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2005 NOVEMBER-DECEMBER VOLUME 29 PAGE 41

ARTICLES

MOLD DISCLOSURE

Fungus: it can be mischievous and malevolent, or beneficial and benign. For example, certain types of fungus are essential for the creation of antibiotics and many things we consume from bread to beer. However, many believe that a type of fungus, mold, can be toxic to the human body if ingested or inhaled. *Indoor Air Quality Info Sheet: Mold in My Home, What Do I Do*, California Department of Health Services (June 2004) at 1. A particular strain of mold, Stachybotrys, can produce toxic compounds called mycotoxins, which have been blamed for causing health problems and have raised liability issues in residential home sales. *Id.* Yet, some experts believe that scientific research regarding the adverse effect of mold on humans in indoor environments has been unable to conclusively prove a causal link. *Issue Paper: Mold*, Mortgage Bankers Association (July 2004) at 2.

Mold grows in just about any place that is moist and has a food source. *Indoor Air Quality Info Sheet*, at 1. It feeds on cellulose products, such as paper, wood, insulation, dry wall, and even carpeting. This makes homeowners who have experienced any water leakage or flooding particularly concerned. *Id.*

For most people, the purchase of a house is the biggest investment they will make, an investment not only in a safe and comfortable place to live, but also one in future hopes and aspirations. A buyer's desire to have peace of mind in a newly purchased home can sometimes be at loggerheads with a real estate seller's goal to limit his or her own liability for defects in the property after the sale. In an effort to mediate between these conflicting interests, some states require sellers and real estate brokers to disclose material defects in the property about which they have actual knowledge before the sale.

Duty to Disclose Mold

The potential dangers of mold in inhabitable structures have caused an increase in litigation involving owners, insurers, real estate brokers, and sellers. See *Coldwell Banker Residential Brokerage Co v Superior Court*, 117 Cal App 4th 155 (Cal App Ct 2004) (action by buyer's son for illness caused by mold undisclosed by seller and broker against seller, broker, and insurance company). However, the seller's duty to disclose problems varies depending on the particular circumstances and on the applicable state's law. For example, in Illinois, a seller has a duty to the buyer to disclose known material defects in the property. See *Provenzale v Forister*, 18 Ill App 3d 869, 743 NE2d 676, 252 Ill Dec 808 (1st D 1974); *Curtis Inv Firm v Schuch*, 321 Ill App 3d 197, 746 NE2d 1233, 254 Ill Dec 185 (3rd D 2001) (applying the Residential Real Property Disclosure Act, 765 ILCS 77/1; see also, *Hook v Bonner*, 265 Wis 2d 938, 664 NW2d 683 (Wis App Ct 2003) (relying on the Restatement (Second) of Torts Section 353 (1965)). In contrast, however, Indiana courts have held that the seller's duty to disclose a defect arises only when the buyer makes inquiries to the seller concerning that defect. See *Fimbel v DeClark*, 695 NE2d 125, 128 (Ind Ct App 1998).

To guide the courts in deciding these types of cases, some state legislatures have enacted laws regarding a seller's disclosure to buyers of the known presence of mold in the structure. Some of these laws provide the seller with some immunity from liability for the buyer's damages caused by the mold by allowing the seller to disclose

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INSIDE

MOLD DISCLOSURE, cont'd. 42

CASENOTES 43

NEWSMAKERS 47

2005-2006 CALENDAR 48

such information. See Montana Mold Disclosure Act 70-16-701 *et seq.* In contrast, California's Toxic Mold Protection Act explicitly creates a duty for the seller of commercial or industrial property to disclose known information about mold. See *Cal Health & Saf Code Section 26140* (2004).

Other state legislatures have chosen to avoid legislation bearing directly on mold disclosure, under the belief that there is not enough data to prove either the danger of mold or the level of exposure at which mold becomes dangerous. Some of these legislatures have created commissions to further research the problem. Illinois passed House Joint Resolution 12 with such a goal in mind. House Joint Resolution 12 directed the formation of a joint task force to research the mold problem in indoor environments and report findings and recommendations for new legislation to address the issue. However, it is questionable whether the joint task force will be able to ascertain the specific levels of mold that should be proscribed. The California Department of Health Services, researching under similar legislation, was unable to reach a conclusion regarding at what level of exposure mold becomes dangerous, in part because different people may be more allergic than others to the same level of mold toxins. *Indoor Air Quality Info Sheet*, at 1. The 93rd Illinois House of Representatives considered House Bill 4593, which would have created the Toxic and Pathogenic Mold Protection Act, requiring a seller of residential real property to disclose the existence of mold in the indoor environment to prospective buyers. The proposed act relied on set permissible exposure limits established by the Department of Public Health. However, the bill did not pass, likely due to the fact that a determination of these exposure limits has so far proven elusive for researchers.

Some legislatures have decided to focus on state licensing requirements for building inspectors. The Wisconsin legislature had been considering Assembly Bill 660, a bill that would have established certification requirements for the performance of mold identification and abatement. However, AB 660 did not become law in 2004. Interestingly, Indiana's Code Section 25-20.2 requires home inspectors to complete inspection reports that explicitly state that the inspection does *not* address mold, presumably in an effort to squelch liability for sellers as well as inspectors.

The U.S. House of Representatives Subcommittee on Housing and Community Opportunity of the 108th Congress was considering House Resolution 1268, an amendment to the Toxic Substances Control Act, which would have required the disclosure of mold in inhabitable real estate sales and leases. However, the proposed act did not pass in 2004. In fact, House Resolution 1268 is the second such legislation proposed to end in subcommittee; the first was killed in 2002.

While California has launched headlong into mold legislation, many other state legislatures are trying to learn more about the potential dangers of mold before passing similar legislation. As a result, some state courts are weighing in on the question of whether a seller has a duty to disclose any known existence of mold in residential real estate. However, litigation on this issue is still sparse at best in Illinois, Wisconsin, and Indiana.

Illinois

While there are no cases in Illinois dealing directly with a seller's liability for nondisclosure of known mold problems, there is reason to believe that the Residential Real Property Disclosure Act (the Act) would require such a disclosure. The Act provides a checklist disclosure form detailing several material defects that the seller must fill out and deliver to the buyer before closing. While the presence of mold is not specifically detailed on the form, the form nevertheless requires the seller to disclose known material defects in the walls, roof, ceilings, floors, heating, air conditioning, or ventilation systems—all places where mold can grow or spores can be circulated throughout the house. 765 ILCS 77/35. Furthermore, the form requires disclosure of any known flooding or leaking, essentially any event that would cause the moisture necessary for mold to grow. *Id.*

The form states that, "a 'material defect' means a condition that would have a substantial adverse effect on the value of the residential real property or that would significantly impair the health or safety of future occupants…" *Id.* The ultimate issue of whether the presence of mold is a material defect within the contemplation of the statute is a complicated one because there are currently no standards for testing or determining at what point the level of mold spores in an environment becomes dangerous. The Illinois Department of Public Health believes that "[w]hile some reports exaggerate the severity of possible health effects is that it is important to handle all molds with caution." *Environmental Health Fact Sheet: Stachybotrys Chartarum (atra) – What You Need to Know*, Illinois Department of Public Health (October 2004). Many realtors in Illinois have recently started to require sellers to fill out a "Mold Disclosure" or "Mold Notice" form, in an effort to stave off any potential mold liability, but these forms are not required by state law, and are usually only required under the terms of the parties' real estate contract.

Indiana

There is not any case law in Indiana on the mold disclosure issue. Furthermore, a seller's liability would hinge on whether the buyer made an inquiry to the seller regarding a mold problem, because Indiana courts do not require automatic disclosure in residential real estate transactions. See *Fimbel*, 695 NE2d at 128. However, even if the buyer made an inquiry and the seller did not disclose the known presence of mold, there would still be the issue of whether the existence of the mold is a material defect. Until either the case law develops further in this area or the Indiana legislature speaks on mold disclosure,

the safest route may be to take the one advocated by the Illinois Association of Realtors and have sellers fill out mold disclosure forms prior to closing.

Wisconsin

The specific issue of whether a seller of residential real property must disclose the known presence of mold in the inhabitable structures has yet to be litigated in Wisconsin. However, the common law duty of a seller to disclose known material defects in the residential property is similar to Illinois's statutory duty.

Conclusion

It may be to the seller's advantage in terms of liability to disclose the presence of mold, even if the seller has no reason to believe that the mold is dangerous. On the other hand, disclosure may harm the seller's other interests as the buyer may use the seller's disclosure of mold as a bargaining chip in negotiating the terms of the contract, or worse for the seller—choose not to enter into the sales contract at all. Certainly, the significant media attention given to mold problems and frequent comparisons of mold to being the "new asbestos," may strike fear in the hearts of many homeowners, as well as potential homeowners. For example, see "Toxic Mold: The Asbestos of a New Generation," Adrianne Mand, *FoxNews.com* (October 12, 2000); but also see "Toxic Mold—It's Not the New Asbestos," Barry MacNaughton, *Los Angeles Business Journal* (November 4, 2002). Regardless, it's important to discuss the issues surrounding mold problems with your real estate clients so all parties are better able to assess the possible risks involved.

CASENOTES

***Casenotes** includes short case summaries broken down by state and topic. In this manner, we hope to report recent developments more fully and more promptly. A summary marked with ➲ designates a case of particular importance.*

ILLINOIS:

Contracts

Nave v Heinzmann, 344 Ill App 3d 815, 801 NE2d 121, 279 Ill Dec 829 (5th D 2003).

Facts: Heinzmann entered into a written contract to sell real estate to Nave. Nave was to pay a total of $25,000, paying $15,000 with the balance remaining due and payable upon delivery of the deed. The contract included a repurchase provision, requiring Nave to sell back the property at the purchase price plus interest. This contract was just one in a series of such contracts that operated as loans where Heinzmann would buy back the property from Nave after allowing Nave to farm the land. The contract also required Nave to pay Heinzmann for existing seed, fertilizer, and crop expenses.

Nave tendered the $15,000 earnest money to consummate the sale, but did not pay the balance of $10,000, which was due, according to the contract, upon delivery of the deed. Heinzmann did not deliver the deed. After Nave tendered the $15,000 two years passed before Nave made a written inquiry to Heinzmann concerning the contract and nearly five years passed before Nave filed suit for breach of contract for Heinzmann's failure to deliver the deed. Nave sought specific performance, and interest on the $15,000 earnest money paid to Heinzmann. The trial court only awarded Nave $15,000 restitutionary damages, and Nave appealed.

Holding: Affirmed. Nave was not entitled to specific performance because the breach was of a mortgage contract, not a land sales contract. The Mortgage Act, 765 ILCS 905/5 provides that, "[e]very deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage." Evidence suggested that, at the time of execution, the parties intended the contract to serve as a mortgage, as opposed to an absolute conveyance of the land. Specific performance, while a proper remedy for breach of a land sale contract, is not a proper remedy for breach of a mortgage contract. Recovery of interest was not appropriate because Nave did not demand performance within a reasonable time or file a timely application to the court.

Easements

River's Edge Homeowners' Association v City of Naperville, 353 Ill App 3d 874, 819 NE2d 806, 289 Ill Dec 310 (2nd D 2004).

Facts: The city of Naperville approved a residential real estate development called River's Edge, conditioned on the developers' agreement to grant the city an easement on the property instead of a grant of property for a public park to the city. The agreement stated that the city was to receive "a dedicated walk easement" five feet wide, and referred to the easement as a "walkway" throughout the document. The developers constructed a walkway measuring 8.7 feet wide on average. Later, the city proposed to reconstruct the easement, widening it to 12 feet, so that it could accommodate bicycle traffic as well as pedestrians. The River's Edge Homeowners' Association (the Association) opposed the expansion of the easement and filed suit seeking a declaratory judgment that the city's proposal to expand the easement exceeded the city's easement rights on the property. Both parties moved for summary judgment.

The trial court denied the parties' motions for summary judgment and after a bench trial, finding that the original intent of the drafters of the easement contemplated bicycle traffic and as a result, the proposed reconstruction was not an expansion of the easement for which just compensation was due to the Association. The trial court found that the intent of the drafters was clear in looking at the language of the easement documents, the public use intended for the easement, evidence concerning the meaning of a "walkway" at the time the easement documents were drafted, that no measures had been in place prohibiting the bicycle traffic on the easement, the actual size of the easement constructed by the developers, and the fact that the easement was given in lieu of a public park. The Association appealed.

On appeal, the Association argued that the city's proposed reconstruction of the easement constituted an impermissible expansion of the easement in light of the unambiguous terms describing the easement in the easement documents. The city argued that the interpretive four corners rule should not apply in this case, and instead the "provisional admission" approach, under which consideration of parol evidence concerning the context of the contract, should apply.

Holding: Reversed. The court noted that while the four corners rule has been questioned in Illinois appellate cases, the rule is still binding precedent under the Illinois Supreme Court jurisprudence as the means to construe unambiguous terms in contracts. Consideration of extrinsic or parol evidence is not proper for a court when the terms of the agreement are unambiguous. The court held that the trial court erred in denying the Association's motion for summary judgment because the term "walkway" as used in the easement document clearly limited use of the easement to pedestrian traffic.

Mechanic's Lien Act; Fraud

Peter J Hartmann Co v Capitol Bank & Trust Co, 353 Ill App 3d 700, 817 NE2d 913, 288 Ill Dec 263 (1st D 2004).

Facts: A contractor working on a piece of property owned by Capitol Bank & Trust (Capitol) entered into a contract with Peter J. Hartmann Company (Hartmann), which was in the business of removing and disposing of contaminated soil. Hartmann was to remove and dispose of contaminated soil on the property in exchange for $9,700. Hartmann completed the work, but was paid only $2,500.

Consequently, Hartmann sought compensation from Capitol by filing a complaint on theories including foreclosure of a mechanic's lien, and breach of contract. Although a jury found in favor of Hartmann's breach of contract claim, the trial court held that Hartmann's recording and registering of multiple notices and claims for lien constituted constructive fraud, and rendered his mechanic's lien unenforceable.

Hartmann appealed the trial court's holding on the mechanic's lien issue, arguing that the case involved one lien for which he spread multiple notices on the record. When the notices are considered as a whole along with the foreclosure suit and the *lis pendens* notice, Hartmann argued that they clearly indicate a single lien claim.

Holding: Reversed. The court held that the trial court erred in holding that two successive mechanic's liens filed against same property for failure to pay same subcontractor (Hartmann) for his work constituted constructive fraud. The appellate court found that the second notice of claim for lien that Hartmann filed was clearly an amendment of first, and is consistent with amount sought in foreclosure complaint.

The court emphasized that under the Mechanics' Lien Act, lien claims should be defeated on the basis of constructive fraud where a lien claimant files multiple liens that create the appearance of an encumbrance on the property that is substantially greater than the amount the claimant is owed. However, in this case, the court found no there document that on its face overstated the amount due, and no evidence of the required intent to defraud. Instead, the court held that the notices and claims for the lien Hartmann recorded and registered state a single contract date for the same described work on the exact same property with the same completion date. The court further held that amendment of such a notice does not indicate fraud.

Zoning; Due Process

Klaeren v Village of Lisle, 325 Ill App 3d 831, 817 NE2d 147, 288 Ill Dec 22, (2nd D 2004).

Facts: Meijer Inc. sought to build a new store in the Village of Lisle. Accordingly, Meijer purchased a parcel of land, and then sought to obtain a special use permit to develop on the parcel. The village held a public hearing regarding the permit. At the hearing, a group of village residents who opposed the store's development, sought to cross-examine a number of witnesses speaking on behalf of Meijer. The residents were permitted to make comments opposing the store's development, but the village mayor denied the residents' request to cross-examine Meijer's witnesses. Following the hearing, the village board approved the plan and made arrangements to vote to approve the special use permit and parallel rezoning, annexation, and subdivision.

The opposing residents filed a complaint against the village seeking an injunction to prevent the board from approving the special use permit. Their injunction was denied because they failed to join all necessary parties. Following that denial, the board adopted the necessary

ordinances, approved the rezoning, and granted the special use permit needed for the project. The community members then filed an amended complaint adding the necessary parties, and the trial court granted a preliminary injunction, holding that it was a violation of due process for the mayor to have denied the community members' right to cross-examine the Meijer witnesses at the permit hearing. The Illinois Supreme Court affirmed the trial court's decision, holding that a municipal body acts in a quasi-judicial capacity when conducting a hearing on a special use petition.

Consequently, the preclusion of the plaintiff's right to cross-examine witnesses was a denial of their due process rights. Upon remand of the case to the trial court, that court further held that the Supreme Court's ruling should be applied retroactively in this case because the Court's holding did not change the law, but instead reaffirmed the law requiring that cross-examination be available to interested parties in a public hearing on a special use application. As a result, the trial court granted summary judgment in favor of the residents. Meijer appealed that decision, arguing both that the Supreme Court's holding constituted a change in the law, and as such, that decision should not be applied retroactively, and that only the special use permit itself should be invalidated, and not the other approvals, resolutions and ordinances that stemmed from the hearing at issue.

Holding: Affirmed. Because the right to cross-examination in a hearing on a special use permit existed before *Klaeren II*, the court held that the Supreme Court's holding in *Klaeren II* in no way enunciated a new change in the law establishing a right that did not exist before this case. As such, the court held that the trial court acted appropriately in retroactively applying the Court's holding to Meijer.

Furthermore, the Court explained that although it is true that only the special use permit approval was of the administrative/quasi-judicial nature necessary to trigger due-process rights, the other actions arising out of the hearing (annexation, rezoning, and subdivision approval) were undertaken "cheek-by-jowl" with the special use permit. As such, the Court held that where there is not a structural separation of the components of a public hearing, the municipal bodies engaged in the joint hearing must afford the participants the most stringent procedural protections of any of the component parts of the joint hearing. Thus, in the case at issue, because the hearings on the other actions were undertaken simultaneously with the special use hearing, the village was required to provide the public the opportunity to cross-examine witnesses on risk of having all of the actions taken as a result of the joint hearing declared invalid. Because cross-examination was prohibited, the entirety of the hearing and the actions taken as a result of the hearing are invalid.

INDIANA:

Liens

White v White, 819 NE2d 68 (Ind Ct App 2004).

Facts: Brian and Lori White were divorced in 1999. At the time of the dissolution, they entered into a property settlement agreement that was approved by the court. That agreement provided that "Husband shall hold a valid Judgment Lien against the property…." Following the divorce, Lori filed for Chapter 7 bankruptcy and sought to avoid Brian's lien. Brian filed an objection to Lori's motion to avoid the lien, claiming that the lien in the settlement agreement was not a judicial lien, but rather a consensual lien.

Brian argued that the lien was a consensual lien because the parties voluntarily negotiated the terms of the settlement agreement and the court did not force the lien upon them. Lori argued that the term "judgment lien" means "judicial lien" under Indiana law. Lori petitioned the Lake Superior Court to determine the classification of the lien. The Lake Superior Court ruled that the lien was a consensual lien and Lori appealed.

Holding: Reversed. The definition of a "judgment lien" is virtually the same as a "judicial lien." The proper characterization of the term, "judgment lien," therefore is as a "judicial lien" and not as a "consensual lien," because the parties used the term "judgment lien" in their settlement agreement. There is no evidence that the parties did not intend to mean any other kind of lien that is not a lien imposed on a judgment debtor's nonexempt property.

Deeds

Payton v Hadley, 819 NE2d 432 (Ind Ct App 2004).

Facts: In August 1999, Roger Harvey entered into a contract whereby he agreed to deliver a warranty deed conveying a parcel of land to James Payton. After failing to deliver the deed by the specified contractual date, Harvey filed a complaint for specific performance, and the court appointed a Commissioner to execute the deed, and all other documents necessary to transfer ownership. In May 2000 the Commissioner executed the warranty deed transferring the property to Harvey, and that deed was recorded on May 17, 2000. On July 28, 2000, Harvey executed another warranty deed conveying the same parcel of land that was conveyed to Payton to Clarence Hadley.

In June 2002, Hadley filed a complaint against Payton, seeking a declaratory judgment that the Commissioner's deed was null and void because of errors in the property description that transferred property to the incorrect person and included property in addition to that which was described in the land sale contracts. Hadley then

moved for summary judgment, which the trial court granted, holding that the Commissioner's deed did not conform to the order that authorized its execution, and as such, it was without legal authority and effect. Payton appealed that decision.

Holding: Reversed. The court held that under Indiana Trial Rule 90(a) a court may direct a warranty deed transfer to be done by some other person appointed by the court, and when this occurs, the act has the same effect as if was done by the original contracting party. Therefore, when the Commissioner executed the deed, it had the same effect as if Harvey had signed the deed himself. As such, if Harvey had signed the deed with errors in the description, the errors would not render the deed void, but would rather leave aggrieved parties with several methods of correcting the error.

In addition, the court held that because the Hadley contended that the Commissioner's deed conveyed more property than Payton was entitled to under his land sales contract with Harvey, it is Harvey's prerogative to seek reformation of the deed through quiet title action, which requires Hadley to show by clear and convincing evidence that the property conveyed to Payton is not what Harvey intended.

Consequently, the court found Hadley was attempting to obtain a "short cut" to a quiet title determination by seeking a declaratory judgment that the Commissioner's deed was void, which would relieve him of the clear and convincing burden of proof, and enable him to avoid a fact-specific determination of whether he was the *bona fide* purchaser of the property at issue. In response, the court reversed the trial court's entry of summary judgment quieting title to the land in favor of Hadley, and ordered further proceedings on the title issue.

WISCONSIN:

Easements

AKG Real Estate LLC v Kosterman, 2004 WI App 232 (Wis Ct App 2004).

Facts: The Chvilceks bought 80 acres of vacant land. In 1960 they deeded four acres of that property, on which there was a house, to their son. The four acres (the homestead) was landlocked and the deed conveyed a thirty-foot easement over the retained parcel for ingress and egress between the homestead and a highway. In 1961, the Chvilceks conveyed a second easement to their son along the same path as the first, widening the easement to sixty-six feet with the intent to someday convert the easement into a public road. This intent was expressed in the deed for the easement by a clause stating that the easement would terminate upon conversion into a public road. In 1998, AKG purchased the Chvilceks' remaining vacant land, with the intention of building a subdivision on it, subject to the easements. Subsequently, the son sold the homestead to the Kostermans.

AKG met with members from the county planning commission who told AKG that the Wisconsin Department of Transportation (DOT) would probably not approve their proposal for turning the thirty-foot easement into public road because it was too close to another public road parallel to it to the south. Later AKG redrew its plans to provide for the construction of a new road, which would cross the Kosternmans' easement, and a cul-de-sac that the Kostermans could use for access to the public road.

The Kostermans refused to allow AKG to modify their easement and AKG filed a complaint seeking a declaration that it had the right to terminate the Kostermans' private road easement upon providing public road access. The Kostermans made the following arguments: (1) The condition subsequent of the easement was not satisfied unless AKG turned only the land included in the easement into a public road and therefore had no right to build another road that interfered with their use and enjoyment of the easement; and (2) The termination of the easement would cause an undue hardship on them due to the location and orientation of their present improvements on the homestead, and thus be barred by equity. The Kostermans moved for summary judgment, requesting a declaration that the 1998 easement remained in effect until AKG builds a public road in its place and that the 1961 easement remains effective and not subject to any such condition subsequent.

The court ruled that the 1998 easement would terminate upon AKG building the public road and, importantly, that it was not required to build the road over the easement to satisfy the condition subsequent for termination of the 1998 easement. However, the court found no reason why the 1961 easement should also terminate. Both AKG and the Kostermans appealed.

Holding: Affirmed and reversed in part. The court affirmed the trial court's determination that the 1998 easement would terminate upon AKG building the public road and that AKG was not required to build the road over the easement by the terms of the condition subsequent in the deed. However, the court reversed the trial court's finding that the 1961 easement remained in full force and effect. The court examined the contemplated benefit of the easement, the underlying assumptions of the parties to the deeds, and the changed circumstances and held that in light of these factors, the court should modify the 1961 easement to provide for its termination upon the construction of a public road for the use of the Kostermans.

Easements

Geyso v Daly, 278 Wis 2d 475, 691 NW2d 915 (Wis Ct App 2004).

Facts: The Geysos and the Dalys live on opposite sides of a county highway. The Geysos owned a right-of-way on their side of the highway, in addition to part of the highway. The Dalys had three routes to access the highway, two of which cross the right-of-way on the Geysos' property. The route at issue, called the "second gate," lay 60 feet away of the Daly's main driveway. The Dalys' increased use of this route allegedly left debris, silt, and gravel deposits on the Geysos' property. The Geysos also noticed that drain tiles originating on the Dalys' property drained onto the Geysos' property.

The Geysos filed suit against the Dalys seeking an injunction prohibiting the following: (1) trespassing onto the Geysos' property except by use of the main driveway; (2) depositing debris, silt, and gravel onto the Geysos' property; and (3) maintaining drain tiles that terminate on and drain onto the Geysos' property.

A jury found the following: (1) The Dalys trespassed on the Geysos' property by use of the "second gate;" (2) The Dalys trespassed on the Geysos' property by depositing the debris, silt, and gravel; and (3) The Dalys maintained a drain outlet within the right-of-way, entitling the Geysos to damages of $62. The Dalys moved to change the jury's answer regarding whether their use of the "second gate" constituted trespass and the trial judge granted their motion, characterizing the Dalys as members of the public and, as such, having unlimited right of access using the "second gate." The Geysos appealed.

Holding: Reversed. On appeal, the court disagreed with the trial court's assertion that, as a matter of law, the Dalys are considered members of the public, rather than merely abutting landowners. The court found that there was credible evidence to support the jury's verdict and set aside the trial court's amendment of that verdict.

The court found that the Dalys' use of the "second gate" was for a private means of ingress and egress rather than for travel along the highway. The court held that the Dalys trespassed on the Geysos' property because their actual use was inconsistent with the rights and usage contained in the general public easement.

The court also found that the Dalys' status as abutting landowners did not give them the right to use the "second gate" because, deferring to the jury's verdict, there was credible evidence to find that the Dalys' already had reasonable access to the highway using the main driveway instead of the "second gate."

NEWSMAKERS

ATG® MEMBERS ELECTED TO ISBA BOARD OF GOVERNORS

ATG board member **John G. O'Brien**, Arlington Heights, Illinois, and ATG member **John E. Thies**, Urbana, Illinois, have been unanimously elected to the Illinois State Bar Association's (ISBA) Board of Governors. Mr. Thies will serve as secretary and Mr. O'Brien as treasurer.

The Board of Governors also elected ATG member **Mark D. Hassakis**, Mt. Vernon, Illinois, along with Mr. O'Brien and Mr. Thies, to the Committee on Scope and Correlation.

In addition, ISBA president Bob Downs made an at-large appointment of Mr. O'Brien to the Illinois Bar Foundation (IBF) board.

Congratulations to all!

ATG® PRESIDENT BIRNBAUM IN THE NEWS

Bar News Praises Birnbaum's Contributions
Peter Birnbaum was featured in the Illinois State Bar Association's October 2005 issue of the *ISBA Bar News*. Titled "Making a difference is par for Birnbaum's life course," written by Stephen Anderson, the article highlights his many accomplishments and numerous awards recognizing his professional contributions and his commitment to community service. You can read the article by clicking "ATG in the News" on our website, www.atgf.com.

Birnbaum Receives Making a Difference Award
The Abraham Lincoln Marovitz Lend-A-Hand Program presented its Making a Difference award to Peter Birnbaum as part of its "My Hero Awards" during luncheon at the Standard Club in Chicago earlier this year.

Lend-A-Hand is a joint program of the Chicago Bar Association and the Chicago Bar Foundation that strives to help young people from disadvantaged Chicago communities succeed in school and reach their full potential by providing grants, attorney mentors/volunteers, and other resources to outstanding tutor/mentor agencies who provide one-on-one mentoring opportunities to young people.

Long active in this cause, Peter has been a big brother and has served on the board of Big Brothers Big Sisters of Metropolitan Chicago, including a term as board president.

Congratulations Peter!

CALENDAR

Visit www.atgf.com for event details.

NOVEMBER

24-25 Thanksgiving Day Weekend - *all ATG offices closed*

DECEMBER

1 ATG Holiday Reception; Harold Washington Library Center, Chicago, Ill.

26 Monday after Christmas, First Day of Hanukkah - *all ATG offices closed*

2006

JANUARY

2 Monday after New Year's Day - *all ATG offices closed*

10 REsource Training; ATG Office, Lombard, Ill.

12 REsource Training; ATG Office, Mt. Prospect, Ill.

FEBRUARY

7 REsource Training; ATG Office, Lombard, Ill.

9 REsource Training; ATG Office, Mt. Prospect, Ill.

MARCH

7 REsource Training; ATG Office, Lombard, Ill.

9 REsource Training; ATG Office, Mt. Prospect, Ill.

APRIL

4 REsource Training; ATG Office, Lombard, Ill.

6 REsource Training; ATG Office, Mt. Prospect, Ill.

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