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Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act

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In 1977, the North Carolina General Assembly adopted the Residential Rental Agreements Act in order to abrogate the common-law rule that landlords, in the absence of an express covenant to the contrary, have no duty to provide their tenants with fit and habitable premises. The North Carolina Supreme Court, however, recently interpreted the Act to exclude renters of non-primary residences, such as vacation property. Although the General Assembly has created new statutory protections for vacation rentals in reaction to this court case, other renters of secondary residences may still be unprotected. In this Essay, Professor Orth examines the court’s misreading of both the Act and the common law, the legislature’s attempt to fix the problem, and potential solutions for the future.

INTRODUCTION

Suppose grandparents lease a beach house for two weeks and invite their children and grandchildren for a family vacation. After dinner one night, they all assemble on the second-story deck for a family photograph. Holding the camera, the grandmother stands with her back to the house, while the rest of the family lines up against the far railing with the ocean behind them. At that moment, the deck separates from the house and collapses, injuring every member of the family.

On essentially this statement of facts, the North Carolina Supreme Court unanimously held on April 9, 1999, in Conley v. Emerald Isle Realty, Inc.,¹ that the injured parties had no cause of
action against the owners of the house or the real estate company that managed and rented the property. According to the court, the Residential Rental Agreements Act, which requires residential landlords to “[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition,” imposed no duty on the landlord because the family had not rented the beach house as its primary residence. In addition, the court held that the common law imposed no duty of fitness on a residential landlord, even one renting furnished dwellings for a short term. Both holdings were wrong.

On August 5, 1999, the North Carolina General Assembly responded to the decision in Conley by enacting the North Carolina Vacation Rental Act and amending the Residential Rental Agreements Act. For rental agreements entered into on or after January 1, 2000, the Vacation Rental Act extends the landlord’s duty to provide “fit and habitable” premises to a “vacation rental,” defined as “[t]he rental of residential property for vacation, leisure, or recreational purposes for fewer than 90 days by a person who has a place of permanent residence to which he or she intends to return.” Had it been in effect at the time of the accident litigated in Conley, the Vacation Rental Act would presumably have altered the outcome of the case.

In addition to enacting the Vacation Rental Act, the General Assembly also amended the Residential Rental Agreements Act by excluding vacation rentals from its coverage and by altering the definition of the word “premises.” While solving the problem of

for reinstatement of a superior court order granting summary judgment in favor of the defendants). Justice Martin did not participate in the consideration or decision of the case; previously, as a judge on the court of appeals, he had joined in the decision that was reversed. Under the actual facts of the case, a married son and his spouse had rented the beach house for a vacation that included three generations of the family. See id. at 294-95, 513 S.E.2d at 558.

5. See id. at 297, 513 S.E.2d at 559.
7. N.C. GEN. STAT. ANN. § 42A-31 (“A landlord of a residential property used for a vacation rental shall . . . [m]ake all repairs and do whatever is reasonably necessary to put and keep the property in a fit and habitable condition.”).
8. Id. § 42A-4(3).
9. See id. § 42-39(a1); infra note 12 and accompanying text.
10. See N.C. GEN. STAT. ANN. § 42-40(2); infra note 68 and accompanying text.
vacation rentals created by the holding in Conley, the new legislation
does not necessarily solve the problem with regard to other rentals of
residential property by those with primary residences elsewhere, such
as college students and workers on assignment away from home. Thus, a significant portion of North Carolina renters may still have no
legal redress against their landlords for failing to keep properties in
habitable condition unless the courts or the General Assembly act
again to correct the errors made in Conley.

I. THE RESIDENTIAL RENTAL AGREEMENTS ACT

The Residential Rental Agreements Act reversed the common-
law rule that landlords have no duty, in the absence of express
covenants, to provide residential tenants with habitable premises. The Act, which was passed in 1977, "determines the rights,
obligations, and remedies under a rental agreement for a dwelling
unit within this State." The only rental agreements originally
excluded from coverage were those involving (1) "transient
occupancy in a hotel, motel, or similar lodging subject to regulation
by the Commission for Health Services"; and (2) "any dwelling[s]
furnished without charge or rent." Residential landlords were
required "to put and keep the premises in a fit and habitable
condition." The Act originally defined the word "premises" to
mean "a dwelling unit, including mobile homes or mobile home
spaces, and the structure of which it is a part and facilities and
appurtenances therein and grounds, areas, and facilities normally held
out for the use of residential tenants who are using the dwelling unit
as their primary residence." Nowhere did the Act define the words

12. N.C. GEN. STAT. § 42-39(a), (b) (1994), amended by N.C. GEN. STAT. ANN. § 42-
39(a1) (Lexis 1999). Incident to its adoption of the new Vacation Rental Act, the General
Assembly amended the exclusions in the Residential Rental Agreements Act by adding a
new subsection to read: "The provisions of this Article shall not apply to vacation rentals
entered into under Chapter 42A of the General Statutes." N.C. GEN. STAT. ANN. § 42-
39(a1).
13. N.C. GEN. STAT. § 42-42(a)(2) (Supp. 1998). The landlord's duty is non-waivable:
"The landlord is not released of his obligations under any part of this section by the
tenant's explicit or implicit acceptance of the landlord's failure to provide premises
complying with this section, whether done before the lease was made, when it was made,
or after it was made . . . ." N.C. GEN. STAT. § 42-42(b).
(Lexis 1999). Incident to its adoption of the new Vacation Rental Act, the General
Assembly amended the definition of "premises" in the Residential Rental Agreements
Act by deleting the words "who are using the dwelling unit as their primary residence." N.C. GEN. STAT. ANN. § 42-40(2); infra note 68 and accompanying text.

The Residential Rental Agreements Act defines only two other terms, "action"
“residential tenants” or “dwelling unit.”

In Conley, the North Carolina Supreme Court misread the definition of “premises” and limited the application of the Residential Rental Agreements Act to “premises which are ‘normally held out for the use of residential tenants who are using the dwelling unit as their primary residence.’”\(^\text{15}\) There was no question in Conley that the injured family had a “rental agreement” or that the owners and the real estate company were “landlords” as defined by the Act.\(^\text{16}\) As part of the structure of the beach house, the deck clearly would be included in the “premises” defined by the Act.\(^\text{17}\) While the Act in its final section provides that “[a] violation of this Article shall not constitute negligence per se,”\(^\text{18}\) a violation can be used as evidence of negligence.\(^\text{19}\) But for the court’s misreading, the injured family would have had a cause of action.

The court’s reading of the Act was inconsistent with both the definition of “premises” and the structure of the statute. The Residential Rental Agreements Act defined “premises” to mean “a dwelling unit.” Dwelling units included, as the definition made clear, “mobile homes or mobile home spaces.” “Premises” also encompassed “the structure of which [the dwelling unit] is a part and facilities and appurtenances therein” and certain “grounds, areas, and

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15. Conley, 350 N.C. at 295, 513 S.E.2d at 558 (quoting N.C. GEN. STAT. § 42-40(2) (1994)). The court’s statement that, as originally adopted, “the Act specifically does not apply to short-term vacation rentals,” id. at 296, 513 S.E.2d at 558, is simply incorrect. See infra notes 20–31 and accompanying text.

16. See supra notes 12 and 14.


facilities” particularly described as those “normally held out for the use of residential tenants who are using the dwelling unit as their primary residence.” The Act’s reference to the tenants’ use of the dwelling unit as their “primary residence” specifically referred only to the “grounds, areas, and facilities” to be included as part of the premises. Indeed, the grammatical structure of the sentence defining “premises” showed that what was listed as included in the Act’s coverage was not intended to restrict the scope of the Act, but rather to expand it by providing examples of what was covered.

In addition, the reference to “primary residence” did not appear in the section concerning the Act’s application and did not limit the type of “dwelling unit” covered by the Act. Residences other than the “primary residence” were not mentioned in the section of exclusions, which excluded only “transient occupancy” in public accommodations and gratuitous leases. The legislature’s omission of limitations on the dwelling units covered by the Act and failure to exclude a dwelling unit not used as a “primary residence” supported the inference that all rented dwelling units were within the scope of the Residential Rental Agreements Act. A canon of statutory construction as old as Blackstone provides that “[o]ne part of a statute must be so construed by another that the whole may if possible stand.”

The court’s error concerning the scope of the Residential Rental Agreements Act may stem from a 1991 case decided by the North Carolina Court of Appeals, Baker v. Rushing. In that case, residents of a building styled by its owners as a “hotel” claimed to be covered by the Act. In determining whether the residents were tenants of


21. By limiting the “grounds, areas, and facilities” to be included as part of the premises to those “normally held out for the use of residential tenants who are using the dwelling unit as their primary residence,” the General Assembly presumably intended to answer such questions as whether the Act applied to exterior seating or a children’s playground.

22. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 89 (facsimile 1979) (1765).


24. See id. at 247, 409 S.E.2d at 112. The residents also claimed the protection of a state law limiting the means by which landlords may evict tenants to those prescribed by statute. See id. (citing N.C. GEN. STAT. § 42-25.6). The background of Baker, as reported in a state legal newspaper, was that developers had bought a run-down hotel, planning to renovate and convert it into an office building, and had required the residents to vacate
dwelling units or transients occupying hotel rooms, the court of appeals examined numerous items of evidence, including proof showing that the tenants had no other residences. In looking beyond the label attached to the building and considering the true relationship of the parties, the court of appeals was clearly correct. The error came in the court’s statement that the Act “provides protection to those persons occupying ‘a dwelling unit . . . normally held out for the use of residential tenants who are using the dwelling unit as their primary residence.’” Of course, the correct statement would have been that the Act provided protection to tenants “under a rental agreement for a dwelling unit.” The only possible relevance of whether the tenants were using the dwelling unit as their “primary residence” would have been to ascertain which “grounds, areas, and facilities” were covered by the Act: those “normally held out” for the use of such persons.

Limiting the protections of the Residential Rental Agreements Act to dwelling units used as tenants’ primary residences violated not only the text of the statute, but also the policy behind its adoption. After centuries of development based on the common-law rule of caveat emptor, the law concerning tenants’ rights in residential leases underwent rapid change beginning in 1970 with a landmark case in the United States Court of Appeals for the District of Columbia the premises. See Tenant Status Given to Hotel ‘Guests,’ N.C. LAW. WKLY., Oct. 21, 1991, at 1. Although the building seemed to have been nominally a hotel since at least 1980, a hotel license was obtained only in January 1988 after the change of ownership. See Baker, 104 N.C. App. at 243-44, 409 S.E.2d at 110.

25. See Baker, 104 N.C. App. at 243, 409 S.E.2d at 110 (stating that “none of the plaintiffs had other residences”); id. at 247, 409 S.E.2d at 112 (noting that “each plaintiff leased his apartment as his sole and permanent residence”). Other evidence showed that some plaintiffs had resided in the building for as long as six years, that the units contained “either one or two bedrooms, a kitchen/living room and a separate bath,” and that the weekly payments for the apartments “were referred to by each party as ‘rent.’” Id.


28. N.C. GEN. STAT. § 42-40(2) (1994), amended by N.C. GEN. STAT. ANN. § 42-40(2) (Lexis 1999). Note that the statutory test was objective. The Act was not concerned with whether particular tenants considered a given dwelling their primary residence; rather, the Act focused on what would “normally” have been “held out” to “residential tenants who are using the dwelling unit as their primary residence.” Id.
Circuit, *Javins v. First National Realty Corp.* The case overturned the common-law rule against implied covenants in residential leases and held that a covenant of habitability is implied as a matter of law in every residential lease. By 1977, when the North Carolina General Assembly adopted the Residential Rental Agreements Act, thirty-eight states had joined the District of Columbia in recognizing, either as a matter of common-law development or by legislative enactment, an implied covenant of habitability in residential leases. Recognition of the implied covenant of habitability secured for all tenants the protections previously available only to those with the bargaining power and foresight to secure an express covenant.

By misreading the Residential Rental Agreements Act, the *Conley* court created a gap in the coverage not intended by the General Assembly and unlikely to have been expected or understood by the public. The court’s misreading excluded only one type of dwelling unit from the protections of the Act: short-term rental units, often used for vacation purposes. Had the family been injured on the deck of a hotel or motel at the beach, the law governing public accommodations would have provided them redress. Had they been renting the beach house as their "primary residence," they would have been covered by the Act as construed by the court. Because they had a primary residence elsewhere, however, they were unprotected, except to the extent the common law provided security. Ironically, short-term leases of furnished premises at vacation spots were one type of residential leasing that the common law did protect.

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29. 428 F.2d 1071 (D.C. Cir. 1970); see also ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:16, at 124 (1980) (describing *Javins* as "the leading warranty of habitability decision").
30. See *Javins*, 428 F.2d at 1080.
31. See *Fillette*, *supra* note 19, at 785, 787 & n.16. The task of reversing the common-law rule fell upon the General Assembly because the North Carolina courts refused to deviate from precedent. See id. at 786 ("By 1977 it was apparent that if landlord-tenant relations were to escape fifteenth century England it would be by legislative reform only.").

Rentals of a secondary residence can occur in a number of other circumstances in addition to vacation rentals, including rentals by workers on assignment away from home and by parents who wish to stay near a child in a hospital. Students in college renting a house together may also have primary residences elsewhere.
33. See *Rappaport v. Days Inn of Am., Inc.*, 296 N.C. 382, 383-84, 250 S.E.2d 245, 247 (1979) (stating that an innkeeper is "liable for injuries resulting from his failure to exercise ordinary care to keep in a reasonably safe condition that part of the premises where, during business hours, guests and other invitees may be expected").
34. See *Conley*, 350 N.C. at 295, 513 S.E.2d at 558.
But the Conley court misunderstood the common law as well as the statute.

II. THE COMMON LAW

The Conley court that the common law imposed no duty of fitness on a residential landlord, even one letting furnished dwellings for a short term.\textsuperscript{35} The common law certainly treated leases as a form of conveyance.\textsuperscript{36} With respect to both deeds and leases, the common-law rule was that there could be no implied covenants. In the absence of an express covenant concerning fitness, neither a grantee under a deed nor a tenant under a lease had an action in contract or tort. The rule was based on the doctrine of caveat emptor, which placed the burden on the conveyee, whether purchaser or tenant, to inspect the premises and determine their suitability or to secure an express covenant.\textsuperscript{37} The North Carolina Supreme Court explicitly adopted this rationale.\textsuperscript{38}

The court, however, ignored the fact that the common law has long admitted an exception to the rule of caveat emptor in cases in which the tenant has no reasonable opportunity to inspect the premises. The leading cases, both English and American, involve the rental of furnished dwellings for short terms; more specifically, they involve vacation properties rented at a distance. In Smith v. Marrable,\textsuperscript{39} decided by the English Court of Exchequer in 1843, a tenant had rented a furnished house at Brighton, then a particularly fashionable resort on the English Channel.\textsuperscript{40} When the premises proved to be unfit for occupation, the tenant vacated and ceased paying rent. The English judges unanimously held that the tenant


\textsuperscript{36} See 3 AMERICAN LAW OF PROPERTY 215 (A. James Casner ed., 1952) (describing the principal forms of conveyance at common law as feoffment, lease, grant, and mortgage).

\textsuperscript{37} See 1 id. at 267 (stating the rule concerning leases); JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 292 (3d ed. 1989) (stating the rule concerning deeds).

\textsuperscript{38} See Conley, 350 N.C. at 296, 513 S.E.2d at 559 (citing Robinson v. Thomas, 244 N.C. 732, 736, 94 S.E.2d 911, 914 (1956)).

\textsuperscript{39} 152 Eng. Rep. 693 (Ex. 1843).

\textsuperscript{40} See G.M. TREVELYAN, ENGLISH SOCIAL HISTORY 492 (1942) ("Brighton, famous for the patronage of [King] George IV and for the Pavilion he had built there, was already [in the early nineteenth century] an adjunct of London.").
was discharged. As explained by Chief Baron Abinger, "[a] man who lets a ready-furnished house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited." The Massachusetts Supreme Judicial Court reached the same result in 1892 in *Ingalls v. Hobbs*, which involved the rental of a furnished house at Swampscott on the Massachusetts coast. Again the premises proved unfit, and the judges unanimously announced:

> We are of opinion that in a lease of a completely furnished dwelling house for a single season at a summer watering place there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed.

In *Conley*, the North Carolina Supreme Court refused to recognize this exception to the general rule of caveat emptor. The court's reasoning was brief. First, the court noted that "'[t]he 'common law' which we have held is to be applied in North Carolina 'is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence.'" Second, the court pointed out that "'[h]istorically, North Carolina has applied the rule of *caveat emptor* to landlord-tenant relations." Third, the court concluded that "'[t]his Court has never adopted an implied warranty of suitability doctrine as an exception to our traditional landlord-tenant law, and we decline to do so now.'"

The court's statement concerning the reception of the common law is clearly correct. A statute continuously in effect in North Carolina since its establishment as a state provides:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby

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42. 31 N.E. 286 (Mass. 1892).
43. *Id.* at 287.
45. *Id.* (citing Robinson v. Thomas, 244 N.C. 732, 736, 94 S.E.2d 911, 914 (1956)).
46. *Id.* at 297, 513 S.E.2d at 559.
declared to in full force within this State.\textsuperscript{47}

Case law also establishes the date of reception as July 4, 1776, the date of the Declaration of Independence.\textsuperscript{48}

The common law as it was at the time of American independence certainly included the rule of caveat emptor in the general law of sales, both of real and personal property. Sir Edward Coke expressed the rule in his commentaries on Littleton's \textit{Tenures} in 1628: "Note, that by the civil [that is, Roman] law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no expresse warranty; but the common law bindeth him not, unlesse there be a warranty, either in deed or in law; for caveat emptor . . . ."\textsuperscript{49}

Until the adoption of the Residential Rental Agreements Act in 1977, North Carolina courts applied the common-law rule of caveat emptor to landlord-tenant relations. In 1956, in \textit{Robinson v. Thomas},\textsuperscript{50} for example, the North Carolina Supreme Court upheld a judgment in favor of a landlord and her rental agent when a tenant was injured by the collapse of a porch.\textsuperscript{51} The court explained that "'[o]rdinarily, the doctrine of caveat emptor applies to the lessee.'"\textsuperscript{52} Consequently, "the landlord is under no duty to make repairs" and "[t]he owner is not liable for personal injury caused by failure to repair."\textsuperscript{53} Today, of course, the Act would impose on the landlord the duty to keep the premises, including the porch, in a "fit and habitable condition," and a violation could be used as evidence of negligence.\textsuperscript{54}

What is not so clear is that the common-law rule of caveat emptor applied to every case of landlord-tenant relations. As old as the rule of caveat emptor is another common-law rule: \textit{cessante ratione legis, cessat et ipsa lex}, or "the reason of the law ceasing, the law itself also ceases."\textsuperscript{55} Therefore, when inspection would not have

\begin{itemize}
\item \textsuperscript{47} N.C. GEN. STAT. § 4-1 (1986).
\item \textsuperscript{48} See Gwathmey, 342 N.C. at 296, 464 S.E.2d at 679.
\item \textsuperscript{49} 1 EDWARD COKE, A COMMENTARY UPON LITTLETON § 145, at 102a (1853); see also HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 501-24 (W.J. Byrne ed., 9th ed. 1924) (discussing the rule of caveat emptor). \textit{But cf.} Walter H. Hamilton, \textit{The Ancient Maxim Caveat Emptor}, 40 YALE L.J. 1133, 1136 (1931) ("Caveat emptor is not to be found among the reputable ideas of the Middle Ages.").
\item \textsuperscript{50} 244 N.C. 732, 94 S.E.2d 911 (1956).
\item \textsuperscript{51} See id. at 737, 94 S.E.2d at 915.
\item \textsuperscript{52} Id. at 736, 94 S.E.2d at 914 (quoting Harrill v. Sinclair Refining Co., 225 N.C. 421, 425, 35 S.E.2d 240, 242 (1945)).
\item \textsuperscript{53} Id.
\item \textsuperscript{54} N.C. GEN. STAT. § 42-40(2) (1994), amended by N.C. GEN. STAT. ANN. § 42-40(2) (Lexis 1999); id. § 42-42(a)(2) (Supp. 1998); see also supra notes 18-19 and accompanying text (stating that a violation of the Act can constitute evidence of negligence).
\item \textsuperscript{55} See 1 COKE, supra note 49, § 96, at 70b; see also BROOM, supra note 49, at 110-12
\end{itemize}
revealed a defect, a tenant was not charged with having notice of it. In Robinson, for example, the court explained that the rule of caveat emptor would not apply if the tenant could show

that there is a latent defect known to the lessor, or which he should have known, involving a menace of danger, and a defect of which the lessee was unaware or could not, by the exercise of ordinary diligence, discover, the concealment of which would be an act of bad faith on the part of the lessor.56

Equally, when a prospective tenant has no opportunity to inspect the premises before leasing, caveat emptor was inapplicable.57 A lease entered into at a distance from the premises was an obvious example.58 Before the Residential Rental Agreements Act was adopted, the rule of caveat emptor operated to encourage inspection before leasing by assigning the risk of unsuitability or injury to the tenant. While the Act eliminated this incentive in the leasing of primary residences, according to the North Carolina Supreme Court, the rule of caveat emptor remained to penalize tenants who leased furnished premises for short-term residence—usually vacationers leasing at a distance—despite the obvious fact that inspection in such cases would be much more difficult than it is when renting primary residences.

This remnant of the rule of caveat emptor was particularly anomalous given the wholesale renovation of the law of sales. The Uniform Commercial Code, as adopted in North Carolina, creates an implied warranty of fitness in the ordinary sale of personal property.59 The Residential Rental Agreements Act, as we have seen, imposed an implied covenant of habitability in leases. The legislature, in other words, had banished the rule of caveat emptor in the large majority of sales and leases.

The North Carolina Supreme Court also had departed from the common-law rule of caveat emptor in significant respects. For

56. Robinson, 244 N.C. at 736, 94 S.E.2d at 914 (quoting Harrill, 225 N.C. at 425, 35 S.E.2d at 242). The plaintiffs injured by the collapsing deck in Conley had presented evidence that the collapse was caused by "corroded nails and the absence of lag bolts." Conley v. Emerald Isle Realty, Inc., 130 N.C. App. 309, 311, 502 S.E.2d 688, 690 (1998), rev'd, 350 N.C. 293, 513 S.E.2d 556 (1999). Thus, it would appear that the family could not have discovered the defect in the property through the exercise of ordinary diligence.

57. See, e.g., Miller v. Cannon Hill Estates, Ltd., 2 K.B. 113, 121 (1931) (discussing the inapplicability of the caveat-emptor rule to the purchase of an unfinished structure).

58. Another example would be a lease to commence in the future of unconstructed or incomplete premises. Inspection in this case is literally impossible.

instance, in the 1974 case of Hartley v. Ballou,⁶⁰ the court recognized an implied covenant in the sale of residential real estate.⁶¹ In that case, a builder conveyed newly constructed housing, and the court held that an implied covenant of workmanlike construction applied to the transaction.⁶² A year later in Hinson v. Jefferson,⁶³ the court recognized a second implied covenant. Acknowledging that "[t]he basic and underlying principle of Hartley is a recognition that in some situations the rigid common law maxim of caveat emptor is inequitable,"⁶⁴ the court held that a deed including restrictive covenants limiting the use of the premises to single-family dwellings included by implication a covenant of suitability for such use.⁶⁵ Although the common law as it was in 1776 permitted no implied covenants in deeds or leases, the court 200 years later was willing to make an exception, at least in the case of deeds.⁶⁶ After the supreme

⁶¹ See id. at 57, 209 S.E.2d at 780.
⁶² The court explained the implied covenant of workmanlike construction as follows: [W]e hold that in every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.
⁶⁴ Id. at 435, 215 S.E.2d at 111.
⁶⁵ See id. The court explained the implied warranty of suitability as follows: [W]e hold that where a grantor conveys land subject to restrictive covenants that limit its use to the construction of a single-family dwelling, and, due to subsequent disclosures, both unknown and not reasonably discoverable by the grantee before or at the time of conveyance, the property cannot be used by the grantee, or by any subsequent grantees through mesne conveyances, for the specific purpose to which its use is limited by the restrictive covenants, the grantor breaches an implied warranty arising out of said restrictive covenants.
⁶⁶ For notes concerning later developments in the law of implied covenants of habitability, see generally Dwight F. Hopewell, Oates v. JAG: Let the Builder Beware—A Remedy for Subsequent Purchasers of Homes in North Carolina, 64 N.C. L. REV. 1485 (1986); Carolyn Whitney Minshall, Note, Another Look at the Implied Warranty of Habitability in North Carolina, 64 N.C. L. REV. 869 (1986); Peter Wayne Schneider, Note,
court's decision in Conley, the tenant of a vacation or secondary residence remained as a lonely victim of the rule of caveat emptor.

Legislative amendment of the Residential Rental Agreements Act was the speediest and simplest way to reverse the effect of Conley. The General Assembly could have restored the Act's original meaning by amending the "Application" section. Instead, the legislature deleted the reference to "primary residence" in the limitation on "grounds, areas, and facilities" included within the definition of "premises." Although the "grounds, areas, and facilities" previously included in the coverage were those "normally held out for the use of residential tenants who are using the dwelling unit as their primary residence," the "grounds, areas, and facilities" now covered are those "normally held out for the use of residential tenants." It is unclear how many more "grounds, areas, and facilities" are now included.

III. THE VACATION RENTAL ACT

The Vacation Rental Act applies to owners and real estate brokers engaged in the leasing of residential property for vacation rental. Like the Residential Rental Agreements Act, the Vacation Rental Act excludes transient occupation of public accommodations and gratuitous leases. In addition, the Vacation Rental Act excludes two other types of rentals: "[r]entals to persons temporarily renting a dwelling unit when traveling away from their primary residence for business or employment purposes" and "[r]entals to persons having no other place of primary residence." Also, by limiting the


67. One justice on the North Carolina Supreme Court expressly called for legislation to effect "a badly needed change in this area of landlord-tenant liability." Conley, 350 N.C. at 299, 513 S.E.2d at 560 (Frye, J., concurring).
68. N.C. GEN. STAT. ANN. § 42A-3 (Lexis 1999). In addition to extending the covenant of habitability to vacation rentals, id. §§ 42A-31 to -35, the Vacation Rental Act also includes detailed provisions concerning vacation rental agreements, id. §§ 42A-10 to -14, the handling of rents and security deposits, id. §§ 42A-15 to -22, expedited eviction proceedings, id. §§ 42A-23 to -30, and the consequences of mandatory evacuations of vacation areas, id. §§ 42A-36 to -40.
69. Id. §§ 42A-3(b)(1), -4.
70. Id. §§ 42A-3(b)(2). A rental incident to a trip with both business and vacation purposes could require a difficult assessment of the relative importance of each purpose.
71. Id. § 42A-3(b)(3). As between two or more dwellings, it may be difficult to determine which is the "primary residence." Retired persons may spend part of the year in one residence and part in another. Determining residency for state inheritance taxes, interpretation of wills and trusts, creditors' rights, and many other matters is notoriously
definition of “vacation rental” to a rental “for fewer than 90 days by a person who has a place of permanent residence to which he or she intends to return,” the Vacation Rental Act limits both the duration of covered vacation rentals and the character of the covered tenants. Excluding tenants who are not renting premises for vacation purposes from the Vacation Rental Act is perhaps understandable. Less understandable is the exclusion of rentals, even of vacation property, to tenants who rent for 90 days or more and who have another place serving as their “primary” or “permanent” residence.

The exclusion of these rentals would be relatively harmless if the Residential Rental Agreements Act, as amended, covered them. The amendment of the Residential Rental Agreements Act adopted incident to the passage of the Vacation Rental Act, however, did not expressly extend the scope of the Residential Rental Agreements Act to these rentals or indeed to any rentals not already covered. Even as amended, the Residential Rental Agreements Act “determines the rights, obligations, and remedies under a rental agreement for a dwelling unit within this State” and excludes only transient occupancy in places of public accommodation, gratuitous leases, and vacation rentals. As interpreted by the supreme court in Conley, the Act also excludes rentals of dwellings used as other than primary residences.

The recent amendment to the Residential Rental Agreements Act alters the definition of the word “premises,” a word not used in either the section on the scope of the Act or in the section on exclusions from the Act. All it did, seemingly, was to expand the type of premises that must be kept fit and habitable if otherwise covered by the Act. If the Residential Rental Agreements Act is indeed to govern all residential leasings except vacation rentals, as seems to be the legislative intent, it would be desirable for the General Assembly to act once more by adding a second clarification to the “Application” section: “This Article applies, subject to the exclusions contained elsewhere in this Article, to every dwelling unit subject to a rental agreement within this State, regardless of whether or not the dwelling unit is used as the tenant’s primary residence.” Such an amendment would clearly correct the mistaken holding in Conley concerning the scope of the Act. In the absence of further legislative action, it may be hoped that the supreme court would interpret the recent amendment as an implied correction of Conley. As amended,


73. N.C. GEN. STAT. ANN. § 42A-4(3).
the Residential Rental Agreements Act no longer mentions the words "primary residence" in any section. Therefore, it would seem anomalous with the statute as it now stands to continue to limit the Act to "premises which are 'normally held out for the use of residential tenants who are using the dwelling unit as their primary residence.'"74

CONCLUSION

By misreading the Residential Rental Agreements Act, the North Carolina Supreme Court created an unfortunate gap in the statutory coverage. By misunderstanding the common law, specifically the rule of caveat emptor, the court compounded the problem. Although almost all sales and leases, both of real and personal property, are covered by implied covenants of fitness imposed by statute or case law, some leases were left unprotected. Tenants leasing beach cottages are now covered by the Vacation Rental Act, but unless the General Assembly amends the Act again or the North Carolina Supreme Court interprets the General Assembly's recent amendment to expand the coverage of the Act, a certain fraction of leases will remain unprotected. Students at college renting a house, workers on assignment renting an apartment, or legislators occupying apartments in Raleigh during a session of the General Assembly may not be protected.

74. Conley, 350 N.C. at 295, 513 S.E.2d at 558 (quoting N.C. GEN. STAT. § 42-40(2) (1994)).