in the annexed territory; or
>
> (2) the owners of more than seventy-five percent (75%) in assessed valuation of land in the annexed territory.
>
> . . .
>
> (b) On receipt of the remonstrance, the court shall determine whether the remonstrance has the necessary signatures. In determining the total number of landowners of the annexed territory and whether signers of the remonstrance are landowners, the names appearing on the tax duplicate for that territory constitute prima facie evidence of ownership. Only one (1) person having an interest in each single property, as evidence by the tax duplicate, is considered a landowner for purposes of this section.[114]

The landowners argued that "owners of land" in section (a)(1) should be limited to owners of taxable property in light of the language in section (b) regarding tax duplicates.[115] The landowners reasoned that only taxed parcels of land are listed on the tax duplicate and therefore only taxed parcels should be tallied for determining whether sixty-five percent of parcels object.[116] The court of appeals disagreed for two reasons: (1) Tax duplicates show the value of all parcels of property, not just taxed parcels; and (2) Tax duplicate listing is only prima facie evidence of ownership, not the only source of evidence of ownership.[117] Further, the court of appeals declined to read the word taxable before land in section (a)(1) because the legislature could have included that language had it wished.[118]

On the third issue, the landowners argued that property abutting public highways, but outside of the annexed area, should be included in the sixty-five percent count. The landowners based their argument on the premise that landowners abutting public roadways have fee simple ownership of the land under the roadway.[119] The court of appeals agreed that the landowners technically do have a fee simple interest to the center of the road, but disagreed that fee simple ownership translates into owning the roadways themselves.[120]

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114. *Id.*
115. *Id.* at 768.
116. *Id.*
117. *Id.*
118. *Id.* at 768-69.
119. *Id.* at 771.
120. *Id.*

According to the court, the landowners "do not have the right to construct, lay out, alter, vacate, maintain, or otherwise control the roadways."[121] Because the focus of Boonville's annexation is on the roadways rather than the property supporting them, the court held that the landowners should not be counted in the sixty-five percent.[122]

C. Zoning

Several interesting zoning cases were handed down during the survey period. This Article, in the interest of brevity, focuses on three of those cases.

In the first case of focus, *Lightpoint Impressions, LLC v. Metropolitan Development Commission of Marion County*,[123] the court of appeals confronted a clash of jurisdiction between the Marion County Metropolitan Development Commission (MDC) and the Lawrence Board of Zoning Appeals ("Lawrence BZA"). On November 17, 2003, the Indianapolis-Marion County City-County Council enacted an ordinance prohibiting advertising signs that display video or emitting graphics.[124] Lightpoint petitioned the City of Lawrence for a variance in order to convert billboards along Interstate 465 to digital displays. Lawrence is located wholly within Marion County. The Lawrence BZA granted the requested variance. Subsequently, the Administrator of the Division of Planning of the Indianapolis Department of Metropolitan Development appealed the Lawrence BZA's decision to the MDC, arguing that the BZA had set a poor precedent.[125] After the MDC denied Lightpoint's request to dismiss the action for lack of jurisdiction, Lightpoint brought the matter to the attention of a trial court. Lightpoint argued that the MDC lacked jurisdiction to review the Lawrence BZA and that the Administrator's decision to appeal was arbitrary and capricious.[126] The trial court granted summary judgment in favor of the MDC and Lightpoint appealed.

On appeal, the court acknowledged that Lawrence is an "excluded city" under Indiana law and, as such, its BZA has "exclusive territorial jurisdiction within [its] corporate boundaries."[127] Though a straightforward application of statutory language favored Lightpoint's argument, the court of appeals relied instead on the intent of Indiana's lawmakers to hold that the MDC did have jurisdiction to review the Lawrence BZA.[128] The court reviewed Indiana Code section 36-7-4-201(d), which explains that

> [e]xpanding urbanization in each county having a consolidated city [*e.g.*, Marion County] has created problems that have made the unification of

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121. *Id.*
122. *Id.*
123. 941 N.E.2d 1055 (Ind. Ct. App. 2010).
124. *Id.* at 1057 (citing INDIANAPOLIS REV. CODE § 734-306(a)(6) (2012)).
125. *Id.* at 1058.
126. *Id.*
127. *Id.* at 1060.
128. *Id.*

> planning and zoning functions a necessity to insure the health, safety, morals, economic development, and general welfare of the county. To accomplish this unification a single planning and zoning authority is established for the county.[129]

The court of appeals reasoned that the MDC could not fulfill its function as a single planning and zoning authority if it could not review decisions of BZA's within its planning territory.[130] Further, the court noted how the general assembly had the power and means to exempt these types of BZAs from review if it wished to do so.[131] The court held that the "exclusive territorial jurisdiction" language must be read to only include initial zoning determinations in Lawrence and not appeals of those decisions.[132]

In the second case of focus, *Siwinski v. Town of Ogden Dunes*,[133] Steven and Lauren Siwinski ("Siwinskis") owned a house in Ogden Dunes, Indiana, located in a district zoned R-Residential.[134] The Siwinskis rented out their home on five occasions in 2007 for periods ranging from two to eleven days. In August 2007, the town sued the Siwinskis for violating section 152.032 of the Town Code.[135] After the trial court found against the Siwinskis and instituted a hefty fine, the Indiana Court of Appeals reversed. The Indiana Supreme Court granted transfer, reversed the court of appeals, and decreased the fine from $40,000 to no more than $32,500.[136]

In order to decide the issue, the Indiana Supreme Court had to construe Town Code section 152.032, which states:

> In a R District, no building or premises shall be used and no building shall be erected which is arranged, designed or intended to be used for other than one or more of the following specified uses: (1) single-family dwellings; (2) accessory buildings or uses; (3) public utility buildings; (4) semi-public uses; (5) essential services; (6) special exception uses permitted by this Zoning Code.[137]

Further, "[a] single-family dwelling is defined as, 'A separate detached building designed for and occupied exclusively as a residence by one family.'"[138] The Siwinskis argued that in renting their home, it was not used for things other than those normally associated with a family residence.[139] Also, the Siwinskis

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129. *Id.* (alterations in original) (citing IND. CODE § 36-7-4-201(d) (2011)).
130. *Id.*
131. *Id.*
132. *Id.* at 1060-61.
133. 949 N.E.2d 825 (Ind. 2011).
134. *Id.* at 827.
135. *Id.*
136. *Id.*
137. *Id.* at 828 (quoting OGDEN DUNES, IND., CODE § 152.032 (2008)).
138. *Id.* (quoting OGDEN DUNES, IND., CODE § 152.002).
139. *Id.* at 829.

contended that they only rented their home to one family at a time, as opposed to multiple families living in the residence at once. The Town, on the other hand, argued that the court should look to the intent of the ordinance—that intent being to prohibit renting to other families for profit.[140]

The court ultimately agreed with the Town, reasoning that both the plain language of the ordinance and the intent of its drafters lead to the conclusion that single-family dwellings may not be rented.[141] As for the plain language, the court looked to the definition of "dwelling" and "multiple dwelling" in other sections of the ordinance.[142] The court explained that a dwelling was defined as "a building which is to be occupied exclusively for living purposes," and a multiple dwelling was defined as "an apartment house or apartment building."[143] Accordingly, the court determined that the plain language of the ordinance indicated that single-family dwellings are not to be rented.[144] As for the intent of the drafters, the court reasoned that "[i]t makes sense that Ogden Dunes, a small, quiet, lakeshore town on Lake Michigan, would not want renters overwhelming its residential district during the summer lake season . . . . [T]he Town has made a conscious decision to forbid its residents from renting their homes."[145]

In the third case of focus, *Wastewater One, LLC v. Floyd County Board of Zoning Appeals*,[146] the Indiana Court of Appeals upheld the Floyd County Board of Zoning Appeals (BZA) denial of a conditional use permit for expansion of a sewage treatment facility.[147] In anticipation of the need to serve a new subdivision in the community, the sewage treatment facility ("Wastewater") submitted a conditional use application to the BZA in 2007 to expand its capacity from 37,000 gallons per day to 100,000 gallons per day.[148] The BZA conducted a public hearing in which remonstrators protested the expansion. They argued that increased plant size would lead to increased odor and, because the larger plant would allow more subdivisions to be built, increased traffic congestion.[149] In accordance with section 15.09(C)(1) of the Floyd County Zoning Ordinance, the BZA considered five factors and ultimately denied the application finding:

> (1) The conditional use WILL NOT be injurious to the public health, safety, moral, and general welfare of the community because: It will provide an essential service to the community.

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140. *Id.*
141. *Id.* at 829-30.
142. *Id.*
143. *Id.* at 829 (quoting OGDEN DUNES, IND., CODE § 152.002).
144. *Id.* at 830.
145. *Id.*
146. 947 N.E.2d 1040 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 645 (Ind. 2011).
147. *Id.* at 1054.
148. *Id.* at 1042.
149. *Id.* at 1043.

(2) The use and value of the area adjacent to the property WILL be adversely affected because: Expansion of this capacity within the area now available will impact adjacent residences.

(3) The need for the conditional use DOES NOT result from any conditions, unusual or peculiar to the subject property itself because: This is an expanded use of a public facility.

(4) Strict application of the terms of the Floyd County Zoning Ordinance WILL result in an unnecessary hardship in the use of the property because: It will eliminate necessary facilities for 123 residences.

(5) Approval of the conditional use WILL contradict the goals and objectives of the Floyd County Comprehensive Plan because: This will allow continued service to Highlander Village then seven additional square miles of undeveloped land which will compound present congestion of the roadways.[150]

Wastewater filed a petition for review of the denial of the application. Wastewater made three arguments: (1) The BZA did not have jurisdiction to decide whether the expansion was proper; (2) The Floyd County Ordinance is contrary to Indiana Law because it conflates the requirements for conditional uses and the requirements for variances; and (3) Two of the BZA's findings were not based upon evidence presented at the hearing.[151] The trial court affirmed the BZA's denial of Wastewater's application. Wastewater appealed.[152] This Article focuses on Wastewater's second argument.

After agreeing with the trial court that the BZA did have jurisdiction to consider Wastewater's application, the court of appeals considered Wastewater's second argument.[153] Wastewater argued that section 15.09(C)(1) violated Indiana Code sections 36-7-4-918.2 and 36-7-4-918.4, which govern conditional uses and variances respectively.[154] Essentially Wastewater argued that the ordinance's five factors for consideration are the same five factors set out in Indiana's variance statute. Wastewater contended that this was problematic because conditional use applications do not allow BZAs to exercise discretion—they require automatic approval or denial according to objective criteria.[155] Variances, on the other hand, allow discretion according to a consideration of the five factors.[156] The BZA countered by arguing that the conditional use application

150. *Id.*
151. *Id.* at 1044.
152. *Id.*
153. *See id.* at 1047.
154. IND. CODE §§ 36-7-4-918.2, -918.4 (2011).
155. *Wastewater*, 947 N.E.2d at 1047.
156. *Id.*

can be objective or subjective, depending on how a given zoning ordinance is structured.

Looking to a recent case,[157] the court of appeals agreed with the BZA.[158] The court noted that in many instances zoning boards are required to follow objective criteria, but that Indiana does not require all conditional uses to work in this manner.[159] Local governments are free to adopt zoning ordinances that grant discretion to their zoning boards in deciding whether to approve conditional use permits.[160] According to the court's reasoning, variances and special uses can be treated identically, despite the requirement for each being laid out in separate Indiana statutes.

D. Nuisance

Of several nuisance cases handed down during the survey period, one case is particularly noteworthy. In *B & B, LLC v. Lake Erie Land Co.*,[161] the Indiana Court of Appeals decided a case of first impression involving wetlands and the common enemy doctrine. The court held that a landowner, having raised the water table on his land to create a federally regulated wetland, may not invoke the common enemy doctrine to shield himself from liability for drowning neighboring properties.[162]

Robert Pruim and his business partner purchased 280 acres of land in Lake Station.[163] At one time, the land had been a swamp, but the parcel had been dewatered by field tiles and a ditch and subsequently used for farming.[164] Pruim and his partner planned to build an industrial park on the parcel, including a waste transfer station in the northwest corner. During the planning phases, the parcel fell subject to scrutiny by the Army Corps. of Engineers. Pruim hired an environmental consultant to give an opinion regarding suitability for development. The consultant determined that only an upward sloping portion of the property was suitable for development. Rather than develop the property, Pruim ultimately sold the upland portion to B & B and the wetland portion to Lake Erie Land Company (LEL). LEL had been working with the same environmental consultant to develop a wetland mitigation bank.[165] Pruim's property, with its wetland characteristics, fit LEL's mitigation bank plans. B & B planned on using its parcel as a concrete crushing plant. LEL, knowing that raising the water table could negatively impact neighboring properties, built

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157. *See* Midwest Minerals, Inc. v. Bd. of Zoning Appeals of the Area Plan Dep't/Comm'n of Vigo Cnty., 880 N.E.2d 1264 (Ind. Ct. App. 2008).

158. *Wastewater*, 947 N.E.2d at 1048.

159. *Id.* at 1048-49.

160. *Id.* at 1049.

161. 943 N.E.2d 917 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 641 (Ind. 2011).

162. *Id.* at 919.

163. *Id.*

164. *Id.*

165. *Id.* at 920.

berms, destroyed drainage tiles, and plugged the drainage ditch running through the property. As a result, the water table rose and submerged the southernmost portion of B & B's property.[166] B & B had been piling concrete on the property, but was ordered to cease and desist when the Army Corps. of Engineers inspected the southern portion of the property and determined it was a wetland.

B & B sued LEL using theories of negligence, trespass, and nuisance.[167] The trial court held in favor of LEL reasoning that the common enemy doctrine precluded B & B from prevailing on any of its theories. B & B appealed the decision.[168]

The court of appeals reviewed the common enemy doctrine. In *Argyelan v. Haviland*,[169] the Indiana Supreme Court described the common enemy doctrine.

> In its most simplistic and pure form the rule known as the "common enemy doctrine," declares that surface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.[170]

The court then explained that the common enemy doctrine only applies to water classified as surface water.[171] The court looked to *Trowbridge v. Torabi*[172] for a definition of surface water.

> As distinguished from the waters of a natural stream, lake, or pond, surface waters are such as diffuse themselves over the surface of the ground, following no defined course or channel, and not gathering into or forming any more definite body of water than a mere bog or marsh. They generally originate in rains and melting snows . . . . Water derived from rains and melting snows is diffused over surface of the ground [is surface water], and it continues to be such and may be impounded by the owner of the land until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, or until it reaches some permanent lake or pond, whereupon it ceases to be "surface water" and becomes a "water course" or a "lake" or "pond," as the case may be.[173]

The *B & B* court ultimately determined that LEL's actions in creating a mitigation bank did not invoke the common enemy doctrine.[174] For one thing, all

166. *Id.* at 921.
167. *Id.* at 921-22.
168. *Id.* at 922-23.
169. 435 N.E.2d 973 (Ind. 1982).
170. *Id.* at 975.
171. *B&B, LLC*, 943 N.E.2d at 924.
172. 693 N.E.2d 622 (Ind. Ct. App. 1998).
173. *B & B, LLC*, 943 N.E.2d at 924-25 (quoting *Trowbridge*, 693 N.E.2d at 627).
174. *Id.* at 925.

experts involved in the case agreed that the water was subterranean.[175] Additionally, the court was impressed by the reason for which LEL was diverting the water.[176]

> In our view, the common enemy doctrine does not permit the creation of a wetland because that type of action simply does not qualify as "water diversion." Moreover, the parties cite to no authority—and we have found none—that permits a party to stop the free flow of subterranean waters in order to raise the water table not only upon its land but on adjoining land to create a federally regulated wetland. In our view, neither the principles applicable to subterranean waters nor the common enemy doctrine would permit a defendant to stop the free flow of underground waters so that adjoining properties become flooded.[177]

Ultimately, the court held that the common enemy doctrine did not preclude B & B's nuisance or trespass action.[178]

III. LIENS AND FORECLOSURES

A. Indiana Supreme Court Decisions

During the survey period, the Indiana Supreme Court granted transfer for two cases addressing foreclosures.[179] In *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*, the court sought to shed some light on the complex area of law that is the doctrine of merger.[180] Countrywide Home Loans, Inc. took and duly recorded a mortgage in a piece of real estate in April 2005.[181] In August of the following year, Countrywide foreclosed on the property which resulted in a sheriff's sale in February 2007. Countrywide purchased the property at the sheriff's sale and recorded the deed in March 2007.[182] In April, Countrywide conveyed the property by a limited warranty deed to the Federal National Mortgage Association (FNMA).[183] The problems giving rise to the case arose because Countrywide failed to discover and list Citizens State Bank of New Castle ("Citizens Bank") as a defendant in its foreclosure action.[184] The

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175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 926-27.

179. *See* Lucas v. U.S. Bank, N.A., 953 N.E.2d 457 (Ind. 2011), *reh'g denied*, 2012 Ind. LEXIS 6 (Jan. 19, 2012); Citizens State Bank of New Castle v. Countrywide Home Loans, Inc., 949 N.E.2d 1195 (Ind. 2011).

180. *Citizens*, 949 N.E.2d 1195.

181. *Id.* at 1196.

182. *Id.*

183. *Id.*

184. *Id.*

mortgagor had issued a promissory note to Citizens Bank in January 2003.[185] In June 2006, two months prior to Countrywide's foreclosure action, Citizens Bank was granted default judgment on the note and recorded its judgment, resulting in a lien on the property.[186] After discovering Citizens Bank's judgment lien, Countrywide filed a complaint seeking to foreclose any interest or equity of redemption Citizens's Bank may have held in the real estate.[187] Citizens Bank filed an answer and its own complaint to foreclose FNMA's lien.[188] The trial court consolidated the two actions and granted Countrywide's motion, directing Citizens Bank to redeem the mortgage or be "forever barred from asserting its judgment lien against the subject property."[189] The court of appeals reversed, finding Countrywide's lien to be extinguished by the doctrine of merger, anti-merger, and an exception to anti-merger.[190] The Indiana Supreme Court granted transfer.

Pursuant to the doctrine of merger, a merger occurs when a single entity acquires both the lien and legal title to the real estate.[191] If merger occurs, the mortgagee's lien is extinguished and loses priority over "any undisclosed junior liens."[192] Application of the merger doctrine in this case would mean that Countrywide's lien is extinguished and Citizens Bank's lien would not only remain intact but actually be advanced to senior lien status.[193] However, "[w]here there is no merger, then the mortgagee's original lien remains intact and thereby maintains a priority position over any undisclosed junior liens."[194] The court acknowledged that the *Restatement (Third) of Property* holds the view that the doctrine of merger as applied to mortgages ought to be eliminated but specifically declined to adopt the Restatement approach.[195] The court instead looked to standing Indiana case law.[196]

> Whether the conveyance of the fee to the mortgagee results in a merger of the mortgage and the fee depends primarily upon the intention of the parties, particularly that of the mortgagee. If that intention has not been expressed it will be sought for and ascertained from all of the circumstances of the transaction. If it appears from all of the circumstances to be for the benefit of the party acquiring both interests

185. *Id.*

186. *Id.*

187. *Id.* at 1197. Though the case does discuss the concept and role of strict foreclosure, it is ultimately not dispositive and thus is not discussed in depth here.

188. *Id.*

189. *Id*.

190. *Id.*

191. *Id.*

192. *Id.* at 1198.

193. *Id.*; *see also id*. at 1203 (Sullivan, J., dissenting).

194. *Id.* at 1198.

195. *Id.* at 1197-98.

196. *Id.* at 1198.

> that merger shall not take place, but that the mortgage should be kept alive, then his intention that such result should follow will be presumed.[197]

The presumption is rebuttable upon evidence "that a merger had been expressly agreed to, or that the mortgagee's conduct and action were such as could fairly be ascribed only to an intention to merge."[198]

The court found that despite the presumption, there was sufficient evidence to rebut.[199] In the limited warranty deed used to transfer the property to FNMA was the language stating that Countrywide "'grants and conveys' the same and 'warrants the title . . . against the acts of the Grantor and all persons claiming lawfully by, through or under Grantor.'"[200] Under Indiana statutory law, such language grants a transfer in fee simple and as such "guarantees that the premises are free from all encumbrances."[201] The court recognized that without a merger, the transfer to FNMA could not have occurred.[202] As the court summarized, "by conveying title to a third party by way of warranty deed, albeit limited, Countrywide demonstrated that it intended a merger of its interests."[203]

As the lone dissenter, Justice Sullivan disagreed with the majority and provided a dissenting opinion.[204] He viewed the case as being one of an "omitted party" and that as an "omitted party" Citizens Bank's interest was not foreclosed.[205] He believed that the appropriate result was "that the senior lienholder and the omitted party get the practical equivalent of a 'do-over'—a second foreclosure—in which the omitted party would be entitled to redeem its (subordinate) interest in the property and if it does not redeem, have its interest foreclosed."[206] Put simply, Justice Sullivan believed that the trial court accurately applied precedent to come to its original decision.[207]

In the second case, *Lucas v. U.S. Bank, N.A.*, the court once more probed the issue of the jury trial right.[208] In a 3-2 decision the court held that mortgagor, the Lucases, did not have a right to a trial by jury on their defenses and claims against the mortgage holder and loan servicer, U.S. Bank and Litton Loan

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197. *Id.* (quoting Ellsworth v. Homemakers Fin. Serv., Inc., 424 N.E.2d 166, 168 (Ind. Ct. App. 1981) (citations omitted)).

198. *Id.* at 1200-01 (quoting Barton v. Cannon, 489 P.2d 1021, 1022 (Idaho 1971)).

199. *Id.* at 1201.

200. *Id.* (citation omitted).

201. *Id.* (quoting IND. CODE § 32-17-1-2 (2011)).

202. *Id.*

203. *Id.*

204. *Id.* at 1202 (Sullivan, J., dissenting).

205. *Id.* at 1202-03.

206. *Id.* at 1203.

207. *Id.*

208. Lucas v. U.S. Bank, N.A., 953 N.E.2d 457 (Ind. 2011), *reh'g denied*, 2012 Ind. LEXIS 6 (Jan. 19, 2012).

Servicing respectively.[209] In 2009, U.S. Bank filed a complaint seeking to foreclose on the Lucases' property.[210] The Lucases, in their answer, made a demand for a jury trial.[211] U.S. Bank sought to strike the Lucases' jury request. The trial court granted U.S. Bank's motion to strike the jury trial, concluding that because U.S. Bank was seeking a foreclosure—"an 'essentially equitable' cause of action"—the defenses and claims by the Lucases were also drawn into equity.[212] On appeal, the court applied the Indiana Supreme Court's decision in *Songer v. Civitas Bank*[213] and reversed.[214] "[T]he [c]ourt of [a]ppeals could not conclude that the essential features of th[e] case were equitable."[215]

While article 1, section 20 of the Indiana Constitution guarantees the right of trial by jury in civil cases, the right only extends to the claims that existed at common law.[216] In *Songer*, the supreme court sought to "comprehensively [analyze] one hundred and twenty years of Indiana jurisprudence related to the joining of law and equity claims" in order to determine when the jury trial right attaches.[217] The rule derived from *Songer* is:

> If the essential features of a suit as a whole are equitable and the individual causes of action are not *distinct or severable*, the entitlement to a jury trial is extinguished. The opposite is also true. If a single cause of action in a multi-count complaint is plainly equitable and the other causes of action assert purely legal claims that are sufficiently *distinct and severable*, Trial Rule 38(A) requires a jury trial on the legal claims.[218]

In order to determine the "essential features of a suit," the court must "evaluate the nature of the underlying substantive claim" by "look[ing] to the substance and central character of the complaint, the rights and interests involved, and the relief demanded."[219]

After analyzing each of the Lucases defenses, claims, and remedies, the court determined that the Indiana Court of Appeals was correct in categorizing most of them as legal in nature.[220] However, the court did not determine this finding alone to be sufficient to determine that the jury trial right had attached.[221] The

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209. *Id.* at 459.
210. *Id.*
211. *Id.*
212. *Id.*
213. 771 N.E.2d 61 (Ind. 2002).
214. *Lucas*, 953 N.E.2d at 459-60.
215. *Id.*
216. *Id.* at 460.
217. *Id*. at 467 (Dickson, J., dissenting) (citing *Songer*, 771 N.E.2d at 61).
218. *Id.* (quoting *Songer*, 771 N.E.2d at 68); *see also id*. at 460-61.
219. *Id.* at 461 (majority opinion) (quoting *Songer*, 771 N.E.2d at 68).
220. *Id.* at 464-65.
221. *Id.* at 465.

court once more looked to *Songer* for guidance.[222] In *Songer*, a suit which "[a]t its heart . . . was a suit to foreclose a lien on property," the court found "that considerable precedent holds that foreclosure actions are equitable, '[a]nd being essentially equitable, the whole of the claim is drawn into equity, including *related* legal claims and counterclaims.'"[223] Applying that reasoning from *Songer*, the court determined that the analysis depended upon the meaning of "related."[224] After looking to cases preceding *Songer*, the court concluded that to determine whether a suit is essentially equitable, a trial court must conduct a multi-pronged inquiry.[225] The court described that inquiry as follows:

> If equitable and legal causes of action or defenses are present in the same lawsuit, the court must examine several factors of each joined claim—its substance and character, the rights and interests involved, and the relief requested. After that examination, the trial court must decide whether core questions presented in any of the joined legal claims significantly overlap with the subject matter that invokes the equitable jurisdiction of the court. If so, equity subsumes those particular legal claims to obtain more final and effectual relief for the parties despite the presence of peripheral questions of a legal nature. Conversely, the unrelated legal claims are entitled to a trial by jury.[226]

The court applied its multi-pronged inquiry and concluded that in the present case "the core legal issues overlap with the foreclosure issues to a significant degree" and as such the essential features of the suit were equitable.[227] Thus, the court affirmed the trial court's denial of a jury trial.[228]

Justice Dickson, with whom Justice Rucker joined, authored a dissenting opinion.[229] Justice Dickson believed that the majority opinion failed to pay due respect to the teachings of *Songer* by further complicating the analysis.[230] He contended that the focus of *Songer* was "whether multiple causes of action are 'distinct and severable."[231] He described the majority opinion as creating a new test requiring courts to determine "whether the legal claims 'significantly overlap' with the subject matter of the original equitable claim."[232] As such, Justice Dickson feared that the "significantly overlap" test may deprive defendants of a jury trial on "purely legal claims that are sufficiently distinct and

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222. *Id.*
223. *Id.* (quoting *Songer*, 771 N.E.2d at 69).
224. *Id.*
225. *Id.*
226. *Id.* at 465-66.
227. *Id.* at 466-67.
228. *Id.* at 467.
229. *Id.* (Dickson, J., dissenting).
230. *Id.*
231. *Id.*
232. *Id.*

severable from the equitable foreclosure action."[233]

B. Procedure

In the area of procedural law the Indiana Court of Appeals was presented with numerous issues of first impression. In the realm of tax sales, the court of appeals held as an issue of first impression that a property owner's appeal of a civil penalty is not rendered moot where the owner pays the penalty under protest so as to avoid a tax sale.[234]

In *Gee v. Green Tree Servicing, LLC*,[235] the court was asked to review an appeal seeking to set aside a sheriff's sale as procedurally deficient. The challenge hinged on the fact that due to construction on the Grant County courthouse, three of the four courts were temporarily relocated.[236] In attempting to comply with Indiana Code section 32-29-7-3(e) "requir[ing] the sheriff to post notice of the sale 'at the door of the courthouse,'" the Grant County Sheriff's department posted notice of the sheriff's sale of the mortgagor's property at the temporary court location.[237] The mortgagor challenged the sale on the grounds that the notice was not posted at the permanent courthouse and thus the sale was procedurally deficient.[238] The trial court denied the mortgagor's motion.[239] On appeal, the court looked to *Black's Law Dictionary* for a definition of courthouse and concluded that the posting was reasonable and did not run afoul of the requirements of section 32-29-7-3(e).[240]

In another instance of the court addressing an issue of first impression, the court, in *Lacy-McKinney v. Taylor Bean & Whitaker Mortgage Corp.*, held that noncompliance with HUD regulations prior to foreclosure of a HUD-insured mortgage is an affirmative defense to foreclosure.[241] Lacy-McKinney contended that Taylor-Bean did not comply with HUD regulations when it commenced its foreclosure action.[242] Lacy-McKinney argued that Taylor Bean:

> (1) did not engage in loss mitigation in a timely fashion as required by 24 C.F.R. § 203.605(a); (2) did not have a face-to-face meeting or make a reasonable effort to have a face-to-face meeting "before three full monthly installments due on the [M]ortgage [were] unpaid" as required by 24 C.F.R. § 203.604(b); and [(3)] did not accept partial payments as

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233. *Id.*

234. *See* Dempsey v. Dep't of Metro. Dev. of City of Indianapolis, 953 N.E.2d 1132, 1133-36 (Ind. Ct. App. 2011).

235. 934 N.E.2d 1260 (Ind. Ct. App. 2010).

236. *Id.* at 1261.

237. *Id.* at 1261-62.

238. *Id.*

239. *Id.* at 1261.

240. *Id.* at 1262.

241. Lacy-McKinney v. Taylor, Bean & Whitaker Mortg. Corp., 937 N.E.2d 853 (Ind. Ct. App. 2010).

242. *Id.* at 859.

required by 24 C.F.R. § 203.556.[243]

To aid in its decision, the court looked to an Illinois case, *Bankers Life Co. v. Denton*,[244] to provide insight into the rationale for recognizing noncompliance with HUD requirements to be used as an affirmative defense.[245] In *Denton*, the Illinois Appellate Court held that "in order to effectively insure that the interests of the primary beneficiaries of the H.U.D. mortgage servicing requirements are being protected, mortgagors must be allowed to raise noncompliance with the servicing requirements as a defense to a foreclosure action."[246] The Indiana Court of Appeals also found persuasive the holdings by courts in Florida, Maryland, and New York which came to the same conclusion as the *Denton* court.[247]

The court did not find persuasive the views of courts in New Jersey and Pennsylvania that found noncompliance with HUD regulations to be an equitable defense as opposed to an affirmative defense.[248] The court feared that cases might arise in which the requirements to exercise an equitable defense, such as the clean hands doctrine, would prove a bar to mortgagors.[249] After looking to the flaws with determining noncompliance to be an equitable defense and finding the reasoning in *Denton* to be quite persuasive, the court held that compliance with HUD servicing responsibilities, such as the ones at issue in this case, are a binding condition precedent to foreclosure.[250] As such, noncompliance with such regulations is an affirmative defense to a foreclosure action.[251]

In yet another case, *Citimortgage, Inc. v. Barabas*,[252] dealing with issues of first impression, the Indiana Court of Appeals sought to determine the relationship of Mortgage Electronic Registration Systems, Inc. (MERS) in a foreclosure action. The result was a split decision with Judge Riley authoring the majority opinion to which Chief Judge Robb concurred and Judge Brown authored a dissent.[253] In 2005 Barabas executed a mortgage on property in Madison County which was duly recorded.[254] "The mortgage state[d] in pertinent

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243. *Id.* (first and second alterations in original).

244. 458 N.E.2d 203 (Ill. App. Ct. 1983).

245. *Id.* at 861-62.

246. *Id.* at 862 (quoting *Denton*, 458 N.E.2d at 205).

247. *Id.* at 862-63 (citing Cross v. Fed. Nat'l Mortg. Ass'n, 359 So. 2d 464 (Fla. Dist. Ct. App. 1978); Wells Fargo Home Mortg., Inc. v. Neal, 922 A.2d 538, 547 (Md. 2007); Fed. Nat'l Mortg. Ass'n v. Ricks, 372 N.Y.S.2d 485, 497 (Sup. Ct. 1975)).

248. *Id.* at 863 (citing Heritage Bank, N.A. v. Ruh, 465 A.2d 547 (N.J. Super. Ct. Ch. Div. 1983); Fleet Real Estate Funding Corp. v. Smith, 530 A.2d 919 (Pa. Super. Ct. 1987)).

249. *Id.*

250. *Id.* at 864.

251. *Id.*

252. 950 N.E.2d 12 (Ind. Ct. App. 2011), *aff'd on reh'g*, 955 N.E.2d 260 (Ind. Ct. App. 2011), *trans. granted*, 2012 Ind. LEXIS 153 (Apr. 10, 2012).

253. *Id.* at 18-19 (Brown, J., dissenting)).

254. *Id.* at 13 (majority opinion).

part: This Security Instrument is given to [MERS], (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns), as mortgagee."[255] The mortgage listed the lender as Irwin Mortgage Corporation.[256] In 2007, Barabas entered into a second mortgage on the property with ReCasa Financial Group, Inc.[257] A year later, after the second mortgage was recorded, Barabas defaulted on the ReCasa mortgage.[258] As a result of the default, in 2008, ReCasa foreclosed and named Irwin Mortgage as a defendant.[259] Irwin Mortgage responded by filing a disclaimer of interest in the property.[260] The trial court entered default judgment in favor of ReCasa and the property was sold at a sheriff's sale to ReCasa on March 4, 2009.[261]

One month after the sale of the property at sheriff's sale and after the recording of the sheriff's deed, on March 20, 2009, ReCasa sold the real estate to Sanders. A month after, MERS assigned the mortgage to Citimortgage, Inc. ("Citi").[262] The MERS assignment was recorded on April 20, 2009.[263] On October 23, 2009, Citi attempted to intervene, seeking relief from default judgment.[264] The trial court allowed Citi to intervene and vacated the default judgment.[265] After several additional filings and a hearing, the trial court issued an order vacating its prior order and reinstating the default judgment.[266]

Citi appealed, arguing that the trial court erred in not setting aside the default judgment.[267] Citi's principal contention was that "ReCasa's failure to name MERS as a party defendant rendered its foreclosure judgment ineffective as to MERS and its assignee, Citi."[268] In order to determine whether MERS was required to be specifically named as a defendant to ReCasa's foreclosure action, the court needed to determine the relationship between MERS and the lender, Irwin Mortgage.[269] The court looked to the Kansas decision in *Landmark National Bank v. Kesler*,[270] a case with extremely similar facts to the case at bar.[271] In *Landmark*, the Kansas Supreme Court determined that "MERS was

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255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 13-14.
261. *Id.* at 14.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 14-15.
267. *Id.* at 15.
268. *Id.*
269. *Id.* at 16.
270. 216 P.3d 158 (Kan. 2009).
271. *See id.*

little more than a 'straw man' for [the lender.]"[272] The Indiana Court of Appeals found the reasoning of *Landmark* to be persuasive given the factual similarities to the case before the court.[273] In keeping with the reasoning of *Landmark*, the court held that:

> when Irwin Mortgage filed a petition and disclaimed its interest in the foreclosure, MERS, as mere nominee and holder of nothing more than bare legal title to the mortgage, did not have an enforceable right under the mortgage separate from the interest held by Irwin Mortgage.[274]

Thus, the trial court did not abuse its discretion by declining to set aside the default judgment.[275]

In her dissenting opinion, Judge Brown found that one fact differed substantially between the case at bar and *Landmark*.[276] In *Landmark*, the mortgage listed MERS as acting "'solely as the nominee' for the lender."[277] However, in the case at bar, the mortgage listed MERS as both nominee and mortgagee.[278] Judge Brown also noted that while the notice provisions of the mortgage list Irwin Mortgage's address, the section of the mortgage listing MERS as mortgagee also lists MERS address.[279] As a result of these differences between *Landmark* and the case at bar, Judge Brown concluded that MERS was more than a mere "straw man" and had an enforceable right.[280] This case has been granted transfer but has not been decided prior to the publication deadline of this Survey.[281]

C. Drafting

Drafters of mortgage agreements would be wise to heed the Indiana Court of

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272. *Barabas*, 950 N.E.2d at 17 (citing *Landmark*, 216 P.3d at 165-66).

273. *Id.*

274. *Id.* at 17-18 (citation omitted).

275. *Id.*

276. *Id.* at 18-19 (Brown, J., dissenting). Judge Brown also found that the majority opinion misinterpreted the language of Indiana Code section 32-29-8-3, which requires an interested party to redeem the property within one year of the sale. *Id.* at 18. The majority held that Citi failed to comply with this section as Citi sought to have the default judgment set aside more than a year after the foreclosure and was not absolved due to failure to name MERS. *Id.* at 17-18 (majority opinion). Judge Brown noted that the majority's use of the foreclosure date was in error as the statute specifically lists the one year period beginning on the date of sale. *Id.* at 18 (Brown, J., dissenting). On rehearing the majority agreed with Judge Brown on this point. *See* Citimortgage, Inc. v. Barabas, 955 N.E.2d 260 (Ind. Ct. App. 2011), *trans. granted*, 2012 Ind. LEXIS 153 (Apr. 10, 2012)).

277. *Barabas*, 950 N.E.2d at 18 (Brown, J., dissenting).

278. *Id.* at 19.

279. *Id.*

280. *Id.*

281. *Barabas*, 955 N.E.2d 260.

Appeals decision in *U.S. Bank National Ass'n v. Seeley*.[282] The mortgage agreement in the case had choice-of-law language that provided that "Ohio and Federal law govern the Lender's interest and charges."[283] Despite the choice-of-law language in the agreement, the court held that Indiana law, not Ohio law, governed.[284] The court found the following factors relevant to determining the applicable law that the agreement: (1) is entitled "Indiana Open-End Mortgage;" (2) was executed in Indiana; (3) "specifically refers to Indiana Code section 31-1-2-16 (now Indiana Code section 32-21-4-1)"; and (4) makes no reference to specific Ohio law while citing an Indiana statute.[285] The court determined that the only applicability of the choice-of-law language is to govern "interest and charges" where interest does not mean "a right, claim, title or legal share in something" but specifically to "the compensation allowed by law or fixed by the parties for the use or forbearance of borrowed money."[286] The court noted that the lender "could have easily made it clear in any number of ways that it intended Ohio law to govern the [m]ortgage and the entirety of the [a]greement, but it did not."[287] The court did not indicate specifically what the lender could have done to show its intent that Ohio law should govern the entire agreement.

IV. PROPERTY USE AND NEGLIGENCE

During the survey period, the Indiana Court of Appeals decided a case that follows and expands upon a case decided during the previous survey period.[288] In *Marshall v. Erie Insurance Exchange*,[289] a case with issues of first impression, the Indiana Court of Appeals held that urban property owners must affirmatively inspect trees on their property and take reasonable actions to prevent trees from falling on neighboring property.[290] Prior to *Marshall*, Indiana property owners, urban or rural, generally were not responsible when a tree on the property owner's land fell on neighboring land causing damage.[291]

In another tree case decided during this survey period, *Scheckel v. NLI, Inc.*,[292] the Indiana Court of Appeals extended the reasoning of *Marshall* to allow liability to attach when tree roots cause damage to neighboring properties.[293] In

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282. 953 N.E.2d 486 (Ind. Ct. App. 2011).

283. *Id.* at 488.

284. *Id.* at 488-89.

285. *Id.* at 488.

286. *Id.* at 489 (quoting BLACK'S LAW DICTIONARY 812 (6th ed. 1990)) (internal quotations omitted).

287. *Id.*

288. *See* Marci A. Reddick, *Recent Developments in Real Property Law: October 1, 2009-September 30, 2010*, 44 IND. L. REV. 1429, 1463 (2011).

289. 923 N.E.2d 18 (Ind. Ct. App. 2010).

290. *Id.* at 26.

291. *See id.* at 23.

292. 953 N.E.2d 133 (Ind. Ct. App. 2011).

293. *Id.* at 137-38.

Scheckel, Stephen Scheckel and NLI owned adjacent lots in Fort Wayne. Scheckel had owned the NLI property prior to transferring it to NLI. A tree stood on NLI's property near a fence marking the boundary line. Scheckel had a sidewalk on his side of the fence.[294] The tree grew into the fence and its roots grew under the sidewalk, causing the fence to buckle and the sidewalk to crack.

Scheckel sued NLI under negligence and nuisance theories. The trial court, relying on the old view that a landowner is not responsible for damage caused by the natural conditions of his or her land, denied Sheckel any relief.[295]

In reversing the trial court's decision, the Indiana Court of Appeals cited *Marshall*, noting that Indiana has expanded the duty of urban or residential property owners to guard against potentially dead or dangerous falling trees.[296] The trial court had distinguished Scheckel's situation because the tree was not dead or dying.[297] The court of appeals rejected that reasoning:

> [W]e see no meaningful difference between the two situations. Indeed, it may be difficult to determine whether a tree is decayed to such an extent that it poses an unreasonable risk of harm to an adjoining property owner, but a tree upon one's property that is growing into a structure on an adjoining property is readily observable. Similarly, a decayed tree falling into a structure on adjoining property may occur instantaneously and without warning, but a tree growing into such structure occurs over an extended period of time.[298]

Accordingly, property owners in urban or residential areas owe a duty to neighboring property owners to reasonably inspect trees growing on their property and guard against any potential damage that may result, whether resulting from the tree being dead or overreaching its bounds.

V. LANDLORD-TENANT

Continuing in the vein of premises liability while shifting into the specifics of the landlord-tenant relationship, the Indiana Court of Appeals, in *McCraney v. Gibson*,[299] addressed a landlord's liability when a third party was injured by a tenant's dog. In *McCraney*, the landlords, the Calows, lived in a house on an adjacent lot to the tenant, Gibson, and were aware of and permitted Gibson to own a dog on the property.[300] After occupying the property, Gibson informed the Calows that the existing fence on the property was insufficient to contain his dog.[301] The Calows were unaware that the dog had escaped the yard on several

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294. *Id.* at 135.
295. *Id.*
296. *Id.* at 136-37.
297. *Id.* at 137.
298. *Id.*
299. 952 N.E.2d 284 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 654 (Ind. 2011).
300. *Id.* at 286.
301. *Id.*

occasions. On one occasion, the dog escaped the fence and injured a third party, McCraney. McCraney filed a complaint against both the Calows and Gibson for damages suffered after being knocked down by Gibson's dog.[302] The Calows moved for summary judgment, claiming that because they did not control the property they had no duty.[303] The trial court granted the Calows' summary judgment motion finding no evidence that either defendant had "actual knowledge of [the dog]'s dangerous propensities prior to the incident at issue in this case."[304]

On appeal, McCraney argued that her action was not governed by the litany of dog bite cases, including *Morehead v. Deitrich*,[305] but rather that the case was governed by either premises liability or assumed liability law.[306] The court in *Morehead* held "that in order to prevail against a landowner for the acts of a tenant's dog, the plaintiff must 'demonstrate both that the landowner . . . retained control over the property and had actual knowledge that the [dog] had dangerous propensities.'"[307] Despite McCraney's argument against the two-prong test applied in *Morehead*, the court chose to apply the two-prong test.[308] As a result, the court held that because there was no evidence in the record that the Calows knew of the dog's violent propensity, there was no genuine issue of material fact.[309] Accordingly, the appellate court upheld the trial court's grant of summary judgment for defendants.[310]

Moving into more common scenarios in the realm of landlord-tenant relations, the court of appeals in *Eppl v. DiGiacomo*[311] addressed the termination of a rental agreement for the purposes of Indiana Code chapter 32-31-3.[312] The tenant, DiGiacomo, entered into a lease agreement for an apartment owned by Eppl that was set to terminate on December 31, 2008.[313] Shortly before the end of the lease term DiGiacomo asked Eppl for permission to remain in the apartment for "a couple more months" because her next residence was not yet available.[314] Eppl consented, creating "an extended month-to-month tenancy" beginning on January 1, 2009.[315] DiGiacomo timely paid all rent due for the months of January and February. In February, DiGiacomo informed Eppl that she intended to vacate the apartment on February 13 and asked Eppl about the

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302. *Id.*
303. *Id.*
304. *Id.* at 287.
305. 932 N.E.2d 1272, 1276 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1202 (Ind. 2011).
306. *McCraney*, 952 N.E.2d at 288.
307. *Id.* at 287 (quoting *Morehead*, 932 N.E.2d at 1276 (internal quotation marks omitted).
308. *Id.* at 289.
309. *Id.*
310. *Id.*
311. 946 N.E.2d 646 (Ind. Ct. App. 2011).
312. This chapter of the code pertains to security deposits relating to lease agreements.
313. *Id.* at 647.
314. *Id.*
315. *Id.*

appropriate location to return the keys.[316] At no point during the parties' discussions was there any mention of proration of the previously paid February rent or the effect of DiGiacomo's vacating the apartment prior to the end of the month.[317] On February 13, DiGiacomo vacated the apartment, dropped off the keys, and provided a forwarding address.[318]

DiGiacomo had no further contact with Eppl until April 10 when she "received an itemization of alleged damages . . . indicating that she had forfeited her security deposit and owed a balance of $87.50 for additional damages."[319] DiGiacomo filed a complaint in small claims court seeking both a refund of her security deposit as well as attorney's fees. Eppl filed an answer contending that he was entitled to the security deposit due to damages to the apartment and filed a counterclaim for the outstanding balance of $87.50.[320] After conducting a bench trial, the small claims court found that DiGiacomo was not liable for the damages and was entitled to a return of her security deposit plus attorney's fees and court costs.[321] The court's decision was based on a finding that: (1) The date of surrender was February 13, which made the reception of the itemization on April 10 beyond the forty-five-day window required by statute;[322] and (2) that the itemization was defective, because it listed fifty-three nail holes when the court found evidence to support the presence of only eight nail holes.[323]

Eppl appealed the judgment on two grounds: (1) The determination that the date of surrender was February 13—alleging that as a matter of law the actual date of surrender was February 28;[324] and (2) that the itemization was not defective.[325] The court of appeals looked to existing case law to determine the actual date of surrender. "Surrender arises by operation of law when the parties to a lease 'take an action that is so inconsistent with the subsisting landlord-tenant relationship as to imply they have both agreed to deem the surrender to

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316. *Id.*

317. *Id.*

318. *Id.* Note that the 45-day requirement discussed below does not begin until the tenant has supplied an address in writing to which the itemization might be sent. IND. CODE § 32-31-3-12(a) (2011).

319. *Eppl*, 946 N.E.2d at 648.

320. *Id.*

321. *Id.* at 648-49.

322. *See* IND. CODE § 32-31-3-14 (requiring that an itemization be sent to a former tenant within 45 days of termination of occupancy of the premises); *see also Eppl*, 946 N.E.2d at 650 ("[I]t is the termination of the lease agreement which triggers the 45-day notice provision." (citation omitted)); *id.* at 650-51 (quoting Floyd v. Rolling Ridge Apartments, 68 N.E.2d 951, 955 (Ind. Ct. App. 2002) ("Termination of a lease agreement occurs when the tenant surrenders the tenancy and the landlord accepts the tenant's surrender." (citation omitted)).

323. *Eppl*, 946 N.E.2d at 648.

324. Meaning that the April 10 date of receipt for the itemization was within the forty-five-day window.

325. *Eppl*, 946 N.E.2d at 648-50.

have taken effect."[326] In order to determine when a surrender has occurred, the court of appeals looked to *Grueninger Travel Service of Ft. Wayne, Indiana, Inc. v. Lake County Trust Co.*,[327] *Floyd v. Rolling Ridge Apartments*,[328] and *Figg v. Bryan Rental Inc*.[329]

In *Grueninger*, the court of appeals held that "the mere delivery of the keys to the landlord *without other acts* to show the landlord accepted the keys as surrender of the premises, [wa]s not sufficient to release [the tenant] from [] liability."[330] In *Floyd*, the tenant had entered into a renewal lease and vacated the premises days before the close of the renewal lease period.[331] The landlord delivered an itemization to the tenant within one month of the tenant vacating the premises.[332] The tenant filed suit claiming that the itemization was untimely and should have been delivered at the end of the original lease period.[333] The trial court found that the itemization was not required at the end of the original lease period.[334] On appeal, the court held that the tenant's actions were inconsistent with surrender and, based upon the tenant's actions, surrender could not occur until the end of the renewal lease term.[335] In *Figg*, the tenant's attorney returned the keys to the landlord, stating that the tenant left the apartment.[336] The landlord ordered the tenant to continue paying rent "until the end of the lease term or until a [new tenant] was found."[337] The tenant agreed to pay a month's rent for the last month of the term.[338] The tenant then sought the return of his security deposit and the rental payments after he vacated the premises.[339] In affirming the trial court judgment for the landlord, the court of appeals in *Figg* "found that the landlord's conversation with [the tenant] . . . 'was not a decisive, unequivocal act . . . which manifest[ed] [his] acceptance of [the tenant's] surrender.'"[340]

Here, the court of appeals held that because DiGiacomo paid rent through the end of February and never sought a pro rata refund of rent for February after the 13th, she did not indicate a desire to end the lease prior to February 28.[341]

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326. *Id.* at 651 (quoting Mileusnich v. Novogroder Co., 643 N.E.2d 937, 939 (Ind. Ct. App. 1994)).

327. 413 N.E.2d 1034 (Ind. Ct. App. 1980).

328. 768 N.E.2d 951 (Ind. Ct. App. 2002).

329. 646 N.E.2d 69 (Ind. Ct. App. 1995).

330. *Eppl*, 946 N.E.2d at 651 (quoting *Grueninger*, 413 N.E.2d at 1039) (alterations in original).

331. *Id.* (citing *Floyd*, 768 N.E.2d at 955-56).

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 651-52 (citing Figg v. Bryan Rental Inc., 646 N.E.2d 69, 74 (Ind. Ct. App. 1995)).

337. *Id.*

338. *Id.* at 652.

339. *Id.*

340. *Id.* (quoting *Figg*, 646 N.E.2d at 74) (second, third and fourth alterations in original).

341. *Id.*

Additionally, DiGiacomo could not demonstrate "any decisive, unequivocal action on February 13, 2009, that manifested [Eppl's] acceptance of her surrender of the premises."[342] DiGiacomo had to have provided more evidence than the mere delivery of the keys to "demonstrate that Eppl actually accepted the surrender of the premises."[343] The court of appeals held that the small claims court was in error in determining that the itemization was untimely and reversed the trial court judgment.[344]

As to the second part of Eppl's appeal, whether the itemization of damages was defective, the court of appeals held that, in light of the "particularly deferential" standard of review used for small claims judgments,[345] there was sufficient evidence from which the trial court could conclude that there were no more than eight nail holes.[346] At trial DiGiacomo asserted, with no further evidence, that there were only eight nail holes.[347] Eppl asserted that his calculation of fifty-three nail holes was accurate but lacked any corroborating evidence.[348] Eppl had the burden to establish that there were in fact fifty-three nail holes; he did not carry his burden.[349] The appellate court affirmed the small claims court's decision, holding that Eppl was "not entitled to prevail in whole on his counterclaim."[350]

The Indiana Court of Appeals was not alone in addressing landlord-tenant relations. In *Cedar Farm, Harrison County, Inc. v. Louisville Gas & Electric Co.*,[351] the Seventh Circuit was asked to determine under what circumstances Indiana law entitles a landowner in an oil and gas lease to the lessee. Cedar Farm was the owner of a 2485 acre plot of land along the Ohio River.[352] About 2000 acres of the property were considered a "classified forest" by the Indiana Department of Natural Resources.[353] Louisville Gas & Electric Company ("LG&E") acquired a series of leases on portions of the property in 1947 for the storage and extraction of oil and natural gas. In 1996, after acquiring all parcels of the property, Cedar Farm entered into a consolidated lease with LG&E, encumbering 2176 acres of the property.[354]

In 2008, Cedar Farm filed a complaint in state court seeking damages and

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342. *Id.*

343. *Id.*

344. *Id.* at 653.

345. *See id.* at 649 (quoting Mayflower Transit, Inc. v. Davenport, 714 N.E.2d 794, 797 (Ind. Ct. App. 1999)) (internal citations omitted).

346. *Id.* at 653-54.

347. *Id.*

348. *Id.* at 654.

349. *Id.*

350. *Id.*

351. 658 F.3d 807 (7th Cir. 2011).

352. *Id.* at 809.

353. *Id.*

354. *Id.*

eviction of LG&E from the property and termination of the lease.[355] The complaint alleged that

> LG&E: (a) . . . "hack[ed] down trees needlessly and indiscriminately"; (b) removed tree limbs in . . . classified-forest areas, without proper notice to Cedar Farm; (c) installed . . . large, above-ground pumping units . . . on elevated platforms in the middle of a scenic vista overlooking the Ohio River . . . and painted them bright yellow; (d) has tossed concrete rubbish into the brush adjacent to the pump jacks and dumped . . . construction and scrap materials on the property; (e) allowed ruts and other impediments to render some road areas . . . nearly impassable; and (f) installed . . . storage tanks that appear to be leaking unidentified fluids.[356]

LG&E moved for and was awarded partial summary judgment on the claim seeking ejectment, with the court "finding that a disagreement about the use of land was not an expressly provided for rationale for termination, and that the lease specifically provided that damages were the proper remedy for such a disagreement."[357] The district court also believed Cedar Farm did not show how damages would be an insufficient remedy.[358]

On appeal to the Seventh Circuit, Cedar Farm sought review of the summary judgment order and, alternatively, "certification to the Indiana Supreme Court on the question of 'whether Indiana would allow a lessor to terminate an oil-and-gas lease where recurring breaches of the lease threaten to inflict intangible, irreparable harm on the subject property.'"[359] The court noted that Indiana law generally permits the enforcement of "forfeiture or termination . . . in oil and gas leases before the lessee has begun drilling."[360] However, after drilling has begun "courts are reluctant to enforce even explicit forfeiture provisions if damages can adequately compensate the lessor."[361] Furthermore, the burden is upon the plaintiff to demonstrate that damages are inadequate compensation.[362]

The court held that the lease provided for money damages as the prescribed remedy and that in order to overcome the terms of the lease, Cedar Farm was required to provide specific evidence of irreparable harm upon which a trier of fact can find for Cedar Farm.[363] The court recognized that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages."[364]

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355. *Id.* at 810.

356. *Id.* at 809-10.

357. *Id.* at 810.

358. *Id.*

359. *Id.* at 812.

360. *Id.* at 811 (citing Risch v. Burch, 95 N.E. 123, 126 (Ind. 1911)).

361. *Id.* (citing Barrett v. Dorr, 1 212 N.E.2d 29, 35 (Ind. App. 1965); Rembarger v. Losch, 118 N.E. 831, 833 (Ind. App. 1918)).

362. *Id.* (citing *Rembarger*, 118 N.E. at 834).

363. *Id.* at 812.

364. *Id.* (quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987)) (alteration

However, due to the lack of any evidence by Cedar Farm to support such a finding, outside of allegations in the complaint and filings, the court affirmed the trial court's grant of summary judgment.[365] The court also declined to exercise its power to certify a question to the Indiana Supreme Court because Indiana law is clear that forfeiture is disfavored unless money damages are inadequate.[366]

VI. BOUNDARY DISPUTES

In *McAllister v. Sanders*,[367] the Indiana Court of Appeals addressed common law dedication. In 1905, Loretta Sanders subdivided property along Crooked Lake, creating fifty-eight lots and three alleys in Stueben County, Indiana.[368] The alleys were each fifteen feet wide and sixty-five feet long extending from Shady Side Road to Crooked Lake. McAllister and Zirkle owned property across Shady Side Road. Their access to Crooked Lake was relegated to the alley between lots eighteen and nineteen, owned by Williamson and the Grays.[369] In December 2008, Zirkle and the McAllisters filed a complaint to quiet title to the alley by adverse possession and eventually amended the complaint to also include a prescriptive easement claim.[370] Williamson and the Grays argued that Sanders had made a common law dedication of the alley, making the alley immune from arguments of adverse possession and prescriptive easement.[371] The trial court found that Sanders had intended to make a common law dedication and the public had accepted the dedication.[372] The McAllisters and Zirkles appealed.

The court of appeals first set out the requirements for common law dedication: "(1) The intent of the owner to dedicate and (2) the acceptance of the public of the dedication."[373] The court quickly affirmed the trial court on the first element.[374] The court of appeals reasoned that Sanders' intent must have been to dedicate the land for public use because all private lots adjacent to the lake had access to the lake without use of the alleys.[375] The thrust of McAllister and the Zirkle's argument was that the second element for public dedication, acceptance by the public, was lacking.[376] At trial, McAllister and the Zirkles called witnesses who testified that Williamson and the Grays were the only other people

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in original).

365. *Id.*

366. *Id.* at 813.

367. 937 N.E.2d 378 (Ind. Ct. App. 2010).

368. *Id.* at 380-81.

369. *Id.* at 381.

370. *Id.*

371. *Id.*

372. *Id.* at 381-82.

373. *Id.* at 383.

374. *Id.*

375. *Id.* at 384.

376. *Id.* at 383.

who used the alley, and they used it very sparingly.[377] Again, the court of appeals affirmed the trial court holding that even sparse use qualifies as public use.[378] Quoting *Chaja v. Smith*,[379]

> the frequency and number of users of a street is not significant, so long as the street remained free to those members of the public who had occasion to use it. In addition, the term "public" has been interpreted to mean "all those who have occasion to use" the road. Finally, a road can be a public road even if the road is only open at one end and only provides access to one landowner.[380]

Affirming the trial court decision that Sanders had made a common law dedication of the disputed alley, the court of appeals denied McAllister and the Zirkles' adverse possession claim.[381]

CONCLUSION

While this Article is not an exercise in blanket coverage of Indiana cases dealing with all aspects of property law, it has endeavored to highlight the most important decisions handed down during the survey period. Indiana property law continues to evolve each year. This survey period marked yet another year of movement, with several cases of first impression, clarifications of previous decisions, and reiterations of prior case law. Even in areas of law that have been reestablished for well over a century, Indiana property law continues to provide interesting new developments. These developments have potential to impact property owners, practitioners, and the general public for years to come.

377. *Id.* at 384.

378. *Id.* at 384-85.

379. 755 N.E.2d 611 (Ind. Ct. App. 2001).

380. *Id.* at 615.

381. *McAllister*, 937 N.E.2d at 385.