

NO. 67216-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LANDIS & LANDIS CONSTRUCTION, LLC, an Oregon limited liability
company,

Appellant,

vs.

NICOLA NATION dba NATION MANAGEMENT

Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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RESPONDENT'S BRIEF

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I. COUNTER STATEMENT OF THE CASE

Respondent and her husband purchased the house and property located at 17106 North Road, Bothell, in 1995 and lived in the house for three years.¹ After they moved out, they rented the home. From 1998 through 2009, they had only three renters and it was continuously rented, except for brief periods between renters.² Respondent received very few complaints from these renters.³

Respondent did not experience any problem with mice or other rodents when she lived in the house.⁴ From 1998 through 2009, only one tenant complained of mice on only one occasion.⁵ Frances Roemer and his family rented the house from July 1, 2008 to October 10, 2009. In December of 2008, Respondent was notified by Mr. Roemer that mice may be entering the house through the old laundry vent.⁶ In response, Respondent sealed the vent and the Roemers made no further complaints of mice in the house.⁷

¹ CP 72.

² CP 72.

³ CP 72.

⁴ CP 73.

⁵ CP 73.

⁶ CP 73.

⁷ CP 73.

After the Roemers moved out, Respondent and her husband cleaned and repainted a portion of the house. During that time, she saw no evidence of mice, and did not smell anything unusual.⁸

In the early part of November 2009, Respondent was contacted by a representative of Appellant, who inquired about renting the house on a short-term basis while Appellant's employees worked on a construction project in the Snohomish area. Respondent agreed to rent the house to Appellant on a short-term basis.⁹ On November 17, 2009, Appellant signed a "Short Term Rental Agreement" wherein Appellant agreed to rent the house from November 23, 2009 to February 28, 2010.¹⁰ After the latter date, the lease converted to a month-to-month tenancy unless one of the parties gave written notice to terminate the contract.¹¹

On November 19, 2009, Cory Moore, Appellant's foreman, met Respondent at the rental house, inspected it, and found it satisfactory. Mr. Moore completed a "move-in" checklist during this

⁸ CP 73.

⁹ CP 73.

¹⁰ CP 79-81.

¹¹ CP 73, CP 79-81.

inspection.¹² He inspected the entire house and did not identify any problems with mice or any unusual odors.¹³ Respondent gave Mr. Moore the keys to the house and agreed to allow Appellant to move in early. Appellant then moved some of his property into the house.¹⁴

Five days later, on November 24, 2009, Appellant notified Respondent that it was terminating the lease. Appellant's "reason" was that the house had rodents, although no employee of Appellant saw any mice inside the house.¹⁵ While Respondent did not believe the house had mice, she offered to have the house inspected and exterminated by an exterminator.¹⁶ Appellant flatly refused and informed Respondent that it would not live in the house regardless of what Respondent did.¹⁷

Respondent thereafter called two exterminators, who recommended that she place traps, covered in peanut butter, in the

¹² CP 83-86.

¹³ CP 83-86.

¹⁴ CP 73.

¹⁵ Appellant's basis for claiming there were rodents were: a few mice droppings were found, a bottle of rodent poison was found in the pantry, a "dead animal" smell was somewhere in the basement, and food wrappers in the backyard had been torn into tiny pieces.

¹⁶ CP 73.

¹⁷ CP 73.

area where there may be a path mice may follow.¹⁸ On November 25, Respondent and her husband went to the house and inspected it. They did not detect the “dead animal” smell.¹⁹ They did find a few old mice droppings behind the lower stove and under the drawer in the upper kitchen. They placed several traps in these areas and put out poison.²⁰ No mice or other rodents were caught in the traps, or found dead from the poison.²¹ No additional mice droppings were found.²²

On November 30, 2009, Appellant emailed Respondent reiterating that it would not abide by the lease and confirmed this in a letter dated December 1, 2009.²³ After receiving this letter, Respondent listed the house for rent on Craigslist, and rented the house to the Vanyis beginning on January 1, 2010.²⁴ The Vanyis have continued to rent the house and have not experienced any problems with mice or any type of rodents.²⁵

¹⁸ CP 74.

¹⁹ CP 74-5.

²⁰ CP 74.

²¹ CP 75.

²² CP 75.

²³ CP 88-91.

²⁴ CP 75

²⁵ CP 75.

At the time Appellant signed the rental agreement, it paid to Respondent \$4,737 consisting of:

- \$2,437 which represented rent for the months of November and December of 2009.
- \$1,800 security deposit.
- \$500 prepaid utility deposit.²⁶

The lease contained the following provision:

Should Tenants move before this Agreement expires, they will be responsible for paying rent through the end of the term or until another tenant approved by the Owners has moved in, whichever comes first.²⁷

Pursuant to this provision, Respondent kept the money paid by Appellant for rent for November and December of 2009. Respondent refunded to Appellant its security deposit and utility deposit, minus \$35, which was deducted because Respondent had to clean the house and remove garbage left by Appellant. Respondent refunded Appellant \$2,265.²⁸

Despite breaching the rental contract, Appellant sued Respondent to recover the rent money it paid for November and

²⁶ CP 73.

²⁷ CP 79-81.

²⁸ CP 75.

December of 2009. Appellant's Complaint alleged three causes of action: breach of contract, breach of the Residential Landlord Tenant Act (hereinafter "RLTA"), and breach of an implied warranty of habitability.

II. PROCEDURAL HISTORY

Appellant initially sued Respondent in Clark County, an improper venue. The case was transferred to Snohomish County where Respondent filed a motion for summary judgment on all claims. This motion was granted.²⁹ The court subsequently granted Respondent's motion for attorneys fees because the lease contained an attorneys fee provision.³⁰ A judgment in favor of Respondent was entered.³¹ Appellant has appealed from that judgment.³²

III. ARGUMENT

A. INTRODUCTION

Appellant initially sued Respondent for breach of contract, breach of the RLTA, and breach of an implied warranty of habitability. Appellant did not appeal the trial court's dismissal of

²⁹ CP 14-15.

³⁰ CP 7-8, 79-80.

³¹ CP 5-6.

³² CP 1-4.

the breach of contract and breach of the RLTA. Appellant's only claim, on appeal, is that there exists an implied warranty of habitability independent of the RLTA, and that slight evidence that the rental house may have had a mouse in it breached this implied warranty. Appellant further claims that it was entitled to void the rental contract without giving the landlord an opportunity to exterminate the mice.

As set forth in detail *infra*, there is no implied warranty independent of the RLTA. Even assuming that there is, Appellant was required to give Respondent notice of the condition and an opportunity to remedy it before there was a breach. Appellant did not give Respondent any such notice. Finally, the presence of a mouse inside a house does not breach the implied warranty of habitability allowing Appellant to void the lease.

B. THERE IS NO IMPLIED WARRANTY OF HABITABILITY INDEPENDENT OF THE RLTA.

At common law, the landlord owed no duty to repair rental property; instead, *caveat emptor* applied and the tenant took the

property as he found it.³³ In *Foisy v. Wyman*,³⁴ the Court modified the common law and held:

We therefore hold that in all contracts for the renting of premises, oral or written, there is an implied warranty of habitability and breach of this warranty constitutes a defense in an unlawful detainer action.

The Supreme Court rendered this decision in December of 1973, but applied it to an unlawful detainer action which began in 1971. Thus, the court modified the common law **before the enactment of the RLTA**.

The RLTA went into effect on July 1, 1973 and modified the common law.³⁵ It is a comprehensive statute setting forth the duties of both the landlord and the tenant. RCW 59.18.060 enumerates the landlord's duties, and begins:

The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular: ...

It goes on to enumerate the landlord's specific duties in order to keep the premises fit for human habitation, including:

³³ *Hughes v. Chehalis School District*, 302 61 Wn.2d 222, 225, 377 P.2d 642 (1963); *Lincoln v. Farnkoff*, 26 Wash. App. 717, 713 P.2d 1212 (1980).

³⁴ 83 Wn.2d 22, 28, 515 P.2d 160 (1973).

³⁵ *Lincoln v. Farnkoff, supra*; *O'Brian v. Detty*, 19 Wash. App. 620, 621, 576 P.2d 1334 (1978).

(1) Maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which a legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such conditions substantially endangers or impairs the health or safety of the tenant;

(2) Maintain the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components in reasonably good repair so as to be usable and capable of resisting any and all normal forces and loads to which they may be subjected;

...

(4) Provide a reasonable program for the control of infestation by insects, rodents, and other pests at the initiation of the tenancy and, except in the case of a single family residence, control infestation during tenancy except where such infestation is caused by the tenant.

...

The Legislature superseded and subsumed the implied warranty found in *Foisy* when it enacted the RLTA. As explained in *Stoebuck and Whitman*, the Law of Property §6.38 (3rd Ed. 2000):

In Hawaii, Iowa, Ohio, Texas, Vermont, and Washington, however, the judge-made ‘implied’ warranty of habitability has been

entirely or largely superseded by comprehensive residential landlord-tenant statutes imposing on landlords a duty – set out in detail – to put and keep the leased premises in a habitable condition.

In other words, the RLTA changed the common law and incorporated the implied warranty of habitability found in *Foisy* into its statutory scheme. This is recognized in *Howard v. Horn*³⁶ where the court states:

Finally, the Howards contend a duty was imposed on Mr. Horn under the Residential Landlord Tenant Act – the warranty of habitability. We disagree. Prior to the adoption of this act, the landlord’s duty to the tenant was governed by an implied warranty of habitability. This warranty was later codified by the Legislature in the Act. RCW 59.18. (Citations omitted)

Foisy was decided in 1973. In the 38 years since that decision, there has not been one case wherein the court has held that there is an implied warranty of habitability independent of the RLTA. There have been numerous cases stating that there is an implied warranty, but only within the RLTA.³⁷

³⁶ 61 Wash. App. 520, 524, 810 P.2d 1387 (1991).

³⁷ *Howard v. Horn, supra., Lincoln v. Farnkoff, supra., Wright v. Miller*, 93 Wash. App. 189, 963 P.2d 934 (1998).

Appellant cites only dicta in *Aspon v. Loomis*³⁸ as authority for its contention that an implied warranty of habitability exists outside of the RLTA. In fact, *Aspon* supports Respondent's position.

In *Aspon*, the tenant sued the landlord after injuring herself when she tripped on an oil burner box inside the rental house. The tenant appealed a jury verdict in favor of the landlord, claiming that the trial court erred in failing to instruct the jury that the landlord owed the tenant a general duty to keep the premises fit for human habitation which extended beyond the specific duties set forth in the RLTA. The Appellate Court rejected the tenant's argument, holding that the landlord's duties were limited to those specifically enumerated in the RLTA. While the Court discussed *Foisy*, it refused to expand the RLTA's enumerated duties under the guise of an implied warranty of habitability.

If an implied warranty of habitability existed independent of the RLTA, then the court would have analyzed whether the oil burner box breached this warranty regardless of the RLTA. The

³⁸ 62 Wash. App. 818, 816 P.2d 751 (1991).

court did not do so because no such warranty exists outside of the RLTA.

Simply put, there is no implied warranty of habitability distinct from the RLTA. The RLTA's comprehensive scheme subsumed the implied warranty of habitability found in *Foisy*. Therefore, Appellant's claim, based upon an implied warranty of habitability, must be dismissed.

C. EVEN ASSUMING THAT AN IMPLIED WARRANTY OF HABITABILITY EXISTS OUTSIDE THE RLTA, THE LANDLORD MUST BE GIVEN AN OPPORTUNITY TO REMEDY THE DEFECT BEFORE A BREACH OCCURS.

Even if this Court finds an implied warranty of habitability exists outside the RLTA, the landlord is entitled to a reasonable opportunity to correct the defective condition before there is a breach, and the tenant can unilaterally terminate the lease.³⁹ A breach of an implied warranty of habitability is analogous to a breach of the rental agreement which requires a landlord to keep the premises in good repair. In *Franklin v. Fischer*,⁴⁰ the Supreme Court held that a landlord is not liable for breach of a contract to

³⁹ This assumes that Appellant's remedy for a breach of an implied warranty of habitability includes termination of the lease. Appellant cites no authority to support this contention.

⁴⁰ 34 Wn.2d 342, 208 P.2d 902 (1949).

keep the premises in good repair until he is given notice of the condition and an opportunity to repair. The Court explains on pg. 348:

Under the general rules of law applicable to such situations, a lessee, before any damages can be recovered from a lessor for breach of a covenant to keep and repair, would have to establish timely notice to the lessor of the need for repairs, and that the lessor failed to make them within a reasonable time under the circumstances. This rule is well stated by Judge Hay in *Asheim v. Fahey*, 170 Or. 330, 133 P.2d 246, 247, 145 A.L.R. 861, in these words:

In the absence of a special agreement to make repairs upon the demised premises, a landlord is under no duty to do so. 32 Am.Jur., Landlord & Tenant. § 705. He may, of course, by the terms of his lease, covenant to make repairs, but the law in that connection is that he must have timely notice of the need for repairs before he is obligated to make them. If, after such notice and a reasonable opportunity to make the repairs, the landlord fails to do so, and damage to the tenant or his invitees results, the landlord may be held liable.

The RLTA similarly requires notice to the landlord and a reasonable time to repair.⁴¹

A landlord should be allowed the same opportunity for notice and reasonable time to repair when there is an alleged breach of an implied warranty of habitability. As stated in Stoebuck and Whitman, the Law of Property, § 6.38 (3rd Edition, 2000):

Where the landlord's duty to keep the leased premises in repair is based on judicially-created implied warranty of habitability, it would seem that the landlord should not be deemed to be in breach of his duty unless he fails to make the necessary repairs within a reasonable time after receiving notice of the defect condition(s) requiring repair...

Conditions can suddenly occur in any house. The roof may begin leaking, the furnace may malfunction, or a mouse may find its way into the house. Assuming that an implied warranty of habitability exists independent of the RLTA, fairness dictates the landlord be given notice of the condition and an opportunity to repair it before there is a breach, and the tenant can void the contract. It would be grossly unjust to allow a tenant to void a lease and move

⁴¹ RCW 58.18.090; *Howard v. Horn*, *supra* at 825.

out the instant a defect occurred without giving the landlord an opportunity to fix it.

In the present case, the undisputed evidence is that Respondent offered to hire an exterminator to remove any mice that might be inside the house as soon as the Appellant notified her of its concern. Appellant never gave Respondent the opportunity to remedy the alleged defect; instead, Appellant simply moved out. Since Appellant did not give Respondent an opportunity to remedy, there was no breach of the implied warranty of habitability as a matter of law.

D. EVEN ASSUMING THAT AN IMPLIED WARRANTY OF HABITABILITY EXISTS OUTSIDE THE RLTA, THE HOUSE WAS HABITABLE.

1. The Standard for Breach of Implied Warranty of Habitability Is Whether The House Was Unfit To Live In.

Even if this Court finds an implied warranty of habitability exists, the rental house was habitable even if a mouse was temporarily inside it. To violate the implied warranty of habitability,

the defect must render the house unfit to live in. The standard was set forth by Division I in *Wright v. Miller*⁴²:

The only conditions held to violate the warranty of habitability are those which render a dwelling actually unfit to be lived in.

*See also, Howard v. Horn, supra; Stewart v. Caldwell Banker.*⁴³

In the present case, Appellant never actually saw a mouse, dead or alive, inside the house. They observed only a few old mice droppings, and a bottle of rodent poison inside the house which had been left by the prior tenant.

Even assuming that there was a mouse inside the house, its presence does not make the house unfit to live in. Mice are easily eradicated by the use of traps or by exterminators. Their temporary presence does not create an imminent health hazard requiring people to evacuate the house.

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⁴² *Wright v. Miller, supra* at pp. 200-201. In this case, the court found an implied warranty of habitability under the RLTA.

⁴³ 109 Wn.2d 406, 745 P.2d 1284 (1987).

2. **The House Was Habitable Even Using The Standard For Habitability Set Forth By Division III.**

Appellant contends that the implied warranty of habitability is breached if there exists a condition which poses an actual or potential safety hazard to the occupants, citing *Lian v. Stalick*.⁴⁴ *Lian* is a Division III case decided 2 to 1. Its decision is not binding on this Court which has already adopted the standard set forth in the preceding section.

Even applying the *Lian* standard, the presence of a mouse inside the house, without more, does not pose a safety hazard to the occupants. As noted, mice are easily eradicated, and Respondent offered to hire an exterminator to do so when she was informed that mice might be in the house.

3. **The Bothell Municipal Code Does Not Support Appellant's Position.**

Appellant cites the Bothell Municipal Code as supporting its position that a mouse in the house breached the implied warranty of habitability. Nowhere in the Code does it state this. Instead, under the title "Public Nuisances," it defines "health hazards" as:

⁴⁴ 106 Wash. App. 811, 25 P.3d 467 (2001).

1. Vegetation or refuse which provides a harborage for wild rats or other pests as set forth in RCW Title 17, weeds, rodents and pests.

4. The Cases Appellant Cites Do Not Support Its Position.

Appellant initially cites *Apostle v. Seattle*,⁴⁵ a case which in no way addresses the issue of whether a mouse poses a safety hazard. In *Apostle*, the issue is whether the City of Seattle properly designated an area as “blighted” so it could condemn the property under the Urban Renewal Act. The court referred to the case of *Miller v. City of Tacoma*⁴⁶ as one with conditions that establish blight. These conditions were: extreme fire danger, unsanitary and unsafe conditions throughout the entire area, heavy rodent infestation with the ever-present danger of disease transmission, improper ventilation, light and sanitary facilities, physical dilapidation, deterioration, and defective construction.

Appellant also cites several out of state cases, but none support his position that a mouse or mice, without more, in the house poses a safety hazard. In each case, the defects were much more extensive. For example, in *Bernstein v. Fernandez*⁴⁷ the defects included: bathroom ceiling that continually leaked and ceilings in other rooms which leaked intermittently, the presence of rats, mice

⁴⁵ 70 Wn.2d 59, 422 P.2d 289 (1966).

⁴⁶ 61 Wn.2d 374, 378 P.2d 464 (1963).

⁴⁷ 649 A.2d 1064 (D.C. 1991).

and roaches, and a gas leak. In *Creekside Apartments v. Poteat*⁴⁸ the defects in the apartment complex included: cockroach infestation, unreliable heat and air conditioning, unreliable appliances, leaking and stopped-up plumbing, apartments not weather tight, entire apartment building in unsafe disrepair, no lights in hallway and common areas, dumpsters not emptied regularly, mice in one of the apartments, no smoking detector in an apartment, faulty smoking detectors in other apartments, holes in the ceiling, exposed electrical wires and faulty wiring.

In *Lawrence v. Triangle Capital Corp.*,⁴⁹ the tenant sought rent abatement because the landlord was unable to eliminate roaches in her apartment after several months of trying to do so. Appellant finally cites *Lemle v. Breeden*,⁵⁰ a case involving rats inside the house which were so numerous that the tenants (a family) had to sleep together in the downstairs living room.

This court should note that in each of the above cases cited by Appellant, the landlord was given an opportunity to repair the condition and failed to do so before the claims were brought.

E. RESPONDENT IS ENTITLED TO ATTORNEYS FEES.

Respondent is entitled to attorneys fees on appeal, pursuant to the following provision in the rental agreement:

⁴⁸ 116 N.C. App. 26, 446 SE.2d 826 (1994). Interestingly, in *Creekside*, the court held that the implied warranty of habitability was derived from the North Carolina statute, and the cause of action was based on the landlord's breach of that statute.

⁴⁹ 90 Ohio App.3d 105, 628 N.E.2d 74 (1993).

⁵⁰ 51 Haw. 426, 462 P.2d 470 (1969).

15. **ATTORNEYS FEES.** In any action or proceeding involving a dispute between the Owner and Tenant arising out of this Agreement, the prevailing party will be entitled to reasonable attorneys fees and any costs incurred.⁵¹

VI. CONCLUSION

The RLTA is a comprehensive statute changing the common law and represents a series of compromises between the landlord and tenant.⁵² When it was enacted, it incorporated into the legislation the implied warranty of habitability established in *Foisy v. Wyman, supra*. Appellant therefore cannot base a cause of action solely on the breach of an implied warranty of habitability outside of the RLTA.

Even if an implied warranty of habitability does exist, there cannot be a breach of it until the landlord is given notice of the condition and an opportunity to repair it. Since Appellant did not give Respondent such notice and opportunity, there was no breach as a matter of law.

⁵¹ CP 80.

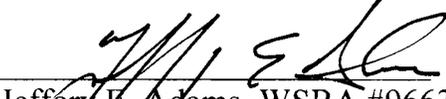
⁵² *Dexheimer v. CDS, Inc.*, 104 Wash. App. 464, 471, 17 P.3d 641 (2001).

The presence of a mouse, or even a few mice, inside a house does not create an imminent danger to the occupants, and there was no breach of any implied warranty.

This court should affirm the summary judgment.

DATED this 19 day of October, 2011, at Seattle,
Washington.

MURRAY DUNHAM & MURRAY



Jeffery E. Adams, WSBA #9663
Attorney for Respondent

CERTIFICATE OF SERVICE

I, Dorothy Brooks, hereby declare under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

I certify that on this day, I caused a true and correct copy of Respondent's Motion to Strike Appellant's Brief to be served upon the following in the manner indicated therein:

VIA HAND DELIVERY

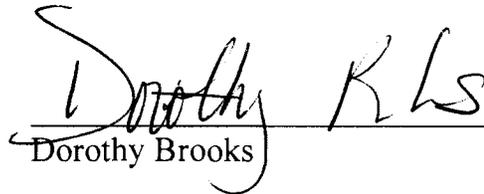
Clerk of the Court
Court of Appeals, Division II
600 University Street
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VIA EMAIL AND FIRST CLASS MAIL

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DATED this 20 day of October, 2011, at Seattle, Washington.



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