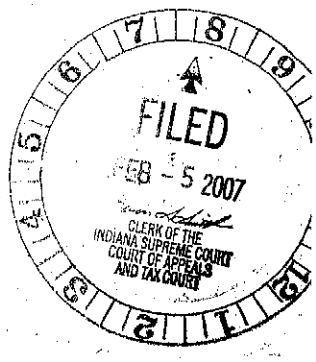


IN THE
INDIANA COURT OF APPEALS

Case No. 49A02-0608-CV-680

BRETT GIBSON,	)	**Appeal from the Marion Superior Court**
	)	
Appellant,	)	**Trial Court Cause No.: 49D10-0506-MF-21457**
	)	
v.	)	**The Honorable David Dreyer, Judge**
	)	
THOMAS A. NEU, and	)	
ELIZABETH A. NEU	)	
	)	
Appellees.	)	

APPELLANT'S REPLY BRIEF

Sean M. Clapp
SEAN M. CLAPP, LLC
8766 South Street, Suite 220
Fishers, IN 46038
(317) 578-9966

Attorney for Appellant, Brett Gibson

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii-iii

I. SUMMARY OF ARGUMENT 1

II. ARGUMENT 1

A. Nowak Never Became Current; Therefore, He Did Not Satisfy the Conditions Precedent to Obtain a Mortgage Release, Which the Parties Agreed Could not be Waived 1

1. The Conditions Precedent of the Release-on-Sale Language Were not Satisfied 2
2. Gibson Could Not have Waived Nowak's Failure to Be Current 2
3. Neus Provide No Authority that the Substantial Performance Doctrine Applies 4
4. In a Promissory Note Context, Failure to Pay Part of the Required Payment is not *De Minimis* 5

B. Neus Waived the Argument that the Gibson Mortgage was Invalid to Impart Constructive Notice Because it was Not Properly Acknowledged, and Their Analysis is Incorrect 5

C. Neus Present No Indiana Authority for Applying Equitable Subrogation in a Traditional Purchase Situation Like this Case 7

D. The Equities and Facts of this Case Dictate that Equitable Subrogation Not be Permitted 16

III. CONCLUSION 17

WORD COUNT CERTIFICATE 18

TABLE OF AUTHORITIES

CASES

Abbott v. Kasson, 72 P. St. 183 10

Ayers v. Adams, 82 Ind. 109 (Ind. 1882) 8-11

Baldin v. Calumet Natl. Bank, 135 B.R. 586 (Bankr. N.D. Ind. 1991) 7

Birke v. Abbott, 103 Ind. 1, 1 N.E. 485 (1885) 9-11, 16

Cavens v. Zaberdac, 849 N.E.2d 526 (Ind. 2006) 5

Cowan v. Murphy, 165 Ind. App. 566, 333 N.E.2d, 802 (1975) 2

Endres v. Ind. State Police, 809 N.E.2d 320 (Ind. 2004) 5, 10

First Federal Sav. and Loan Ass'n of Gary v. Stone, 467 N.E.2d 1226 (Ind Ct. App. 1984) 3

First Federal Savings Bank v. U.S., 118 F.3d 532 (7th Cir. 1997) 16

Fortmeyer v. Summit Bank, 565 N.E.2d 1118 (Ind. Ct. App. 1991) 5, 6

Hancock v. Fleming, 103 Ind. 533, 3 N.E. 254 (1885) 11, 12

La Grange v. Greer-Wilkinson Lumber Co., 59 Ind. App. 448, 108 N.E. 373 (1915) 15

Oglebay v. Todd, 166 Ind. 250, 76 N.E. 238 (1905) 13, 14

Oshinski v. Northern Ind. Commuter Transp. Dist., 843 N.E.2d 536 (Ind. Ct. App. 2006) 5

Peet v. Beers, 4 Ind. 46, (1853) 8-10

Stubbs v. Chase Manhattan Mortg. Corp., 330 B.R. 717 (Bankr. N.D. Ind. 2005) 7

U.S. v. Anrol & Mildred Shafer Farms, Inc., 107 B.R. 605 (N.D. Ind. 1989) 7

Wachstetter v. Johnson, 61 Ind. App. 659, 108 N.E. 624 (1915) 14, 15

Wilshire Servicing Corp. V. Timber Ridge Partnership, 743 N.E.2d 1173 (Ind. Ct. App. 2001), *trans. denied* 16

I. SUMMARY OF ARGUMENT

Neus recitation of the undisputed facts shows that Nowak had defaulted on his payment obligation and was never current. Since these were the two conditions precedent to obtaining a release of the Gibson Mortgage, neither of which could be waived, Nowak was not entitled to a release. Nowak was not entitled to circumnavigate these conditions precedent by "substantially performing" his payment obligations, because, as Neus showed by failing to cite any authority to the contrary, the doctrine of substantial performance does not apply in this context. Furthermore, neither Neus nor their lender are entitled to equitably subrogate their interests to the interests of Nowak's first mortgage holder that Nowak satisfied with the proceeds of the sale to Neus. Equitable subrogation does not apply in a purchase context like this, and Neus have offered no Indiana authority in which it has been. Finally, the equities of this case favor Gibson over Neus and their lender.

II. ARGUMENT

A. Nowak Never Became Current; Therefore, He Did Not Satisfy the Conditions Precedent to Obtain a Mortgage Release, Which the Parties Agreed Could not be Waived

Neus cannot overcome a fundamental flaw in their argument that Gibson was required to release the Gibson Mortgage[1]: the undisputed payment history clearly shows that Nowak had defaulted and was never current. Nowak never once made his payment on time, or in full, and at the time the property was sold to Neus, Nowak was not current and never thereafter became current. The express terms of the Gibson Note and Gibson Mortgage clearly indicate the parties' intent that those conditions precedent could not be waived.

---

[1]Capitalized terms not defined herein shall be the same meaning as in Appellant's Brief.

1. The Conditions Precedent of the Release-on-Sale Language Were not Satisfied

Gibson was required to release the Gibson Mortgage from the Nowak Home in the event of a sale only if "[Nowak] has not defaulted in his obligations to [Gibson] and is current in his payments." Appellant's App. P. 156. The conditions precedent were not satisfied. Nowak agreed in the Gibson Note to repay the loan to Gibson in monthly installments of $7,000.00 due on the first day of every month beginning December 1, 2004. Appellant's App., p. 149. The parties also agreed that failure to make the payments as agreed in the Gibson Note automatically made the entire note obligation due immediately: "[f]ailure to make any payment as scheduled above **shall** advance the due date of all remaining payments to the date of default." Appellant's App., p. 149 (emphasis supplied). This language is mandatory. *Cowan v. Murphy,* 165 Ind. App. 566, 333 N.E.2d, 802, 806 (1975)("Inasmuch as the note was mandatory in nature, the Indiana cases are clear that once the note met the conditions in the acceleration clause, it became immediately due and payable").

By operation of this mandatory language, all remaining payments under the Gibson Note were advanced to the date of default when Nowak did not make the payment as scheduled, including the very first payment due December 1, 2004. Thus, when Nowak did not thereafter pay in full the remaining payments due under the Gibson Note, he was in default and never current. No subsequent payment satisfied the entire note balance, and Nowak was therefore never entitled to have the Gibson Mortgage released.

2. Gibson Could Not have Waived Nowak's Failure to Be Current

Notwithstanding the fact that Nowak had defaulted and was never current, Neus urge the Court to look beyond that undisputed fact and find that Gibson, by accepting late and partial

payments, waived his right to declare a default and thus waived his right to require the satisfaction of the conditions precedent to obtaining the release. Neus contend that the language in the Gibson Note and Gibson Mortgage that gives Gibson the option to declare a default somehow renders the mandatory acceleration of the Gibson Note a nullity. The clauses are not the same and can easily be harmonized. The acceleration clause acts mandatorily to accelerate all of the payments of the Gibson Note as soon as Nowak does not make payments as scheduled. The default provisions thereafter allow Gibson to take action, at his option, if the accelerated amount is not paid. Furthermore, the language giving Gibson the option to declare a default is not tied in any way to the conditions precedent to obtaining a release.

Even if the clauses were somehow tied together, Gibson could not possibly have waived the right to declare Nowak in default by accepting late payments that were less than the accelerated amount. The Gibson Note and Gibson Mortgage clearly and unambiguously state that the option to declare a default could not be waived. Appellant's App., p. 149-50, 155. As stated in the *First Federal Sav. and Loan Ass'n of Gary v. Stone* case cited by Neus, this non-waiver clause is, "effective in preventing acceptance of late payments from operating as a waiver of a subsequent default." 467 N.E.2d 1226, 1232 (Ind Ct. App. 1984). Thus, the fact that Gibson accepted payments that were late and were not the full accelerated amount does not constitute a waiver of his right to declare a default and simply does not relieve Nowak of the conditions precedent of being current and not having defaulted before Gibson would be required to release the mortgage.

3. Neus Provide No Authority that the Substantial Performance Doctrine Applies

Despite the clear language in the parties' agreements requiring Nowak to pay the monthly payments in full and on time, Neus assert that Nowak substantially performed his obligations to Gibson and is therefore entitled to a release. However, even after being challenged to do so, Neus proffered no authority to the Court applying the "substantial performance" theory in the context of repayment of a promissory note or satisfaction of a mortgage. Further undermining their argument, Neus misstate the facts regarding Nowak's payment history by asserting that, "Nowak paid Gibson all of the installments due through at least April of 2005, over a month after the sale date." Appellees Br., p. 10[2]. Neus' recitation of undisputed facts regarding Nowak's payment history show their assertion to be incorrect. In February, 2004, Nowak made a late payment of $6,500, which was $500 less than the $7,000 payment due. Appellees Br., p. 3. Nowak made subsequent payments, but he never paid the $500 shortage, the interest that continued to accrue on the $500, or the interest that had accrued on the other late payments. As the undisputed facts clearly demonstrate, Nowak definitely did not pay Gibson all of the installments due.

---

[2]Neus later admit that Nowak was delayed "in making his $7000 payments and the $500 shortage in one payment," but Neus continue to add parenthetically that the $500 was cured in the April payment. Appellees Br., p. 11. The $500 deficiency was not cured in April, because Nowak paid only a total of $7,000, late and in two installments, and he never paid the additional $500, the interest that accrued on the $500, or the interest that accred on the other late payments. If Neus are suggesting that of the April payments of $7,000, $500 was applied to the March payment, then Nowak continued to be short $500, plus interest for April, plus interest on all of the other late payments.

4. In a Promissory Note Context, Failure to Pay Part of the Required Payment is not *De Minimis*

Finally, Neus argue that the Court should deem *de minimis* the $500, the interest that accrued on the late payments, and the interest that accrued on the $500 that was never paid. What Neus are asking the Court to do is twofold: (1) ignore the express agreement of the parties that the monthly payments be made in full and on time, and (2) interpret the conditions precedent of the release-on-sale language to mean something the parties clearly did not intend. The parties did not agree that the release would be given if most of the payments were made and Nowak was pretty much current. The conditions precedent were absolute, and they were not satisfied.

B. Neus Waived the Argument that the Gibson Mortgage was Invalid to Impart Constructive Notice Because it was Not Properly Acknowledged, and Their Analysis is Incorrect

Neus argue that the recording statutes preclude Gibson from enforcing his mortgage against Neus because the mortgage was not properly acknowledged. The invalidity of the Gibson Mortgage was not raised on summary judgment, and this issue cannot now be raised on appeal. The law in Indiana is well-settled in this regard: "In order to properly preserve an issue on appeal, a party must, at a minimum, 'show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal.'" *Cavens v. Zaberdac,* 849 N.E.2d 526, 533 (Ind. 2006), *citing Endres v. Ind. State Police,* 809 N.E.2d 320, 322 (Ind. 2004). This is true even at the summary judgment stage. *Oshinski v. Northern Ind. Commuter Transp. Dist.,* 843 N.E.2d 536 (Ind. Ct. App. 2006)("Generally, a party may not raise an issue on appeal that was not raised to the trial court, even in summary judgment proceedings"). Moreover, a party may not raise an issue on appeal unless the opposing party has unequivocal notice of this issue. *Fortmeyer v. Summit Bank,* 565 N.E.2d 1118, 1121 (Ind. Ct. App. 1991).

The *Fortmeyer* case is instructive on this issue. In *Fortmeyer* the appellee argued that an issued raised by the appellants was not raised at the trial court. *Id.* at 1120-21. The appellants argued that the issue was raised at the trial court, because they had included a paragraph about the issue in their amended answer. *Id.* Nevertheless, the Court of Appeals ruled that the appellee did not have "unequivocal notice that the 'new' issue was being tried." *Id.* at 1121. The Court of Appeals further said it was significant that the trial judge issued detailed findings of fact and conclusions and "[n]owhere in the judgment is there any indication that this issue was tried by the parties." *Id.* at 1121.

Neus made no summary judgment argument whatsoever to the Trial Court that the Gibson Mortgage could not be enforced against them because it was improperly acknowledged. Neither did Neus designate any evidence to the Trial Court that challenged the acknowledgment. Neus failed to give the Trial Court a bona fide opportunity to pass on the merits of this claim at the summary judgment stage. Moreover, the Trial Court issued detailed findings of fact and conclusions of law in its Entry of Summary Judgment, and nowhere in the Entry is there any indication that this issue was tried by the parties on summary judgment. Therefore, Neus have waived this issue on appeal.

Notwithstanding the fact that the issue of the proper acknowledgment on the Gibson Mortgage has been waived for purposes of this appeal, the fact remains that the acknowledgment was sufficient to satisfy the intent of the statute. Neus cite two bankruptcy court cases for the position that the notary's certificate must provide the identity of the person acknowledging his or her signature and that that person is the same one who executed the underlying instrument. Appellee Brief at 15. In one of those cases there were two signatories, and the single notary's

certificate omitted the names of both of the two signatories who purportedly acknowledged their respective signatures. *Baldin v. Calumet Natl. Bank*, 135 B.R. 586 (Bankr. N.D. Ind. 1991). The court held that the mortgage was not properly acknowledged because there was no indication that either of the signatories acknowledged his or her signature. "There was no compliance whatsoever." *Id.* at 600, *see also Stubbs v. Chase Manhattan Mortg. Corp.*, 330 B.R. 717 (Bankr. N.D. Ind. 2005)(signature of mortgagor and a witness present but notary certificate omitted name of person who acknowledged signature). However, in another bankruptcy appeal case not cited by Neus, the United States District Court ruled that an acknowledgment that did not contain the corporate capacity of the signatory was sufficient because the court was required to review the entire document to ascertain whether the certificate of acknowledgment read in connection with the mortgage identified that acknowledgor with the mortgagor. *U.S. v. Anrol & Mildred Shafer Farms, Inc.*, 107 B.R. 605, 610 (N.D. Ind. 1989).

This case is much more like *U.S. v. Arnol* than the other bankruptcy cases. In the Gibson Mortgage, the notary certificate is on the same page, directly below Nowak's signature. There is only one signature on the mortgage, and that is Nowak's. There is no confusion and no misunderstanding about which of the parties singed or if the acknowledgment even accompanied this signature. When the acknowledgment is read in connection with the mortgage itself, it is plain and clear that Nowak signed the mortgage and acknowledged his signature. The acknowledgment is valid as to Neus.

C. Neus Present No Indiana Authority for Applying Equitable Subrogation in a Traditional Purchase Situation Like this Case

Neus cite several Indiana cases for their assertion that equitable subrogation has been applied in Indiana courts in a traditional, outright purchase context like this one. Yet none of the

Indiana cases cited by the Neus have facts similar to this case; and all of the cases involve situations in which the purchaser, as part consideration of the purchase price, assumed the obligation to pay the lien or mortgage to which it sought to be subrogated. Moreover, of the cases cited by Neus, the two oldest have been significantly criticized and were not followed by one of the more recent cases.

In the first case, *Peet v. Beers*, Nimmons purchased a piece of property by paying part of the purchase price in cash and obtaining a loan from the seller for the remainder. Nimmons granted his seller a mortgage on the property to secure repayment of the seller's loan. *Peet v. Beers,* 4 Ind. 46, (1853). Once Nimmons received title to the property, a judgment Peet had obtained earlier against Nimmons attached to the property. Nimmons then sold the property to Beers, and Beers paid part of the purchase price in cash and assumed payment of the remaining balance of Nimmon's seller's mortgage. Unknowingly, Beers also purchased the property subject to the Peet judgment. After Beers paid off and satisfied Nimmons' seller's mortgage, Peet attempted to foreclose his judgment lien. Beers asserted that he should be subrogated to the priority position of Nimmon's seller's mortgage, because Beers was obligated to and did pay off and discharge the mortgage. The Indiana Supreme Court ruled that Beers was entitled to priority over Peet, because "if a subsequent purchaser from the vendee is compelled to discharge the lien of the vendor, he is entitled to stand substituted in his place." *Id.* Beers paid a debt that Nimmons and he were obligated to pay, and so he was permitted to subrogate.

The facts of the second case, *Ayers v. Adams,* are similar to *Peet,* but dissimilar to the case at bar. In *Ayers v. Adams,* 82 Ind. 109 (Ind. 1882), Ayers acquired the property subject to an existing mortgage that Ayers assumed and agreed to pay. *Id.* Unfortunately, a judgment lien

against the seller, about which Ayers had no knowledge, also encumbered the property. *Id.* Shortly after Ayers took title, he satisfied the mortgage he had assumed. The judgment lien holder then had the property sold at execution sale and became the title holder by way of a Sheriff's deed. Ayers sought to be subrogated to the position of the mortgagee it paid off prior to the execution sale. *Id.* The Indiana Supreme Court allowed the subrogation on these facts, which, as is plain, are completely different to the facts of this case.

In this case, Neus did not pay off a debt they owed. They merely paid the purchase price to Nowak. It was Nowak who paid off his own obligation with the proceeds from the sale. Neither *Peet* nor *Ayers* can be applied in this case because there was no assumption by Neus of Nowak's first mortgage that was paid off in connection with the sale.

In the next case, *Birke v. Abbott*, the Indiana Supreme Court significantly criticized and declined to follow the holdings in *Peet* and *Ayers* and did not permit subrogation. 103 Ind. 1, 1 N.E. 485 (1885). *Birke* contained a very complicated factual situation in which a purchaser of property knowingly acquired the property subject to certain judgment liens. Unfortunately, the property was also encumbered by a mortgage of which the purchaser was not aware. The purchaser satisfied the judgment liens he assumed and asked the court to subrogate him to the priority of the judgment liens so that his interest would have priority over the mortgage. The Indiana Supreme Court refused to allow the purchaser to subrogate himself to the judgment liens.

Birke is significant, because it did not grant subrogation in a factual situation very similar to *Peet* and *Ayers*. First, the Indiana Supreme Court stated that subrogation only arises when one pays the debts of another, not when one pays his own debts:

> Subrogation takes place only where one has performed the obligation of another, or has paid his own debt, the burden of which has, for a valuable consideration,

> been assumed by another, or when he has paid incumbrances for the protection of his own title or interest, the payment of which he has not assumed by contract. The debtor upon whom rests the ultimate obligation of discharging the debt cannot by his payment acquire any right of subrogation. A purchaser cannot be subrogated to the right of an incumbrance which he has agreed to pay.

Birke, 103 Ind. 1, 1 N.E. 485, 489 (1885). Moreover, if a mortgage is satisfied by the one who is obligated to pay it, the mortgage lien is extinguished and the mortgage interest ends:

> If payment of the mortgage debt is made to the mortgagee, or other holder of the mortgage, by a party who is himself personally and primarily liable for the debt, who is in any manner and by any means the actual primary debtor, whose duty it is to pay the debt absolutely and before all others, such payment operates, *ipso facto*, as an end of the mortgage, and the lien is completely destroyed. The party so paying is not subrogated to the rights of the mortgagee; there is no equitable assignment to him of the mortgage security. Even if he should receive a formal assignment, the mortgage could not thus be kept alive, but would be wholly merged and ended.

Birke, 1 N.E. at 489. The Indiana Supreme Court further stated, "[i]t would be a novelty for a purchaser of land to keep on foot his own mortgage against his own real estate." *Id.* 1 N.E. at 489 (quoting *Abbott v. Kasson,* 72 P. St. 183).

In *Birke,* the Indiana Supreme Court also criticized and refused to follow *Peet* or *Ayers.* With regard to *Peet,* the court wrote that *Peet* "is apparently put upon the ground that the purchaser, notwithstanding his assumption, stood in the situation of a surety to the mortgage assumed." *Birke,* 1 N.E. at 490. The Indiana Supreme Court declared that it no longer agreed with that analysis:

> Whatever may have been the rule at or before *Peet v. Beers* was decided, this court, as nearly all others, is now so thoroughly committed to the doctrine that the purchaser who assumes an incumbrance is the principal debtor, and the vendor or other person who was primarily liable, the surety, that it cannot now recede from it.

Id. After criticizing *Ayers*[3], the Indiana Supreme Court stated that it will not permit subrogation when the person seeking subrogation pays off a debt that that person has assumed or otherwise agreed to pay:

> We must accept the alternative of deciding whether or not a purchaser, who by his assumption makes a debt his own, can, after paying it off, keep it on foot, or whether he will be treated as having paid and discharged his own debt. We feel constrained to adopt the latter view.

Id. at 490.

In another Indiana case cited by Neus, the Indiana Supreme Court did apply the doctrine of subrogation; however, the facts are nowhere close to the facts in this case. *See Hancock v. Fleming,* 103 Ind. 533, 3 N.E. 254, 255 (1885). In *Hancock*, Smith was the owner of a piece of real property on which a judgment lien against him attached. *Id.* Smith sold the property to Fleming. Fleming obtained a loan from Hancock and granted a mortgage to Hancock to secure the repayment of Hancock's loan. *Id.* Fleming and her husband deeded the property to Kelsey & Wood subject to the Hancock mortgage. After Kelsey & Wood took title, the judgment lien holder had the property sold at execution sale to satisfy its judgment lien against the property. *Id.* Kelsey & Wood purchased the property at the execution sale and received a Sheriff's deed. Wood later disclaimed any interest in the property. *Id.* In an action to determine the relative priority of the Hancock mortgage and the Kelsey Sheriff's deed, the trial court held that the Sheriff's deed, having emanated from the prior judgment lien, extinguished the Hancock mortgage. *Id.*

---

[3]"Of *Ayers v. Adams* it may be said the question [regarding subrogation] does not seem to have been either presented or considered. It seems to have been conceded on all hands that, if what was received by the creditor constituted payment of the debt assumed, the purchaser was entitled to be subrogated." *Birke,* 1 N.E. at 490.

The Indiana Supreme Court reversed and held that the Hancock mortgage would survive the execution sale, but that Kelsey was allowed to step into the shoes of the judgment lien holder for priority purposes. *Id.* at 256. Thus, because Kelsey had directly paid off the judgment through the execution sale, he was entitled to the priority position of the judgment lien. *Id.*

The facts of *Hancock* are not even close to the facts in this case. In *Hancock* there was a judgment lien that was foreclosed against property already owned by Kelsey & Wood. To protect his own interest in the property, Kelsey paid off the judgment lien and acquired a completely new title through the execution sale. As the purchaser at the execution sale, he, of course, stepped into the shoes of the judgment lien holder. That being the case, he was in exactly the same position he was in prior to his knowledge of the judgment lien: he owned the property subject to the Hancock mortgage. However, the mortgage lien was not foreclosed through the execution sale because Kelsey had previously agreed to pay it. Thus, when Kelsey purchased the property at the execution sale, the judgment lien interests he acquired merged into his prior deed and Kelsey's interest remained subject to the mortgage.

The facts of this case are completely different. Neus did not agree to assume any liens on Nowak's property and did not purchase any interest at an execution sale. Neus merely paid a purchase price for the property and Nowak then paid off his first mortgage with the proceeds, leaving Gibson's Mortgage intact. There was no expectation whatsoever that Neus intended to become a creditor of Nowak or keep Nowak's mortgage alive to encumber their property. Their clear intent was to purchase the property and have the Nowak mortgage released. Thus, the facts of this case do not resemble in any way the facts of any of the cases cited by Neus.

Neus also incorrectly rely on a statement from INDIANA LEGAL ENCYCLOPEDIA to support their position that a purchaser may be subrogated to the rights of the seller's mortgage that was

satisfied as part of a purchase transaction. Appellees Br., p. 19, *citing 26* I.L.E. *Subrogation*, § 9 (2006). However, none of the cases cited by ILE for support of this statement have facts even remotely resembling the facts of this case. In *Oglebay v. Todd,* 166 Ind. 250, 76 N.E. 238 (1905), which is also cited earlier in Neus' Brief, Todd obtained title to property from Woodruff through a deed in which Todd agreed to assume and pay a mortgage Woodruff previously granted on the property. 76 N.E. at 239. Todd later conveyed the property to Eschelman through a deed containing the same assumption and agreement to pay the Woodruff mortgage. *Id.* When the mortgage was not paid, the mortgage holder foreclosed against Woodruff, Todd, and Eschelman and sought to hold them each personally responsible pursuant to the assumption language of their respective deeds. *Id.* After judgment was obtained, Todd paid off the judgment and took an assignment thereof. *Id.* Thereafter, Eschelman quitclaimed the property to Oglebay. Todd and Oglebay disputed the title to the property.

The Indiana Court of Appeals ruled that Todd was a surety for Eschelman and was entitled to subrogate, because Todd paid the obligation that Eschelman had agreed to relieve him of:

> As between them, the amount which [Todd] was compelled to pay to relieve himself from his personal liability on the judgment was not a payment, but a debt was thereby created in his favor, for the enforcement of which, upon the equitable principle of subrogation, he was entitled to keep alive the security of his creditor.

Id. The Indiana Court of Appeals further based its decision to allow Todd's interest in the property to remain in spite of Oglebay's claim of being a bona fide purchaser for value because Oglebay had actual knowledge of the Woodruff mortgage being assumed by virtue of his search of the public record. *Id.* at 240-41.

Obviously, the facts of this case are nothing like *Oglebay.* Todd paid off a debt that he was obligated, with Eschelman, to pay. Having satisfied the obligation Eschelman had agreed to

relieve him of, Todd was allowed to subrogate himself and collect from Eschelman and his sussessor, Oglebay. The *Oglebay* facts are nothing like the Neus' facts, and neither the facts nor the ruling of *Oglebay* apply to this case.

The second case cited for support of the ILE statement is *Wachstetter v. Johnson,* 61 Ind. App. 659, 108 N.E. 624 (1915). *Wachstetter* contains another very complicated set of facts in which a purchaser acquired property by a deed from a husband that did not contain the wife's signature. *Wachstetter,* 108 N.E. at 627. There was also a mortgage on the property that was recorded prior to the husband taking title to the property, which the husband assumed and agreed to pay. *Id.* Husband and purchaser agreed that purchaser would pay part of the purchase price to husband and accept a deed subject to the mortgage. However, the two agreed to let the property be sold at Sheriff's sale for nonpayment of the mortgage, and the purchaser then would purchase from the Sheriff's sale and receive a Sheriff's deed, which they believed would eliminate any other interests in the property. *Id.* Purchaser did not know that husband was married when the conveyances took place, and, under the statutory provisions in lieu of dower in effect at the time, wife was entitled to an interest in the property that her husband owned when they were married. *Id.*

The Indiana Court of Appeals ruled that the Sheriff's deed that resulted from the mortgage foreclosure did not eliminate wife's inchoate interest in the property; however, the purchaser's heirs were entitled to subrogate their interest in the property to the mortgage lien that was the subject of the foreclosure action through which the purchaser acquired the Sheriff's deed. The court reasoned that the wife's interest should remain what it was when it became effective (*i.e.* when her husband acquired title) and that meant subject to the mortgage. *Id.* at 630.

The facts of this case are not in any way related to *Wachstetter,* which is a case involving a foreclosure sale and the inchoate rights of a wife.

La Grange v. Greer-Wilkinson Lumber Co., 59 Ind. App. 448, 108 N.E. 373 (1915), the third case referenced in the ILE section cited by Neus, is also inapplicable on its facts. In *La Grange,* La Grange was a surety on a note from Larcy to American National Bank. 108 N.E. 373-374. In consideration for La Grange agreeing to be surety, Larcy granted a mortgage to La Grange on certain real estate. *Id.* at 374. While Larcy owned the real estate, Greer-Wilkinson Lumber Co. filed its notice of intention to hold a mechanic's lien against the real estate. *Id.* at 373. Larcy later conveyed the subject real estate to La Grange by a deed that stated that the conveyance was made to La Grange in exchange for La Grange accepting primary responsibility for the American Nation Bank note. The deed was given:

> solely in consideration of his release of said Winfield P. Larcy from personal liability on the aforesaid indebtedness but with the further agreement that the lien of said mortgage should remain unimpaired.

Id. at 374. A dispute later arose regarding the relative priority of the parties' interests in the real estate. The mechanic's lien holder asserted that its lien was now prior to La Grange's interest because the mortgage was merged into the deed of from Larcy to La Grange. *Id.* The Indiana Court of Appeals ruled that La Grange had intended that the mortgage not merge into the deed; therefore, the lien of the mortgage was preserved as it related to the mechanic's lien. *Id.*

Once again, *La Grange* is nothing like the facts of this case. La Grange was about whether a mortgage merged with the deed. La Grange was not a purchaser of the real estate in the way Neus were; he was given the deed in exchange for accepting full, primary responsibility for repayment of a debt for which he was already a surety. There are no such facts in this case, and

there is certainly no evidence that was designated to the Trial Court of Neus' intent to keep Nowak's first mortgage alive for their benefit.

Equitable subrogation has not been applied in Indiana in a purchase context like this case, and it should not be applied now. The cases cited in Appellant's Brief that have addressed this traditional purchase setting have refused to allow equitable subrogation to the purchaser or his purchase money lender. *See* Appellant's Brief at 21-24. These rulings are consistent with *Birke*, because if payment of the mortgage debt is made by one who is primarily liable, Nowak in this case, such payment "operates, *ipso facto*, as an end of the mortgage, and the lien is completely destroyed." *Birke*, 1 N.E. at 489.

D. The Equities and Facts of this Case Dictate that Equitable Subrogation Not be Permitted

This Court has stated that a factor in determining where the equities lie is whether a title insurer had an opportunity to review the file and find the recorded lien. *Wilshire Servicing Corp. v. Timber Ridge Partnership,* 743 N.E.2d 1173, 1179 (Ind. Ct. App. 2001), *trans. denied.* The *Wilshire* court quoted the Seventh Circuit Court of Appeals:

> [E]xistence of title insurance [is] a controlling factor when weighing equities in a commercial transaction: "[e]ither they insure or they don't. It is not the province of the court to relieve a title insurance company of its contractual obligation."

Id. at 1180 (quoting *First Federal Savings Bank v. U.S.*, 118 F.3d 532 (7th Cir. 1997)).

It cannot be disputed that Nowak was the bad actor in this case. He did not inform Neus of the Gibson Mortgage, and he did not inform Gibson that he was selling the Nowak Home. He pocketed approximatley $55,000 in proceeds from the sale of the Nowak Home, and he did not pay Gibson.

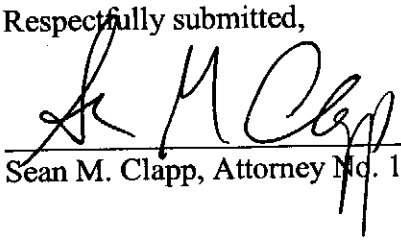
However, as between Gibson and Neus and Neus' lender, it was Neus and their lender who could have best prevented this situation from occurring. The purpose of the recording

system is to put subsequent purchasers and lenders on notice of an interest in property. Gibson did his part in the recording system: he recorded his mortgage. Neus and their lender, however, did not. Neus did not search the record themselves, as is common is modern day real estate transactions; rather, they hired their agent, Investors Title, to do the search for them. They paid Investors Title a premium to insure that there were no encumbrances on the property being purchased. The simple fact is that Investors Title made a mistake and missed the Gibson Mortgage. Because Neus and their lender, through their agent Investors Title, were the ones best able to avoid this loss and failed, it is they who should bear the loss. Finally, Investors Title was paid a premium to do this search, and Investors Title did not do it properly. Either insurers insure, or they don't. For these reasons, equity does not permit the application of equitable subrogation in this case.

III. CONCLUSION

Appellant, Brett Gibson, respectfully requests that this Court reverse the Trial Court's summary judgment in favor of Neus and Washington Mutual and remand the case with instructions to enter summary judgment of foreclosure in favor of Brett Gibson.

Respectfully submitted,

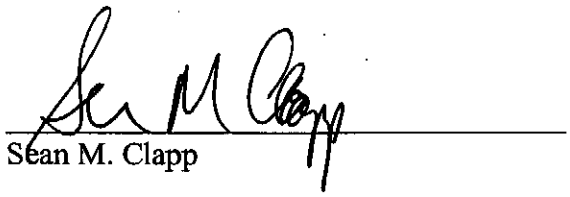


Sean M. Clapp, Attorney No. 13940-49

SEAN M. CLAPP, LLC
8766 South Street, Suite 220
Fishers, IN 46038
Telephone: (317)578-9966
Facsimile: (317) 578-9967
Attorney for Appellant, Brett Gibson

WORD COUNT CERTIFICATE

Pursuant to Indiana Rules of Appellate Procedure 46(A)(11) and 44(F), the undersigned counsel for Appellant, Brett Gibson, hereby verifies that this reply brief contains no more than 7,000 words exclusive of the cover page, Table of Contents, Table of Authorities, Signature block, Certificate of Service, and Word Count Certificate.



Sean M. Clapp

CERTIFICATE OF SERVICE

Pursuant to Indiana Rules of Appellate Procedure, Rule 24, Sean M. Clapp certifies that on February 5th, 2007, he caused copies of the Reply Brief of Appellant to be served on the following counsel of record by first class United States mail, postage prepaid, and addressed as follows:

Craig D. Doyle
James L. Shoemaker
DOYLE & FRIEDMEYER, P.C.
135 N. Pennsylvania, #2000
Indianapolis, IN 46204-2456

Jerlyn S. Southwick
FEIWELL & HANNOY, P.C.
251 N. Illinois Street
Suite 1700
Indianapolis, IN 46204

John R. Carr
Bret S. Clemet
AYRES CARR & SULLIVAN
251 E. Ohio St., #50
Indianapolis, IN 462042186

Rhonda D. Oldham
BARNES & OLDHAM
191 Harding Ave.
P.O. Box 410
Terre Haute, IN 478080410

Sean M. Clapp