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Actual Knowledge of Inaccuracy in Indiana Real Estate Disclosure Form is Actionable for Fraud

Here on the Hoosier Litigation Blog we do not often have the opportunity to discuss much in the way of real property law. This is generally sad in light of the fact that your author very much enjoys real property law to the point that for the last two years he has co-authored the real property law survey article for the Indiana Law Review. For that reason, and the fact that I think it is a victory for common sense, I am very happy to have the opportunity to discuss this week's decision by the Indiana Supreme Court that seems to have hammered home the final nail in the coffin of the *caveat emptor* doctrine as an excuse for knowingly providing inaccurate material on a real estate sales disclosure form. The case, *Johnson v. Wysocki*, saw the Indiana Supreme Court hold for the first time that a seller could be liable to a buyer for knowingly placing inaccurate information on a sales disclosure form.

The timing of the case could not have been better for me as I was in the middle of drafting written materials to accompany a presentation for continuing legal education that was going to cover, in substantial part, this exact issue. Consequently, I am going to take a moment for a shameless plug. If you are interested in Indiana real property law and need an hour of CLE, join my co-author,

Charles Daugherty, and I for the Indiana Real Property Law Update at the Indianapolis Bar Association's headquarters in Indianapolis on July 15, 2013.

Conspicuous self-promotion concluded. Now let us examine why the *Johnson v. Wysocki* decision is so very important and long overdue.

It all began in 1881 with the case *Cagney v. Cuson*. In *Cagney*, the Indiana Supreme Court determined that a buyer of a piece of land and a house was not permitted to rely upon the representations of the seller so long as the buyer had the reasonable opportunity to investigate the property before the purchase. This fell into the *caveat emptor* doctrine. For those of us less acquainted with Latin phrases, the general translation used is "let the buyer beware." This doctrine placed the onus upon the buyer to inspect the item prior to purchase or else the buyer was stuck with it. This was the law of the land for almost 130 years. Indeed, in a technical sense, it was the law of the land until Tuesday. Oddly, in a hyper-technical sense, it was only the law of the land until 1993. I will explain this in a moment.

It likely goes without saying that this is a relatively harsh concept in the law. This approach to property transactions caused many a seemingly legitimate claim to fall to the wayside. Such an example was the pivotal case *Dickerson v. Strand*. In *Dickerson*, a split (2-1) panel of the Indiana Court of Appeals found that the rule from *Cagney* was still controlling and that despite the creation of the Indiana Disclosure Statutes that mandated a seller fill out a sales disclosure form, there was no recompense for a buyer harmed by a seller's conscious misrepresentations.

It was not the majority's decision that made the case pivotal. The importance was the analysis provided by the dissenting Judge Nancy Vaidik. Judge Vaidik was of the opinion that the adoption of the Sales Disclosures Statutes in 1993 acted as an abrogation – i.e. abolition – of the *caveat emptor* doctrine in real estate transaction where a sales disclosure form was mandated. Both Judge Vaidik's dissent as well as the majority opinion thought it imperative that the Indiana Supreme Court take a look at the issue. Sadly, though the case seemed on a fast track to the Supreme Court, the sellers' dropped the ball and did not file their petition in time and it was denied as untimely.

The *Dickerson* decision was handed down on April 24, 2009. A year and a half late on October 27, 2010, the issue was once more before the Court of Appeals in the case *Hizer v. Holt*. In *Hizer*, an entirely different panel of the court determined that Judge Vaidik was right and determined that *Cagney* was no longer good law and that a buyer could bring a claim against a seller for knowingly placing false or misleading information in a sales disclosure form. In reaching that conclusion, the court noted that cases such as *Cagney* stem from a time in Hoosier life when people

buying houses and land were much more knowledgeable and sophisticated in assessing property. The court thought in light of the increased urbanization such policies fail to hold much value in the modern world.

In thinking about this concept I find a good example to be my grandfather. My grandfather was born in 1930 at the beginning of the depression and raised on a family farm in northern Indiana. In the early 1960s, employed in a factory, he set out to purchase a farm for his family – in no small part so that my mother could pursue her dream of owning horses. When my grandfather negotiated the purchase of what became the family farm he was able to complete a thorough inspection of the farmhouse on his own without batting an eye. He was able to identify all of the structural problems– of which there were very many – prior to agreeing on a purchase price and he completely renovated the home making it the beautiful farmhouse that it is today. Despite not being an engineer nor having worked in home construction, the man had the skill to do that to the farmhouse, build two barns, build my parent's home – which was next door – and build a gorgeous lake cottage in northern Minnesota. Despite having helped the man on building one of the barns from the ground up and other construction projects, I would not have the slightest idea what to look for in assessing a piece of property today.

Just nineteen days after *Hizer*, the same judge that authored *Hizer* authored the decision in *Vanderwier v. Baker* that adopted the *Hizer* approach. The following February, Judge Vaidik, who provided the basis for *Hizer* in her *Dickerson* dissent, was able to author an opinion adopting the *Hizer* approach. Despite the clear trend that was developing in support of *Hizer*, there was still some trepidation toward the lasting value of *Hizer*. The reason for this is because the law is not settled until the Indiana Supreme Court has spoken on the matter. At this point, the court had not had a chance to do so.

As Charlie and I counseled our readers in the survey article from this past fall:

> 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.

Nevertheless, it was still an open question until Tuesday. It was then that the Indiana Supreme Court officially adopted the view of Judge Vaidik's dissent in *Dickerson* and held:

> Thus, for those types of residential real estate transactions to which they apply—and for the property features which are addressed within them—we hold that Indiana's Disclosure Statutes abrogated the common law principles originally set forth in *Cagney*. In such transactions, the seller may be liable for fraudulent misrepresentations made on the Disclosure Form when he or she had actual knowledge that the representation was false at the time he or she completed the form. But because statutes in derogation of common law are strictly construed. . . we view our common law principles as being undisturbed for transactions falling outside the scope of the Disclosure Statutes.

An important note in all of this that you may have picked up throughout reading is the requirement that seller actually know that the information in the disclosure form is inaccurate. This requirement exists because Indiana Code section 32-21-5-11 specifically states:

> 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.

To return to my earlier point about how technically one may say it was the law of the land until Tuesday stems from the fact that on all common law issues the issue is not final until the Indiana Supreme Court rules upon it. The reason that a hyper-technical reading shifts the date back to 1993 is because ultimately the Supreme Court determined that the 1993 statute was an abrogation. To that end, this means that in a hyper-technical sense the law of the land changed in 1993. That said, a hyper-technical reading does nothing to address the reality experienced by people such as the buyers in *Dickerson*.

To summarize, the *Johnson v. Wysocki* decision capped a 132-year evolution of Indiana law that now permits a buyer of real estate to sue a seller for intentional misrepresentations in an Indiana Real Estate Sales Disclosure Form. However, in circumstances where the seller is not obligated to fill out a sales disclosure form for

whatever reason, the doctrine still survives.

Join us again next time for further discussion of developments in the law.

Sources

- Charles B. Daugherty & Colin E. Flora, *Survey of Recent Developments in Real Property Law*, 45 IND. L. REV. 1305 (2012), available free of charge at http://mckinneylaw.iu.edu/ilr/pdf/vol45p1305.pdf.

- Charles B. Daugherty & Colin E. Flora, *Survey of Recent Developments in Real Property Law*, 46 IND. L. REV. ____ (forthcoming Fall 2013).

- *Johnson v. Wysocki*, ---N.E.2d---, No. 45S04-1211-CT-634, 2013 WL 3193341 (Ind. Jun. 25, 2013).

- *Cagney v. Cuson*, 77 Ind. 494 (1881).

- *Dickerson v. Strand*, 904 N.E.2d 711, 716-18 (Ind. Ct. App. 2009) (Vaidik, J., dissenting), *reh'g denied*, *petition to trans. denied as untimely*.

- Indiana Sales Disclosures Statutes – codified at Ind. Code chapter 32-21-5.

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

- *Vanderwier v. Baker*, 937 N.E.2d 396 (Ind. Ct. App. 2010).

- *Wise v. Hayes*, 943 N.E.2d 835 (Ind. Ct. App. 2011).

- An excellent read on the application of the *caveat emptor* concept in other business related transactions: M. Neil Browne, Kathleen M. S. Hale, & Maureen Cosgrove, *Legal Tolerance Toward the Business Lie and the Puffery Defense: The Questionable Assumptions of Contract Law*, 37 S. ILL. L.J. 69 (2012), available free of charge at http://www.law.siu.edu/Journal/37Fall/3%20-%20Browne,%20Hale,%20Cosgrove.pdf.

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