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NORTH CAROLINA'S RESIDENTIAL RENTAL AGREEMENTS ACT: NEW DEVELOPMENTS FOR CONTRACT AND TORT LIABILITY IN LANDLORD-TENANT RELATIONS

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In July 1977 the North Carolina General Assembly passed the Residential Rental Agreements Act,¹ which was codified as the new Article 5 to Chapter 42 of the General Statutes.² This Act creates new responsibilities for landlords and tenants in the care and maintenance of all residential rental property in the state. The primary change effected by the statute is the creation of an implied warranty of habitability in all residential leaseholds. This article attempts to analyze the implications of the Act for new contract and tort liability in landlord-tenant relations.

Historically, North Carolina has adhered to the common law rules in landlord-tenant relations, with a few statutory modifications found in Chapter 42 of the General Statutes.³ The historical setting of the common law was the feudal society of England in the fifteenth century. In that society, the tenant was generally a farmer whose main interest in the leasehold was uninterrupted use of land for farming. It was assumed that the farmer would build and maintain his own shelter on the land because he was a "jack of all trades."⁴ In this economic setting, the tenant did not expect the landlord to provide or maintain shelter as part of the bargain. Thus, the law implied no duty on the landlord to provide or maintain any structures on the land, and the rule of *caveat emptor* applied to any structures that happened to be on the rented premises. The North Carolina courts have applied these common law concepts to both commercial and residential leases.⁵

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1. Law of June 28, 1977, ch. 770, 1977 N.C. Sess. Laws 1006.

2. N.C. GEN. STAT. §§ 42-38 to -44 (Supp. 1977).

3. Most modifications in Chapter 42 set out special rules for agricultural tenancies, *id.* §§ 42-15 to -25 (1976), and procedures for summary ejectment of tenants, *id.* §§ 42-26 to -36.1.

4. See discussion of historical basis for common law rules in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

5. *Robinson v. Thomas*, 244 N.C. 732, 94 S.E.2d 911 (1956) (lease of apartment); *Mercer*

Even when a landlord made express covenants to repair, these covenants were deemed independent of the tenant's covenant to pay rent, and the aggrieved tenant was expected to perform the repairs and then sue to recover their costs.⁶ In addition, express covenants to repair ordinarily did not render breaching landlords liable for injuries caused by their breaches.⁷

In 1974 the North Carolina Supreme Court finally departed from the anachronistic doctrine of *caveat emptor* and recognized an implied warranty of habitability applicable to vendors of newly constructed houses.⁸ Having acknowledged the modern trend away from applying the doctrine of *caveat emptor* to the sale of new houses, the court might logically have recognized implied warranties in the parallel area of leased housing.⁹ In the following year, however, the court of appeals refused to recognize the implied warranty of habitability in leased housing, stating that it was still bound by the common law precedents of the North Carolina Supreme Court.¹⁰ The supreme court denied certiorari,¹¹ declining this invitation to extend the implied warranty doctrine to leaseholds.

When the court of appeals refused to modernize these common law rules in 1975, it referred to the failure of the General Assembly to make essentially the same policy change during the 1975 Session.¹² By 1977 it was apparent that if landlord-tenant relations were to escape fifteenth century England it would be by legislative reform only. The North Carolina General Assembly rose to the occasion by enacting Chapter 770 of the 1977 Session, the "Residential Rental Agreements Act"¹³ (or, as it is also

v. Williams, 210 N.C. 456, 187 S.E. 556 (1936) (lease of hardware store—no implied duty to repair); Carolina Mtg. Co. v. Massie, 209 N.C. 146, 183 S.E. 425 (1936) (lease of theater—no implied duty to repair); Fields v. Ogburn, 178 N.C. 407, 100 S.E. 583 (1919) (lease of house—no implied duty to repair and, therefore, no liability for injuries caused by state of disrepair); Smithfield Improvement Co. v. Coley-Bardin, 156 N.C. 255, 72 S.E. 312 (1911) (commercial lease—no implied duty to repair); Clarke v. Kerchner, 11 N.C. App. 454, 181 S.E.2d 787 (1971); Thompson v. Shoemaker, 7 N.C. App. 687, 173 S.E.2d 627 (1970) (lease of house—no implied duty to repair even though housing code violated).

6. See Leavitt v. Twin County Rental Co., 222 N.C. 81, 21 S.E.2d 890 (1942).

7. *Id.* For a more detailed discussion of tort liability of landlords, see text accompanying notes 107-27 *infra*.

8. Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974). The implied warranty is that "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." *Id.* at 62, 209 S.E.2d at 783.

9. This implied warranty has been recognized in 38 states and the District of Columbia. See note 16 and accompanying text *infra*.

10. Knuckles v. Spaugh, 26 N.C. App. 340, 215 S.E.2d 825, *cert. denied*, 288 N.C. 241, 217 S.E.2d 665 (1975).

11. 288 N.C. 241, 217 S.E.2d 665 (1975).

12. Knuckles v. Spaugh, 26 N.C. App. 340, 340, 215 S.E.2d 825, 826, *cert. denied*, 288 N.C. 241, 217 S.E.2d 665 (1975).

13. Law of June 28, 1977, ch. 770, 1977 N.C. Sess. Laws 1006 (codified at N.C. GEN. STAT. §§ 42-38 to -44 (Supp. 1977)).

known, the "Landlord-Tenant Act"¹⁴).

I. NEW TENANT RIGHTS IN CONTRACT

The primary effect of the new Act is to create the implied warranty of habitability in every residential leasehold in North Carolina.¹⁵ This implied warranty has been adopted by case law or statute in thirty-eight states and the District of Columbia.¹⁶ Most of the statutes, including North Carolina's, have been patterned after the Uniform Residential Landlord and Tenant Act, which was drafted and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws in August 1972.¹⁷ The North Carolina Act creates the implied warranty by defining certain duties of the landlord to provide fit premises¹⁸ and by making the

14. Charlotte Observer, May 17, 1977, at 18A, col. 1; Raleigh, N.C., News & Observer, May 27, 1977, at 4, col. 1.

15. The only exclusions from coverage are transient lodging in hotels, motels, or "similar lodging subject to regulation by the Commission for Health Services" and dwellings furnished "without charge or rent." N.C. GEN. STAT. § 42-39 (Supp. 1977).

16. Alaska: ALASKA STAT. §§ 34.03.100, .160, .180 (1974); Arizona: ARIZ. REV. STAT. §§ 33-1324, -1361 (1974); California: CAL. CIV. CODE §§ 1941, 1941.1, 1942 (West 1954 & Cum. Supp. 1978); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Connecticut: CONN. GEN. STAT. ANN. § 47a-7, -12, -13 (West Cum. Supp. 1978); Delaware: DEL. CODE tit. 25, § 5303 (1974); District of Columbia: Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); Florida: FLA. STAT. ANN. §§ 83.51, .56 (Harrison 1976); Georgia: GA. CODE ANN. §§ 61-111 to -112 (1966); Hawaii: HAW. REV. STAT. § 521-42 (1976); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Idaho: IDAHO CODE § 6-320 (Cum. Supp. 1977); Illinois: Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Indiana: Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. Ct. App. 1976); Iowa: Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Kansas: Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Kentucky: KY. REV. STAT. §§ 383.595, .625 (Cum. Supp. 1974); Maine: ME. REV. STAT. ANN. tit. 14, § 6021 (West Supp. 1974); Maryland: MD. REAL PROP. CODE ANN. § 8-211 (Cum. Supp. 1975), superseded in their respective jurisdictions by Baltimore, Md., City Public Local Laws, § 9-9, -10, -14.1 (July 1, 1971); Montgomery County, Md. Code, Fair Landlord-Tenant Relations, ch. 93A (Nov. 21, 1972); Massachusetts: MASS. ANN. LAWS ch. 239, § 8A (Law. Co-op 1932 & Cum. Supp. 1977); Boston Housing Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Michigan: MICH. STAT. ANN. § 26.1109 (1970); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972); Minnesota: MINN. STAT. ANN. § 504.18 (West Supp. 1977), applied in Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973); Missouri: King v. Moorehead, 495 S.W.2d 65 (Mo. 1973); Nebraska: NEB. REV. STAT. §§ 76-1419, -1425 to -1429 (1976); New Hampshire: Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); New Jersey: Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); New Mexico: N.M. STAT. ANN. §§ 70-7-20, -27 (Supp. 1975); New York: N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1977); Ohio: OHIO REV. CODE ANN. §§ 5321.04, .07 (Page Supp. 1977); Oregon: OR. REV. STAT. §§ 91.770, .800 to .815 (1977); Pennsylvania: Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812 (1974); Tennessee: TENN. CODE ANN. § 64-2824 (1976); Virginia: VA. CODE ANN. §§ 55-248.13, .25 (Cum. Supp. 1977); Washington: WASH. REV. CODE ANN. § 59.18.060 (Supp. 1976) (enacted after judicial implication of warranty of habitability in Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973)); Wisconsin: Pines v. Persson, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). But see Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

17. The National Conference is affiliated with the American Bar Association and has as its purpose drafting and lobbying for the enactment of uniform laws in diverse legal areas. One law promulgated by the National Conference is the Uniform Commercial Code.

18. Section 42-42(a) requires the landlord to:

tenant's duty to pay rent mutually dependent upon adequate performance of these duties.¹⁹ These provisions reverse the common law rules that the landlord had no implied duties to provide or maintain fit premises and that express covenants to maintain the premises were independent of the tenant's covenant to pay rent.²⁰

A. *New Contract Remedies*

The remedies allowed under the new Act are not clear and probably will be the subject of confusion and litigation. One initial question that needs to be resolved concerns when the tenant is entitled to reduce the amount of his rental payment after the landlord has failed to perform his duties under section 42-42(a).²¹ In jurisdictions that have adopted the implied warranty of habitability by judicial amendment of the common law, the mutuality of the tenant's obligation to pay rent and the landlord's obligation to provide fit premises has been interpreted to allow the tenant to withhold rent and to assert a breach of the implied warranty of habitability as a defense to a summary ejectment action.²² Although North Carolina's Act makes the tenant's obligation to pay rent mutually dependent upon the landlord's obligation to provide fit premises, its remedies section states that the tenant "may not unilaterally withhold rent prior to a judicial determination of a right to do so."²³

(1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code;

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in safe condition; and

(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations.

N.C. GEN. STAT. § 42-42(a) (Supp. 1977).

19. Section 42-41 provides: "The tenant's obligation to pay rent under the rental agreement or assignment and to comply with G.S. 42-43 and the landlord's obligation to comply with G.S. 42-42(a) shall be mutually dependent." *Id.* § 42-41.

20. For a detailed discussion of changes from the common law brought by the adoption of the implied warranty of habitability, see generally *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1070 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

21. N.C. GEN. STAT. § 42-42(a) (Supp. 1977), *quoted in* note 18 *supra*.

22. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Marini v. Ireland*, 56 N.J. 130, 140, 265 A.2d 526, 531 (1970).

23. N.C. GEN. STAT. § 42-44(c) (Supp. 1977) provides:

The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so. The tenant shall be entitled to remain in possession of the premises pending appeal by continuing to pay the contract rent as it becomes due; provided that, in such case, the provisions of G.S. 42-34(b) shall not apply.

Numerous difficult questions are raised by this language. There is no definition of the phrase "judicial determination"; arguably this requirement could be satisfied by a magistrate's judgment or a preliminary injunction in the district or superior court. There is no definition of the phrase "unilaterally withhold" which is obviously the key to possible limits on the tenant's remedies. Finally, there is no explanation of what consequences follow if the tenant does "unilaterally withhold rent."

The phrase "unilaterally withhold rent" could be interpreted to include any prelitigation failure to pay rent by a tenant, including refusals to pay rent when a landlord is in breach of the implied warranty of habitability created by sections 42-41 and 42-42.²⁴ If such an interpretation were adopted, the tenant would have to obtain a judicial determination of his right to withhold rent or keep paying the contract rent to avoid a summary ejectment action. This would not mean, however, that the tenant would forfeit any claims for money damages by refusing to pay the rent for a substandard house.²⁵

If the North Carolina courts interpret the phrase broadly, so that the tenant may not withhold rent even when there has been a breach of the implied warranty of habitability, the Act will be practically useless for most low-income tenants in the state. Absolute prohibition of rent withholding by the tenant would largely negate the mutuality clause in section 42-41 of the Act and substantially lessen the tenant's leverage with the landlord. It would transfer landlord-tenant disputes from the bargaining table to the judicial forum by forcing the tenant to litigate in every situation in which there is an obvious breach of the implied warranty of habitability. It is difficult to believe that the General Assembly intended to encourage such a proliferation of litigation.

Another likely result of such a broad interpretation of this prohibition against unilaterally withholding rent would be to foreclose the possibility of a tenant's repairing the premises and deducting the cost from the rent. This remedy was implicitly sanctioned by the North Carolina Court of Appeals in pre-Act case law.²⁶ There is no indication elsewhere in the Act that the General Assembly intended to limit available tenant remedies by including this curious phrase in section 42-44(c).²⁷

24. *Id.* §§ 42-41, -42.

25. The phrase "unilaterally withhold rent" is part of a subsection relating only to the tenant's right to hold possession of the premises. It appears that the tenant's possession of the premises is the only right that may be jeopardized by violating the prohibition against unilateral withholding of rent. *See id.* § 42-44(c).

26. *See Cato Ladies Modes, Inc. v. Pope*, 21 N.C. App. 133, 135, 203 S.E.2d 405, 406 (1974).

27. N.C. GEN. STAT. § 42-44(c) (Supp. 1977), *quoted in* note 23 *supra*.

On the other hand, the North Carolina courts could adopt a more restrictive interpretation of the phrase "unilaterally withhold rent" in order to avoid negating the doctrine of mutuality of obligations set forth in section 42-41 of the Act. Such an interpretation could reconcile the prohibition against the unilateral withholding of rent with the mutuality of obligations established by section 42-41 by limiting the definition of unilaterally withholding to a tenant's withholding of rent when there has, in fact, been no breach of the implied warranty of habitability by the landlord. The terms "wrongful" and "unilateral" could be read synonymously in this context on the theory that a wrongful withholding is also unilateral because it occurs when the landlord has not breached his mutually dependent obligation to provide fit premises.

North Carolina courts should adopt such an interpretation because the implied warranty of habitability created by the Act can operate effectively only if the statutory language is reconciled in a manner that will permit tenants to withhold rent without going to court. Such an interpretation would also further the purpose of the implied warranty by enabling tenants to use the threat of withholding rent in bargaining with their landlords.²⁸

This narrow construction of "unilaterally withhold rent" would also allow tenants to assert a breach of implied warranty defense in summary ejectment actions. This conclusion is supported by the fact that section 42-44(a)²⁹ of the Act gives the tenant the power to enforce his claim for rent abatement³⁰ by "civil action" and section 42-40(a)³¹ defines "action" to include "defense." In a summary ejectment action for nonpayment of rent, the tenant should not be evicted so long as he either pays the rent deemed *owing* after deduction of an appropriate rent abatement³² or escrows the full contract rent pending litigation.

In several leading jurisdictions, when a tenant raises breach of the implied warranty of habitability as a defense for nonpayment of rent, the finder of fact must make two determinations: (1) whether the alleged breach existed during the period for which past due rent is claimed; and (2) what portion of the tenant's obligation to pay rent was abated by the landlord's breach.³³ Under this approach, if no part of the rental obligation is found to

28. See generally *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074-80 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Rome v. Walker*, 38 Mich. App. 458, 196 N.W.2d 850 (1972); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

29. N.C. GEN. STAT. § 42-44(a) (Supp. 1977).

30. See text accompanying notes 41-48 *infra*.

31. N.C. GEN. STAT. § 42-40(a) (Supp. 1977).

32. See, e.g., *Hinson v. Delis*, 26 Cal. App. 3d 62, 69, 102 Cal. Rptr. 661, 666 (1972).

33. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 638-39, 517 P.2d 1168, 1183-84,

have abated, the court may issue a judgment for possession; if the trier of fact finds that no rent is due the complaint should be dismissed;³⁴ but if the trier of fact finds that the tenant is entitled to a partial abatement of rent but that he has withheld rent in an amount greater than that abatement, no judgment for possession should issue if the tenant agrees to pay that portion of the rent that is found to be owing.³⁵ Of course, if the tenant elects not to pay the balance due, a judgment for possession may issue.

The breach of implied warranty defense in an action for possession based upon nonpayment of rent is to be distinguished from other defenses already recognized by the North Carolina courts. The defense of constructive eviction can be raised only when the tenant has vacated the premises as a result of conditions rendering them seriously inadequate for his purposes.³⁶ The illegal contract defense to a suit for the collection of rent does not depend on whether the tenant has vacated the premises.³⁷ It may, however, render the lease void and leave the occupant a tenant at will unless the court finds that the landlord's ejectment action was retaliatory and therefore illegal.³⁸ Finally, there is the well-established common law defense of breach of the implied covenant of quiet enjoyment, which may be raised by a tenant who has been partially³⁹ or totally deprived of the use of the premises by the landlord.⁴⁰ All these common law defenses are still available to tenants. The new Act, however, may offer tenants broader protection against eviction without as many conditions.

111 Cal. Rptr. 704, 719-20 (1974). *See generally* Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

34. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). In a concurring opinion in McKenna v. Begin, 362 N.E.2d 548 (Mass. App. 1977), Justice Brown expressed the opinion that a citation by the Board of Health condemning the premises as "unfit for human habitation" showed a complete failure of consideration so that the rental value of the premises should have been zero. *Id.* at 554 (Brown, J., concurring).

35. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

36. Thompson v. Shoemaker, 7 N.C. App. 687, 691-92, 173 S.E.2d 627, 630 (1970). Constructive eviction can be raised by the tenant even when the landlord has failed to remedy a defect not affirmatively caused by the landlord. *See* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

37. Hines v. Norcott, 176 N.C. 123, 96 S.E. 899 (1918). *See also* Shephard v. Lerner, 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (1960); Todd v. May, 6 Conn. Cir. Ct. 731, 316 A.2d 793 (1973); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. 1968); Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919 (1972).

38. *See* Robinson v. Diamond Housing, 463 F.2d 853 (D.C. Cir. 1972); text accompanying notes 74-95 *infra*.

39. Blomberg v. Evans, 194 N.C. 113, 138 S.E. 593 (1927).

40. *See generally* Carolina Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 139 S.E.2d 362 (1964); Andrews & Knowles Produce Co. v. Currin, 243 N.C. 131, 90 S.E.2d 228 (1955); Huggins v. Waters, 154 N.C. 443, 70 S.E. 842 (1911); Poston v. Jones, 37 N.C. (2 Ired.) 350 (1842).

Regardless of whether tenants will be allowed to assert a breach of the implied warranty of habitability as a defense for nonpayment of rent, the Act clearly allows an affirmative action or counterclaim for a breach of the landlord's duties.⁴¹ The Act is silent on the measure of damages for such breaches, however.

Leading decisions from other jurisdictions have expressed the measure of damages for breach of the implied warranty of habitability in terms of traditional contract remedies.⁴² Thus, under the guidelines of *Hadley v. Baxendale*,⁴³ the tenant is entitled to recover damages for personal injury and property damage, including consequential damages that were reasonably foreseeable at the time the contract was made.⁴⁴

North Carolina courts have long recognized the *Hadley v. Baxendale* measure of damages for breach of a landlord's implied covenant to deliver possession to the tenant⁴⁵ and the implied warranty of quiet enjoyment.⁴⁶ The courts calculate the difference between the rental value of the premises as promised and the actual rental value of the property during the rental term, plus any special damages alleged and proved. Special damages may include mental as well as physical injury.⁴⁷ The same measure of damages has been applied in landlord-tenant cases involving express covenants to repair.⁴⁸

If the North Carolina courts apply these same principles to breaches of the implied warranty to repair, the tenant may recover the full value of the premises as if it had been delivered in the condition warranted minus the rental value of the premises actually provided. The value of the premises as warranted may be more than the rent actually paid by the tenant or agreed to be paid in the lease.⁴⁹ In other words, the tenant will be entitled to damages

41. N.C. GEN. STAT. § 42-44(a) (Supp. 1977) provides: "Any right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity."

42. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1073 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744 (Ind. Ct. App. 1976); *McKenna v. Begin*, 362 N.E.2d 548 (Mass. App. 1977); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

43. 156 Eng. Rep. 145 (1854).

44. See, e.g., *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744 (Ind. Ct. App. 1977).

45. *Sloan v. Hart*, 150 N.C. 269, 274, 63 S.E. 1037, 1039 (1909).

46. *Andrews & Knowles Produce Co. v. Currin*, 243 N.C. 131, 136, 90 S.E.2d 228, 231 (1955).

47. *Burwell v. Brodie*, 134 N.C. 540, 47 S.E. 47 (1904). Damages for mental distress have also been allowed in trespass cases. See *Matthews v. Forrest*, 235 N.C. 281, 285, 69 S.E.2d 553, 556 (1952); *May v. Western Union Tel. Co.*, 157 N.C. 416, 72 S.E.2d 574 (1911).

48. *Brewington v. Loughran*, 183 N.C. 558, 564-65, 112 S.E. 257, 259-60 (1922); *Cary v. Harris*, 178 N.C. 624, 101 S.E. 486 (1919).

49. *Troitino v. Goodman*, 225 N.C. 406, 413, 35 S.E.2d 277, 282 (1945) (allowing recovery of difference between actual value of tractors and value if in first-class condition).

in the form of a rent abatement calculated as the difference between the fair rental value of the premises if the premises were in full compliance with section 42-42(a)⁵⁰ and the fair rental value of the premises in its defective condition, plus any special damages alleged and proved.⁵¹

In assessing the amount of damages for the diminution of the habitability of the dwelling, the trier of fact should consider the following factors:⁵² (1) violations of any applicable housing, building, or health codes; (2) the potential or present impact of defects upon health and safety; (3) the length of time the defect has persisted; (4) the tenant's responsibility for causing the defect;⁵³ and (5) the existence of defects in the "common areas" of the premises, outside of the individual's private living space.⁵⁴ It will be up to the trier of fact to determine how much, in dollar terms, all of the above factors have reduced the rental value of the premises from its value if it were in the condition warranted by section 42-42(a) and the applicable codes. Thus, it would be appropriate for the trier of fact first to determine what the fair rental value of the premises would be if in the fully warranted condition.⁵⁵ Then, the trier would determine the dollar value per week or month for the reduction of usage and enjoyment that reasonably could be attributed to the defects.

The tenant's own opinion as to the reduction in usage and enjoyment attributable to the defects should be admissible as evidence.⁵⁶ This evidence is comparable to allowing property owners to testify as to value of their own

50. N.C. GEN. STAT. § 42-42(a) (Supp. 1977).

51. See, e.g., *Green v. Superior Court*, 10 Cal. 3d 616, 638-39, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974); *Berzito v. Gambino*, 63 N.J. 460, 469, 308 A.2d 17, 21-22 (1973). See generally *Troitino v. Goodman*, 225 N.C. 406, 35 S.E.2d 277 (1945).

52. See *Berzito v. Gambino*, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973).

53. Since § 42-41 makes the landlord's obligation to provide fit premises under § 42-42(a) mutually dependent on the tenant's obligations under § 42-43(a)(4) and (6) to refrain from deliberately or negligently destroying or damaging any part of the premises, the landlord may defend against claims of the tenant by proving that the tenant or someone in the tenant's household caused a particular defect. N.C. GEN. STAT. §§ 42-41, -42(a), -43(a)(4), (6) (Supp. 1977). Section 42-44(a) gives the landlord the right to enforce the tenant's duties in § 42-43 by "civil action," which is defined to include "defense." *Id.* §§ 42-40(1), -43, -44(a).

54. Section 42-42(a)(3) requires the landlord to keep all common areas of the premises in safe condition. *Id.* § 42-42(a)(3). See also *McKenna v. Begin*, 362 N.E.2d 548, 553 (Mass. App. 1977); *Franklin Drug Stores, Inc. v. Gur-Sil Corp.*, 269 N.C. 169, 152 S.E.2d 77 (1967).

55. This value might often be higher than the contract rent, especially where the landlord knowingly delivered the premises in substandard condition. The tenant is entitled to be put in the position he would have been in if performance had been as warranted. See *Troitino v. Goodman*, 225 N.C. 406, 35 S.E.2d 277 (1945).

56. "Useful expert testimony is unlikely to be readily available as to the 'worth' of the defects, and even if it were available, the imposition upon indigent tenants of the financial burden of supplying expert witnesses would seriously diminish the effectiveness of the relief contemplated in our earlier opinion." *McKenna v. Begin*, 362 N.E.2d 548, 553 (Mass. App. 1977) (citations omitted).

real and personal property⁵⁷ and it should be given similar treatment. It is to be expected that the proffered opinions will sometimes be imprecise, but the nature of damages in breach of implied warranty cases, like other contract and tort cases, is such that they cannot be computed with precision and certainty.⁵⁸ The mere uncertainty in assessing the amount of damages should not jeopardize the tenant's right to recover as long as these damages are the certain result of wrongdoing on the part of the landlord.⁵⁹ The tenant should be allowed to recover damages whenever there is proof of any violation that is not plainly immaterial.⁶⁰

Thus, one of the tenant's most important remedies for the implied warranty may be restitution of rent paid in excess of the fair market rental value of the premises in its substandard condition. The application of this remedy to breaches of the implied warranty of habitability would also reverse the court of appeals' holding in *Thompson v. Shoemaker*⁶¹ that a tenant cannot recoup voluntary rent payments "made under a mistake of law."⁶²

The General Assembly anticipated the problem of tenants making rent payments without knowledge of their new rights and realized that such payments might be deemed to be implicit acceptance of the substandard conditions. To prevent such wholesale frustration of the Act, the legislature provided specifically that the landlord would *not* be released of his obligations to provide fit premises by the tenant's explicit *or implicit* acceptance of the landlord's defaults.⁶³

57. See, e.g., *North Carolina State Hwy. Comm'n v. Helderman*, 285 N.C. 645, 207 S.E.2d 720 (1974) (real property); *City of Elizabeth City v. Gregory*, 202 N.C. 759, 762-63, 164 S.E. 354, 355 (1932) (witness allowed to express decrease in value of real property in fractional terms); *South Atl. Waste Co. v. Southern Ry.*, 167 N.C. 340, 343, 83 S.E. 618, 619 (1914) (witness allowed to express increase or decrease in value of real property in percentage terms); *Hubbard v. Lumbermen's Mut. Cas. Co.*, 24 N.C. App. 493, 211 S.E.2d 544, *cert. denied*, 286 N.C. 723, 213 S.E.2d 721 (1975) (personal property).

58. See *Green v. Superior Court*, 10 Cal. 3d 616, 638, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974).

59. See *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 485-86, 268 A.2d 556, 561-62 (1970); *Cary v. Harris*, 178 N.C. 624, 101 S.E. 486 (1919).

60. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 n.63 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

61. 7 N.C. App. 687, 173 S.E.2d 627 (1970).

62. *Id.* at 689, 173 S.E.2d at 629.

63. N.C. GEN. STAT. § 42-42(b) (Supp. 1977) provides:

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, unless a governmental subdivision imposes an impediment to repair for a specific period of time not to exceed six months. Notwithstanding the provisions of this subsection, the landlord and tenant are not prohibited from making a subsequent written contract wherein the tenant agrees to perform specified work on the premises, provided that said contract is supported by adequate consideration other

B. Possible Limitations on Tenants' Use of Contract Remedies

With one exception,⁶⁴ the Act does not explicitly require the tenant to give notice to the landlord of any defects in the premises. The leading cases from other jurisdictions have held, however, that the tenant is required to give notice (oral or written) of defects that arise *during the term of the lease*, if the landlord can be found with any reasonable effort.⁶⁵ By contrast, these jurisdictions impose no notice requirement for defects that arise before or at the beginning of the tenancy because the landlord is presumed to know the condition of the premises upon delivery of possession.⁶⁶

Another likely requirement that may be implicit in the Act is that the tenant allow the landlord a reasonable time after notice to repair those defects that arise during the term. This requirement has been implied in jurisdictions allowing tenants the alternative remedies of repairing the defects themselves and deducting the cost from the rent or suing for rent abatement.⁶⁷

The above discussion of the measure of damages applies to the common situation in which the tenant is unable to repair the premises himself and is, therefore, suing for damages. In some instances, however, it may be possible for the tenant to make relatively minor repairs. This situation raises the question whether the tenant may deduct the reasonable cost of such repairs from the rent,⁶⁸ especially when the Act explicitly

than the letting of the premises and is not made with the purpose or effect of evading the landlord's obligations under this Article.

This provision prohibits express waivers in the lease of tenants' rights to fit premises, such as clauses which state that the tenant accepts the premises in an "as is" condition. The sponsors of the legislation recognized that generally there is greatly unequal bargaining power between landlords and residential tenants, a well-known market factor that results in widespread use of standardized leases. See Note, *Landlord and Tenant—Recent Erosions of Caveat Emptor in the Leasing of Residential Housing*, 49 N.C.L. REV. 175, 182-83 (1970). It might also violate public policy for the lease to attempt to limit the landlord's liability. Cf. *Gore v. George J. Ball, Inc.*, 279 N.C. 192, 208, 182 S.E.2d 389, 398 (1971) (limitation of seller's liability in contract for sale of seed contrary to public policy and void).

64. N.C. GEN. STAT. § 42-42(a)(4) (Supp. 1977), *quoted in* note 18 *supra*. The probable reason that written notice by the tenant is required in this subdivision and not in the other three is that this subdivision refers mainly to appliances and facilities *supplied* by the landlord or required to be supplied by the landlord, whereas the previous three subdivisions refer to general requirements of the local codes themselves, which the landlord should presumably know. *Id.* § 42-42(a)(1)-(3).

65. See, e.g., *Berzito v. Gambino*, 63 N.J. 460, 467, 308 A.2d 17, 20 (1973).

66. See, e.g., *McKenna v. Begin*, 362 N.E.2d 548, 550 (Mass. App. 1977). The Act itself requires the landlord to "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." N.C. GEN. STAT. § 42-42(a)(2) (Supp. 1977) (emphasis added). Since this duty arises at the inception of the tenancy, the landlord should presumably inspect the premises and repair any defects before delivering possession to the tenant.

67. E.g., *McKenna v. Begin*, 362 N.E.2d 548, 550-52 (Mass. App. 1977).

68. This remedy has been recognized as an alternative remedy for breaches of the implied

prohibits the tenant from "unilaterally withhold[ing] rent prior to a judicial determination of a right to do so."⁶⁹ Given the general rules on mitigation of damages,⁷⁰ it would seem unreasonable to require a tenant who is willing and able to make small repairs to bring suit to recover his costs rather than allowing him to deduct them directly from his rent. If faced with a situation in which the tenant has made a repair and deducted the cost from his rent, the North Carolina courts could treat the tenant not as if he had "withheld" his rent, but rather as if he had simply *applied* the rent, on the landlord's behalf, to the cost of repairing the premises. Such a construction would avoid the prohibition against the unilateral withholding of rent set forth in section 42-44(c).

Although the tenant may be permitted to perform the landlord's repair responsibilities, neither the Act, previous case law, nor the law of other states requires the tenant to make the repairs himself and then sue for damages.⁷¹ One assumption behind the general rule of contract remedies that the injured party must "cover" and then sue for the costs is that the party injured is in a position to pay the cost of having the defects remedied.⁷² The crucial policy assumption, however, behind the implied warranty of habitability is that tenants generally, and low-income tenants living in multi-family units especially, cannot afford the cost of repairing serious defects in their dwellings.⁷³ For example, requiring one tenant to spend thousands of dollars to repair the plumbing or heating system in a multi-family apartment building would be an inequitable, if not impossible, burden. Such a burden would defeat the purpose of the Act, which is to place the responsibility for basic structural maintenance on the landlord while making the tenant

warranty of habitability. *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970). See also *Cato Ladies Modes, Inc. v. Pope*, 21 N.C. App. 133, 203 S.E.2d 405 (1974).

69. N.C. GEN. STAT. § 42-44(c) (Supp. 1977); see text accompanying notes 23-35 *supra*.

70. See *Monger v. Lutterloh*, 195 N.C. 274, 142 S.E. 12 (1928).

71. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078-79 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *McKenna v. Begin*, 362 N.E.2d 548, 552 (Mass. App. 1977); *Berzito v. Gambino*, 63 N.J. 460, 468-73, 308 A.2d 17, 21-24 (1973); *Spencer v. Hamilton*, 113 N.C. 49, 51, 18 S.E. 167, 168 (1893).

72. See authorities cited in *McKenna v. Begin*, 362 N.E.2d 548, 552 (Mass. App. 1977). But see *Thompson v. Shoemaker*, 7 N.C. App. 687, 691, 173 S.E.2d 627, 630-31 (1970) (dictum) (reciting general rule for contracts when express covenants to repair made by individual landlord). The Act, by recognizing the implied warranty in residential leases, creates an exception to the general rule because of the different policy assumptions underlying the regulation of residential leases and most business contracts. For a more detailed discussion see cases cited in note 73 *infra*.

73. The North Carolina Supreme Court ruled long ago that a tenant was not prevented from recovering damages simply because he might be unable to perform the landlord's duties of repairing the premises. *Spencer v. Hamilton*, 113 N.C. 49, 51, 18 S.E. 167, 168 (1893); *accord*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *McKenna v. Begin*, 362 N.E.2d 548, 552 (Mass. App. 1977); *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 488, 268 A.2d 556, 560 (1970).

responsible for using the premises in a reasonable and clean manner. North Carolina courts should therefore not require tenants to make repairs themselves and sue their landlords for the cost.

C. Defense Against Retaliatory Evictions

One provision that is absent from the North Carolina Act, but that has been adopted by a majority of American jurisdictions,⁷⁴ is the tenant's defense against retaliatory evictions. A retaliatory eviction is an action taken by the landlord that is designed to effect the removal of a tenant, provided the action is initiated in response to any activities on the part of the tenant contrary to the interests of the landlord. Such activities might include complaining to public officials or to the landlord about housing defects or forming a tenants' association.⁷⁵ Obviously, the availability of this retaliatory eviction defense is important to the general efficacy of the new Act. If tenants can be freely evicted in return for exercising their rights under section 42-42(a), many of them may choose to live with leaky roofs and broken windows rather than risk being left without a home altogether.

Although retaliatory evictions are not specifically addressed by the new Act, there is no legislative history to indicate that the General Assembly intentionally excluded a prohibition against retaliatory evictions.⁷⁶ It seems

74. Alaska: ALASKA STAT. § 34.03.310 (1975); Arizona: ARIZ. REV. STAT. § 33-1381 (1974); California: CAL. CIV. CODE § 1942.5 (West Cum. Supp. 1978); Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970); Connecticut: CONN. GEN. STAT. ANN. § 47a-20 (West Cum. Supp. 1978); Delaware: DEL. CODE tit. 25, § 5516 (1974); District of Columbia: Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); Florida: FLA. DEP'T OF LEGAL AFFAIRS, RULES OF THE DEPARTMENT OF LEGAL AFFAIRS, Rental Housing and Mobile Home Parks, ch. 2-11.07 (1974); Hawaii: HAW. REV. STAT. § 521-74 (1976); Illinois: ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966); Clore v. Fredman, 59 Ill. 2d 20, 319 N.E.2d 18 (1974); Kentucky: KY. REV. STAT. § 383.705 (Cum. Supp. 1976); Maine: ME. REV. STAT. tit. 14, § 6001 (Cum. Supp. 1977-78); Maryland: MD. REAL PROP. CODE ANN. § 8-208.1 (Cum. Supp. 1977); Massachusetts: MASS. ANN. LAWS ch. 186, § 18 (Law. Co-op Cum. Supp. 1977); Michigan: MICH. STAT. ANN. § 27A.5720 (Cum. Supp. 1978); Minnesota: MINN. STAT. ANN. § 566.03, .28 (West Cum. Supp. 1978); Nebraska: NEB. REV. STAT. § 76-1439 (1976); New Hampshire: N.H. REV. STAT. ANN. § 540.13 (1974); New Jersey: N.J. STAT. ANN. § 2A: 42-10.10 (West Cum. Supp. 1977-78); E. & E. Newman, Inc. v. Hallock, 116 N.J. Super. 220, 281 A.2d 544 (1971); New York: N.Y. UNCONSOL. LAWS §§ 8590, 8609 (McKinney 1974); Ohio: OHIO REV. CODE ANN. § 5321.02 (Page Supp. 1977); Oregon: OR. REV. STAT. § 91-865 (1977); Pennsylvania: PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977); Rhode Island: R.I. GEN. LAWS § 34-20-10 (1969); Tennessee: TENN. CODE ANN. § 53-5505 (1977); Virginia: VA. CODE § 55-248.39 (Cum. Supp. 1977); Washington: WASH. REV. CODE ANN. §§ 59.18.240, .250 (Cum. Supp. 1976); Wisconsin: Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

75. See generally Note, *The Use of the Federal Remedy to Bar Retaliatory Eviction*, 39 U. CINN. L. REV. 712 (1970). The only case in North Carolina that discusses any type of retaliatory eviction rejected, without any legal reasoning or citation of authorities, an asserted defense that a tenant could not be evicted for exercising her constitutional rights to air other tenants' grievances. Evans v. Rose, 12 N.C. App. 165, 182 S.E.2d 591, *cert. denied*, 279 N.C. 511, 183 S.E.2d 686 (1971).

76. The original draft of House Bill 949 simply failed to mention retaliatory evictions. The chief sponsors expressed their desire to limit the size of the bill so that it would be easily

almost inevitable that the North Carolina courts will have to decide whether a defense to retaliatory evictions is implied by passage of the new Act, perhaps in conjunction with three pre-existing statutes that express a public purpose in eliminating unsafe or unsanitary dwellings.⁷⁷ Hence, this article will discuss briefly the doctrinal sources that are likely to be relevant to this issue.

In *Edwards v. Habib*,⁷⁸ the seminal case on retaliatory eviction, the tenant had rented an apartment on a month-to-month basis. Shortly after taking possession she complained to the local authorities about numerous sanitary code violations in her unit.⁷⁹ The landlord then gave the tenant a thirty-day statutory notice to vacate the premises. By way of a defense, the tenant alleged that the action for possession of her apartment was initiated in retaliation for her complaints regarding the code violations.⁸⁰

The District of Columbia court ruled that a private landlord was not required by the District of Columbia Code for summary ejectment provisions to give any reason for evicting a month-to-month tenant. That court also expressed the view that any such limitation on the landlord's eviction remedy would have to be based on *specific* statutory authority or very special circumstances.⁸¹ In rejecting the lower court's opinion, the United States Court of Appeals for the District of Columbia held that the retaliatory eviction defense was a necessary corollary to the broad public policies embodied in the housing code promulgated by the District of Columbia Commissioners.⁸²

The court reviewed the legislative findings that there were blighted housing conditions in the city that threatened the general welfare of the inhabitants and that warranted the exercise of police powers for code enforcement.⁸³ Then in one succinct statement, the court set forth the combination of housing factors that supported adoption of the retaliatory eviction defense:

In light of the appalling condition and shortage of housing in Washington, the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions,

readable by members of the public. While the bill was moving through the house and senate, no amendments regarding retaliatory evictions were offered.

77. N.C. GEN. STAT. § 122A-2 (Supp. 1977); *id.* § 160A-441 (1976), *quoted in note 85 infra*; *id.* §§ 160A-501, -502.

78. 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

79. *Id.* at 688.

80. *Id.* at 689.

81. *Edwards v. Habib*, 227 A.2d 388, 390, 392 (D.C. 1967); *see* 397 F.2d at 689-90.

82. 397 F.2d at 690, 699.

83. *Id.* at 700.

we do not hesitate to declare that retaliatory eviction cannot be tolerated. There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence.

The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can be legally intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation even if it is not expressed in the statute itself.⁸⁴

The General Assembly of North Carolina has emphasized the existence in North Carolina of several factual elements similar to those underlying the decision in *Edwards v. Habib*. First, the state enabling act for the promulgation of local housing codes includes the finding that dwellings that are unfit for human habitation are inimical to the general health, safety and welfare of the people of North Carolina.⁸⁵ Second, the extensive shortage of decent, safe and sanitary housing has also been found to be inimical to the health, safety and welfare of all residents of the State.⁸⁶ Third, the inequality of bargaining power between landlords and tenants is implicitly recognized by the provisions of the new Act. By statutorily allocating the basic duties for repair and maintenance of habitable dwellings to landlords⁸⁷ and by prohibiting landlords from shifting these duties back to the tenants through

84. *Id.* at 701-02 (footnotes omitted).

85. N.C. GEN. STAT. § 160A-441 (1976) in pertinent part provides:

It is hereby found and declared that the existence and occupation of dwellings in this State that are unfit for human habitation are inimical to the welfare and dangerous and injurious to the health, safety and morals of the people of this State, and that a public necessity exists for the repair, closing or demolition of such dwellings. Whenever any city or county of this State finds that there exists in the city or county dwellings that are unfit for human habitation due to dilapidation, defects increasing the hazards of fire, accidents or other calamities, lack of ventilation, light or sanitary facilities, or due to other conditions rendering the dwellings unsafe or unsanitary, or dangerous or detrimental to the health, safety, morals or otherwise inimical to the welfare of the residents of the city or county, power is hereby conferred upon the city or county to exercise its police powers to repair, close or demolish the dwellings in the manner herein provided.

The purpose of this statute is to ensure that minimum housing standards will be achieved in the cities and counties of this state. *Harrell v. City of Winston-Salem*, 22 N.C. App. 386, 391, 206 S.E.2d 802, 806 (1974).

86. N.C. GEN. STAT. § 122A-2 (Supp. 1977), which makes the legislative findings for the establishment of the North Carolina Housing Corporation, provides in pertinent part:

The General Assembly hereby finds and declares that as a result of the spread of slum conditions and blight to formerly sound urban and rural neighborhoods and as a result of actions involving highways, public facilities and urban renewal activities there exists in the State of North Carolina a serious shortage of decent, safe and sanitary residential housing available at low prices or rentals to persons and families of lower income. This shortage is severe in certain urban areas of the State, is especially critical in the rural areas, and is inimical to the health, safety, welfare and prosperity of all residents of the State and to the sound growth of North Carolina communities.

87. *See id.* § 42-42(a).

adhesive leases,⁸⁸ the legislature tried to prevent landlords from having the upper hand in drafting and enforcing rental agreements.

Regardless of whether a defense against retaliatory evictions may be premised on the underlying policy of the foregoing housing statutes, such improperly motivated evictions may be illegal under North Carolina General Statutes section 75-1.1, the so-called little FTC Act.⁸⁹ Section 75-1.1 has been interpreted by at least one court as prohibiting retaliatory evictions. In the unreported case of *State ex rel. Carson v. Cleve*⁹⁰ the attorney general filed suit on behalf of a tenant residing in a trailer park who was threatened with eviction in retaliation for the tenant's complaining to the county health department about a defective septic tank. The superior court⁹¹ restrained the threatened eviction, finding it was an unfair practice affecting commerce and therefore illegal under section 75-1.1. Subsequently, another superior court judge⁹² issued a preliminary injunction, which remained in effect until the case was finally settled.

No claims of retaliatory eviction under section 75-1.1 have yet reached the appellate courts of North Carolina. In the recently reported case of *Love v. Pressley*,⁹³ however, the court of appeals did hold that a landlord's extrajudicial eviction of a tenant and subsequent conversion of the tenant's personal property violated section 75-1.1. The court found that the landlord's conduct violated the ethical standards of dealing between those engaged in business (renting property) and the consuming public and was therefore inimical to the statute's purpose.⁹⁴ It is possible, then, that the North Carolina courts will apply the analysis of *Love v. Pressley* to find that a classic retaliatory eviction amounts to an unfair or deceptive act or practice barred under section 75-1.1. Such a decision would parallel those reached by courts in other jurisdictions applying laws regulating unfair trade practices to abusive acts of landlords and to unconscionable clauses in leases.⁹⁵

88. See *id.* § 42-42(b); note 63 and accompanying text *supra*.

89. N.C. GEN. STAT. § 75-1.1 (Supp. 1977) provides: "(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful. (b) For purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession."

90. No. 74-CVS-852 (Carteret County, N.C. Super. Ct., Sept. 9, 1974).

91. The Honorable J. William Copeland on September 9, 1974.

92. The Honorable L. Bradford Tillery on February 19, 1975.

93. 34 N.C. App. 503, 239 S.E.2d 574 (1977).

94. *Id.* at 517, 239 S.E.2d at 583. *Love* was decided under former § 75-1.1, Law of June 12, 1969, ch. 833, § 1, 1969 N.C. Sess. Laws 930 (current version codified at N.C. GEN. STAT. § 75-1.1 (Cum. Supp. 1977)). The applicability of § 75-1.1 to retaliatory eviction should be unaffected by the amendment.

95. See *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962); *Abstract Inv. Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962); *Commonwealth v. DeCotis*, 366 Mass. 234, 316 N.E.2d 748 (1974); *Commonwealth v. Monumental*

II. NEW LANDLORD RIGHTS IN CONTRACT

Section 42-43(a) of the Residential Rental Agreements Act imposes six obligations on tenants.⁹⁶ Subsections (4) and (6) essentially codify the implied covenant against waste found in the common law.⁹⁷ It is possible to read subdivision (6) to include damage beyond ordinary wear and tear that was accidentally but not negligently caused by a tenant. Such an interpretation, however, would be inconsistent with section 42-10 which limits a tenant's liability for waste.⁹⁸ Because section 42-10 was not repealed by the 1977 Act, it is unlikely that the legislature intended to hold tenants responsible for damage to the property that could not have been avoided by the use of reasonable care.⁹⁹

Properties, Inc., 459 Pa. 450, 329 A.2d 812 (1974). Florida's Department of Legal Affairs, promulgating regulations under FLA. STAT. ANN. §§ 501.201-213 (1974), listed retaliatory eviction as an unfair or deceptive trade practice. The retaliatory conduct rule provides:

(1) It shall be an unfair or deceptive act or practice for a landlord to retaliate against the tenant by discriminatorily increasing his rent or decreasing services, or by bringing or threatening to bring an action for possession or other civil action because:

(a) the tenant has complained to a governmental agency charged with responsibility for enforcement of a building, housing or health code of a suspected violation applicable to the premises;

(b) the tenant has complained to the landlord of a suspected violation of the rental agreement or of any provision of law;

(c) the tenant has complained to any governmental agency about an illegal or unauthorized increase in rent; or

(d) the tenant has organized, encouraged or participated in a tenant organization.

(2) It shall be presumed by the enforcing authority that evidence of a complaint or notice of violation, or evidence of any other activity protected by subsection (1), within six months prior to the action of the landlord constitutes evidence of retaliatory conduct by the landlord.

FLA. DEP'T OF LEGAL AFFAIRS, RULES OF THE DEPARTMENT OF LEGAL AFFAIRS, Rental Housing and Mobile Home Parks, ch. 2-11.07 (1974).

96. N.C. GEN. STAT. § 42-43(a) (Supp. 1977) requires a tenant to:

(1) Keep that part of the premises which he occupies and uses as clean and safe as the conditions of the premises permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the premises which he uses;

(2) Dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner;

(3) Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;

(4) Not deliberately or negligently destroy, deface, damage, or remove any part of the premises or knowingly permit any person to do so;

(5) Comply with any and all obligations imposed upon the tenant by current applicable building and housing codes; and

(6) Be responsible for all damage, defacement, or removal of any property inside a dwelling unit in his exclusive control unless said damage, defacement or removal was due to ordinary wear and tear, acts of the landlord or his agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces.

97. See, e.g., *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 79 S.E.2d 185 (1953).

98. N.C. GEN. STAT. § 42-10 (1976) provides: "A tenant for life, or years, or for a less term, shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part, unless he so contract."

99. It is generally presumed that when passing new legislation the General Assembly is

The tenant's obligations under subdivisions (1), (2), (3) and (5) are new requirements of state law. The most general duty, found in subdivision (1), is to keep the part of the premises that the tenant occupies and uses *as clean and safe as the conditions of the premises permit*. Of course, this obligation must be read in conjunction with the landlord's mutually dependent obligation¹⁰⁰ under section 42-42(a) to provide fit premises. By way of illustration, subdivision (1) of section 42-43(a) generally would require the tenant to keep the woodwork and frames of windows as clean as their condition permits, but the tenant's failure to clean the window frames might be excused if the wood were so rotten that scrubbing it might cause the window panes to fall out.¹⁰¹ Mutuality can also work in favor of the landlord. Thus, a tenant's failure to maintain part of the premises as required by section 42-43 could release the landlord from his duty to repair that part under section 42-42. For example, if the tenant breaks a window, the landlord will not be required to repair it, even though that repair may be necessary to put the premises in habitable condition. Similarly, the landlord could plead the tenant's breach of one of his obligations as a defense in a suit for breach of a related section 42-42 obligation.

Aside from the effect of the mutuality provision, the landlord's remedies for the tenant's breach of the duties imposed under section 42-43(a) are essentially those provided by contract law and the common law of waste.¹⁰² Though the landlord probably will be concerned about damages and uncleanliness at the end of the term,¹⁰³ the Act does not require him to wait until the end of the term to enforce the tenant's obligations. In order to enforce the tenant's duties under section 42-43(a), however, the landlord must give the tenant written notice of any alleged breaches, "except in emergency situations."¹⁰⁴ Presumably, the tenant must also be given a reasonable time after receipt of the notice to cure the breach before the landlord's right to sue accrues.¹⁰⁵

aware of existing law and does not intend to repeal statutes without so stating. *Spaugh v. City of Charlotte*, 239 N.C. 149, 79 S.E.2d 748 (1954).

100. See discussion of N.C. GEN. STAT. § 42-42(a) (Supp. 1977) in text accompanying notes 21-23 *supra*.

101. The landlord would be responsible for replacing rotten wood under most local housing codes and, therefore, under N.C. GEN. STAT. § 42-42(a)(1) (Supp. 1977).

102. See *id.* § 42-44(a).

103. Since most cleaning and repair charges are small, the landlord generally expects to deduct these costs from the tenant's security deposit. See the new regulation of security deposits in Article 6 of Chapter 42 of the General Statutes. *Id.* §§ 42-50 to -56.

104. *Id.* § 42-43(b).

105. This is inferred from the analogous requirement that the tenant notify the landlord of defects in the premises that arise during the term, *id.* § 42-42(4), and allow a reasonable time for curing. Normally, oral notice suffices for both landlords and tenants.

The Act, of its own force, does not provide any new remedies that would allow the landlord to have the tenant evicted. Unless the lease specifically provides that the tenant forfeits the term for a particular act or omission, the landlord may not evict the tenant for failing to perform his duties under section 42-43(a).¹⁰⁶

III. NEW LIABILITY IN TORT FOR THE LANDLORD

Historically, North Carolina courts have retained the common law rules imposing limited liability in tort on the landlord. For example, the landlord is liable to third parties (nontenants) for injury resulting from the disrepair of the premises only if the condition existed at the time the premises were leased and the landlord failed to make the necessary repairs within a reasonable time.¹⁰⁷

Generally, liability of the landlord for injury to the tenant or the tenant's guests caused by defective conditions on the premises has been governed by the doctrine of *caveat emptor*.¹⁰⁸ A few exceptions to this rule have been recognized, however. When the landlord retains control over a portion of the premises, he may be held liable for ordinary negligence that causes injury to the tenant's property.¹⁰⁹ In addition, once the landlord agrees to repair the premises, he may be held liable for personal injury to the tenant resulting from negligent performance of the repair work.¹¹⁰ Otherwise, the landlord is liable to the tenant for injuries resulting from defective conditions only if the following conditions are satisfied: (1) the defects are latent; (2) the landlord had actual or constructive knowledge of such dangerous conditions and failed to warn the tenant; and (3) the tenant was not aware of the danger and could not have discovered it through the exercise of ordinary care.¹¹¹

The passage of the Residential Rental Agreements Act has created a new standard of care owed by the landlord to his tenant in North Carolina. Although the Act's only explicit reference to tort liability states that

106. See *Morris v. Austraw*, 269 N.C. 218, 152 S.E.2d 155 (1967) (stating general rule that tenant will not be deemed to have forfeited term for any breach of lease unless lease specifically reserves right of landlord to declare forfeiture for particular breach by tenant).

107. *Childress v. Lawrence*, 220 N.C. 195, 16 S.E.2d 842 (1941); *Knight v. Foster*, 163 N.C. 329, 79 S.E. 614 (1913). But see *Andrews v. Taylor*, 34 N.C. App. 706, 239 S.E.2d 630 (1977) (dictum).

108. See cases cited in notes 5 & 6 *supra*.

109. *Rucker & Sheely Co. v. Willey*, 174 N.C. 42, 93 S.E. 379 (1917). The landlord is also liable for purposeful refusal to repair conditions under his control. See *Steffan v. Meiselman*, 223 N.C. 154, 25 S.E.2d 626 (1943).

110. See, e.g., *Livingston v. Essex Inv. Co.*, 219 N.C. 416, 14 S.E.2d 489 (1941).

111. *Robinson v. Thomas*, 244 N.C. 732, 94 S.E.2d 911 (1956). The same rule applies to social guests of the tenant. See *Clarke v. Kerchner*, 11 N.C. App. 454, 181 S.E.2d 787 (1971). But see *Andrews v. Taylor*, 34 N.C. App. 706, 239 S.E.2d 630 (1977).

violations of the Act do not constitute negligence per se,¹¹² this reference itself implies that the landlord is now liable for ordinary negligence by failing to deliver and maintain fit premises. Since the previous rule shielding the landlord from liability for negligence was premised upon the lack of any implied duty to provide fit premises,¹¹³ it is logical that ordinary liability should attach to the duties imposed under the new Act.

Although the Act has created a new standard of care for landlords, it is possible the North Carolina courts still will not find landlords liable for personal injuries caused by negligent failure to comply with the statutory obligations in section 42-42(a). The courts would at least have to reconcile any such new liability with the old rationale for denying liability even when the landlord expressly covenanted to make the repairs.¹¹⁴ This rationale was grounded on the presumed requirement that the tenant could and, indeed, had to repair the defects in the premises for the landlord. As previously discussed, the implied warranty of habitability has been construed in other jurisdictions in such a manner that the tenant is no longer required to perform the work for the defaulting landlord,¹¹⁵ and there is at least one North Carolina case indicating that tenants who are without the financial means to cover for the landlord are not foreclosed from recovering damages in contract.¹¹⁶ Thus, the basis of the old rationale for denying liability for negligence may have been removed by the statutory recognition of an implied warranty of habitability.

There are well-reasoned opinions from other jurisdictions that would support the adoption of such an approach by the courts of North Carolina. In *Sargent v. Ross*¹¹⁷ and *Old Town Development Co. v. Langford*,¹¹⁸ the courts interpreted the implied warranty of habitability to mean that the landlord must exercise reasonable care in the maintenance of the premises for purposes of tort liability, as well as contract liability. Having recognized a new standard of care for the landlord, the courts saw no reason to deny

112. N.C. GEN. STAT. § 42-44(d) (Supp. 1977).

113. *Fields v. Ogburn*, 178 N.C. 407, 100 S.E. 583 (1919).

114. A contract to repair does not contemplate as damages for the failure to perform it that any liability for personal injuries shall grow out of the defective condition of the premises; *because the duty of the tenant, if the landlord fails to perform his contract to repair, is to do the work himself*, and recover the cost in an action for that purpose, or upon a counterclaim in an action for rent, or if the premises are made untenable by reason of the breach of contract, the tenant may move out and defend in an action for rent as upon an eviction. In accordance with this view, in order to recover damages for personal injuries there must be shown some clear act of negligence or misfeasance on the part of the landlord beyond the mere breach of covenant.

Jordan v. Miller, 179 N.C. 73, 75, 101 S.E. 550, 551-52 (1919).

115. See note 71 and accompanying text *supra*.

116. *Spencer v. Hamilton*, 113 N.C. 49, 18 S.E. 167 (1893).

117. 113 N.H. 388, 308 A.2d 528 (1973).

118. 349 N.E.2d 744, 762-65 (Ind. Ct. App. 1976).

compensation for personal injury when property damage caused by the same defect was compensated.

In those jurisdictions in which ordinances or statutes require landlords to provide and maintain fit premises but do not expressly provide for liability in tort or contract, some courts have found tort liability to be the logical consequence of such protective legislation.¹¹⁹ The rationale for liability was articulated in *Altz v. Leiberson*,¹²⁰ a landmark case in which the New York Court of Appeals inferred tort liability from the passage of New York's Tenement House Law. The statute generally required rental units to be kept in good repair, but it did not address the issue of tort liability directly. The statute did not indicate which party had the duty to make the repairs. Nevertheless, the court reasoned that the legislature "must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by anyone. The duty imposed became commensurate with the need."¹²¹

The North Carolina General Assembly's intent to place the obligation to provide and maintain fit premises on landlords is clear from the Act.¹²² It is equally clear that the legislature intended that tenants be able to recover civil damages for the landlord's breach of these new duties.¹²³ At the very least, the legislature must have intended these duties to carry contractual liability. Since in North Carolina liability in tort is recognized for negligent performance of contractual duties,¹²⁴ the legislature must have intended that the new standards of care create concomitant liability in tort. If the legislature had not realized the tort dimensions of the new standards of care, there would have been no reason to exclude findings of negligence per se under section 42-44(d).¹²⁵

Thus, the net effect of the new standard of care for providing and maintaining fit premises may be to allow violations of the Act to be used as

119. See *Finnegan v. Royal Realty Co.*, 35 Cal. 2d 409, 218 P.2d 17 (1950); *McNally v. Ward*, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961); *Annis v. Britton*, 232 Mich. 291, 205 N.W. 128 (1925); *Saracino v. Capital Properties Assocs., Inc.*, 50 N.J. Super. 81, 141 A.2d 71 (1958); *Altz v. Leiberson*, 233 N.Y. 16, 134 N.E. 703 (1922).

120. 233 N.Y. 16, 134 N.E. 703 (1922).

121. *Id.* at 19, 134 N.E. at 704 (construing Law of March 20, 1909, ch. 99, 1909 N.Y. Laws 155 (repealed 1952) (current version of landlord's duty to repair codified at N.Y. MULT. DWELL. LAW § 78 (McKinney 1974))).

122. See N.C. GEN. STAT. § 42-42 (Supp. 1977).

123. See *id.* § 42-44(a).

124. See *Sims v. Oakwood Mobile Homes, Inc.*, 27 N.C. App. 25, 217 S.E.2d 737, cert. denied, 288 N.C. 511, 219 S.E.2d 347 (1975).

125. The bill's chief sponsor in the house, Rep. Henry Frye (D. Guilford), agreed to the amendment which became § 42-44(d) because certain critics of the bill expressed their belief, in floor debate, that violations of § 42-42(a) causing personal injury to the tenant would result in strict liability in tort.

evidence of ordinary negligence.¹²⁶ If the North Carolina courts adopt this view, the landlord's liability for negligence would be contingent upon the tenant's ability to produce evidence of a violation of the Act, proximate cause, and the landlord's actual or constructive knowledge of the violation.¹²⁷ In other words, the ordinary rules of negligence would apply.

CONCLUSION

Passage of the new Act portends a major shift in landlord-tenant relations for a state that has labored under the common law for nearly 200 years. It is the first piece of consumer-oriented real property legislation ever passed by the General Assembly. Although the standards of care are expressed in broad terms and the remedies are confusing, the courts of North Carolina have ample case law from other jurisdictions, as well as their own heritage of contract law, to assist them in interpreting the Act.

The courts should view the Act as remedial legislation and construe the difficult sections in a manner that will facilitate the purpose of protecting housing consumers. In particular, the courts should recognize an equitable defense to retaliatory evictions. If the courts are unable to unravel the ambiguities and apparent contradictions in a manner favorable to the consumer, it will be incumbent on the General Assembly to clarify its intent. Realistically, the interplay of the judiciary and the legislature in this field may require several years before clear rules emerge. Both consumers and suppliers of rental housing should hope that this process will begin soon.

126. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 17.6, at 997 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 36, at 201 (4th ed. 1971); *RESTATEMENT (SECOND) OF TORTS* § 288B(2) (1965).

127. See *Hancock v. Abbitt Realty Co.*, 142 Ga. App. 739, 236 S.E.2d 860 (1977) (for landlord to have constructive knowledge of defect, tenant need only show that it existed for such length of time or under such circumstances as would put owner of building on notice).