STATE OF INDIANA	)	IN THE JOHNSON SUPERIOR COURT NO. 1
	) SS:	
COUNTY OF JOHNSON	)	CAUSE NO. 41D01-1308-PL-000103

JOHN WATKIN AND SUSAN WATKIN, Plaintiff,	)
- V -	)
CARPENTER REALTORS AND SUSAN HODGES, Defendants.	)

FINDINGS OF FACT, CONCLUSIONS THEREON AND JUDGMENT

The above cause of action came before the Court for trial by court on July 12, 2016 and July 13, 2016 on the Amended Complaint filed by Plaintiffs, John Watkin and Susan Watkin, on September 13, 2013 and the Answer to Amended Complaint and Affirmative Defenses filed by Defendants Carpenter Realtors and Susan Hodges on October 4, 2013.

Plaintiffs, John Watkin and Susan Watkin, appeared in person and by counsel, Thomas W. Vander Luitgaren and Emily M. Gettum. Defendant Susan Hodges appeared in person and by counsel, James N. Scahill. Defendant Carpenter Realtors appeared by agent, Thomas Myers, and by counsel, James N . Scahill.

On July 11, 2016, Plaintiffs filed their Motion for Findings of Fact and Conclusions. The Motion for Findings of Fact and Conclusions was granted by the Court. The parties were directed to submit proposed Findings of Fact and Conclusions. Proposed Findings of Fact and Conclusions were submitted by the parties.

Witnesses were sworn. Evidence was presented.

After consideration of the evidence submitted, the arguments of counsel and the written post trial proposed findings of fact and conclusions submitted by the parties, the Court now enters the following Findings of Fact, Conclusions and Judgment. To the extent that any finding of fact should be construed as a conclusion, or vice versa, they shall be so construed.

FINDINGS OF FACT

1. Pursuant to Ind. Trial Rule 56(D), the Court hereby incorporates all factual findings and rulings made in its prior ruling on summary judgment entered on December 29, 2015.

2. Susan Hodges, hereinafter referred to as Ms. Hodges, has been a licensed real estate agent in the State of Indiana since 2004.

3. Ms. Hodges has been a licensed real estate broker since 2005, and at all times relevant in this proceeding, Ms. Hodges was associated with Carpenter Realtors.

4. In the spring of 2012, Ms. Hodges was engaged by the Plaintiffs, John Watkin and Susan Watkin, hereinafter referred to as Plaintiffs or Mr. and Mrs. Watkin, to provide services as a realtor to assist them in their search for a new home.

5. Mrs. Watkin stated that Ms. Hodges represented that she would assist Mr. and Mrs. Watkin in providing her services to help the Watkins in finding a house, helping with the Purchase Agreement and helping to have a successful closing. Record, 7/12/16, 9:25.

5. Mr. Watkin holds a bachelor of science degree in mechanical engineering from Purdue University, and he was worked at Rolls-Royce for the past thirty (30) years. While technically oriented, he denies any expertise in real estate transactions.

6. Mrs. Watkins holds a master degree in mechanical engineering from Purdue University, and she has likewise worked at Rolls-Royce for the past thirty (30) years. She also denies any expertise in real estate transactions.

7. Defendants Ms. Hodges and Carpenter Realtors admitted that the Defendants acted as real estate agent for the Plaintiffs in the purchase of their residence at 7413 Misty Woods Lane, which transaction closed on May 3, 2012. Par. 4, Answer to Amended Complaint.

8. Ms. Hodges had Mr. and Mrs. Watkin to sign an Agency Policy For Buyers on April 12, 2012. In parts relevant, the Agency Policy For Buyers provided:

"As a licensed Indiana Real Estate Broker, Carpenter REALTORS, and its Licensed Associates, hereinafter referred to as "Carpenter", endeavors to actively assist Sellers in the sale of real estate and Buyers in the purchase of real estate by rendering professional services to each.

Under Indiana Law (I.C. 25-34, 1-10-9.5) this document defines the nature of the employment agreement between Carpenter and the client and/or clients in real estate transactions.

In order that the nature of Carpenter's relationship with each party to a transaction is clearly identified and understood by all parties; and

In order that Carpenter may proceed to render its professional services consistent with its directives of its clients, we ask that this document be presented, reviewed and explained to each prospective client and executed prior to our efforts to provide professional services.

Agency Policies - Buyer Representation

Buyer Agency: Carpenter shall represent Buyers of real estate as their Agent and shall render professional services intended to:

(a) Assist the Buyer in locating real estate the Buyer(s) wishes to purchase.

(b) Assist the Buyer in negotiating prices, terms and conditions acceptable to the Buyer(s).

© Generally work toward the Buyer's best interests in the purchase of real estate.

(d) Provide confidentiality and total disclosure of information to Buyer(s).

. . .

Required Duties Disclosure: Indiana Law (I.C. 25-34. 1-1-10-9.5) provides that a Licensee must perform at least the following duties for the Buyer(s):

(a) Be available to receive and timely present Offers and Counter-Offers for the property:

(b) Assist in negotiating, completing real estate forms, communicating, and timely presentation of Offers, Counter-Offers, notices, and various Addenda relating to the offers and counter-offers until:

1. A Purchase Agreement is signed, and
2. All contingencies are satisfied or waived.

© Timely response to questions relating to Offers, Counter-Offers, notices, various Addenda, and contingencies pertaining to the subject property.

(d) Attend, participate and advise the Buyer(s) during the Closing.

. . . Further, a Licensee may lawfully perform duties in addition to those set forth above on behalf of or at the request of the Buyer(s).

A Licensee's duties in a real estate transaction set forth in this Agency Policy for Buyers do not relieve the Buyer(s) from the responsibility to protect his/her own interests. The Buyer(s) should carefully read all documents to assure they adequately reflect the Buyer's understanding of the transaction. If legal, tax or other expert advice is desired, the Buyer(s) should consult a qualified professional.

. . .

It is further understood by the parties herein that, unless specifically agreed to and defined by a separate agreement, all compensation to Carpenter resulting from this agreement shall be paid to Carpenter by the Listing Principal Broker resulting from its Listing Contract with the Seller."
Exhibit H.

The document was signed by Ms. Hodges as Licensee/Associate in representative capacity for Carpenter Realtors as well as by Thomas Prall, President of Carpenter Realtors. The document was also signed by Mr. and Mrs. Watkin as "Client(Buyer)". Id.

9. Defendants admitted that "(t)he Defendants Susan Hodges and Carpenter Realtors as the real estate agent for the Plaintiffs, had certain duties to the Plaintiffs pursuant to I.C. 25-34.1-10-11, specifically including the duty to disclose to them, as the buyers, adverse material facts or risks known by the Defendants concerning the real estate transactions, and the duty to exercise reasonable care and skill." Par. 5, Answer To Amended Complaint.

10. On April 12, 2012, Mr. And Mrs. Watkin made an offer to purchase certain real property at 7413 Misty Woods Lane, Indianapolis, Indiana from Roger French and Judy French by executing a completed Purchase Agreement. Exhibit I.

11. Prior to preparing the Purchase Agreement, Mr. and Mrs. Watkins received a Sellers Residential Real Estate Sales Disclosure form which had been prepared by the owners, Mr. and Mrs. French. Exhibit 1.

12. On the Sales Disclosure form, Mr. and Mrs. French had answered "No" to the question "Are there any encroachments?". The statement was false.

13. On the Sales Disclosure form, Mr. and Mrs. French answered "No" to the question "Are there any violations of zoning, building codes or restrictive covenants?". The statement was false.

14. Ms. Hodges prepared the Purchase Agreement for Mr. And Mrs. Watkin to sign by filling in the blank spaces on the form.

15. Ms. Hodges checked the appropriate box to indicate that Mr. And Mrs. Watkin would order a Surveyor Location Report. In parts relevant, the provision regarding the Surveyor Location Report stated that "Buyer shall receive a SURVEYOR LOCATION REPORT . . . prior to closing . . . reasonably satisfactory to Buyer." It goes on to say: "(I)f Buyer waives the right to conduct a survey, the Seller, the Listing and Selling Brokers, and all salespersons associated with Brokers are released from any and all liability relating to any issues that could have been discovery by a survey."

16. In addition, Ms. Hodges reserved the right for the Plaintiffs to have independent inspections performed at Buyer's expense. Exhibit I.

17. Ultimately, Mr. And Mrs. Watkin and Mr. And Mrs. French agreed upon Counteroffer 5 which provided for a purchase price of $417,500 and which included the provisions for a Surveyor Location Report and inspections.

18. At all times relevant to this case, Carpenter agents used a Closing Check Sheet in a pre-printed format, which was part of it's client files. Ex. Q. The Closing Check Sheet included blank lines calling for the insertion of pertinent information concerning the transaction including but not limited to the contact information for the seller, purchaser, realtors and title insurance company.

19. Carpenter's form Closing Check Sheet also contained a list of "to do" items for the agent to complete as a transaction proceeded towards closing. The Closing Check Sheet included, among other items, blank lines roughly in the following order: "Home Inspection Appointment", "Title Insurance ordered", "Response to/Waiver of Inspection", "Surveyor Location Report ordered", "Pay-off/Assumption statement ordered", "Required Repairs Completed", "Mortgage Loan Approved", "Sold Sign Up", "Closing Date Established", "Closing numbers reviewed w/ Buyer/Seller", "Review documents for original signatures" and "Pre-Closing walk thru".

20. The information on Ms. Hodge's Closing Check Sheet for Mr. and Mrs. Watkin's transaction for the property at 7413 Misty Woods Lane, Indianapolis, Indiana was not completed. Ms. Hodges' acknowledged that she did not use Carpenter's Check Sheet for Mr. & Mrs. Watkin's transaction.

21. The Closing Check Sheet called for a "Pre-Closing walk thru". The "Pre-Closing walk thru" was not performed.

22. The only pre-closing contingencies addressed by Ms. Hodges prior to closing consisted of the physical inspection of the home and the association documents.

23. Regarding the home inspection, Mr. Watkin made arrangements for a home inspection after receiving the name of an inspector from Ms. Hodges. Mr. Watkin contacted Ms. Hodges after he had received the Home Inspection Report pursuant to Ms. Hodges' instruction.

24. Ms. Hodges helped Mr. and Mrs. Watkin to complete an inspection response based upon the report. Mr. And Mrs. Watkin accepted Sellers Inspection Response #2. Exhibit K.

25. Ms. Hodges and Mr. and Mrs. Watkins also discussed the association documents prior to closing after they were delivered to the Watkins as called for by the Purchase Agreement. Mr. Watkins discussed a concern about an item in the documents with Ms. Hodges, but Ms. Hodges assured Mr. Watkins that the language was commonly found in association documents.

26. Margaret Litz, the agent for the seller, ordered the title insurance policy, which was the responsibility of the sellers, through Royal Title. Royal Title acted as closing agent.

27. Royal Title ordered the Survey Location Report from SEA Group Land Surveyors.

28. Sometime during April, 2012, the realtors coordinated a closing date with Royal Title for May 3, 2012 at 4:00 p.m. at the Royal Title office in Indianapolis.

29. SEA Group Land Surveyors performed the field work on May 2, 2012. A Survey Location Report was prepared on May 3, 2012 by Brian C. Rismiller, a registered land surveyor.

30. The Survey Location Report was delivered to Royal Title on May 3, 2012.

31. None of the parties including the realtors requested a delay of closing due to the fact that the Survey Location Report was not completed and delivered until the day of closing. The Purchase Agreement appears to require that closing be conducted prior to May 11, 2016. The second digit of the date is marked out and the number 11 is written above the date along with the sole initials of S.H. on the Purchase Agreement. Exhibit I.

32. The Survey Location Report showed that a fence that enclosed the side and back yards of the property at 7413 Misty Woods Lane, Indianapolis, Indiana enroached as much as twelve feet on the adjoining property. Exhibit N.

33. The Survey Location Report also showed that the house at 7413 Misty Woods Lane, Indianapolis, Indiana was four feet from the side property line.

34. The applicable side yard set back requirement for the City of Indianapolis was seven feet.

35. Upon receiving the survey location report, Royal Title issued a revised Title Commitment.

36. The revised Title Commitment added the following language: "Reviewed survey and added survey clause, fence clauses and encroachment clause." Exhibit F. The following exceptions were added by Royal Title the date of closing based upon the Survey Location Report:

"25. Conditions as set out on a Surveyor Location Report prepared by Brian Craig Rismiller, RLS No. LS2020083 as Job No. 820126872 dated May 3, 2012.

26. The Company does not insure any land lying between the north and east property

line of the subject premises and a certain fence line as shown on a Surveyor Location Report prepared by Brian Craig Rismiller, RLS No. LS2020083 as Job No. 820126872 dated May 3, 2012.

27. Right, title and interest, if any, of the owner of property adjacent to the south and those claiming through said owner to that part of the land south of the fence line as shown on a Surveyor Location Report prepared by Brian Craig Rismiller, RLS No. LS20200083 as Job No. S20126872 dated May 3, 2012.

28. Encroachment of a fence over the drainage and utility easement as shown on Surveyor Location Report of the premises prepared by Brian Craig Rismiller, RLS No. LS2020083 as Job No. S20126872 dated May 3, 2012."
Exhibit L.

37. Royal Title emailed the revised Title Commitment to Ms. Hodges on May 3, 2012 approximately four hours prior to closing.

38. Ms. Hodges forwarded the Royal Title e-mail and revised Title Commitment to Mr. and Mrs. Watkin approximately two hours prior to closing. Ms. Hodges' e-mail contained no comments relative to the revised Title Commitment.

39. Ms. Hodges did not review the revised Title Commitment.

40. Mr. and Mrs. Watkin were working on May 3, 2012. Mr. and Mrs. Watkin testified that their employer, Rolls Royce, prohibited using company computers for personal use. They also testified that their cell phones could not access the attachment.

41. Mr. and Mrs. Watkin were unaware of either the Survey Location Report or the revised Title Commitment prior to closing on May 3, 2012.

42. At the end of their work day on May 3, 2012, Mr. and Mrs. Watkins traveled together to the scheduled closing at Royal Title. Others present at the closing included, the Sellers, Roger French and Judy French, the Sellers' realtor, Margaret Litz, Ms. Hodges and the closing agent for Royal Title Services, Marcy McKamey.

43. The closing agent, Ms. McKamey, was responsible for obtaining the signatures of Sellers and Buyers on all required documents at closing. Although their signature was not required on the Survey Location Report, Ms. McKamey presented the Survey Location Report to Mr. and Mrs. Watkin in the course of the closing. This was the first time that Mr. and Mrs. Watkin had seen the Survey Location Report.

44. Upon presentation, Mr. Watkin or Mrs. Watkin noted the encroachment displayed on the Survey Location Report and raised a concern about the encroachment that was displayed.

45. At trial, both Mr. Watkin and Mrs. Watkin testified that the Survey Location Report showed an encroachment and that they recognized the encroachment.

46. Ms. McKamey, the closing agent, stated that the Survey Location Report was only approximate. Mr. And Mrs. Watkin took this to mean that the Survey Location Report did not present any issue with which they should be concerned.

47. Roger French stated that the survey was not accurate because the property line was in line with the sidewalk, which meant that the survey was not accurate by several feet and that the fence was located within the property line.

48. The Survey Location Report states: "NO CORNER MARKERS WERE SET AND THE LOCATION DATA HEREIN IS BASED ON LIMITED ACCURACY."

49. Ms. Hodges remained silent during the closing. The closing agent, Ms. McKamey, did not present the Survey Location Report to Ms. Hodges, and Ms. Hodges did not ask to see it.

50. Generally, the closing agent, Ms. McKamey, passed documents to Mr. and Mrs. Watkin. Ms. Hodges did not ask to see the documents. Ms. Hodges had not reviewed the documents prior to closing.

51. When the issue of the encroachment was raised by Mr. Watkin or Mrs. Watkin, Ms. Hodges did not respond. Ms. Hodges acknowledged hearing that the Survey Location Report was only approximate. Exhibit O. When the closing agent, Ms. McKamey, and a Seller, Roger French, questioned the Survey Location Report, Ms. Hodges did not respond.

52. Ms. Hodges provided no advice or counsel to Mr. and Mrs. Watkin about the Survey Location Report, the revised Title Commitment or the matters of the encroachment that were raised at closing.

53. Ms. Hodges stated that she did not follow up on the Survey Location Report because the title companies that she used when she had the opportunity to select a closing agent as seller's broker were First American Title or Chicago Title, and First American Title or Chicago Title would notify her if any issues existed with regard to a Survey Location Report prior to closing.

54. Although Ms. Hodges was seated in proximity to Mr. and Mrs. Watkin, Mr. and Mrs. Watkin did not direct any questions to Ms. Hodges

55. Mr. and Mrs. French provided Mr. and Mrs. Watkin with a Vendors Affidavit at closing, Exhibit 2.

56. The Vendors Affidavit states in part relevant that "The improvements upon the Real Estate are all located entirely within the bounds of the Real Estate, and there are no encroachments thereon. There are no existing violations of zoning ordinances or other restrictions or covenants applicable to the Real Estate." Exhibit 2. The statement was false.

57. Prior to closing, Mr. and Mrs. Watkin had received instructions to wire funds to Royal Title. On May 2, 2012, Mr. and Mrs. Watkins wired Four Hundred Eighteen Thousand Three Hundred Seventy-One Dollars and Sixty-Six Cents ($418,371.66) to Royal Title for their obligations under the Purchase Agreement.

58. Royal Title closed the transaction and made disbursement of funds as escrow agent.

59. Pursuant to the Listing Agreement utilized in the central Indiana area, the Seller agrees to pay an agreed upon commission to the realtor for services at closing. The commission is divided between listing realtor and the selling realtor. Carpenter Realtors was due 2.75% of the gross sales price as it's commission for representing Mr. and Mrs. Watkin. Exhibit X. Carpenter Realtors presented it's form to Royal Title prior to closing that identified that it was entitled to a commission of 2.75% of the gross sales price or Eleven Thousand Four Hundred Eighty-One Dollars and Twenty-Five Cents ($11,481.25). Id. Ms. Hodges was identified as "Carpenter Agent". Id. Royal Title, as escrow agent, then issued funds to Carpenter Realtors in the amount of Eleven Thousand Four Hundred Eighty-One Dollars and Twenty-Five Cents ($11,481.25) for services provided to Mr. and Mrs. Watkin.

60. After the closing, Mr. And Mrs. Watkin discussed the encroachment with Ms. Hodges. Ms. Hodges told Mr. and Mrs. Watkin that they needed to call the surveyor and demand that he correct the Survey Location Report. The possibility that Survey Location Report accurately identified an encroachment was not considered.

61. Mr. and Mrs. Watkin took possession of the property at 7413 Misty Woods Lane, Indianapolis, Indiana subsequent to closing on May 3, 2012.

62. During the first part of October, 2012, the vacant lot to the north of the property at 7413 Misty Woods Lane, Indianapolis, Indiana was sold. As a result of survey work performed in connection with the sale of the said lot, Mr. and Mrs. Watkin learned that the location of the house at 7413 Misty Woods Lane, Indianapolis, Indiana violated the side yard setback of the zoning ordinance for the City of Indianapolis.

63. The back yard of the property at 7413 Misty Woods Lane, Indianapolis, Indiana included a chipping and putting green and sprinkler system. Exhibit W.

64. Portions of the chipping and putting green, sprinkler system, vegetation and fence encroached on the lot to the north as had been disclosed in the Survey Location Report.

65. Mr. and Mrs. Watkins, individually and through counsel, attempted to negotiate a resolution of the encroachments with the new neighbor. However, the effort was not successful and the new neighbor demanded the removal of the encroachments. Mr. and Mrs. Watkins then undertook to remove the encroachments from the adjoining lot and to restore the landscaping.

66. Upon notification of the issue by the new neighbor, Mr. and Mrs. Watkin turned to Ms. Hodges for assistance. Ms. Hodges responded that she would look at the survey and stated that "This is just horrible." Exhibit O.

67. The chipping and putting green was at a higher elevation than the remainder of the backyard. The green consisted of a layer of turf over compacted dirt, sand and gravel which was held together by a retaining wall. The chipping and putting green was so situated that it would be impractical to only remove the portion that encroached upon the adjoining lot without destroying the entire feature. Accordingly, the entire chipping and putting green had to be removed.

68. The chipping and putting green and the patio were designed together to be aesthetically pleasing. The chipping and putting green could not be eliminated by itself without creating a substantial drop off from the patio and destroying the aesthetics of the original landscape design.

69. The sprinkler system was relocated. The fence was removed. The side and back yard were relandscaped.

70. Mr. And Mrs. Watkin found the original backyard with the chipping and putting green and original landscape design to be aesthetically pleasing. The original backyard design was a positive feature in the appeal of the property to prospective buyers.

71. In redesigning the back yard, Mr. And Mrs. Watkin sought to create an aesthetically pleasing setting. As a result of the encroachment issue, Mr. And Mrs. Watkin did not enjoy good relations with the neighbor to the north. Landscaping was used to create privacy from the neighbor to the north.

72. The house was situated four feet from the side yard property line. The house was in an area of D-1 zoning of the City of Indianapolis, which was subject to a seven (7) foot side yard set back.

73. The house to the north was constructed so that approximately twenty (20) feet are between the two houses. The minimum distance between the two houses if both houses had complied with the set back requirement for D-1 zoning would have been fourteen (14) feet.

74. Mr. and Mrs. Watkins sought and obtained a variance from the side yard setback requirements. Exhibits A and B.

75. Mr. and Mrs. Watkin paid the following amounts related to removal of the encroachments, restoration of the side and back yards and obtaining a variance, to-wit:

a. Ballard Irrigation - One Thousand Six Hundred Seventy-Seven Dollars and Forty Cents ($1,677.40) for relocation of the sprinkler system;

b. Pioneer Land Services, Inc. - Twenty-Three Thousand Eight Hundred Ninety-Nine Dollars ($23,899.00) for removal of the chipping and putting green and the restorative landscape work;

c. Jason Hammons - Two Hundred Dollars ($200.00) for fence removal;

d. Jon Adams - Two Hundred Dollars ($200.00) for the landscape plan;

e. Attorney fees to the Van Valer Law Firm related to obtaining a variance from the set back requirements - Two Thousand Six Hundred Fifty-Three Dollars and Thirty-Six Cents ($2,653.36);

f. Attorney fees to the Van Valer Law Firm in efforts to negotiate a resolution of the encroachment issue - Two Thousand One Hundred Two Dollars ($2,102.00).

76. The total expenditures by Mr. and Mrs. Watkin that they claim to be related to the encroachment and side yard set back issues were in the amount of Thirty Thousand Seven Hundred Thirty-One Dollars and Seventy-Six Cents ($30,731.76).

77. In addition to the removal of the chipping and putting green and retaining wall, the services provided by Pioneer Land Services included replacement of the rear patio, installation of a new retaining wall and landscaping. Defendants disputed that all of the landscape work was necessitated by restorative landscaping due to removal of the chipping and putting green. The charge by Pioneer Land Services was not broken down. Exhibit Z.

78. Mr. and Mrs. Watkin paid Four Hundred Seventeen Thousand Five Hundred Dollars ($417,500.00) for the property at 7413 Misty Woods Lane, Indianapolis, Indiana from Mr. and Mrs. French.

79. Mr. and Mrs. Watkin sold the property at 7413 Misty Woods Lane, Indianapolis, Indiana for the gross sales price of Four Hundred Twenty-Five Thousand Dollars ($425,000.00) on October 9, 2015. Mr. and Mrs. Watkin realized net proceeds of Three Hundred Ninety-Three Thousand Dollars ($393,000.00). Exhibit Q.

80. Merrill Moores, a lawyer by training who has been employed as a real estate broker and who has extensive experience in real estate transactions, was called as an expert witness to procedures for closing real estate transactions in the Indianapolis Metropolitan area at the time of the closing in question as well as the expertise and standard of care of a realtor in the Indianapolis Metropolitan area. Mr. Moores opined as to the following:

A. A realtor has an obligation to advise the client. "It's why we are there." July 12, 2016, 3:52.

B. If the realtor detects a problem at closing, the realtor has an obligation to say something to the client. "You're not just a flower vase there." July 12, 2016, 3:52.

C. The realtor has an obligation to review the closing documents, including the title insurance policy and a surveyor location report, prior to closing. July 12, 2016, 1:31.

D. Closing should be a highly orchestrated culmination to the sale. Everything should be

reviewed in advance so that nothing is left to surprise at closing.

E. If, for whatever reason, review of the title insurance policy and surveyor location report is not done prior to closing, the realtor must review the documents at closing.

F. The Surveyor Location Report showed the fence line going over the property line. This should have been a "red flag" to the realtor. July 12, 2016, 1:31.

G. Paragraphs 25-28 of the Title Insurance Policy raised a "red flag" that should have been recognized by the realtor. July 12, 2016, 2:01.

H. Based upon the Surveyor Location Report and the Title Insurance Policy the normal realtor should have recognized that a problem existed. Closing should not have continued until the problem was addressed.

I. If a realtor does not have the expertise to fully counsel a client after a problem is recognized, the realtor has an affirmative duty to refer the client to a trained professional so that the client can receive competent advice.

J. The normal realtor would not recognize a set back issue based upon the four foot set back dimension shown on the Survey Location Report. July 12, 2016, 3:30.

K. Buyers generally have no idea what is going on at closing. Hence, the advice of a realtor is important.

81. Mr. Moores had been trained as an appraiser. He had been certified as an appraiser. He continues to provide appraisals under situations where certification is not required. Mr. Moores had not viewed or appraised the property.

82. Mr. Moores opined that the encroachment problem with cause a ten to eleven percent reduction in the value of the lot.

83. The tax assessment placed the value of the lot at $51,000 to $58,000. Mr. Moores opined that this would be a normal valuation if not a low valuation for a lot in Franklin Township, Marion County at the time for homes in the price range at issue.

84. Mr. Moores originally opined that the value of the house would be subject to a one percent (1%) reduction in value due to the side yard set back issue, but he later revised his

opinion to say that no reduction in value would occur here for the reason that the two houses were not closer together than the minimum space allowed for D-1 zoning by the City of Indianapolis.

85. Mr. and Mrs. Watkin presented no evidence that a normal realtor in the Indianapolis Metropolitan area would be expected to possess any specialized knowledge and skill with respect to setback requirements.

86. No evidence was presented as to the standard of care of a realtor in the Indianapolis Metropolitan area with respect to setback requirements.

87. Mr. and Mrs. Watkin also brought a separate action against Mr. and Mrs. French. The action was dismissed by Mr. and Mrs. Watkin following settlement of their claim against Mr. and Mrs. French. Evidence was not produced as to the amount of compensation as may have been received by Mr. And Mrs. Watkin.

88. Ms. Hodges testified on the following points:

A. She acknowledged that she completed the Purchase Agreement, including the requirement of a Survey Location Report and the time of closing.

B. In reviewing the title insurance policy, Ms. Hodges recognized that the title insurance policy included exceptions for an encroachment and adverse possession that should have been addressed. July 13, 2016, 9:50.

C. The Survey Location Report should have been received prior to closing. July 13, 2016, 9:52.

D. The Title Insurance Policy and Survey Location Report should have been reviewed prior to closing. July 13, 2016, 9:52.

E. Ms. Hodges normally reviewed documents prior to closing. July 13, 2016, 10:58.

F. Ms. Hodges did not discuss either the title insurance policy or the survey location report with Mr. And Mrs. Watkin at any time. July 13, 2016, 10:38.

G. Ms. Hodges was familiar with encroachments at the time of closing. July 13, 2016, 10:50.

H. Ms. Hodges recognized that the Survey Location Report disclosed an encroachment. July 13, 2016, 9:56.

I. If the Survey Location Report had been reviewed prior to closing, Ms. Hodges would have recommended that someone with more expertise review the Survey Location Report and provide advice regarding the encroachment. July 13, 2016, 9:57.

J. If the Survey Location Report and Title Insurance Policy had been reviewed at closing and the encroachment identified, Ms. Hodges would have recommended that closing be postponed. July 13, 2016, 9:57.

K. Ms. Hodges recalled that Ms. McKamey, the closing agent, stated at closing that the Survey Location Report was only approximate, and she would not worry about the disclosed encroachment. July 13, 2016, 10:05.

L. Ms. Hodges acknowledged that parties can feel rushed at closing. July 13, 2016, 10:07.

M. When a document is reviewed for the first time "under the gun", a person doesn't always think of everything that they should do. July 13, 2016, 10:07.

N. Even though Ms. Hodges is aware of encroachments and knows that encroachments need to be addressed, Ms. Hodges took no action at closing when she heard discussion about an encroachment. July 13, 2016, 10:37. Her stated reason for not doing so was that she "was not aware that it was a problem." Id.

O. Even though Mr. And Mrs. Watkin recognized the encroachment, Ms. Hodges doesn't fault them for proceeding with the closing because they were assured by Ms. McKamey that there was no problem. July 13, 2016, 10:08.

P. Ms. Hodges sat next to Mrs. Watkin at closing and could have looked at documents over her shoulder. July 13, 2016, 10:09.

Q. Ms. Hodges denied receiving training on set back requirements. July 13, 2016, 10:29.

R. Ms. Hodges denied knowledge of set back requirements in Marion County. July 13, 2016, 10:29.

S. Based upon her knowledge of the standard of practice of realtors in the Indianapolis Metropolitan area, the normal realtor would not be able to identify a set back violation from the Survey Location Report. July 13, 2016, 10:30.

89. Tim Dougherty of Pioneer Land Services, Inc. testified to the following:

A. Pioneer Land Services, Inc. removed the putting green, retaining wall, stone and sand that was compacted for the putting green and material and vegetation that encroached on the adjoining lot. Once the material was removed, Pioneer Land Services, Inc. relandscaped the side and back yard.

B. Mr. Dougherty and three employees worked for a week and a half to two weeks on the project.

C. The putting green consisted of several feet of compacted 53 stone with a layer of sand over the stone and artificial turf over the sand.

D. The putting green and patio were designed as a single feature with a retaining wall around the feature. The retaining wall kept the material in place.

E. Pioneer Landscaping was under a tight time frame to get the work done because foundation work was commencing on the adjoining property and Mr. And Mrs. Watkin were required to remove the encroachment and material from the adjoining property due to the construction work.

F. The patio also had to be removed so that Mr. And Mrs. Watkin could have a space that they could use.

G. The patio and putting green as designed was an attractive feature that was a selling feature for the home.

H. Once the retaining wall was removed, the patio did not have any support. The aggregate fill was exposed.

I. For the concrete to match, the patio could not be added onto. The patio would need to be poured in a single pour in order for the concrete to match.

J. Plant material was used to create screening.

K. If the putting green had been removed without any restorative landscaping, the result would have been unattractive. Mr. Dougherty opined that it would look like a "war zone".

L. If an effort had been made to restore the putting green by moving the area that encroached, the result would have been a lot more money compared to what was done.

M. Most of the expense incurred was in labor, equipment and hauling. The cost of material was minimal compared to the total cost.

N. The cost of plant material, mulch and soil for the work in front was Eight Hundred Dollars to Eight Hundred Fifty Dollars ($800-$850).

O. The cost of plant material, mulch and soil for the work in back was One Thousand Two Hundred Dollars to One Thousand Three Hundred Dollars ($1,200-$1,300).

P. Most of the cost incurred was in removing material and restoring the property to a usable state for the relandscape work.

Q. The patio and putting green were designed together. With the removal of the putting green, there was no benefit of the shape of the patio to the property owner.

R. The cost of labor for landscaping in approximately two to two and a half times the cost of the material.

S. The cost of labor for the work in front would have been between One Thousand Six Hundred Dollars and Two Thousand Dollars ($1,600-$2,000.).

T. The work was performed in February, 2013. Pioneer Land Services, Inc. was paid the balance due on February 23, 2013.

90. The description of the property used in the listing included the putting green as a feature and said that the property sat on a "picturesque setting". Exhibit W.

CONCLUSIONS

1. The Court has personal jurisdiction of all parties in this cause of action.

2. The Court has subject matter jurisdiction of all issues in this cause of action.

3. Defendant Ms. Hodges is domiciled in Johnson County. Venue is properly placed in Johnson County, State of Indiana.

4. Mr. and Mrs. Watkin sought the assistance of Ms. Hodges in purchasing a house. Ms. Hodges was a real estate broker associated with Carpenter Realtors. Prior to undertaking to provide services for Mr. and Mrs. Watkin, Ms. Hodges had Mr. and Mrs. Watkin to sign Carpenter's Agency Policy For Buyers. Ms. Hodges then signed the Agency Policy For Buyers

as a representative of Carpenter Realtors. The Agency Policy was subsequently signed by Mr. Prall, the President of Carpenter Realtors.

5. Defendants assert that a contract was not formed for the reason that Mr. and Mrs. Watkin did not have any obligations so as to create mutuality of obligations for a valid contract. Par. 5, 6, Conclusions, Defendants' Proposed Findings of Fact and Conclusions.

6. The agreement at issue is classified as a brokerage contract, which is a form of agency contract under which "a broker is employed to make contracts of the kind agreed upon in the name and on behalf of the broker's principal and for which the broker is paid an agreed commission." 12 Am.Jur.2d Brokers Sec. 1. "Two elements must be met to find that one is acting as a "broker": the person must act for compensation, and the person must act on behalf of someone else." Id.

7. Professor Corbin considers real estate brokerage agreements in the context of bilateral and unilateral agency contract. Professor Corbin states:

> "Contracts between principal and agent, like other employment contracts, may be either bilateral or unilateral. The principal may promise either a salary or commissions or both; and the agent may promise in return to render specified services for some stated period. In these cases, there is 'mutuality of obligation'; the consideration for each promise is the return promise. A real estate agent, with whom property is placed for sale, seldom promises that he will find a purchaser at the price desired by the principal; but he may, either expressly or impliedly, promise that he will diligently advertise and solicit. Here, too, there is 'mutuality of obligation,' the contract being bilateral. The validity of such a contract is not affected by the fact that the principal promises to pay nothing for the agent's diligent efforts; his promise is to pay for the production of a purchaser on the terms fixed. Nor is it affected by the fact that the agent makes no promise to find a purchaser, the very result for which the commission is promised. Two promises may be exchanged for each other, even though the two promised performance are not exchanged at all, and are not regarded by the parties as of equivalent value. The principal has agreed to exchange his money for finding a purchaser, not for diligently looking for one.
>
> Many contracts between principal and agent are purely unilateral, there being no 'mutuality of obligation.' As in the case just discussed, the principal promises to pay a commission for the finding of a purchaser, for the actual selling or buying of stock or bonds or commodities, or for some other completed result; but the agent or broker may make no return promise at all, not even a promise of diligent effort. In a case like this, the principal's promise it not binding when it is first made, unless it is under seal; but it

> becomes irrevocable as soon as the agent has performed some substantial action in the process of attempting to earn the commission, and it becomes immediately enforceable when the requested result is attained and the time set for payment has come. Here, the agent has never made any promise; but he has acted at request and in reliance on the principal's promise. There is never any 'mutuality of obligation', but there is a valid unilateral obligation as soon as the agent's services are recognized as a sufficient executed consideration to create it."
> Sec. 154, Corbin on Contracts.

8. Here, the brokerage agreement was made for the purpose of assisting Mr. and Mrs. Watkin in finding a house to purchase. Under the arrangement, the broker was to provide services in seeking a suitable residence for Mr. and Mrs. Watkin. The Agency Policy For Buyers states that the relationship is an "employment agreement between Carpenter and the client" obligating Carpenter "to render its professional services consistent with the directives of its clients". Exhibit H. Defendants are accurate in stating that the agreement does not obligate the Defendants to purchase a house or impose any obligation upon Mr. and Mrs. Watkin initially. The obligation arises when Mr. and Mrs. Watkin agree to purchase a property through the broker's efforts. As to compensation, although Mr. and Mrs. Watkin are not themselves obligated to pay the broker, their performance creates a right in favor of the broker to receive a commission in the real estate transaction under the shared commission with the selling broker. The promise by Mr. and Mrs. Watkin is to purchase a suitable house procured through the diligent efforts of the broker which then creates a right to receive a commission payment. This is recognized by Carpenter in the form directed to the closing agent. The form states: "Gross Commission due Carpenter Realtors". Exhibit X. While originally unilateral, the act of purchasing a property through the broker's efforts creates an enforceable obligation. The Restatement, Second, of Contracts notes that classification of contracts as bilateral and unilateral "has not been carried forward because of doubt as to the utility of the distinction, often treated as fundamental, between the two types." Restatement, Second, of Contracts, Sec. 1 (1981).

9. Furthermore, any agency relationship is recognized to exist statutorily during the relationship between a licensee and the person who is being assisted by the licensee. Bunger v. Demming, 40 N.E.2d 887, 897 (Ind. Ct. App. 2015).

10. As the Court noted in it's Order On Summary Judgment:

> "10. A real estate broker is an agent. Egan v. Burkhart, 657 N.E.2d 401, 404 (Ind. Ct. App. 1995), citing Restatement (Second) of Agency Sec. 1 cmt. e (1958). See also 12 Am. Jur. 2d Brokers Sec. 3 (1964). An agent has a duty to act in accordance with the express and implied terms of any contract between the agent and the principal. Restatement (Third) of Agency Sec. 8.07 (2006). Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances. Restatement (Third) of Agency Sec. 8.08 (2006)."

11. The Court concludes that a contractual obligation of duty was owed to Mr. and Mrs. Watkin, the scope of which the Court now considers.

12. The duties imposed upon a broker are established under the Agency Policies. Exhibit H. The stated duties include providing assistance "in negotiating, completing real estate forms" until "contingencies are satisfied or waived" and "(a)ttend, participate and advise the Buyer(s) during the Closing." Id.

13. Statutory duties include:

> "© disclosing to the buyer or tenant adverse material facts or risks actually known by the licensee concerning the real estate transaction;
> (D) advising the buyer or tenant to obtain expert advice concerning material matters that are beyond the licensee's expertise.
> . . .
> (F) exercising reasonable care and skill".
> Indiana Code 23-34.1-10-11.

14. Although the duty to exercise reasonable care and skill is established by statute, an implied duty also exists in a contract for work that the work be performed "skillfully, carefully, and in a workmanlike manner". INS Investigations Bureau, Inc. v. Lee, 784 N.E.2d 566, 576 (Ind. Ct. App. 2003). The negligent failure to perform work "skillfully, carefully, and in a workmanlike manner" is a tort as well as a breach of contract. Id.

15. In it's Order On Summary Judgment, the Court considered the scope of duty of a broker.

The consideration was based upon Ms. Hodges' statement that "(a)s a real estate agent, I have no expertise or training with respect to survey location reports." Par. 33, Affidavit of Susan Hodges. Ms. Hodges went on to say that any issue about the survey location report would be referred to legal counsel. Par. 38, Affidavit of Susan Hodges. After reviewing professional license educational requirements as well as industry practice, the Court rejected Ms. Hodges' assertion and concluded at paragraph 28 of it's Order that:

> "28. The Court does find that a duty exists by a real estate broker and salesperson to provide assistance to a client in providing advice in determining if property boundaries conflict and encroachments are present and, if present, how to respond to the issues raised."

16. Notwithstanding her earlier denial of expertise, Ms. Hodges demonstrated sufficient expertise as to the Surveyor Location Report and Title Commitment, that she recognized that the documents disclosed an encroachment, and that an encroachment needed to be addressed prior to closing.

17. In every contract for work or services, the law recognizes an implied duty to perform the contract skillfully, carefully, diligently and in a workmanlike manner. INS Investigations Bureau, Inc. V. Lee, 784 N.E.2d 566, 577 (Ind. Ct. App. 2003). The negligent failure to observe an implied condition is a breach of contract as well as a tort. Id.

18. The court finds the following points significant:

A. Ms. Hodges controlled the drafting of the purchase agreement. She completed the provision requiring that the buyers obtain a Surveyor Location Report prior to closing.

B. The Surveyor Location Report was received by Ms. Hodges four hours before closing, however, Ms. Hodges did not look at the Report.

C. Ms. Hodges did not look at the revised Title Commitment prior to closing.

D. At closing, Ms. Hodges never sought to review the Surveyor Location Report or the Title Commitment.

E. Neither before closing nor at closing did Ms. Hodges review the Surveyor Location Report

or Title Commitment with Mr. And Mrs. Watkin.

F. Ms. Hodges did not counsel delay in closing due to the lateness with which the Surveyor Location Report and revised Title Commitment were produced prior to closing.

G. At closing, when Mr. And Mrs. Watkin raised an issue about the Surveyor Location Report, Ms. Hodges did nothing. She offered no counsel to Mr. And Mrs. Watkin once an issue had been disclosed.

H. At closing, when the closing agent made a statement that the Surveyor Location Report was only approximate and not to worry about it, Ms. Hodges did not challenge the statement or offer to provide counsel to Mr. and Mrs. Watkin.

I. At closing, when the property owner, Roger French, made a statement that a survey prepared by a licensed surveyor should be disregarded because the survey did not match his belief as to the location of the property line, Ms. Hodges did not challenge the statement or offer to provide counsel to Mr. And Mrs. Watkin.

19. Ms. Hodges was engaged to provide professional advice to Mr. And Mrs. Watkin in the purchase of a parcel of real property. By Answer, Defendants admitted a "duty to disclose to them (Plaintiffs), as the buyers, adverse material facts or risks known by the Defendants concerning the real estate transactions, and the duty to exercise reasonable care and skill." By the Agency Policy For Buyers, Defendants acknowledged a duty to "advise the Buyer(s)". Ms. Hodges provided no advice. Even though she had drafted a contract that required that a Surveyor Location Report be prepared prior to closing, she did not examine the Surveyor Location Report prior to or at closing. Even at closing when the problem with the Surveyor Location Report was detected, she did nothing. No advice was offered. Enough warning flags were present with the language in the Surveyor Location Report, the exclusion in the title policy and the issue being raised at closing, Ms. Hodges should have provided advice or if she did not feel that she could provide competent counsel, the closing should have been recessed so that one more qualified could have examined the Surveyor Location Report and provided competent advice to Mr. And Mrs. Watkin.

20. Here, Ms. Hodges did not provide advice or counsel regarding the Surveyor Location Report and the disclosed encroachments. The absence of advice by one who is hired to provide

advice is a breach of the service contract. If services are not provided, the services are not provided skillfully and carefully. The services subject to contract were not provided, and the contract was breached.

21. In addition to the encroachment issue, an issue is also present as to the side building set back line. The Surveyor Location Report disclosed that the building was four feet from the side
property line. The Surveyor Location Report does not reveal that the building set back was insufficient under the zoning code of the City of Indianapolis.

22. Mr. Moores opined that a normal realtor would not be aware of a building set back requirement for a specific parcel without investigation. There is nothing in the Survey Location Report that discloses the violation of the Indianapolis zoning ordinance. A normal realtor would not have been placed on notice for the need to conduct further inquiry. Nothing would have placed Ms. Hodges on notice of a need for further inquiry. The Court does not find a violation of the service contract as to the building set back requirement.

23. The Carpenter Realtors, Agency Policy For Buyers, is a contract between Carpenter Realtors and Mr. And Mrs. Watkin. Ms. Hodges signed the Agency Policy For Buyers as the Licensee/Associate of Carpenter Realtors. The Agency Policy For Buyers is signed by Mr. Prall as the President of Carpenter Realtors.

24. "When an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal, (1) the principal and the third party are parties to the contract; and (2) the agent is not a party to the contract unless the agent and third party agree otherwise." Restatement, Third of Agency, Sec. 6.01 (2006).

25. Ms. Hodges signed the Agency Policy For Buyers as agent for a disclosed principal. A contract for services was created between Plaintiffs and Carpenter Realtors but not Ms. Hodges'
personally.

26. The information contained in the Surveyor Location Report and the Title Insurance Policy was sufficient to place the normal or average realtor on notice that the fence and putting green encroached on the adjoining lot. Ms. Hodges acknowledged that she would have identified the encroachment if she had examined the Title Commitment and/or Surveyor Location Report. Based upon the duty to provide advice, Carpenter Realtors was obligated to provide advice to Mr. And Mrs. Watkin as clients of the encroachment problem. The failure of Carpenter Realtors to render advice is a breach of the contract existing between Carpenter Realtors and Mr. And Mrs. Watkin.

27. Carpenter Realtors seeks to excuse the failure to provide advice on the basis that Mr. And Mrs. Watkin recognized that an encroachment existed but nonetheless continued with closing. Mr. Moores recognized the importance of reviewing the surveyor location report and the title insurance policy prior to closing. The intangible element is that closing is for the purpose of concluding the transaction and parties are under pressure, however subtle, to carry out the purpose for which the parties are gathered. As recognized by Mr. Moores, the closing should be an uneventful culmination of the process and not a point when parties are seeing documents for the first time. As stated by Mrs. Watkin, she recognized that an encroachment existed but did not understand her rights and obligations within the context of closing. Ms. Hodges also recognized that clients feel rushed at closing.

28. The Court does not identify any authority for relieving Carpenter Realtors of it's duty to render advice. No authority is provided by Carpenter Realtors.

29. Advice consists of more than recognizing that a problem exists. Advice includes how to respond once it is determined that problem does exist. Even though Mr. And Mrs. Watkin may have recognized the encroachment, Defendant was not relieved of the obligation to provide advice.

30. Carpenter also asserts that the duty to provide advice is passive and not active. That is, Ms. Hodges was only required to respond to questions posed by Mr. And Mrs. Watkin but did

not have an affirmative obligation to provide advice. The duty to provide advice in the Agency Policy For Buyers is not limited. Effectively, the client would be expected to know of matters to such an extent that they know when to ask for advice. As noted by Ms. Hodges, clients, and realtors, feel rushed at closing so that not everything may be considered. As noted by Mr. Moores, buyers do not know what is going on at closing. To limit the duty to advise as proposed by Carpenter Realtors would effectively remove any duty to provide advice.

31. An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or shold know when (1) subject to any manifestation by the principal, the agent knows or has rason to know that the principal wold wish to have the facts or the facts are material to the agent's duties to the principal; and (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person. Restatement, Third Of Agency, Sec. 8.11 (2006).

32. Based upon the affirmative duty to provide advice, the realtor is not limited to simply responding to requests for advice from the client.

33. Carpenter Realtors also asserts that Ms. Hodges was precluded from offering advice for the reason that such advice would constitute legal advice. In the case of State ex rel. Indiana State Bar Ass'n. V. Indiana Real Estate Ass'n., 244 Ind. 214, 191 N.E.2d 711 (1963), the Indiana Supreme Court held that the completion of a standardized legal document by a realtor does not constitute the practice of law. However, the Supreme Court also recognized that the forms that realtors would provided assistance in completing would have legal implications. 244 Ind. at 222, 191 N.E.2d at 715. The assistance provided by realtors does have legal implications. This is not to say that realtors avoid responsibility for the legal implications by asserting that they cannot provide legal advice. The need to obtain legal advice must be part of the advice given by a realtor if circumstances so warrant.

34. As recognized by Mr. Moores, it is especially important that the realtor identify problems in advance of closing so as to be able to refer the clients for legal advice if an issue is present as to their legal rights and obligations. Here, no effort was made to review any of the

documents in advance of closing. Although Carpenter Realtors asserts the danger of exposing Mr. And Mrs. Watkin to breach of contract by refusing to close, Ms. Hodges would have been aware that the deadline for closing under the Purchase Agreement was May 11, 2012 or a week after the date on which closing occurred. Even assuming that the determination of whether to proceed or to delay closing required legal assistance, no effort was made to counsel Mr. And Mrs. Watkin to obtain legal assistance after being placed in a situation due to Mrs. Hodges' failure to discharge her duties in advance of closing by reviewing the closing documents. Ms. Hodges acknowledged that if she had been aware of the encroachment problem at closing, closing could have been delayed so that professional advice could have been sought.

35. The duty to perform a contract skillfully, carefully, diligently and in a workmanlike manner can create liability in tort.

36. The duty to advise was created by contract. Evidence of the duty and the standard of care was provided by Mr. Moores. By failing to provide advice and by failing to render assistance to Plaintiffs by reviewing documents prior to or at closing, Ms. Hodges failed to provide services skillfully, carefully and diligently and was negligent.

37. However, in the case of Greg Allen Constr. Co. v. Estelle, 798 N.E.2d 171 (Ind. 2003) the Indiana Supreme Court held that under circumstances when the negligence of the agent is in "negligently carrying out a contractual obligation of the corporation" and "(n)othing he did, and therefore nothing the corporation did, constituted an independent tort if there were no contract", then the Plaintiffs "should be remitted to their contract claim against the principal, and they should not be permitted to expand that breach of contract into a tort claim against the principal or its agents by claiming negligence as the basis of the breach." Id. at 173.

38. An issue present in the case is the fault or negligence of other parties in the Plaintiffs' damages. The issue arose on summary judgment inasmuch as Plaintiffs sought summary judgment on based in tort under a theory of professional malpractice and application of comparative fault principles. At trial, Plaintiffs focused upon recovery based upon breach of contract. Based upon the foregoing case, the Court would conclude that Plaintiffs have properly

brought their claims for breach of contract as opposed to tort. However, the assertion of claims in contract then raises the issue of allocation of damages among those parties at fault. In it's Order on Summary Judgment, the Court had determined that a genuine issue of material fact existed as to the allocation of fault to the Plaintiffs, to the title company and to the sellers.

39. "In order to recover on a breach of contract claim, the alleged breach must be a cause in fact of the Plaintiff's loss. Farnsworth, Farnsworth on Contracts, Sec. 12.1, at 148. (1990). For a cause in fact to be a legal cause, it must have been a substantial factor in bringing about the harm. Krauss v. Greenbarg (3rd Cir. 1943), 137 F.2d 569, 572, cert. Denied. 320 U.S. 791, 64 S.Ct. 207, 88 L.Ed. 477. While there may be other contributing causes and more than one factor operating, the trier of fact may determine that one cause predominates over another in bringing about the harm. Id.; cf. Huey v. Milligan (1961), 242 Ind. 93, 103, 175 N.E.2d 698, 703 (actor's negligent conduct is 'legal cause' of harm to another if his conduct is substantial factor in bringing about harm).

The principal of legal causation in contracts is similar to that in negligence. Farnsworth, Sec. 12.1 at 148. However, in a breach of contract action, where an injury arising from the breach may have resulted from multiple causes, Indiana does not recognize comparative causation. The test of causation in common law contract actions is not whether the breach was the only cause, or whether other causes may have contributed, but whether the breach was a substantial factor in bringing about the harm. Greenbarg, 137 F.2d at 572." Fowler v. Campbell, 612 N.E.2d 596, 601-602 (Ind. Ct. App. 1993).

40. The Court determines that the breach of contract was a substantial factor in bringing about the Plaintiffs' harm. While the Plaintiffs recognized the encroachment at closing, they were deprived of any advice or counsel either at closing or in advance of closing. As Ms. Hodges noted, if she had looked at the Title Insurance Policy and the Surveyor Location Report prior to or at closing, she would have realized that an encroachment existed, that closing should have been delayed until the encroachment issue was resolved and Mr. And Mrs. Watkin referred to other professionals to help resolve the problem. While Ms. McKamey provided false assurance that Mr. And Mrs. Watkin should proceed with closing notwithstanding the

encroachment, if Ms. Hodges had discharged her duty to provide advice, Mr. And Mrs. Watkin would not have been susceptible to heeding Ms. McKamey's false assurances. While Mr. French misrepresented the property line at closing so as to induce Mr. And Mrs. Watkin to close notwithstanding the encroachment identified on the Survey Location Report, if Ms. Hodges had discharged her duty to provide advice, Mr. And Mrs. Watkin would not have been susceptible to heeding Mr. French's false assurances. The Court determines that the breach of contract was a substantial factor in bringing about Plaintiffs' harm.

41. Having determined that the breach of contract was a substantial factor in bringing about Plaintiffs' harm, the fault of other parties is not relevant as to liability.

42. Having determined breach, the Court turns to the issue of damages. The measure of damages is generally as follows:

'Subject to the limitations stated in Sections 350-53, the injured party has a right to damages based on his expectation interest as measured by: (a) the loss in the value to him of the other party's performance caused by its failure or deficiency; plus any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that he has avoided by not having to perform."

Restatement of the Law, Second, Contracts, Sec. 347 (1981).

43. The Comments provide that "(c)ontract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." Restatement of the Law, Second, Contracts, Sec. 347, Comment a, Expectation Interest.

44. The measure of damages for breach of contract is the loss actually suffered by the breach. Centennial Mortg., Inc. V. Blumenfeld, 745 N.E.2d 268, 281 (Ind. Ct. App. 2001)(citing Colonial Discount Corp. V. Berkhardt, 435 N.E.2d 65, 66 (Ind. Ct. App. 1982). "To recover the plaintiff must show that its damages flowed directly and naturally from the breach." Id.

45. Defendants assert that Plaintiffs received what they contracted to purchase. Plaintiffs agreed to purchase a .39 acre lot. They receive a .39 acre lot. The argument ignores that an encroachment existed that had to be addressed.

46. Defendants assert that the proper measure of damages is the measure of damages for permanent injury to real property which consists of the market value of the property before the injury less the market value of the property after the injury. Par. 46, Proposed Findings of Fact and Conclusions (citing General Outdoor Advertising Co. v. LaSalle Realty Corp., 218 N.E.2d 141 (Ind. Ct. App. 1966).

47. However, the Plaintiffs are entitled to recover damages for the loss actually suffered. Restatement, Second of Contracts, Sec. 347, Comment c (1981).

48. Here, Plaintiffs took title to real property that encroached upon an adjoining property. The issue is not the reduction in value of the property purchased by the Plaintiffs. Mr. Moores provided testimony that the value of the house would be reduced due to the encroachment. However, Plaintiffs would nonetheless be required to remove the encroachment or face action by the adjoining property owner due to the existing encroachment. Simply stated, using the loss of value of the property due to the encroachment does not make the Plaintiffs whole for the reason that it does not take into account the damages incurred by the Plaintiffs in the removal of the encroachment.

49. Plaintiffs make claim for the following damages:

a. Ballard Irrigation - One Thousand Six Hundred Seventy-Seven Dollars and Forty Cents ($1,677.40) for relocation of the sprinkler system;

b. Pioneer Land Services, Inc. - Twenty-Three Thousand Eight Hundred Ninety-Nine Dollars ($23,899.00) for removal of the chipping and putting green and the restorative landscape work;

c. Jason Hammons - Two Hundred Dollars ($200.00) for fence removal;

d. Jon Adams - Two Hundred Dollars ($200.00) for the landscape plan;

e. Attorney fees to the Van Valer Law Firm related to obtaining a variance from the

set back requirements - Two Thousand Six Hundred Fifty-Three Dollars and Thirty-Six Cents ($2,653.36);

f. Attorney fees to the Van Valer Law Firm in efforts to negotiate a resolution of the encroachment issue - Two Thousand One Hundred Two Dollars ($2,102.00).

50. Inasmuch as the Court does not find a breach of contract due to the failure to advise on the setback violation, fees incurred for obtaining a variance are not subject to award.

51. The amount paid to Pioneer Land Services, Inc. was contested. The putting green and the backyard was a feature of the property. It was noted on the listing for the property. Photographs of the back yard were included in the web based material.

52. The putting green and retaining wall had to be removed. Most of the expense incurred was in the labor of removing the compacted material and hauling it away. While the patio itself could have been retained, the evidence is that the patio had to be replaced in order to create an attractive, usable outdoor space.

53. The Court finds that the work performed in the back yard was required in order to produce an attractive landscape design that enhanced the property and that was comparable to the feature that was removed.

54. The Court does find that the work in the front was not required due to the encroachment but due to the proximity of the property to the adjoining property. Mr. Dougherty testified that this work was done to screen the driveway and entryway of the adjoining property. The cost of the material and labor for the work in the front was placed at between Two Thousand Four Hundred Dollars and Two Thousand Eight Hundred Fifty Dollars ($2,400-$2,850). A median amount of Two Thousand Six Hundred Twenty-Five Dollars ($2,625.00) is accepted. Defendant is not responsible for this amount since it is not related to the encroachment.

55. Based upon the reduction for the material and work in the front, the Court finds that

Twenty-One Thousand Two Hundred Seventy-Four Dollars ($21,274.00) of the cost paid to Pioneer Land Services, Inc. was for work related to the encroachment.

56. The Court finds that the following expenses were incurred by the Plaintiffs as consequential damages:

a. Ballard Irrigation - One Thousand Six Hundred Seventy-Seven Dollars and Forty Cents ($1,677.40) for relocation of the sprinkler system;

b. Pioneer Land Services, Inc. - Twenty-One Thousand Two Hundred Seventy-Four Dollars ($21,274.00);

c. Jason Hammons - Two Hundred Dollars ($200.00) for fence removal;

d. Jon Adams - Two Hundred Dollars ($200.00) for the landscape plan;

e. Attorney fees to the Van Valer Law Firm in efforts to negotiate a resolution of the encroachment issue - Two Thousand One Hundred Two Dollars ($2,102.00).

Total: $25,453.40.

57. Plaintiffs also seek a return of the commission paid to Carpenter Realtors in the amount of Eleven Thousand Four Hundred Eighty-One Dollars and Twenty-Five Cents ($11,481.25). However, based upon the fee splitting method of compensation utilized, the amount paid to Carpenter Realtors would otherwise have been subject to retention by the Sellers' realtor if Mr. And Mrs. Watkin had not been represented or retained by the Seller if neither party had been represented.

58. "It is a fundamental rule of damages that a party injured by a breach of contract may recover the benefit of his bargain but is limited in his recovery to the loss actually suffered. Indiana Tri-City Plaza Bowl, Inc. v. Estate of Glueck (1981), Ind. App. 422 N.E.2d 670, 678, trans. denied." Fowler v. Campbell, 612 N.E.2d 596, 603 (Ind. Ct. App. 1993).

59. An award of the commission paid to Carpenter Realtors would place the Plaintiffs in a better position.

60. The Court notes that Plaintiffs also brought an action against the property owners, Mr. And Mrs. French. However, the action against Mr. And Mrs. French also included claims not asserted in this case. In addition, no evidence was presented as to the amount of any recovery from Mr. And Mrs. French. While Plaintiffs are prohibited from recovery of the same element of damage from multiple parties, no evidence was presented as to any offset that should be provided due to recovery from Mr. And Mrs. French.

61. Plaintiffs also assert that they are entitled to recover as damages the difference between what they paid for the property at 7413 Misty Woods Drive and the net proceeds from the sale of the property on October 19, 2015. Plaintiffs did not establish any reduction in value of the property following the removal of the encroachment and the restorative landscape work performed by Pioneer Land Services, Inc.. Plaintiffs purchased the property from the Frenches for $417,500. Plaintiffs sold the property for $425,000.00. Effectively, Plaintiffs assert that Defendants should be responsible for realtor commission, closing costs and other expenses associated with the 2015 sale. The Court does not find these expenses to be consequential damages to Defendant Carpenter Reatlors' breach of contract.

62. The damages incurred by Plaintiffs are also subject to award of prejudgment interest. As noted by the Indiana Court of Appeals in Troutwine Estates Development Company, LLC v. Comsub Design and Engineering, Inc., 854 N.E.2d 890 (Ind. Ct. App. 2006): "An award of prejudgment interest is not generally a matter of discretion. INS Investigations Bureau, Inc. v. Lee, 784 N.E.2d 566, 578 (Ind. Ct. App. 2003) trans. denied. Rather, in a contract action, such an award is warranted if the amount of the claim "rests upon a simple calculation and the terms of the contract make such a claim ascertainable." Id. (quoting Noble Roman's Inc. v. Ward, 760 N.E.2d 1132, 1140, 760 N.E.2d 1195 (Ind. Ct. App. 2002)). "The award is considered proper when the trier of fact need not exercise its judgment to assess the amount of damages." Id.." Id. at 904.

63. Indiana Code 24-4.6-1-102 establishes the applicable rate of interest at eight percent (8%) per annum.

64. Accordingly, prejudgment interest is assessed from the date that Plaintiffs paid for removal of the encroachment and the restorative work, which the Court finds to be February 23, 2013, to the date of judgment. Prejudgment interest is subject to award in the amount of Seven Thousand Eight Hundred Sixty Dollars and Ninety-Three Cents ($7,860.93)

65. In accordance with the foregoing findings of fact and conclusion, judgment be entered in favor of the Plaintiffs, John Watkin and Susan Watkin, and against the Defendant Carpenter Realtors in the amount of Thirty-Three Thousand Three Hundred Fourteen Dollars and Thirty-Three Cents ($33,314.33) together with the costs of the action and with interest on the judgment as provided by law.

66. Based upon the decision in Greg Allen Constr. Co. v. Estelle, 798 N.E.2d 171 (Ind. 2003), the Court finds that the Plaintiffs action is against the principal and not the agent, and accordingly, the Court finds in favor of the Defendant Susan Hodges and against the Plaintiffs John Watkin and Susan Watkin. As noted in the *Greg Allen Constr. Co.* decision, the liability of the agent is to the principal and not the third party. Chief Justice Shepherd wrote: "To be sure, a number of authorities have expressed the point in terms of 'economic loss'. Section 357 of the Second Restatement of Agency provides that "an agent who intentionally or negligent fails to perform duties to his principal is not thereby liable to a person whose economic interests are thereby harmed." Id.
at 174.

67. The Court does turn to an issue raised by the parties in closing. Plaintiffs assert that Defendants are bound by Request For Admission, including paragraphs 7 and 11 through 15. In all cases, Defendants answered that Defendants could not admit or deny the request for admission due to insufficiency of information. Answers to Request For Admission were provided on November 23, 2013.

68. Certainly under Trial Rule 36(A), "(a)n answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is

insufficient to enable him to admit or deny or that the inquiry would be unreasonably burdensome." However, Trial Rule 37(A) goes on to say that "(t)he party who has requested the admissions may move for an order with respect to the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time **prior** to trial."

69. Here, Plaintiffs made no effort in a period in excess of two and a half years to require that Defendants provide an answer to the request for admission prior to trial as set out in Trial Rule 36(A). Plaintiffs' Request For Admission were then not admitted. However, Plaintiffs retain the right to recover "reasonable expenses" under Trial Rule 37 C.

IT IS THEREFORE ORDERED BY THE COURT AS FOLLOWS,

1. Judgment is entered in favor of the Plaintiffs, John Watkin and Susan Watkin and against Defendant Carpenter Realtors in the amount of Thirty-Three Thousand Three Hundred Fourteen Dollars and Thirty-Three Cents ($33,314.33) together with the costs of the action and with interest on the judgment as provided by law;

2. Judgment is entered in favor of the Defendant Susan Hodges and against the Plaintiffs, John Watkin and Susan Watkin.

All of which is Ordered this 3rd day of January, 2017.

KEVIN M. BARTON, JUDGE
JOHNSON SUPERIOR COURT NO. 1

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