

67216-9

67216-9

No. 67216-9-I

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

**ORIGINAL**

---

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

Appellant,

v.

NICOLA NATION dba NATION MANAGEMENT,

Respondent.

---

CORRECTED BRIEF OF APPELLANT

---

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 AUG 29 AM 9:42

Joseph A. Yazbeck, Jr., WSBA 32700  
Yazbeck, Cloran & Bowser, P.C.  
1300 SW Fifth Ave., Suite 2750  
Portland, OR 97201-5617  
Tel: (503) 575-7622  
Fax: (503) 227-4866  
jay@ycblaw.com

## TABLE OF CONTENTS

	<u>Page</u>
I. <b><u>INTRODUCTION</u></b> .....	1
II. <b><u>ASSIGNMENTS OF ERROR</u></b> .....	2
A. <b><u>Assignment of Error</u></b> .....	2
B. <b><u>Issues Pertaining to Assignment of Error</u></b> .....	2
III. <b><u>STATEMENT OF THE CASE</u></b> .....	3
IV. <b><u>ARGUMENT</u></b> .....	5
A. <b><u>Introduction</u></b> .....	5
B. <b><u>Standard of Review</u></b> .....	6
C. <b><u>There Is an Implied Warranty of Habitability and a Remedy for Breach Independent of the RLTA</u></b> .....	6
1. <b><u>The Foisy Court’s Holding Was Not Subsumed by the RLTA and Is Not Limited to Use as an Affirmative Defense in Unlawful Detainer Actions</u></b> .....	7
2. <b><u>Tenant’s Remedies for Breach of the Implied Warranty of Habitability Are Not Limited to RLTA</u></b> .....	11
D. <b><u>A Condition That Substantially Endangers or Impairs a Tenant’s Health or Safety Is a Breach of the Implied Warranty of Habitability</u></b> .....	14

	<u>Page</u>
E. <b><u>Rodent Infestation Constitutes a Breach Because Is Endangers a Tenant’s Health and Safety and Rendered the Rental House Unfit for Habitation .....</u></b>	16
F. <b><u>There Was a Genuine Issue of Material Fact Precluding Summary Judgment Regarding Whether There Was a Rodent Infestation in the Rental House ..</u></b>	20
G. <b><u>Landis &amp; Landis Was Not Required to Stay in the Rental House and Allow Ms. Nation Time to Eradicate the Rodent Infestation .....</u></b>	21
V. <b><u>CONCLUSION .....</u></b>	23

## TABLE OF AUTHORITIES

<u>TABLE OF CASES</u>	<u>Page</u>
<i>Apostle v. City of Seattle</i> , 70 Wash.2d 59, 65, 422 P.2d 289 (1966) .....	17
<i>Aspon v. Loomis</i> , 62 Wn.App. 818, 825, 816 P.2d 751 (1991) ...	9
<i>Atherton Condominium Apartment–Owners Association Board v. Blume Development Company</i> , 115 Wash.2d 506, 519–22, 799 P.2d 250 (1990) .....	14, 15
<i>Bernstein v. Fernandez</i> , 649 A.2d 1064, 1072 (D.C. 1991) .....	17
<i>Creekside Apartments v. Poteat</i> , 116 N.C.App. 26, 28, 446 S.E. 826 (1994) .....	17
<i>Dexheimer v. CDS, Inc.</i> , 104 Wn.App. 464, 467, 17 P.3d 641 (2001) .....	11, 12, 13
<i>Foisy v. Wyman</i> , 83 Wash.2d, 22, 28, 515 P.2d 160 (1973) .....	7, 8, 9, 10, 11, 12, 13, 23
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn. App. 853, 560, 93 P.3d 108 (2004) .....	6
<i>Howard v. Horn</i> , 61 Wn.App. 520, 524, 810 P.2d 1387 (1991) ...	9, 11, 15, 16, 19
<i>Lawrence Triangle Capital Corp.</i> , 90 Ohio App.3d 105, 107, 628 N.E. 2d 74 (1993) .....	17, 22
<i>Lemle v. Breeden</i> , 51 Haw. 426, 436, 462 P.2d 470 (1969) .....	16, 18, 19, 22, 23

	<u>Page</u>
<i>Lian v. Stalick</i> , 106 Wn.App. 811, 814, 25 P.3d 467 (2001) . . . . .	8, 13, 14, 15, 18, 19
<i>Olson v. Scholes</i> , 17 Wn.App. 383, 563 P.2d 1275 (1977) . . . . .	7
<i>Pickney v. Smith</i> , 484 F.Supp.2d 1177, 1182 (W.D. Wash., 2007) . . . . .	14, 15
<i>Tucker v. Hayford</i> , 118 Wn.App. 246, 248, 75 P.3d 980 (2003) . . .	13
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn. App. 16, 26, 109 P.3d 805 (2005) . . . . .	6
<i>Wright v. Miller</i> , 93 Wn.App. 189, 200–01, 963 P.2d 934 (1998) .	14, 15, 16, 19

STATUTES/LAWS/CODES

Bothell Municipal Code . . . . .	16, 17, 19
Laws of 1973, 1st Ex.Sess., ch. 207 . . . . .	8
RCW Title 17, Weeds, Rodents and Pests . . . . .	16
RCW 17.15.010(2) . . . . .	16
RCW 59.18.060 . . . . .	11, 13
RCW 59.18.070 . . . . .	7, 11, 13
Residential Landlord Tenant Act (“RLTA”) . . . . .	1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 23, 24
Uniform Landlord Tenant Act . . . . .	13

Page

SECONDARY AUTHORITY

Restatement (Second) of Property § 17.6 ..... 8

## **I. INTRODUCTION**

This appeal arises from an action brought by Landis & Landis Construction, LLC (“Landis & Landis”) against Nicola Nation dba Nation Management (“Ms. Nation”) in breach of contract for a breach of the implied warranty of habitability. Landis & Landis entered into a rental agreement (“Rental Agreement”) in which it rented a house in Bothell, Washington (“Rental House”) for one of its construction crews, which was working on a construction project in the area. When the crew moved in, it found evidence of a rodent infestation and moved out shortly thereafter. Landis & Landis demanded Ms. Nation return the money it had paid, but Ms. Nation refused and Landis & Landis brought the breach of contract action. Ms. Nation moved for summary judgment that Landis & Landis failed to comply with the requirements of the Residential Landlord Tenant Act (“RLTA”) and had no right to terminate the lease of the Rental House, that there is no independent warranty of habitability outside of the RLTA, and that Ms. Nation did not breach any provision of the Rental Agreement. The trial court granted Ms. Nation’s motion for summary judgment and Landis & Landis timely filed a notice of appeal therefrom.

## **II. ASSIGNMENT OF ERROR**

### **A. Assignment of Error**

The trial court erred in granting Ms. Nation's motion for summary judgment.

### **B. Issues Pertaining to Assignment of Error**

1. Should the trial court have granted Ms. Nation's motion for summary judgment when there is an implied warranty of habitability and a remedy for breach independent of the RLTA?

2. Should the trial court have granted Ms. Nation's motion for summary judgment when the rodent infestation of the Rental House substantially endangered or impaired Landis & Landis' crew's health and safety and rendered the Rental House unfit for habitation?

3. Should the trial court have granted Ms. Nation's motion for summary judgment when a reasonable factfinder could have found that there was an rodent infestation in the Rental House?

4. Should the trial court have granted Ms. Nation's motion for summary judgment when Landis & Landis was not required to stay in the Rental House and allow Ms. Nation time to eradicate the rodent infestation?

### **III. STATEMENT OF THE CASE**

Landis & Landis was performing a construction project in Snohomish County in late 2009 and needed a house for its crew to live in during its work on the project. CP 43. To that end, Landis & Landis entered into the Rental Agreement with Ms. Nation for rental of the Rental House. *Id.* On or about November 19, 2009, Landis & Landis' project superintendent, Cory Moore, met Ms. Nation at the Rental House. *Id.* The Rental House appeared to have been cleaned recently and, as a result, smelled strongly of cleaning supplies. *Id.*

On or about November 23, 2009, the Landis & Landis crew started to move into the Rental House. *Id.* Upon entering, the crew smelled a strong "dead animal" odor, which was emanating from the basement. CP 44. One of the crew members left and purchased air freshener, with which we attempted to mask the odor, but to no avail. *Id.* Later that evening, the crew was unpacking their food and kitchen supplies when they saw rodent poison as well as rodent feces in the kitchen and pantry where their food was to be stored. *Id.* Based on these observations, it seemed obvious to the crew that the odor that they had smelled was of dead rodents. *Id.* Further, they found garbage in the backyard and under the back deck which had

evidently been torn into tiny pieces by rodents. *Id.* The following morning, Mr. Moore contacted Ms. Nation to notify her of what the crew had observed. CP 44. Ms. Nation admitted to Mr. Moore that the previous renter of the Rental House had stored their food garbage in the kitchen pantry and that there were rats, but she thought had eradicated them. *Id.* He explained to her that Landis & Landis could not expose its crew to the health hazard of a rodent infestation. *Id.*

Ms. Nation admits that the previous tenant, Mr. Roemer, had complained of a rodent infestation. CP 58–59. Ms. Nation states that she had sealed the vent through which the rodents had entered the house and thought that action had eradicated the infestation. CP 59. Ms. Nation further states that she cleaned the Rental House following Mr. Roemer’s departure and found no evidence of rodent infestation. *Id.* However, Ms. Nation admits that on November 25, 2009, following the Landis & Landis crew’s departure, she inspected the Rental House and “did find a few old mice droppings behind the lower stove and under the drawer in the upper kitchen.” CP 60.

///

///

#### **IV. ARGUMENT**

##### **A. Introduction**

As will be shown below, under Washington case law, there is an implied warranty of habitability in all contracts for rental of residential premises, independent of the RLTA. Thus, the Rental Agreement contained an implied warranty of habitability. Correspondingly, a tenant has available to him or her any remedy available at law and is not limited to the remedies provided for in the RLTA. Therefore, Landis & Landis properly brought an action in breach of contract for Ms. Nation's breach of the implied warranty of habitability. There is a split between this Court and Division III regarding what constitutes a breach of the implied warranty of habitability. This Court has held that in order for a breach to occur a premises must be unfit for habitation, while Division III holds that a breach occurs if a condition substantially endangers or impairs a tenant's health and safety. However, under either standard, the rodent infestation of the Rental House constituted a breach as it both substantially endangered Landis & Landis' crew's health and safety and rendered the Rental House uninhabitable. Finally, Landis & Landis was not required to give Ms. Nation an opportunity to eradicate the rodent infestation before

bringing its action to recover the money it had paid her pursuant to the Rental Agreement. Thus, the trial court erred in granting Ms. Nation's motion for summary judgment.

**B. Standard of Review**

The Appellate Court reviews an order on summary judgment de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn. App. 853, 560, 93 P.3d 108 (2004). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The Court is to view all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn. App. 16, 26, 109 P.3d 805 (2005). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Id.*

**C. There Is an Implied Warranty of Habitability and a Remedy for Breach Independent of the RLTA.**

Ms. Nation argued below that "a cause of action for breach of the implied warranty of habitability does not exist outside of the RLTA." CP 67. Tellingly, Ms. Nation cites no authority for this proposition. However,

the Supreme Court of Washington in *Foisy v. Wyman* held that “in all contracts for the renting of premises, oral or written, there is an implied warranty of habitability.” *Foisy*, 83 Wash.2d, 22, 28, 515 P.2d 160 (1973); *see also Olson v. Scholes*, 17 Wn.App. 383, 563 P.2d 1275 (1977). Ms. Nation also argued below that Landis & Landis’ remedies for a breach of the implied warranty of habitability were limited to those provided for in the RLTA, because, she argued, there is no implied warranty of habitability independent of the RLTA. CP 39. However, the plain language of RCW 59.18.070 and Washington case law show that an action in breach of contract for a breach of the implied warranty of habitability is proper.

1. **The *Foisy* Court’s Holding Was Not Subsumed by the RLTA and Is Not Limited to Use as an Affirmative Defense in Unlawful Detainer Actions.**

As noted above, the Washington Supreme Court in *Foisy* held that all contracts for the leasing of premises include an implied warranty of habitability. *Foisy*, 83 Wash.2d, 22, 28, 515 P.2d 160 (1973). Ms. Nation argued below that the *Foisy* holding was codified in the RLTA, and therefore no independent warranty of habitability exists outside of the RLTA. CP 38. However, *Foisy* was decided *after* the enactment of the

RLTA. *Foisy*, 83 Wash.2d at 28–29 (RLTA effective July 16, 1973, and *Foisy* decided October 25, 1973). In other words, Ms. Nation’s argument fails for the simple reason that it is impossible that the RLTA subsumed the holding of a case that had not yet been decided when it was enacted. Further, the *Foisy* court explicitly references the RLTA and states that the RLTA “reinforced” its holding that all contracts for the leasing of premises include an implied warranty of habitability. *Foisy*, 83 Wash.2d at 28–29 (“Our belief that public policy demands such a result is reinforced by our review of Laws of 1973, 1st Ex.Sess., ch. 207 [i.e., the RLTA], which became effective July 16, 1973. The legislature in passing this bill and the Governor in signing it have recognized that public policy demands this result.”) (emphasis added); *Lian v. Stalick*, 106 Wn.App. 811, 814, 25 P.3d 467 (2001) (“The *Foisy* court granted an implied warranty of habitability, finding support in the newly enacted RLTA.”) (emphasis added); *Lian*, 106 Wn.App. at 822 (adopting Restatement (Second) of Property § 17.6, which states that landlord is liable for physical harm if he or she failed to exercise reasonable care to repair a dangerous condition and the existence of the condition was “in violation of: (1) an implied warranty of habitability; or (2) a duty created by statute [e.g., the RLTA]

or administrative regulation.”). Below, Ms. Nation cited *Howard v. Horn*, which she claimed explained the codification of the *Foisy* court’s holding in the following passage:

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. See discussion in *Lincoln v. Farnkoff*, 26 Wash.App. 717, 613 P.2d 1212 (1980). This warranty was later codified by the Legislature in the act. RCW 59.18.

*Howard*, 61 Wn.App. 520, 524, 810 P.2d 1387 (1991). However, this discussion does not even mention the *Foisy* court’s holding and the fact that it came *after* the enactment of the RLTA. Further, Ms. Nation’s argument begs the question why the Supreme Court of Washington would establish an implied warranty of habitability if one already existed in the RLTA and if it the court did not mean for its holding to establish an implied warranty of habitability independent of the RLTA. As Division 1 stated in *Aspon v. Loomis*:

[T]he Residential Landlord-Tenant Act and the *Foisy* decision appear to have developed independently. Thus, we cannot presume that the Legislature intended the Act to

restrict application of the implied warranty  
of habitability.

*Aspon*, 62 Wn.App. 818, 825, 816 P.2d 751 (1991). Therefore, it is clear that the *Foisy* court's holding that all contracts for the leasing of premises include an implied warranty of habitability was not subsumed by the RLTA. Therefore, there is an implied warranty of habitability independent of the RLTA.

In summary, the Supreme Court in *Foisy* established an implied warranty of habitability for all housing rental contracts and the RLTA did not restrict application of that implied warranty of habitability. *Foisy*, 83 Wash.2d at 28; *Aspon*, 62 Wn.App. at 825. Thus, the Rental Agreement contains an implied warranty of habitability, independent of the RLTA. Ms. Nation's arguments to the contrary ignore the decisions of the courts of this state and the strong public policy behind them.

Ms. Nation also argued below that the court's holding in *Foisy* "is limited to unlawful detainer actions." CP 38. However, the *Foisy* court did not limit the holding to unlawful detainer actions. It held that:

[I]n 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.

*Foisy*, 83 Wash.2d at 28 (emphasis added). In other words, the court’s holding has two parts: (1) there is an implied warranty of habitability in all contract for renting premises; and (2) breach of the warranty can be an affirmative defense in an unlawful detainer action. Thus, *Foisy*’s holding is not “limited to unlawful detainer actions.”

**2. Tenant’s Remedies for Breach of the Implied Warranty of Habitability Are Not Limited to RLTA.**

The RLTA’s tenant remedies statute, RCW 59.18.070, expressly provides that it does not preclude a tenant from pursuing remedies outside of the RLTA, providing that:

If at any time during the tenancy the landlord fails to carry out the duties required by RCW 59.18.060 or by the rental agreement, the tenant may, in addition to pursuit of remedies otherwise provided him or her by law, deliver written notice [to the owner stating the defect and then the owner will have an opportunity to repair.]

RCW 59.18.070 (emphasis added); *Dexheimer v. CDS, Inc.*, 104 Wn.App. 464, 467, 17 P.3d 641 (2001) (citing *Howard*, 61 Wn.App. at 522–23 and holding that “[a] tenant may premise an action against a landlord under any three legal theories: the Residential Landlord Tenant Act (RLTA), the rental agreement, or the common law.”) Ms. Nation agrees that Landis &

Landis may bring an action independent of the RLTA if she owed Landis & Landis and obligation imposed by contract. CP 36. As noted above, *Foisy* established that “in all contracts for the renting of premises, oral or written, there is an implied warranty of habitability.” *Foisy*, 83 Wash.2d at 28. As noted above, Ms. Nation argues the *Foisy* implied warranty of habitability was codified by the RLTA and is limited to use as an affirmative defense to an unlawful detainer action. Thus, she argues, the Rental Agreement contains no implied warranty of habitability, and therefore Landis & Landis may not maintain a cause of action for her breach of the warranty. CP 36–39. In other words, if the Court finds, as Landis & Landis argues, that an implied warranty of habitability exists independent of the RLTA, then Ms. Nation implicitly agrees that Landis & Landis may bring an action against her in breach of contract for breach of the warranty.

The fact that a tenant is not limited to the remedies provided for in the RLTA is now well-established. While Division III in *Dexheimer* initially held that a tenant *was* limited to the remedies provided in the RLTA, it later held that:

In *Dexheimer v. CDS, Inc.* we concluded that the remedies available to a tenant under

the Landlord-Tenant Act were limited to those outlined in the statute. We were wrong.

*Tucker v. Hayford*, 118 Wn.App. 246, 248, 75 P.3d 980 (2003);

*Dexheimer*, 104 Wn.App. at 467. Division III based this decision on the fact that “[o]ther jurisdictions allow a tenant’s cause of action arising from statutory duties under its versions of the Uniform Landlord Tenant Act” and that “Washington commentators appear to agree.” *Id.* at 257–58. *See also Lian*, 106 Wn.App. at 819–20 (holding that the “RLTA does not bar a tenant from ‘pursuit of remedies otherwise provided him by law’ for the landlord’s failure to carry out the duties required under RCW 59.18.060. RCW 59.18.070. Some legal commentators have interpreted ‘remedies otherwise provided by law’ to include a tort action for personal injuries caused by the landlord’s breach of the RLTA.”)

Thus, Landis & Landis is not limited to the remedies provided for in RCW 59.18.070 and may bring an action to enforce implied warranties. Under *Foisy*, the Rental Agreement contains an implied warranty of habitability. Therefore, Landis & Landis’ action against Ms. Nation in breach of contract for breach of the implied warranty of habitability was proper.

**D. A Condition That Substantially Endangers or Impairs a Tenant’s Health or Safety Is a Breach of the Implied Warranty of Habitability.**

The Washington Supreme Court has held that it would determine whether the implied warranty of habitability was applicable on a case-by-case basis. *Lian*, 106 Wn.App. at 817 (citing *Atherton Condominium Apartment–Owners Association Board v. Blume Development Company*, 115 Wash.2d 506, 519–22, 799 P.2d 250 (1990)). However, in *Pickney v. Smith*, the U.S. District Court for the Western District of Washington pointed out that “Washington appellate courts have reached opposing conclusions as to what conditions are sufficiently dangerous to qualify a residence as uninhabitable and the Washington Supreme Court has not decided the issue.” *Pickney*, 484 F.Supp.2d 1177, 1182 (W.D. Wash., 2007). This Court has held that a condition does not constitute a breach of the implied warranty of habitability “unless the condition is so sever that the dwelling is actually unfit to live in.” *Id.* (citing *Wright v. Miller*, 93 Wn.App. 189, 200–01, 963 P.2d 934 (1998)). However, Division III has held that the warranty applies “whenever the defects of a structure poise an actual or potential safety hazard to its occupants.” *Id.* (citing *Lian*, 106 Wn.App. at 818). Because of this conflict, the *Pickney* court then

proceeded to “determine how the Washington State Supreme Court would decide the issue.” *Id.* The court determined that the Supreme Court would side with the standard established by Division III in *Lian*, and held that a condition violates the implied warranty of habitability if substantially endangers or impairs a tenant’s health or safety. *Pickney*, 484 F.Supp.2d at 1184.

In making this determination, the *Pickney* court found that “both *Howard* and *Wright* relied solely on the older Washington Supreme Court case—*Stuart*—and did not consider *Atherton*, which states that questions relating to the warranty of habitability must be made on a case-by-case basis.” *Id.* The court notes that *Atherton* “involved a discussion of the warranty of habitability in the context of a sale between two owners of property” and “[t]here is an even stronger case for extending the more flexible *Atherton* analysis to landlord-tenant disputes in light of the legislature’s decision to provide extra protection to tenants when it enacted the RLTA.” *Id.* The court also found that “because *Lian* [] repudiated the *Howard* decision, it also undermined the foundation of the *Wright* decision which relied on *Howard*.” *Id.*

///

Thus, the proper standard for determining whether a breach of the implied warranty of habitability has occurred is whether the condition poses actual or potential safety hazard to its occupants, not—as Ms. Nation argued below—whether the premises were unfit for habitation. However, even if the Court chooses to adopt the more rigorous standard of *Howard* and *Wright*, the Rental House was nevertheless rendered unfit for habitation by the rodent infestation.

**E. Rodent Infestation Constitutes a Breach Because It Endangers a Tenant's Health and Safety and Rendered the Rental House Unfit for Habitation.**

A rodent infestation can constitute a breach of the implied warranty of habitability because it endangers a tenant's health and safety. *See Lian*, 106 Wn.App. at 818; *Lemle v. Breeden*, 51 Haw. 426, 436, 462 P.2d 470 (1969). Furthermore, a rat infestation can render a premises unfit for habitation. *See Wright*, 93 Wn.App. at 200–01; *Lemle*, 51 Haw. at 436.

The Bothell Municipal Code provides that “[h]ealth hazard” means any of the following: [] [v]egetation or refuse which provides a harborage for wild rats or other pests as set forth in RCW Title 17, Weeds, Rodents and Pests.” Bothell Municipal Code, § 8.24.020 E (emphasis added). RCW 17.15.010(2) defines "pest" to include rodents. In other

words, the Bothell Municipal Code defines rodents as a health hazard. Further, Washington courts have acknowledged that rodents are a health hazard. *E.g., Apostle v. City of Seattle*, 70 Wash.2d 59, 65, 422 P.2d 289 (1966) (holding that a property was blighted because of, among other factors, “rodent infestation with the ever-present danger of disease transmission”)(emphasis added). Thus, Washington courts have acknowledged that the presence of rodents—as known vectors of disease—pose a threat to health and safety.

Landis & Landis has found no Washington case that determines whether a rodent infestation constitutes a breach of the implied warranty of habitability. However, other jurisdictions have held that rodent (and insect) infestations constitute a breach of the warranty. *E.g., Bernstein v. Fernandez*, 649 A.2d 1064, 1072 (D.C. 1991) (rodent infestation constituted breach of implied warranty of habitability such that the “as is” value of the premises was zero); *Creekside Apartments v. Poteat*, 116 N.C.App. 26, 28, 446 S.E. 826 (1994) (rodent and insect infestation constituted breach of implied warranty of habitability); *Lawrence v. Triangle Capital Corp.*, 90 Ohio App.3d 105, 107, 628 N.E.2d 74 (1993) (insect infestation constituted breach of implied warranty of habitability).

In a case factually similar to this case, the Supreme Court of Hawaii found that a rodent infestation was a breach of the implied warranty of habitability and the tenant was justified in rescinding the rental agreement, vacating the premises, and bringing an action to recover the deposit he had paid. *Lemle*, 51 Haw. at 436. In *Lemle*, the evening that the tenant and his family took possession of the premises, “it became abundantly evident to the plaintiff [tenant] that there were rats within the main dwelling and on the corrugated iron roof” causing the tenant and his family to abandon their bedrooms and sleep together in the downstairs living room.” *Id.* They stayed in the house two more nights and “[r]ats were seen and heard during those three nights.” *Lemle*, 51 Haw. at 428. After the third night, the tenant moved out and demanded the return of the money he had paid, and when it was not returned to him, he filed suit against the landlord for breach of the implied warranty of habitability. *Id.* The court found that “the facts demonstrate the uninhabitability and unfitness of the premises for residential purposes” as the family was “unable to sleep in the proper quarters or make use of the other facilities in the house due to natural apprehension of the rats which made noise scurrying about on the roof and invaded the house through the unscreened

openings.” *Id.* at 433–34 (emphasis added). The court also found that it was “too much to ask” the tenant to “have the requisite patience and fortitude in the face of trial and error methods of extermination” to remain in the house. *Id.* at 434.

Here, as in *Lemle*, Landis & Landis’ crew moved in to the premises and immediately discovered a rodent infestation. Here, as in *Lemle*, Landis & Landis moved its crew out because of the infestation, demanded its money back from Ms. Nation, and brought an action in breach of contract for breach of the implied warranty of habitability. As the Bothell Municipal Code and Washington case law provide, the presence of rodents is a health hazard and an immediate and serious threat to health and safety. Thus, under *Lian*, the rodent infestation constituted a breach of the implied warranty of habitability because it endangered Landis & Landis’ crew’s health and safety. *See Lian*, 106 Wn.App. at 818. Further, as in *Lemle*, the Rental House’s rodent infestation “demonstrate[s] the uninhabitability and unfitness of the premises for residential purposes” *Lemle*, 51 Haw. at 433–34. Thus, even under the more restrictive standard of *Howard* and *Wright*, the rodent infestation

///

rendered the Rental House uninhabitable and unfit for residential purposes.

**F. There Was a Genuine Issue of Material Fact Precluding Summary Judgment Regarding Whether There Was a Rodent Infestation in the Rental House.**

Here, sufficient evidence was presented to the trial court to constitute a genuine issue of material fact regarding whether the Rental House was infested with rodents. As the above facts and Ms. Nation's own admissions make plain, rodents were an ongoing problem in the Rental House. As stated above, Ms. Nation states that she cleaned the Rental House following Mr. Roemer's departure and found no evidence of rodent infestation. CP 59. Thereafter, on November 23, 2009, Landis & Landis' crew encountered a dead rodent odor and found rodent feces in the kitchen and pantry. CP 43. Ms. Nation admits that on November 25, 2009, following the Landis & Landis crew's departure, she inspected the Rental House and "did find a few old mice droppings behind the lower stove and under the drawer in the upper kitchen." CP 60.

In other words, immediately prior to the Landis & Landis crew moving in, Ms. Nation had cleaned the Rental House and found no rodent feces, but a short time later, the Landis and Landis crew moved in and

found rodent feces, which Ms. Nation herself found after the crew left. Thus, rodents had obviously infested the Rental House. This evidence is sufficient to create a genuine issue of material fact precluding summary judgment regarding whether there was a rodent infestation, and therefore the court erred in granting Ms. Nation's motion for summary judgment.

**G. Landis & Landis Was Not Required to Stay in the Rental House and Allow Ms. Nation Time to Eradicate the Rodent Infestation.**

Without citation to authority, Ms. Nation argued below that she should have been given an opportunity to abate the rodent infestation before Landis & Landis rescinded the Rental Agreement. CP 41. She argued that “[t]he presence of a mouse or mice inside a dwelling does not make the home unfit to live in,” but is simply a condition that “can suddenly occur in a house” and that “mice are easily eradicated by the use of traps or by exterminators.” CP 40. In other words, Ms. Nation failed to see the health hazard and immediate and serious threat to health and safety the rodent infestation posed. This is demonstrated by her casual response to previous infestations. *See* CP 58–59. Conspicuously missing from Ms. Nation's abatement efforts, described in her motion for summary judgment, is any mention of hiring an exterminator, which is something

she admits would have “easily eradicated” the rodent infestation. *Id.* In *Lawrence v. Triangle Capital Corp.*, an Ohio case involving roach infestation, the landlord made a similarly dismissive argument regarding vermin infestation, which the court quoted as follows:

Although the existence of vermin in an apartment may cause the tenant some trouble in eradicating them, it is not always a matter of sufficient gravity to relieve the tenant of his liability. The evidence does not reflect that Ms. Lawrence was deprived of the beneficial use of the premises in a substantial manner. At no time did the housing inspector find that the premises were uninhabitable or truly unsafe during the relevant time frame associated with this case.

*Lawrence*, 90 Ohio App.3d at 107. The court held that “[w]hile the damages that would ensue from the presence of roaches, whether dead or alive, might depend to some extent upon human sensibilities, there can be no doubt that the limited view take by the appellant [landlord] is somewhat removed from reality.” *Id.*

Indeed, as the *Lemle* court held, it was “too much to ask” the Landis & Landis to “have the requisite patience and fortitude in the face of trial and error methods of extermination” to remain in the house. *See Lemle*, 51 Haw. at 434. Obviously, Ms. Nation’s trial-and-error efforts, of

which she informed Landis & Landis, were not sufficient to eradicate the infestation, as the infestation continued despite those efforts. CP 44. As discussed above, in *Lemle*, after discovering the rodent infestation, the tenant moved out without giving the landlord an opportunity to eradicate the infestation, and brought an action for return of the money he had paid the landlord. *Lemle*, 51 Haw. at 434. As stated above, the *Lemle* court found that it was “too much to ask” the tenant to stay in the house while the landlord attempted to eradicate the infestation and affirmed the trial court’s verdict for the tenant. Here, it would have been also too much to ask Landis & Landis to live in the rodent-infested Rental House while Ms. Nation continued her ineffective efforts to eradicate the infestation. Thus, the fact that Landis & Landis did not give Ms. Nation further opportunity to attempt to eradicate the rodent infestation does not preclude it from seeking to recover the money it paid her.

## V. CONCLUSION

As shown above, the *Foisy* court established an implied warranty of habitability in all contracts for rental of residential premises. That warranty is independent of and was not subsumed by the RLTA, which was passed prior to the *Foisy* decision. There is a split between this Court

and Division III regarding what constitutes a breach of the implied warranty of habitability; however, under either standard, the rodent infestation constituted a breach. The RLTA does not limit a tenant's remedies to those provided for in the RLTA, and therefore Landis & Landis properly brought an action in breach of contract for the breach of the implied warranty of habitability. Finally, Landis & Landis was not required to give Ms. Nation an opportunity to eradicate the rodent infestation before bringing its action to recover the money it had paid her pursuant to the Rental Agreement.

Thus, the trial court erred in granting Ms. Nation's motion for summary judgment. Therefore, this Court should reverse and remand this matter to the trial court.

DATED this 26<sup>th</sup> day of August, 2011.

Respectfully submitted,

YAZBECK, CLORAN & BOWSER, PC



---

Joseph A. Yazbeck, Jr., WSBA No. 32700  
Yazbeck, Cloran & Bowser, P.C.  
1300 SW Fifth Avenue, Suite 2750  
Portland, OR 97201-5617  
jay@ycblaw.com  
(503) 575-7622  
Fax: (503) 227-4866  
of Attorneys for Appellant

**Landis & Landis Construction, LLC v. Nicola Nation dba Nation Management  
Washington State Court of Appeals Division I Case No. 67216-9-1  
Snohomish County Superior Court Case No. 10-2-04763-6**

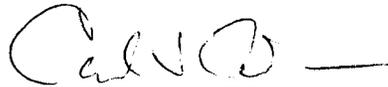
**PROOF OF SERVICE**

1. My name is Carl V. Anderson. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Oregon, and am not a party to this action.
2. On August 26, 2011 I served the **CORRECTED BRIEF OF APPELLANT** on the following individual by United States Postal Service regular mail and by email:

Jeffory Emerson Adams  
Murray Dunham & Murray  
200 West Thomas Street, Suite 350  
Seattle, WA 98119  
email: [jeff@murraydunham.com](mailto:jeff@murraydunham.com); [Dorothy@murraydunham.com](mailto:Dorothy@murraydunham.com)  
Counsel for Defendant/Respondent

**I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE  
STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.**

Dated: August 26, 2011  
At: Portland, Oregon.



---

Carl V. Anderson, Legal Assistant  
Office of Attorneys for Plaintiff/Appellant