

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

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

Appellant,

v.

NICOLA NATION dba NATION MANAGEMENT,

Respondent.

APPELLANT'S CORRECTED REPLY BRIEF

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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I. INTRODUCTION

Ms. Nation erroneously states that Landis & Landis “did not appeal the trial court’s dismissal of the breach of contract” claim. Resp’t’s Brief, 6–7. Landis & Landis assigned as error the trial court’s grant of Ms. Nation’s motion for summary judgment. Appellant’s Corrected Brief, 2. Ms. Nation moved for summary judgment on all of Landis & Landis’s claims, including the breach of contract claim. The trial court granted Ms. Nation’s motion. Therefore, in assigning error to the trial court’s grant of Ms. Nation’s motion for summary judgment, Landis & Landis appealed “the trial court’s dismissal of the breach of contract” claim. *See* RAP 2.4(a). The trial court’s grant of summary judgment on the breach of contract, breach of RLTA, and breach of implied warranty of habitability claims were not discrete orders that each required their own appeal. Further, as Landis & Landis’s brief makes clear, it argues that the Rental Agreement contains an implied warranty of habitability and that Ms. Nation breached that implied warranty, thereby breaching the Rental Agreement.

II. THERE IS A WARRANTY OF HABITABILITY AND A REMEDY FOR BREACH INDEPENDENT OF THE RLTA.

Ms. Nation argues that the *Foisy* court “modified the common law *before the enactment of the RLTA.*” Resp’t’s Brief, 8 (emphasis in original). Ms. Nation does not cite to the *Foisy* opinion for this proposition. This omission is due to the fact that nothing in the *Foisy* holding limits its effect to before the enactment of the RLTA. Indeed, it is clear from decision that holding was prospective in nature. The court held that “in all contracts for the renting of premises, oral or written, there is an implied warranty of habitability.” *Foisy v. Wyman*, 83 Wash.2d, 22, 28, 515 P.2d 160 (1973). If the *Foisy* court had merely meant the implied warranty of habitability it established in its decision to apply to those rental agreements entered into *prior* to the RLTA, it logically would have provided for such a limitation by including language to the effect of “in all contracts for the renting of premises, oral or written, entered into prior to the enactment of the RLTA there is an implied warranty of habitability.” Furthermore, the *Foisy* court stated that “[o]ur belief that public policy demands such a result is reinforced by our review of Laws of 1973, 1st Ex.Sess., ch. 207, [RLTA] which became effective July 16, 1973.” *Id.* at 28–29 (emphasis added). If the *Foisy* court had merely meant

its holding to have the limited effect argued by Ms. Nation, the *Foisy* court would not have stated that its holding was “reinforced” by the RLTA, but would have stated explicitly that its holding was applicable to those rental agreements entered into prior to enactment of the RLTA.

Additionally, the Court in *Aspon v. Loomis* held that:

[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). Thus, it is clear from the *Foisy* decision itself and the Court’s reading of the *Foisy* decision that the applicability of that decision is not limited to those rental agreements entered into prior to the enactment of the RLTA.

Additionally, Ms. Nation argues that “[t]he Legislature superseded and subsumed the implied warranty found in *Foisy* when it enacted the RLTA.” Resp’t’s Brief, 9. Ms. Nation cites to no judicial authority for this proposition. Instead, Ms. Nation cites a property treatise, which states that in several states, including Washington, “the judge-made ‘implied’ warranty of habitability has been entirely or largely superseded by comprehensive residential landlord-tenant statutes.” *Id.* The treatise and

this quote ignore the timing of *Foisy* and RLTA and are obviously not an in-depth examination of their interaction. *Foisy* was decided in October 25, 1973 and the RLTA became effective on July 16, 1973. *Foisy*, 83 Wash.2d at 28–29. Similarly, the cases cited by Ms. Nation for the proposition that the RLTA subsumed the *Foisy* decision either fail to even mention *Foisy* or ignore the fact that *Foisy* was decided *after* the enactment of the RLTA. The Court in *Howard v. Horn* and *Wright v. Miller* fails to make any mention of *Foisy* whatsoever, much less analyze the timing of *Foisy* and the RLTA. *Howard*, 61 Wn.App. 520, 524, 810 P.2d 1387 (1991); *Wright v. Miller*, 93 Wn.App. 189, 200–01, 963 P.2d 934 (1998). The Court in *Lincoln v. Farnkoff* stated that in *Foisy*, the doctrine of caveat emptor “gave way to modern realities and residential tenants were afforded the protection of an implied covenant of habitability” and then “[f]ollowing this lead, the legislature enacted the residential landlord-tenant act in 1973.” *Lincoln*, 26 Wn.App. 717, 719–20, 613 P.2d 1212 (1980). In other words, the only case cited by Ms. Nation for the proposition that the RLTA subsumed the *Foisy* decision, and which actually addressed the *Foisy* decision, got the timing wrong.

Further, Ms. Nation makes much of the fact that since the *Foisy* decision “there has not been one case wherein the court has held that there is an implied warranty of habitability independent of the RLTA.” Resp’t’s Brief, 10. This does not mean that the warranty does not exist. A legal basis for an action can lay dormant for decades waiting for the right facts to rouse it.

Finally, Ms. Nation argues that if there was an implied warranty of habitability independent of the RLTA, the *Aspon* court “would have analyzed whether the oil burner box breached this warranty regardless of the RLTA.” Resp’t’s Brief, 11. The oil burner box in question was located in a non-common area of the rental. *Aspon*, 62 Wn.App. at 820. The *Aspon* court noted that the RLTA and *Foisy* “appear to have developed independently,” and therefore it “cannot presume that the Legislature intended the Act to restrict application of the implied warranty of habitability.” *Id.* at 825 (emphasis added). The *Aspon* court stated, however, that it could not “presume that the *Foisy* court construed the Act as giving rise to a general duty extending beyond the specific duties enumerated.” *Id.* In other words, the *Aspon* court acknowledged that the *Foisy* court established an implied warranty of habitability independent of

RLTA, but held that the *Foisy* implied warranty was limited to the duties enumerated in the RLTA. In *Aspon*, the court found that since:

[T]he Legislature specifically provided that a landlord must . . . keep common areas reasonably clean, sanitary, and safe from defects (RCW 59.18.060(3)), but did not provide that landlords must keep noncommon areas safe from defects. An inference therefore arises that the Legislature did not intend to impose a duty on landlords to keep noncommon areas safe from defects. Under the principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), the list of particulars is treated as exhaustive.”

Id. at 826–27 (emphasis added). Thus, because the oil burner box was located in a non-common area, and the RLTA did not provide that a landlord must keep non-common areas safe from defects, the Court did not apply the *Foisy* implied warranty of habitability. Here, in contrast, keeping a rental free from rodent infestation *is* one of the enumerated duties imposed upon a landlord by the RLTA. RCW 59.18.060(4). Thus, under the *Aspon* analysis, the *Foisy* implied warranty of habitability applies here, independent of the RLTA.

**III. LANDIS & LANDIS WAS NOT REQUIRED TO GIVE MS.
NATION AN OPPORTUNITY TO REMEDY THE DEFECT
BEFORE A BREACH OCCURS.**

As Landis & Landis noted in its opening brief, it found no Washington cases that deal with breach of the implied warranty of habitability due to a rodent infestation. However in *Lemle v. Breeden*, a Hawaii Supreme Court case, a tenant was not required to give the landlord an opportunity to remedy a breach of the implied warranty of habitability due to a rodent infestation, and a rodent infestation alone. *Lemle v. Breeden*, 51 Haw. 426, 436, 462 P.2d 470 (1969). Ms. Nation does not address *Lemle*, except to imply that the remedy in that case was allowed because there were more rodents involved. Resp't's Brief, 19. This begs the question how Ms. Nation knows how many rodents had infested the Rental House and ignores the *Lemle* court's clear holding that it is "too much to ask" to require a tenant to stay in a rodent-infested house and wait for the landlord to remedy the condition. *Lemle*, 51 Haw. at 434.

Instead, Ms. Nation states in a conclusory fashion that "[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" and cites a case that deals with a commercial lease, *Franklin v.*

Fischer. Franklin is clearly inapplicable, as a commercial lease case, but even if it did deal with a residential lease, it was nevertheless decided under the standard of caveat emptor that was the law prior to *Foisy* and the RLTA. *Franklin*, 34 Wash.2d 342, 208 P.2d 902 (1949)

In *Lemle*, the court held 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 after discovering a rodent infestation. *See Lemle*, 51 Haw. at 434. The *Lemle* court affirmed the trial court’s verdict for the tenant, who 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. Here, as in *Lemle*, it was too much to ask Landis & Landis to have the requisite patience and fortitude in the face of Ms. Nation’s trial-and-error efforts, of which she informed Landis & Landis, and which were obviously not sufficient to eradicate the infestation, as the infestation continued despite those efforts. CP 44.

**IV. THE STANDARD FOR BREACH OF THE IMPLIED
WARRANTY OF HABITABILITY IS WHETHER A CONDITION
SUBSTANTIALLY ENDANGERS OR IMPAIRS A TENANT'S
HEALTH OR SAFETY**

Ms. Nation, relying on this Court's decisions in *Howard* and *Wright*, argues that the standard for determining whether a breach of the implied warranty of habitability has occurred is whether the dwelling is unfit to be lived in. Resp't's Brief, 15–16. Landis & Landis, relying on Division III's decision in *Lian v. Stalick*, argues that the standard is whether a condition substantially endangers or impairs a tenant's health or safety. *Lian*, 106 Wn.App. 811, 818, 25 P.3d 467 (2001). Ms. Nation argues that *Lian* "is not binding on this Court which has already adopted the [*Howard* and *Wright*] standard." Resp't's Brief, 17. Ms. Nation fails to address *Pickney v. Smith*, the U.S. District Court for the Western District of Washington case cited by Landis & Landis in its opening brief, which examines the continued viability of the *Howard* and *Wright* standard. *Pickney*, 484 F.Supp.2d 1177, 1182 (W.D. Wash., 2007).

As argued in Landis & Landis' opening brief, 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)). The *Pickney* court 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). 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.

The basis of the *Pickney* court’s determination was the fact 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, while this Court's standard remains that of *Howard* and *Wright*, Landis & Landis respectfully requests that the Court reconsider that standard in light of the reasoning of *Pickney* and adopt the *Lian* standard.

V. A RODENT INFESTATION CLEARLY ENDANGERS OR IMPAIRS A TENANT'S HEALTH OR SAFETY

Ms. Nation argues that even if the *Lian* standard is applied, "the presence of a mouse inside the house, without more, does not pose a safety hazard to the occupants." Resp't's Brief, 17. It is common sense that the presence of rodents endangers human health and safety. Rodents spread over 35 diseases, including hantavirus pulmonary syndrome, plague, and certain types of encephalitis, typhus, and meningitis. Centers for Disease Control and Prevention, CDC - Rodents, <http://www.cdc.gov/rodents/> (last visited Nov. 10, 2011); Centers for Disease Control and Prevention, CDC - Diseases directly transmitted by rodents,

<http://www.cdc.gov/rodents/diseases/direct.html> (last visited Nov. 10, 2011) ; Centers for Disease Control and Prevention, CDC - Diseases indirectly transmitted by rodents, <http://www.cdc.gov/rodents/diseases/indirect.html> (last visited Nov. 10, 2011). Those diseases “can be spread to humans directly, through handling of rodents, through contact with rodent feces, urine, or saliva, or through rodent bites.” Centers for Disease Control and Prevention, CDC - Rodents, <http://www.cdc.gov/rodents/> (last visited Nov. 10, 2011). Here, Ms. Nation admits that she found rodent feces in the Rental House. CP 60.

Additionally, Ms. Nation has no way of knowing that the infestation was limited to “a mouse.” Further, Ms. Nation takes issue with Landis & Landis’ citation to the Bothell Municipal Code and *Apostle v. Seattle*. Landis & Landis cited the code and *Apostle* merely to demonstrate that the City of Bothell and Washington courts consider rodent infestation a health hazard, a fairly uncontroversial assertion. Bothell Municipal Code, § 8.24.020 E; *Apostle v. City of Seattle*, 70 Wash.2d 59, 65, 422 P.2d 289 (1966). Finally, Ms. Nation makes much of the fact that in many of the out-of-state cases Landis & Landis cited there were other factors involved, in addition to rodent infestation, which lead to breach of the

implied warranty of habitability. However, regarding *Lemle*—the case that is directly on point here and in which there was a rodent infestation alone—she says only that in that case the rats “were so numerous that the tenants (a family) had to sleep together in the downstairs living room.” Resp’t’s Brief, 19. This in no way distinguishes *Lemle* from this matter. In fact, this argument supports Landis & Landis’ reliance on *Lemle*, as in this matter Landis & Landis’ crew was so concerned for its health and safety that it could not remain in the house.

VI. ATTORNEY FEES

RAP 18.1 provides for the award of attorney fees by the Court. A party must include “more than a bald request for fees” and its request for attorney fees must contain “argument and citation to authority.” *Richards v. City of Pullman*, 134 Wn.App. 876, 883, 142 P.3d 1121 (2006). Argument and citation to authority are necessary to advise the Court of the proper grounds for an award of attorney fees. *Dept. of Labor and Industries v. Kaiser Aluminum and Chemical Corp.*, 111 Wn.App. 771, 788, 48 P.3d 324 (2002).

The Court may award a prevailing party attorney fees based on a contractual fee provision. *Renfro v. Kaur*, 156 Wn.App. 655, 667, 235 P.3d 800 (2010). Here, the Rental Agreement provides that:

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 costs incurred.

CP 80. Thus, the Court may base an award of attorney fees on the attorney fee provision of the Rental Agreement as it is a contractual fee provision. This proceeding clearly involves a dispute between the Owner, Ms. Nation, and the Tenant, Landis & Landis, arising out of the Rental Agreement, as Landis & Landis alleges that Ms. Nation breached the Rental Agreement by breaching the implied warranty of habitability contained therein. Therefore, if Landis & Landis prevails, it is entitled to its attorney fees incurred on appeal.

VII. CONCLUSION

As shown above, *Foisy* established an implied warranty of habitability independent of the RLTA. A landlord breaches that warranty by allowing a condition in the dwelling that endangers or impairs a tenant's health or safety. A rodent infestation clearly endangers or impairs

a tenant's health or safety. Under *Lemle*, if a breach is caused by a rodent infestation, and a rodent infestation alone, a tenant may immediately move out and sue the landlord for return of money paid without waiting for the landlord to attempt to eradicate the infestation.

Here, there is evidence that the Rental House was infested with rodents sufficient to create a genuine issue of material fact precluding summary judgment. Thus, the trial court erred in granting Ms. Nation's motion for summary judgment, and therefore this Court should reverse and remand this matter to the trial court.

DATED this 17 day of November, 2011.

Respectfully submitted,

YAZBECK, CLORAN & BOWSER, PC



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**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 November 17, 2011 I served the **APPELLANT'S CORRECTED REPLY BRIEF** on the following individual by United States Postal Service regular mail and by email:

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

Dated: November 17, 2011
At: Portland, Oregon.



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