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## CAVEAT WHO?: A REVIEW OF THE LANDLORD/TENANT RELATIONSHIP IN THE CONTEXT OF INJURIES AND MAINTENANCE OBLIGATIONS

*Jerald Clifford McKinney, II\**

Bad things happen. People make mistakes. Evil exists in the world, as does stupidity, which may be the superlative source of many tort and contract claims. Claims of liability will inevitably arise in the landlord/tenant relationship. This article will explore the liability of a landlord in Arkansas when a tenant, guest of a tenant, or a third party claims injury. It will also look at the obligations of landlords to maintain leased premises as well as examine how language in a lease agreement (or the lack thereof) can affect the liability and responsibilities of the parties. This article will try to answer whether the landlord/tenant relationship in Arkansas should still be viewed as truly *caveat lessee*, which will include examining the Arkansas General Assembly's codification of the *caveat lessee* doctrine. Where applicable, this article will discuss distinctions between commercial and residential tenancies.

Before proceeding, it may be helpful to reveal a little of the author's background. My background is that of a lease drafter, representing both tenants and landlords mostly in the commercial context. I write leases—I do not litigate tort claims. Consequently, the aim of this article is to explore the contractual and practical liabilities and obligations of the parties as opposed to creating a “how to handle a tort claim” guide.

*Caveat lessee* means “lessee beware” and provides that the leased premises are taken “as is” unless the lease agreement specifies otherwise.<sup>1</sup> The doctrine means, “absent fraud or an express provision in the lease, the landlord [has] absolutely no obligation to repair or maintain the leased premises.”<sup>2</sup> As stated by one court, “The tenant hires at his peril, and a rule similar to that of *caveat emptor* applies, and throws on the lessee the respon-

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1. Corey Mostafa, *The Implied Warranty of Habitability, Foreseeability, and Landlord Liability for Third-Party Criminal Acts Against Tenants*, 54 UCLA L. REV. 971, 975 (2007).

2. Brian A. Montague, *Exculpatory Clause in Residential Lease Absolving Lessor of Tort Liability for Common Areas is Void as Against Public Policy*, 52 MISS. L.J. 913, 915–16 (1982).

sibility of examining as to the existence of defects in the premises, and of providing against their ill-effects.”<sup>3</sup> Since the landlord has no obligation to repair or maintain the leased premises, the landlord is “not liable to the tenant or the tenant’s invitees for injuries caused by the defective condition of the premises.”<sup>4</sup>

Some jurisdictions have abandoned the *caveat lessee* doctrine, and most have created significant exceptions.<sup>5</sup> As one commentator said, “Today, at least in the residential lease context, the doctrine is virtually dead.”<sup>6</sup> Much has been written on the topic of the *caveat lessee* doctrine, mostly critical.<sup>7</sup> The criticism has been the same in Arkansas, with law review articles and comments being primarily critical of the doctrine.<sup>8</sup> However, the purpose of this article is not to join the debate calling for the end of the *caveat lessee* doctrine or criticizing the doctrine, but simply to describe the current status of the law. The Supreme Court of Arkansas has consistently upheld the doctrine for more than a century. Just a few years ago, the Arkansas General Assembly codified and reaffirmed the essential elements of the common law doctrine. In 2012, the Non-Legislative Commission for the Study of Landlord-Tenant Law released a report that compared Arkansas’s landlord-tenant law with that of other states, making findings and recommendations. The report discusses tort liability of landlords, but the Commission split on the issue of tort liability and thus made no recommendation.<sup>9</sup> Regardless of the merits for or against the *caveat lessee* doctrine, the doctrine exists in Arkansas, and this article’s purpose is to report on the current

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3. *Watson v. Almirall*, 70 N.Y.S. 662, 662 (N.Y. App. Div. 1901).

4. Montague, *supra* note 2, at 916.

5. Jamie M. Powers, *Oklahoma Landlords Beware: Miller v. David Grace, Inc. Abandons Caveat Emptor in Residential Leases*, 63 OKLA. L. REV. 361, 361 (2011). See also RESTATEMENT (SECOND) OF TORTS ch. 13, topic 3, § 357 (1965); Samuel R. Gilbert, *Don’t Let Them Bite: Defining the Responsibilities of Landlords and Tenants in the Event of a Bedbug Infestation*, 80 GEO. WASH. L. REV. 243, 251 (2011); Paula C. Murray, *The Evolution of Implied Warranties in Commercial Real Estate Leases*, 28 U. RICH. L. REV. 145, 152-54 (1994); Mostafa, *supra* note 1, at 975.

6. Murray, *supra* note 5, at 152.

7. A WestlawNext search on 11-30-12 with the search term “caveat lessee” produced 622 secondary source listings.

8. See, e.g., Kathryn Hake, *Is Home Where Arkansas’s Heart Is?: State Adopts Unique Statutory Approach to Landlord Tort Liability and Maintains Common Law “Caveat Lessee”*, 59 ARK. L. REV. 737 (2006); Stephen J. Maddex, *Propst v. McNeill: Arkansas Landlord-Tenant Law, A Time for Change*, 51 ARK. L. REV. 575 (1998); Ashley E. Norman, *A Tenant’s Dilemma: The Arkansas Residential Landlord-Tenant Act of 2007*, 62 ARK. L. REV. 859 (2009); Marshall Prettyman, *The Landlord Protection Act, Arkansas Code § 18-17-101 Et Seq.*, 2008 ARK. L. NOTES 71 (2008).

9. STEPHEN R. GILES ET AL., Non-Legislative Commission for the Study of Landlord-Tenant Law, December 31, 2012, at \*27 <http://www.arkansasjustice.org/sites/default/files/file%20attachments/Landlord-Tenant%20Commission%20Report.pdf>.

state of the law as case law continues to put twists and turns into the doctrine.<sup>10</sup>

### I. HISTORY OF THE *CAVEAT LESSEE* DOCTRINE

The doctrine originally developed in the Middle Ages.<sup>11</sup> When the doctrine developed, a lease was considered a conveyance of land that was treated essentially like a sale of land except for the obligation to pay rent.<sup>12</sup> The lease arrangement typically gave the tenant virtually all control and all responsibility for the leased property, even to the point that the common law allowed the tenant to eject the landlord as a trespasser during the term of the lease.<sup>13</sup> The landlord's sole obligation at common law was to provide quiet

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10. Though criticisms can certainly be made to the doctrine, as is true of most legal doctrines, there can also be unintended consequences from changes made to a doctrine that has existed for more than one hundred years. As a court in another jurisdiction recently noted, "courts attempt to 'avoid capricious departures from bedrock legal rules, as such tectonic shifts might produce unforeseen and undesirable consequences.'" *Hill v. Sears, Roebuck and Co.*, 822 N.W.2d 190, 201 (Mich. 2012) (quoting Bob Young, *A Judicial Traditionalist Confronts the Common Law*, 8 TEXAS REV. L & POL. 299, 307 (2004)).

According to the National Low Income Housing Collation, *Out of Reach 2012 America's Forgotten Housing Crisis*, Arkansas ranks 51<sup>st</sup> on a list ranking states from the most expensive to the least expensive for residential housing with Hawaii, District of Columbia, California, New Jersey and Maryland ranking as the five most expensive based on the cost of leasing a two bedroom house relative to income. See *Out of Reach 2012*, NAT'L LOW INCOME HOUS. COAL. (March 2012), <http://nlihc.org/sites/default/files/oor/2012-OOR.pdf>. As discussed in this article, all five of these jurisdictions have completely or mostly abandoned the *caveat lessee* doctrine. Of course, there could be other factors contributing to the cost difference, but the existence of the difference is worth consideration in any debate over the value of preserving the *caveat lessee* doctrine. Also, of the other four states in the five most affordable, Mississippi, Kentucky, South Dakota and West Virginia, all have some (though variable) version of a statutory or case law imposed warranty of habitability. See *State Adoptions of URLTA Landlord Duties*, Nat'l Conference of State Legislatures, <http://www.ncsl.org/issues-research/env-res/state-adoptions-of-urlta-landlord-duties.aspx>. Even courts that have abandoned the doctrine, however, have acknowledged the potentially high financial costs associated with doing so. See *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 488 (D.C. Cir. 1970).

11. Corey Mostafa, *supra* note 1, at 975; Powers, *supra* note 5, at 363. Some have argued the doctrine developed in part because tenants in the Middle Ages were more "self-sufficient" than modern tenants and could "perform all repairs required on the leased premises." Shannon E. Kelly, *South Dakota Supreme Court Opens the Door to Landlord Liability for Criminal Attacks Committed by Third Parties on the Premises*: *Smith v. Lagow Construction & Development Company*, 48 S.D. L. REV. 365, 371 (2003). See also Joan L. Neisser, *The Tenant as Consumer: Applying Strict Liability Principles to Landlords*, 64 ST. JOHN'S L. REV. 527, 531 (1990) and Jamie M. Powers, *Oklahoma Landlords Beware: Miller v. David Grace, Inc. Abandons Caveat Emptor in Residential Leases*, 63 Okla. L. Rev. 361, 363-64 (2011).

12. Mostafa, *supra* note 1, at 975.

13. *Id.*

enjoyment of the leased premises to the tenant.<sup>14</sup> The tenant's obligation was to pay rent, which was an independent obligation, meaning that the rent could not be withheld even if the landlord breached any of its obligations.<sup>15</sup> Even if the landlord had a contractual obligation to maintain the premises, under the doctrine of independent covenants, the tenant's obligation to pay rent remained an independent obligation with breach of any landlord obligation, compensable only by the right to pursue a suit for damages.<sup>16</sup> Since the obligation to pay rent was an independent obligation, the landlord could seek to evict the tenant if a tenant failed to pay rent during a dispute with the landlord.<sup>17</sup>

Nearly two hundred years ago, courts in various states began eroding the *caveat lessee* doctrine, arguably corresponding to the switch from predominately agricultural leases to more urbanized leases of buildings rather than land.<sup>18</sup> As one observer noted, during the Industrial Revolution and the switch to a more urban society, "The structures on the land, rather than the land itself became the focus of the lease."<sup>19</sup> Courts began viewing leases primarily as contracts rather than as conveyances of land.<sup>20</sup> This was important because, "Since rules of property law solidified before the development of mutually dependent covenants in contract law, theoretically once an estate was leased, there were no further unexecuted acts to be performed by the landlord and there could be no failure of consideration."<sup>21</sup> Under a contract theory, the covenants in the lease are governed by the doctrine of mutually dependent covenants, meaning that the tenant's obligation to pay rent could be relieved by the landlord's failure to perform any of its material obligations under the lease.<sup>22</sup> Also, courts began exercising powers of equity in situations where the court viewed the landlord's exercise of remedies to

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14. Murray, *supra* note 5, at 145.

15. *Id.*

16. *Id.* at 147. See also *Halifax Eng'g, Inc. v. Doyle, Inc.*, 23 Va. Cir. 466, 466 (1991) ("At common law, the tenant's covenant to pay rent and the landlord's express covenants in the lease were viewed as independent and, therefore, the tenant's obligation to pay rent was not affected by the landlord's breach of an express covenant of the lease."); RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 44:42 (4th ed. 1993).

17. Murray, *supra* note 5, at 147.

18. Mostafa, *supra* note 1, at 975.

19. Murray, *supra* note 5, at 148.

20. Mostafa, *supra* note 5, at 975. Today, leases are generally viewed as being both a conveyance and a contract. See *Montague*, *supra* note 2, at 914. See also *Neisser*, *supra* note 11, at 527.

21. *Lemle v. Breeden*, 462 P.2d, 470, 472 (Haw. 1969).

22. Lord, *supra* note 16. See also Melissa Gainor, *Wesson v. Leone Enterprises, Inc.: A Misguided Approach*, 84 B.U.L. REV. 769, 780 (2004); Gary Goldman, *Uniform Commercial Landlord and Tenant Act—A Proposal to Reform "Law out of Context"*, 19 T.M. COOLEY L. REV. 175, 177 (2002).

be heavy-handed or unjust.<sup>23</sup> Opponents of the *caveat lessee* doctrine argued that the doctrine's agrarian-based history makes it "inapplicable to the reality of the modern urban setting of most contemporary residential leases."<sup>24</sup> As one commentator argued, "Urban tenants are less likely to be able to repair defects in the unit than were self-sufficient farmers at the time that the caveat lessee doctrine was developed, and owners of typical multiunit apartment buildings today have more bargaining power in comparison to individual renters than landlords did over tenant farmers in the past."<sup>25</sup>

As courts began to change their view of leases, exceptions to the *caveat lessee* doctrine began to develop.<sup>26</sup> Four "standard" exceptions developed: (1) hidden dangers known to the landlord but unknown to the tenant; (2) premises leased for public use; (3) common areas retained under the landlord's control; and (4) premise negligently repaired by the landlord.<sup>27</sup> These exceptions applied to both residential and commercial leases.<sup>28</sup> Other exceptions and defenses for the tenant also developed, most notably: (1) a breach of an implied warranty of habitability for residential leases; (2) a constructive eviction defense to the payment of rent in certain circumstances; and (3) a breach of an implied warranty of suitability for purpose for buildings under construction.<sup>29</sup> These exceptions will be explored in greater detail later in this article.

## II. STATUS OF THE *CAVEAT LESSEE* DOCTRINE IN ARKANSAS

Arkansas courts have recognized the *caveat lessee* doctrine for more than a century.<sup>30</sup> In 1910, the Supreme Court of Arkansas articulated its approach to the *caveat lessee* doctrine, saying that, "[u]nless a landlord agrees with his tenant to repair leased premises, he cannot, in the absence of a statute, be compelled to do so, and cannot be held liable for repairs."<sup>31</sup> A few years later, the state supreme court further articulated the law in Arkansas by

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23. Murray, *supra* note 5, at 148. *See also* Lord, *supra* note 16.

24. Gilbert, *supra* note 5, at 251.

25. *Id.* at 251–52.

26. Mostafa, *supra* note 1, at 975.

27. Powers, *supra* note 5, at 364–65. *See also* RESTATEMENT (SECOND) OF TORTS ch. 13, topic 3, § 357 (1965).

28. Olin L. Browder, *The Taming of a Duty: The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 102 (1982).

29. Mostafa, *supra* note 1, at 975. *See also* LORD, *supra* note 16; Gilbert, *supra* note 5, at 251; Murray, *supra* note 5, at 152–54; Powers, *supra* note 5, at 365.

30. Propst v. McNeill, 326 Ark. 623, 624, 932 S.W.2d 766, 767 (1996).

31. Delaney v. Johnson, 95 Ark. 131, 131, 128 S.W. 859, 860 (1910). *See also* Propst, 326 Ark. at 624, 932 S.W.2d 766, 767 (1996) ("[U]nder that rule, unless a landlord agrees with his tenant to repair leased premises, he cannot, in the absence of statute, be compelled to do so or be held liable for repairs.").

saying, “[i]t is the settled rule of common law that there is no implied covenant by the lessor that the leased premises are in good repair or fit for the intended use, nor that the premises shall continue to be suitable for the lessee’s use or business.”<sup>32</sup> The court continued, “[i]n other words, in the absence of fraud or concealment, the tenant leases at his peril, and the rule in the nature of caveat emptor throws upon the lessee the responsibility of examining the demised premises for defects and providing against their consequences before he enters into the lease.”<sup>33</sup> In an older decision, the court stated, “in the absence of fraud or concealment, the tenant leases at his peril, and the rule in the nature of caveat emptor throws upon the lessee the responsibility of examining the demised premises for defects and providing against their consequences before he enters into the lease.”<sup>34</sup>

Arkansas’ *caveat lessee* approach to landlord-tenant law was solidified in the 1932 case of *Joseph v. Riffel*.<sup>35</sup> In *Joseph*, the plaintiff fell through an open elevator shaft that was “open, unguarded, unlighted and in darkness and without [a]danger sign . . . .”<sup>36</sup> The court in *Joseph* recited common law doctrine that “in the absence of statute or agreement, the landlord is under no legal obligation to light common passageways for the benefit of tenants.”<sup>37</sup> The court further stated,

On the analogy of a lack of duty on the part of the landlord to light common passageways, it has been held that a landlord is not liable for injury received by tenant [sic] through the failure of the landlord to supply rails or guards when the condition was the same at the time of letting.<sup>38</sup>

The court cited no case law in the decision but noted that there was no law requiring elevator openings in a commercial facility to have rails, guards, lights or warning signs.<sup>39</sup> The court also refused to consider that the premises may have been improperly constructed, saying,

We cannot indulge the presumption that the shafts or wells in which the elevators were lifted and lowered from floor to floor were improperly

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32. Little Rock Ice Co. v. Consumers’ Ice Co., 114 Ark. 532, 532, 170 S.W. 241, 243 (1914).

33. *Id.*

34. Rogers v. Rob Roy Plantation Co., 208 Ark. 429, 432, 186 S.W.2d 661, 662 (1945).

35. Bartley v. Sweetser, 319 Ark. 117, 120, 890 S.W.2d 250, 251 (1994) (“Since 1932, Arkansas has adhered to the general rule that, as between a landlord and tenant, the landlord is under no legal obligation to a tenant for injuries sustained in common areas, absent a statute or agreement.”)

36. Joseph v. Riffel, 186 Ark. 418, 53, S.W.2d 987, 988 (1932).

37. *Id.* (citing 36 C. J. § 891).

38. *Id.*

39. *Id.* at 418, 53, S.W.2d at 988–89.

constructed because they had no railings around them or guards or signals upon them, considering the uses for which they were intended, nor can we presume a necessity for lights in the corridors.<sup>40</sup>

By holding the landlord not to be liable, the court noted that the lease agreement did not specify that any of these items would be in the building.<sup>41</sup>

Since *Joseph*, Arkansas courts have generally stayed loyal to the caveat lessee doctrine. Indeed, "[t]he doctrine of caveat lessee, which states that unless a landlord agrees with his tenant to repair leased premises he cannot, in the absence of a statute, be compelled to do so, is firmly established law in this state."<sup>42</sup> Many plaintiffs, however, have assaulted the doctrine over the years.

In 1996, in *Propst v. McNeill*, the Supreme Court of Arkansas specifically addressed a challenge that the *caveat lessee* doctrine is outdated.<sup>43</sup> The tenant argued that the modern rule should eliminate *caveat lessee* in favor of compelling landlords to "exercise reasonable care not to subject others to an unreasonable risk of harm."<sup>44</sup> The tenant, whose airplane was damaged in a storm due to a faulty building, argued "that Arkansas has become less rural, and consequently tenants have become less informed and too ill-equipped to judge the structural integrity of buildings with which they are unfamiliar."<sup>45</sup> The tenant further argued "that landlords, on the other hand, are generally familiar with their properties either through firsthand knowledge of the condition of the properties or through knowledge imputed to them by persons hired to manage their properties."<sup>46</sup>

While acknowledging that most states have eliminated the *caveat lessee* doctrine, the Supreme Court of Arkansas rejected the tenant's argument,<sup>47</sup> noting several cases that attacked the *caveat lessee* doctrine, including the Supreme Court of New Hampshire case, *Sargent v. Ross*. In *Sargent v. Ross*, the New Hampshire Supreme Court described the *caveat lessee* doctrine in extremely harsh terms, referring to it as a "'scandal'"<sup>48</sup> and "an artificial and illogical rule."<sup>49</sup> The court "discard[ed] the rule of 'caveat les-

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40. *Id.*

41. *Id.*

42. *Adkinson v. Kilgore*, 62 Ark. App. 247, 254, 970 S.W.2d 327, 331 (1998).

43. *Propst v. McNeill*, 326 Ark. 623, 625, 932 S.W.2d 766, 767 (1996).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 626, 932 S.W.2d at 768.

48. *Sargent v. Ross*, 308 A.2d 528, 530 (1973) (quoting Quinn and Phillips, *THE LAW OF LANDLORD TENANT: A CRITICAL EVALUATION OF THE PAST WITH GUIDELINES FOR THE FUTURE*, 38 *FORD. L. REV.* 225 (1969)).

49. *Sargent*, 308 A.2d at 531 (quoting Note, *Lessor's Duty to Repair: Tort Liability to Persons Injured on the Premises*, 62 *HARV. L. REV.* 669 (1949)).



see' and the doctrine of landlord nonliability to which it gave birth."<sup>50</sup> After giving consideration to the claimed merits of these negative cases, the Arkansas Supreme Court held:

Because of the policy considerations and possible impact that would ensue in enlarging a landlord's liability, there is merit in the argument that such matters might be dealt with better in the legislative arena. In any event, this court has steadfastly adhered to the caveat lessee rule for one hundred years without a hint it might consider abandoning it. This court has held that it is a matter of public policy to uphold prior decisions unless great injury or injustice would result.<sup>51</sup>

Without expressly adopting a position on the policy issues, the Court in *Propst* noted several policy considerations for keeping the *caveat lessee* doctrine, most notably that the doctrine "serves Arkansas's constitutionally declared public policy of respecting its citizens' right to contract" and "eliminating caveat lessee will not result in more protections, but instead in fewer options for the tenant [because a change could "eliminate the productive and beneficial use of marginal structures, absent landlord repair and insurance against possible liability"]."<sup>52</sup>

However, the Arkansas Supreme Court did not completely foreclose the possibility of changing or eliminating the rule in the future even without the General Assembly changing the doctrine legislatively.<sup>53</sup> The Court noted that the *Propst* case concerned "a businessman who owns a plane and was not shown to be someone who could not appreciate the risk of storing his plane in an old hangar."<sup>54</sup> The Court stated that it did not see this type of situation or facts as warranting a departure from the long-standing *caveat lessee* doctrine.<sup>55</sup>

Five years later, a plaintiff in another case asked the Arkansas Supreme Court to overturn the doctrine of *caveat lessee*.<sup>56</sup> In the case of *Thomas v. Stewart*, the plaintiff's son leaned against a defective second-floor balcony railing and suffered numerous injuries when he fell.<sup>57</sup> The Court again declined to overturn the doctrine but again stated that "we do not foreclose the possibility of considering this issue in the future."<sup>58</sup> The Court listed several

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50. *Sargent*, 308 A.2d at 534 (1973).

51. *Propst*, 326 Ark. at 626, 932 S.W.2d at 768 (citing *Independence Fed. Bank, F.S.B. v. Paine Weber*, 302 Ark. 324, 331-32, 789 S.W.2d 725, 730 (1990)).

52. *Id.*

53. *Id.* at 627, 932 S.W.2d at 768.

54. *Id.*

55. *Id.*

56. *Thomas v. Stewart*, 347 Ark. 33, 41, 60 S.W.3d 415, 420 (2001).

57. *Id.* at 36, 60 S.W.3d at 416.

58. *Id.* at 41, 60 S.W.3d at 420.

reasons for declining to overturn the doctrine.<sup>59</sup> First, the Court found the plaintiff's brief on the issue to be deficient because it cited only one case (the 1973 *Sargent v. Ross* case from New Hampshire) with any authority on the issue of the *caveat lessee* doctrine, which was the same case the Court had already addressed and rejected in the *Propst* case.<sup>60</sup> Second, the Court found that the plaintiff's appellate brief failed to apprise the Court of any developments since the *Propst* decision that would cause the Court to change direction.<sup>61</sup> Third, the Court noted that it had not invited, or received, *amicus curiae* briefs from interested organizations on the issue as the Court did in 1970 when it modified the *caveat emptor* doctrine in the context of the sale of new houses.<sup>62</sup>

The Court in *Thomas* effectively painted a roadmap for what it would consider to overturn the doctrine of *caveat lessee*. The Court in *Thomas* particularly focused on its desire for the General Assembly to weigh in on the issue, with the majority restating its position in *Propst* that "the question of landlord liability was more properly a question for the General Assembly."<sup>63</sup> However, Justice Brown concurred in the decision, agreeing that the issue was not adequately briefed for consideration in this case, but arguing rather forcefully that the time may have come for the Court to give serious reconsideration of the doctrine of *caveat lessee* since the General Assembly had failed to act in the three legislative sessions since the *Propst* case.<sup>64</sup>

The General Assembly got the message from Justice Brown. On February 17, 2005, Representative Robert Thompson introduced House Bill 1766 titled "An Act to Clarify the Responsibilities of Landlords."<sup>65</sup> House Bill 1766 began with a preamble that read:

Section 1. Statement of legislative purpose and intent.

(a) The General Assembly finds that the Arkansas Supreme Court has requested its guidance regarding the law pertaining to a landlord's liability to tenants and tenant's licensees and invitees for death, injuries, or property damage suffered on the leased premises that are proximately caused by defects or disrepair on the premises.

(b) As the Supreme Court recognized in *Thomas v. Stewart*, 347 Ark. 33, 60 S.W.3d 415 (2001) and *Propst v. McNeill*, 326 Ark. 623, 932 S.W.2d 766 (1996), for more than a century, Arkansas law has adhered to the

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59. *Id.*

60. *Id.* (mentioning *Sargent*, *supra* note 49, 308 A.2d 528 (1973)).

61. *Id.*

62. *Thomas*, 347 Ark. at 42, 60 S.W.3d at 420.

63. *Id.* at 41, 60 S.W.3d at 420.

64. *Id.* at 42–43, 60 S.W.3d at 421.

65. H.B. 1766, 2006 Leg., 85th Gen. Assemb., Reg. Sess. (Ark. 2005).

common law principle under which a landlord has no liability to a tenant or tenant's guests absent the landlord's:

(1) Agreement supported by consideration or assumption by conduct of a duty to undertake repair and maintenance; and

(2) Failure to perform the agreement or assumed duty in a reasonable manner.

(c)(1) The General Assembly further finds that the Supreme Court has properly and correctly interpreted and applied the law and that existing law should not be altered or extended.

(2) The purpose and intent of Section 2 of this act is to codify this rule of law as it exists under Arkansas common law.

The bill was given a "Do Pass" recommendation by the House Public Health, Welfare and Labor Committee on February 24, 2005.<sup>66</sup> The bill passed the Democrat-controlled House of Representatives on February 25, 2005 by a vote of 62 Yeas, 24 Nays, 13 Not Voting, and 1 Voting Present.<sup>67</sup> The bill was then referred to the Senate Committee on the Judiciary where it received a "Do Pass" recommendation on March 7, 2005.<sup>68</sup> The bill passed the Democrat-controlled Senate almost unanimously on March 15, 2005, by a vote of 34 Yeas and 1 Excused Absence.<sup>69</sup> During the process, the bill was not amended from how it was originally introduced.<sup>70</sup> The bill was transmitted to Governor Mike Huckabee on March 16, 2005, and returned five days later as Act 928 of 2005.<sup>71</sup>

As codified, the Act reads:

18-16-110. Landlord's liability arising from alleged defects or disrepair of premises.

No landlord or agent or employee of a landlord shall be liable to a tenant or a tenant's licensee or invitee for death, personal

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66. *Bill Status History*, <http://www.arkleg.state.ar.us/assembly/2005/R/Pages/BillStatusHistory.aspx?measureno=HB1766> (accessed December 9, 2012).

67. *HB 1766—An Act to Clarify the Responsibilities of Landlords*, <http://www.arkleg.state.ar.us/assembly/2005/R/Pages/Votes.aspx?rcsnum=651&votechamber=House> (accessed December 9, 2012). The Arkansas House of Representatives has one hundred members.

68. *Bill Status History*, <http://www.arkleg.state.ar.us/assembly/2005/R/Pages/BillStatusHistory.aspx?measureno=HB1766> (accessed December 9, 2012).

69. *HB 1766—An Act to Clarify the Responsibilities of Landlords*, <http://www.arkleg.state.ar.us/assembly/2005/R/Pages/Votes.aspx?rcsnum=1508&votechamber=Senate> (accessed December 9, 2012). The Arkansas Senate has thirty-five members.

70. *Bill Status History*, <http://www.arkleg.state.ar.us/assembly/2005/R/Pages/BillStatusHistory.aspx?measureno=HB1766> (accessed December 9, 2012).

71. *Id.*

injury, or property damage proximately caused by any defect or disrepair on the premises absent the landlord's:

(1) Agreement supported by consideration or assumption by conduct of a duty to undertake an obligation to maintain or repair the leased premises; and

(2) Failure to perform the agreement or assumed duty in a reasonable manner.<sup>72</sup>

Given the strong legislative response, the common law incarnation of the *caveat lessee* doctrine appears to be firmly set in Arkansas. It also appears to have the strong support of the General Assembly. Given the present codification of the common law doctrine, the question becomes what, if any, of the exceptions to the *caveat lessee* doctrine adopted in other states might have some foothold in Arkansas case law.

### III. THE EXCEPTIONS TO THE *CAVEAT LESSEE* DOCTRINE

#### A. The Four Traditional Exceptions

There are four traditional exceptions to the *caveat lessee* doctrine that have developed in the common law of many states: (1) a hidden danger in the premises of which the landlord, but not the tenant, was aware (*i.e.*, the latent defect exception); (2) premises leased for public use; (3) common areas retained under the landlord's control (*i.e.*, the retention of control exception); or (4) premises negligently repaired by the landlord.<sup>73</sup> All four of these have not been addressed, at least expressly, in Arkansas decisions. The following subsections will discuss the application of these exceptions in other states and, to the extent possible, the Arkansas approach to the same.

##### 1. *The Latent Defect Exception*

One of the traditional exceptions to the *caveat lessee* doctrine is hidden dangers known to the landlord.<sup>74</sup> This exception abrogates the *caveat lessee* doctrine in cases where the landlord fraudulently concealed facts about the premises or failed to disclose latent defects that could not be discovered through a reasonable inspection.<sup>75</sup> The exception does not require the land-

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72. ARK. Code Ann. § 18-16-110.

73. Propst v. McNeill, 326 Ark. 623, 627, 932 S.W.2d 766, 768 (1996). See also Milligan v. Chesterfield Vill. GP, LLC, 239 S.W.3d 613, 629 (Mo. Ct. App. 2007).

74. Sargent v. Ross, 308 A.2d 528, 531 (1973).

75. Murray, *supra* note 5, at 153.

lord to conduct inspections or even to make repairs—just to disclose what is known to the landlord.<sup>76</sup> The duty can be describe as one that requires to warn of “‘hidden dangers, traps, snares, pitfalls and the like’” but does not require “‘protecting from dangers so ‘open and obvious’ as to reasonably expect others to detect them for themselves.’”<sup>77</sup>

As stated in an early case on this exception, “Where there are concealed defects attended with danger to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them, in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor, if injury occurs.”<sup>78</sup>

Arkansas case law is not completely clear on the latent defect exception. In the *Propst* case, the Arkansas Supreme Court rejected the plaintiff’s latent defect claim but said, “Without the need of discussing whether the latent-defect exception has ever been recognized by Arkansas courts, we believe that, even if it had, Propst’s evidence on this issue is sorely lacking.”<sup>79</sup> In an early case, however, the Supreme Court of Arkansas articulated the *caveat lessee* doctrine as being, “[I]n the absence of fraud or concealment, the tenant leases at his peril, and the rule in the nature of caveat emptor throws upon the lessee the responsibility of examining the demised premises for defects and providing against their consequences before he enters into the lease.”<sup>80</sup> Arkansas courts have since copied this language in other decisions as being the embodiment of the doctrine in Arkansas.<sup>81</sup>

This definition would seem to imply the existence of the latent defect exception in Arkansas though cases typically do not hold the landlord liable for defects unknown by either party.<sup>82</sup> At least in part, this may be because of how strongly Arkansas holds to the portion of the *caveat lessee* doctrine that provides that a landlord has no duty to repair or maintain the leased premises absent a contract between the parties to obligate the landlord for the repair or maintenance.<sup>83</sup> As stated in one case, “At common law the les-

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76. Browder, *supra* note 28, at 103–04.

77. Miller v. David Grace, Inc., 212 P.3d 1223, 1231 (Okla. 2009).

78. Cowen v. Sunderland, 145 Mass. 363, 364 (Mass. 1887). *See also* Sunasack v. Morey, 196 Ill. 569, 571 (Ill. 1902).

79. Propst v. McNeill, 326 Ark. 623, 627, 932 S.W.2d 766, 769 (1996).

80. Little Rock Ice Co. v. Consumers’ Ice Co., 114 Ark. 532, 532, 170 S.W. 241, 243 (1914) (*citing* Watson v. Almirall, 61 App. Div. 429 (N.Y. 1901)).

81. *See, e.g.*, Rogers v. Rob Roy Plantation Co., 208 Ark. 429, 432, 186 S.W.2d 661, 662 (1945).

82. *See, e.g.*, Haizlip v. Rosenberg, 63 Ark. 430, 430, 39 S.W. 60, 60 (1897) (holding a landlord was not liable for water damage caused by a defective toilet).

83. Steward v. McDonald, 330 Ark. 837, 841, 958 S.W.2d 297, 299 (1997); Stalter v. Akers, 303 Ark. 603, 605, 798 S.W.2d 428, 430 (1990).

sor owed no duty of repair of the premises to the lessee. Arkansas law follows this rule.”<sup>84</sup>

If the contract between the landlord and the tenant does not expressly impose a duty to repair or maintain on the landlord, then no such duty exists.<sup>85</sup> This idea seems to hold whether the defect is latent or patent in nature, though not necessarily where the landlord fraudulently conceals a fact known to it. For instance, in *Miller v. Centerpoint Energy Resource Corp.*, the court found no duty to maintain an uncapped gas valve that led to an explosion since the lease agreement contained no provision for repairs, including repairs to the gas line or space heater.<sup>86</sup> Even if there is a latent defect exception in Arkansas, a tenant clearly cannot impose liability on a landlord because of a defect which was discoverable “by a reasonably careful examination” prior to entering into the lease agreement.<sup>87</sup>

## 2. *Premises Leased for Public Use*

Another of the traditional exceptions to the *caveat lessee* doctrine is for premises leased for public use.<sup>88</sup> This exception exposes the landlord to liability despite the *caveat lessee* doctrine when the lease of the premises is for “a purpose involving admission of the public.”<sup>89</sup> The rationale for this exception is that the landlord has responsibility to the public when the premises are leased for a purpose involving admission of the public and the landlord has reason to expect that the tenant will admit the public before the premises is put in a reasonably safe condition for the public.<sup>90</sup> Under this exception, the landlord has a duty to fix a dangerous condition on the premises if the landlord knows that the premises will be for public use.<sup>91</sup> The exception is not limited to leases to the government, but applies to any

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84. *Hurst v. Feild*, 281 Ark. 106, 108, 661 S.W.2d 393, 394 (1983).

85. *Stalter*, 303 Ark. at 606, 798 S.W.2d at 430.

86. *Miller v. Centerpoint Energy Res. Corp.*, 98 Ark. App. 102, 110, 250 S.W.3d 574, 580 (2007).

87. *Little Rock Ice Co. v. Consumers' Ice Co.*, 114 Ark. 532, 532, 170 S.W. 241, 243 (1914).

88. *Murray*, *supra* note 5, at 155. *See also Sargent v. Ross*, 308 A.2d 528, 530 (1973).

89. *Jones v. Levin*, 2007 PA Super 412, 412, 940 A.2d 451, 456 (Pa. Super. Ct. 2007). *See also Paglesdorf v. Safeco Ins. Co. of Am.*, 91 Wis. 2d 734, 741, 284 N.W.2d 55, 59 (1979).

90. *Id.* at 412, 940 A.2d at 457. *See also Hao v. Campbell Estate*, 76 Haw. 77, 81, 869 P.2d 216, 220 (1994).

91. *Shoy v. Venator Group Specialty, Inc.*, No. CIV. 458/2000, 2002 WL 561063 (V.I. Mar. 26, 2002).

premises, such as shopping centers, where members of the public might frequent.<sup>92</sup>

The exception "only extends to injuries suffered by members of the public and which occur in that portion of the premises intended to be open to the public."<sup>93</sup> The exception only applies for those persons admitted by the tenant for the purpose for which the land is held open.<sup>94</sup> For example, a court in Kansas held that a plumber who came on the public premises for the purpose of preparing an estimate for plumbing work did not fall within the exception.<sup>95</sup> In a Missouri case, the court found that a repairman working on a marquee was not a member of the public because he was conducting a business purpose at the time of the injury.<sup>96</sup>

Difficult questions in these cases involve determining what constitutes a public use or an area open to the public. A Washington court determined that a participant in a race who was injured on the race course did not qualify for the exception because the race course was not open to members of the public, but only to the race participants.<sup>97</sup> In a Connecticut case, the court determined that a back room of a public facility did not constitute an area open to the public.<sup>98</sup> In a Pennsylvania case, the court determined that a side corridor of a lobby in a shopping center was a public use that was open to the public.<sup>99</sup> In another Pennsylvania case, the court determined that the interior walkway of a baseball park during batting practice (as opposed to during a game) constituted a public place.<sup>100</sup>

Generally, an employee is not considered a member of the public for purposes of taking advantage of the public use exception.<sup>101</sup> However, some jurisdictions, such as New York, extend the exception to employees but only so long as the injury occurs in an area that is open to the public and not just open to the employees of the tenant.<sup>102</sup> For instance, in New York, an employee of a restaurant could not recover from the landlord when the injury

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92. See, e.g., *Yarkosky v. Caldwell Store, Inc.*, 151 A.2d 839, 840 (Pa. Super. Ct. 1959) (concerning the lease of a shopping center); *Strade v. Ryan*, 470 N.Y.S.2d 707, 708 (N.Y. 1983) (concerning the lease of a restaurant).

93. *Regan v. City of Seattle*, 458 P.2d 12, 15 (Wash. 1969).

94. *Rollo v. City of Kansas City, Kan.*, 857 F. Supp. 1441, 1444 (D. Kan. 1994).

95. *Id.*

96. *Horstman v. Glatt*, 436 S.W.2d 639, 643 (Mo. 1969).

97. *Regan*, 458 P.2d at 15.

98. *Stevens v. Polinsky*, 341 A.2d 25, 27 (Conn. Super. Ct. 1974).

99. *Yarkosky v. Caldwell Store, Inc.*, 151 A.2d 839, 841 (Pa. Super.Ct. 1959).

100. *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 552 (Pa. 1978).

101. *Jones v. Levin*, 2007 PA Super. 412, 412, 940 A.2d 451, 458. See also *Polinsky*, 341 A.2d at 27.

102. *Brady v. Cocozzo*, 570 N.Y.S.2d 748, 749 (N.Y. App. Div. 1991).

occurred in the area of a cooler located off of the kitchen in the rear of the restaurant.<sup>103</sup>

There appears to be no case law in Arkansas directly discussing this exception. However, as discussed more fully in a later section, Arkansas has held that a third-party visitor may only seek recovery from the landlord for injuries caused by a defective condition if the landlord had a contractual obligation to the tenant to maintain or repair the premises.<sup>104</sup> While not discussing a situation where the premises is intended to be open the public use, the strong indication from the existing case law is that Arkansas does not recognize the public use exception to the *caveat lessee* doctrine.

### 3. *Common Areas Retained Under the Landlord's Control*

Another of the traditional exceptions to the *caveat lessee* doctrine applies to areas under the control of the landlord, often referred to as “common areas”.<sup>105</sup> Common areas include structures such as exterior stairways, hallways, parking lots, swimming pools, and other recreational areas.<sup>106</sup> This exception requires a landlord to keep areas under its control in a reasonably safe condition.<sup>107</sup> Cases may turn on whether an area, such as a stairway or lawn, is under the control of the landlord or the tenant.<sup>108</sup> The exception typically holds the landlord to a negligence standard (as opposed to a strict liability standard), meaning that the landlord does not have to make the premises absolutely safe.<sup>109</sup> Additionally, the exception typically requires the landlord to have knowledge or imputed knowledge from what a reasonable inspection would have revealed in order to impose liability on the landlord for damages suffered on the area retained under the landlord's control.<sup>110</sup>

The general rule is that “a landlord is under no legal obligation to a tenant for injuries sustained in common areas, absent a statute or agreement.”<sup>111</sup> In the *Propst* case, the Court expressly stated that Arkansas does

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103. *Strade v. Ryan*, 470 N.Y.S.2d 707, 708 (N.Y. App. Div. 1983).

104. *Stalter v. Akers*, 303 Ark. 603, 606, 798 S.W.2d 428, 430 (1990).

105. *Murray*, *supra* note 5, at 155. *See also Sargent*, *supra* note 49, at 531.

106. *See, e.g., Arnold v. Walters*, 224 P.2d 261, 262 (Okla. 1950).

107. *Browder*, *supra* note 28, at 102–03. *See also Miller v. David Grace, Inc.*, 212 P.3d 1223, 1228 (Okla. 2009).

108. *See, e.g., Hiatt v. Tallmage*, 365 N.W.2d 448, 449–50 (Neb. 1985) (holding that a stairway that serviced only one apartment did not fall under the common area exception); *Tighe v. Cedar Lawn, Inc.*, 649 N.W.2d 520, 530 (Neb. App. 2002) (holding that a lawn for which the tenant had maintenance obligations did not fall under the common area exception).

109. *Browder*, *supra* note 28, at 103.

110. *Id.*

111. *Boren v. Worthen Nat'l. Bank of Ark.*, 324 Ark. 416, 421, 921 S.W.2d 934, 938 (1996).



not recognize the retention of control exception.<sup>112</sup> The Arkansas Supreme Court reaffirmed its rejection of the retention of control exception in the *Eoff* case, which had the twist that the injured party was a visitor on the premises.<sup>113</sup> In *Eoff v. Warden*, Ms. Warden tripped over a concrete barrier in the parking lot of an apartment complex.<sup>114</sup> She argued that the landlord had retained possession and control of the parking lot of the apartment complex.<sup>115</sup> Ms. Warden succeeded in convincing the trial court of the merits of her position but was reversed by the Arkansas Supreme Court.<sup>116</sup> The Arkansas Supreme Court reaffirmed the position that a landlord can only be held liable for injuries to tenants or visitors if the landlord was obligated to maintain the premises through “an express agreement or assumption of duty by conduct.”<sup>117</sup>

Arkansas also does not impose a duty on a landlord to remove hazards from common areas absent a contractual obligation to do so.<sup>118</sup> Arkansas provides that “a landlord has no duty to a tenant to remove hazards from common areas *unless such terms are spelled out in the lease*. [emphasis in the original].”<sup>119</sup> Absent a contractual obligation in the lease, Arkansas does not impose liability to the landlord for hazards in the common area even if the landlord undertakes to maintain the common areas.<sup>120</sup> Arkansas imposes no duty on a landlord to remove natural hazards, such as snow or ice accumulations that could threaten the well-being of tenants.<sup>121</sup> Arkansas holds to the rationale that:

[A] duty to remove snow and ice from common passageways would subject the landlord to an unreasonable burden of vigilance and care and a landlord should not be responsible for such temporary natural hazards as the expected acts of nature over which he has no control and it would be unreasonable to require the landlord to be subjected to the duty of keeping a janitor on the premises at all times merely to insure the immediate removal of snow and ice.”<sup>122</sup>

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112. Propst v. McNeill, 326 Ark. 623, 628, 932 S.W.2d 766, 769 (1996).

113. Eoff v. Warden, 330 Ark. 244, 244, 953 S.W.2d 880, 881 (1997).

114. *Id.*, 953 S.W.2d at 881.

115. *Id.*, 953 S.W.2d at 881.

116. *Id.*, 953 S.W.2d at 881.

117. *Id.*, 953 S.W.2d at 881.

118. Wheeler v. Phillips Dev. Corp., 329 Ark. 354, 357, 947 SW.2d 380, 382 (1997).

119. *Id.* This concept is somewhat muddled by *Propst* where the Arkansas Supreme Court stated “that assumption of duty by conduct can remove a landlord from the general rule of non-liability.” Propst v. McNeill, 326 Ark. 623, 628, 932 S.W.2d 766, 769 (1996).

120. Wheeler, 329 Ark. at 357, 947 SW.2d at 382.

121. Kilbury v. McConnell, 246 Ark. 528, 530, 438 S.W.2d 692, 693 (1969).

122. *Id.*, 438 S.W.2d at 693.

In the case of *Kilbury v. McConnell*, the plaintiff urged the Arkansas Supreme Court to abandon this approach and adopt a rule established in some jurisdictions that imposes a duty of reasonable care upon a landlord for common areas when a landlord has “notice, actual or constructive,” of a hazard and a reasonable opportunity to correct it.<sup>123</sup> The court stated that the plaintiff “ably and forcefully argues that we should adopt the Connecticut rule [which imposes liability in such instances] which he contends is the more modern and enlightened approach to this issue.”<sup>124</sup> The Court acknowledged that “[m]any courts have found favor with this rule.”<sup>125</sup> However, the Court determined that the arguments for a change in the rule did not justify the imposition of this obligation on landlords.<sup>126</sup>

Just because a landlord creates rules regarding the use of common areas does not impose a duty on the landlord to protect the tenant from unsafe conditions related to the common areas that are the subject of the rules.<sup>127</sup> In *Glasgow v. Century Property Fund XIX*, the tenant slipped on ice resulting from the landlord’s failure to close a hot tub area at the apartment complex while snow was on the ground.<sup>128</sup> The tenant asserted, unsuccessfully, that the landlord had liability because the landlord created rules regarding the use of the hot tub.<sup>129</sup> However, the court found that merely creating rules governing the use of the common areas did not equate to assuming liability for the common area features.<sup>130</sup>

#### 4. *Premises Negligently Repaired by the Landlord*

Many states have carved out an exception to the *caveat lessee* doctrine when the landlord negligently makes repairs or improvements.<sup>131</sup> Under this exception, a landlord may be liable for damages when the landlord agrees to make repairs but does so in a negligent manner.<sup>132</sup> As one court said, “A botched voluntary repair by the landlord constitutes an affirmative act of negligence.”<sup>133</sup>

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123. *Id.*, 438 S.W.2d at 693.

124. *Id.*, 438 S.W.2d at 693.

125. *Id.*, 438 S.W.2d at 693.

126. *Id.*, 438 S.W.2d at 693.

127. *Glasgow v. Century Prop. Fund XIX*, 299 Ark. 221, 222, 772 S.W.2d 312, 313 (1989).

128. *Id.*, 772 S.W.2d at 313.

129. *Id.*, 772 S.W.2d at 313.

130. *Id.*, 772 S.W.2d at 313.

131. *Miller v. David Grace, Inc.*, 212 P.3d 1223, 1228. *See also* *Taylor v. Schukei Family Trust ex rel. Schukei*, 996 P.2d 13, 16 (Wyo. 2000); *Sargent v. Ross*, 308 A.2d 528, 531; *Hunkins v. Amoskeag Mfg. Co.*, 86 N.H. 356, 356 (N.H. 1933).

132. *Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157, 1160 (Ind. Ct. App. 1988).

133. *Lian v. Stalick*, 106 Wash. App. 811, 821, 25 P.3d 467, 474 (Wash. Ct. App. 2001).

In some jurisdictions, a landlord may not be liable under this exception if the repair was made gratuitously, that is to say without an obligation under the lease agreement to make the repair.<sup>134</sup> In other jurisdictions, a landlord may be liable for a gratuitous repair that is done in a grossly negligent manner.<sup>135</sup> In yet other jurisdictions, a landlord may be held to an ordinary negligence standard even for gratuitous repairs.<sup>136</sup> Generally, a written obligation is needed to make a repair anything but gratuitous, but at least one jurisdiction has found that an oral lease agreement can establish a duty on the landlord to make repairs that would be subject to this exception.<sup>137</sup>

Arkansas recognizes this exception to the *caveat lessee* doctrine.<sup>138</sup> As the Arkansas Supreme Court said,

[t]he law appears to be settled that, notwithstanding the landlord is under no implied obligation to make repairs or improvements upon leased premises, in the absence of a covenant or agreement to do so, still, if he undertakes to make such improvement or repairs, and makes them in such a negligent and careless manner as to injure the tenant, the tenant may recover damages therefor.”<sup>139</sup>

As stated more recently by the Arkansas Supreme Court, “Our law in this regard is well settled that when a landlord undertakes to repair the premises, the landlord is liable for any negligence in making those repairs.”<sup>140</sup> Whether repair work by a landlord was negligently performed is a question for a jury.<sup>141</sup>

The landlord’s liability for repairs under Arkansas law is discussed more thoroughly in a more comprehensive section below.

## B. The Implied Warranty of Habitability

In addition to the four traditional common law exceptions to the *caveat lessee* doctrine, some jurisdictions have created other exceptions. One of the most widespread and earliest additional exceptions is the implied warranty of habitability for residential leases.<sup>142</sup> This implied warranty abrogates the

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134. Brubaker v. Glenrock Lodge Int’l Order of Odd Fellows, 526 P.2d 52, 58 (Wyo. 1974).

135. Young v. Garwacki, 402 N.E.2d 1045, 1047 (Mass. 1980).

136. Buck v. Miller, 181 P.2d 264, 267 (Okla. 1947).

137. Taylor v. Schukei Family Trust *ex rel.* Schukei, 996 P.2d 13, 16 (Wyo. 2000).

138. Sparks v. Murray, 120 Ark. 17, 178 S.W. 909, 910 (1915).

139. *Id.*, 178 S.W. at 910.

140. Barnes, Quinn, Flake, & Anderson, Inc. v. Rankins, 312 Ark. 240, 244, 848 S.W.2d 924, 926 (1993).

141. *Id.*

142. Murray, *supra* note 5, at 152.

common law rule “that one who lets an unfurnished building to be occupied as a dwelling house does not impliedly agree that it is fit for habitation.”<sup>143</sup>

The justification for this exception is the belief “that tenants expect habitable premises when they enter into residential leases.”<sup>144</sup> The exception removes from the tenant the responsibility for “examining property and extracting express warranties from the landlord.”<sup>145</sup> The implied warranty of habitability assumes that a residential tenant may take property without adequate opportunity to inspect the premises or without conducting an investigation.<sup>146</sup> Some courts found this principle may be truer in short-term lease agreements where the tenant may be more inclined to assume that the premises are intended for immediate occupancy, thus allowing no time for inspection.<sup>147</sup> Some courts also found that furnished dwellings were harder to inspect and therefore had to have an implied warranty of habitability.<sup>148</sup> Some courts also justified an implied warranty of habitability on the belief that residential tenants had no bargaining power with landlords to bargain for an express warranty of habitability.<sup>149</sup> According to one observer, “The vast majority of jurisdictions now have an implied warranty of habitability either by statute or judicial decision.”<sup>150</sup> The most common version of a statutorily imposed warranty of habitability comes from the Uniform Residential Landlord Tenant Act (the “URLTA”), which has been enacted in twenty-one states.<sup>151</sup> Section 2.104 of the URLTA imposes a duty on the landlord to “make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.”<sup>152</sup>

One of the first cases to recognize an implied warranty of habitability was *Lemle v. Breeden*. In what was a case of first impression for the Supreme Court of Hawaii, the tenant sued the landlord to recover the deposit and rent in the amount of \$1,190.00.<sup>153</sup> The tenant leased the house after an inspection during the daytime,<sup>154</sup> but after moving into the house, the tenant

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143. *Ingalls v. Hobbs*, 156 Mass. 348, 349 (Neb. 1892).

144. Gilbert, *supra* note 5, at 251.

145. *Id.*

146. Murray, *supra* note 5, at 152.

147. Neisser, *supra* note 11, at 531.

148. *Id.*

149. *Id.*

150. Murray, *supra* note 5, at 160.

151. *Legislative Fact Sheet—Residential Landlord and Tenant*, UNIFORM LAW COMMISSION, [http://uniformlaws.org/LegislativeFactSheet.aspx?title=Residential Landlord and Tenant Act](http://uniformlaws.org/LegislativeFactSheet.aspx?title=Residential%20Landlord%20and%20Tenant%20Act) (accessed August 23, 2013).

152. *Id.* Arkansas has not adopted the URLTA, although it has enacted all of the pro-landlord provisions of the URLTA.

153. *Lemle v. Breeden*, 462 P.2d, 470, 471 (Haw. 1969).

154. *Id.*

discovered the house was infested with rats that came out during the night.<sup>155</sup> The tenant vacated the house after three days and demanded a refund from the landlord.<sup>156</sup>

The Hawaii trial court ruled for the tenant, finding both constructive eviction and an implied warranty of habitability.<sup>157</sup> On appeal to the Supreme Court of Hawaii, the Court was careful to make a clear distinction between these two theories, noting that “[t]he origin, history, and theoretical justification for these legal doctrines are quite different and are not to be confused.”<sup>158</sup> The Court examined the doctrine of implied warranties of fitness and merchantability in the context of the sale of chattels.<sup>159</sup> The court found the justification for these doctrines in the context of the sale of chattels to be “(1) that the public interest in safety and consumer protection requires it, and (2) that the burden ought to be shifted to the manufacturer who, by placing the goods on the market, represents their suitability and fitness.”<sup>160</sup> The court found that these concepts had been extended in other states to the sale of new homes.<sup>161</sup> The court decided that “a lease is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship.”<sup>162</sup> The court held “that in the lease of a dwelling house, such as in this case, there is an implied warranty of habitability and fitness for the use intended.”<sup>163</sup>

The case of *Javins v. First National Realty Corp.*, following a year after *Lemle v. Breeden*, popularized the concept of the implied warranty of habitability.<sup>164</sup> In *Javins*, the United States Court of Appeals, District of Columbia Circuit, stated that “in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live.”<sup>165</sup> The court followed the same logic of the *Lemle v. Breeden* court, turning to an analysis of the law involving the sale of personal property.<sup>166</sup> The court said, “Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality.”<sup>167</sup> The court

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Lemle*, 462 Haw. P.2d at 473.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Browder, *supra* note 28, at 103–104. A WestlawNext Search conducted on December 26, 2012 by Keyciting showed 738 citing references.

165. *Javins v. First Natl. Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970).

166. *Id.* at 1075.

167. *Id.*

went on to analogize, “[t]hus without any special agreement a merchant will be held to warrant that his goods are fit for the ordinary purposes for which such goods are used and that they are at least of reasonably average quality.”<sup>168</sup> The court found that implied warranties of quality have been extended beyond sales to include “renting a chattel, paying for services, or buying a combination of goods and services.”<sup>169</sup> The court concluded that an implied covenant of habitability applies to residential housing in the District of Columbia.<sup>170</sup>

Arkansas does not recognize an implied warranty of habitability. Arkansas’s jurisprudence strongly disfavors implied covenants of any kind.<sup>171</sup> As the Arkansas Supreme Court said, implied covenants “are not favored by the law and can be justified only upon the ground of legal necessity arising from the terms of the contract and the circumstances attending its execution,”<sup>172</sup> especially in the landlord-tenant context. This is not to say, however, that Arkansas never recognizes implied covenants. For instance, in the case of new home construction, Arkansas recognizes implied warranties of habitability, sound workmanship, and proper construction.<sup>173</sup> Arkansas recognizes an implied covenant of quiet enjoyment in the context of leases.<sup>174</sup>

In the *Bartley v. Sweetser* case, the plaintiff argued for an implied warranty of habitability.<sup>175</sup> The Court in that case did not directly respond to the plaintiff’s argument regarding there being an implied warranty of habitability, but, in firmly dismissing the plaintiff’s case, the Court left little room to presume that Arkansas recognizes an implied warranty of habitability.<sup>176</sup>

### C. Constructive Eviction

In the purest form of the *caveat lessee* doctrine, the tenant is responsible for paying rent under all circumstances except for the actual eviction of the tenant due to the failure of the landlord to deliver quiet enjoyment of the

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168. *Id.*

169. *Id.*

170. *Id.* at 1080.

171. See generally William L. Patton, Jr. Family Ltd. P’ship, L.L.P. v. Simon Prop. Grp. Inc., 370 F. Supp. 2d 846, 848 (E.D. Ark. 2005); Blake v. Scott, 92 Ark. 46, 46, 121 S.W. 1054, 1055 (1909); State v. Real Estate Bank, 5 Ark. 595, 1844 WL 443, 5 (1844). For more on implied covenants in Arkansas, see the author’s article *Are You Trying to Imply Something?: Understanding the Various State Approaches to Implied Covenants of Continuous Operation in Commercial Leases*, 31 U. ARK. LITTLE ROCK L. REV. 427 (2009).

172. Amco Production Co. v. Ware, 269 Ark. 313, 320-21, 602 S.W.2d 620, 623 (1980).

173. Bullington v. Palangio, 345 Ark. 320, 328, 45 S.W.3d 834, 839 (2001).

174. Dupree v. Worthen Bank & Trust Co., N.A., 260 Ark. 673, 676, 543 S.W.2d 465, 467 (1976); Picket v. Ferguson, 45 Ark. 177, 199 (1885).

175. Bartley v. Sweetser, 319 Ark. 117, 119, 890 S.W.2d 250, 251 (1994).

176. *Id.*

premises.<sup>177</sup> Constructive eviction is a judicial construct that softens this approach to the tenant's responsibility for rent by allowing for a termination of the rental obligations when the tenant can no longer practically occupy the premises through the fault of the landlord.<sup>178</sup> As described by one court, "[a] 'constructive eviction' is an act which, although not amounting to an actual eviction, is done with the express or implied intention, and has the effect, of essentially interfering with the tenant's beneficial enjoyment of the leased premises."<sup>179</sup> The same court went on to describe it by saying, "[i]t may constitute a constructive eviction if the landlord does nay wrongful act or is guilty of any default or neglect whereby the leased premises are rendered unsafe, unfit, or unsuitable for occupancy in whole, or in substantial part, for the purposes for which they are leased."<sup>180</sup>

The constructive eviction exception first emerged in the colorful case of *Dyett v. Pendleton* from 1826.<sup>181</sup> The New York court summarized the facts in *Dyett* as follows:

[I]n *February*, 1820, from time to time, and at sundry times, the plaintiff [i.e., the landlord] introduced into the house, (two rooms upon the second floor and two rooms upon the third floor whereof had been leased to the defendant [i.e., the tenant],) divers [sic] lewd women or prostitutes, and kept and detained them in the said house all night, for the purpose of prostitution; that the said lewd women or prostitutes would frequently enter the said house in the day time, and after staying all night, would leave the same by day-light in the morning; that the plaintiff sometimes introduced other men into the said premises, who, together with him, kept company with the same lewd women or prostitutes during the night; that on such occasions, the plaintiff and the said lewd women or prostitutes, being in company in certain parts of the said house, not included in the lease to the defendant, but adjacent thereto, and in the occupation or use of the plaintiff, were accustomed to make a great deal of indecent noise and disturbance, the said women or prostitutes often screaming extravagantly, and so as to be heard throughout the house, and by the near neighbors, and frequently using obscene and vulgar language so loud as to be understood at a considerable distance; that such noise and riotous proceedings, being from time to time continued all night, greatly disturbed the rest of persons sleeping in other parts of the said house, and particularly in those parts thereof demised to the defendant; that the practices aforesaid were matters of conversation and reproach in

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177. *Halifax Eng'g, Inc. v. Doyle, Inc.*, 23 Va. Cir. 466, 466 (Va. Cir. Ct. 1991).

178. *Lemle v. Breeden*, 462 P.2d, 470, 473 (Haw. 1969).

179. *Hankins v. Smith*, 138 So. 494, 495 (Fla.1931).

180. *Id.* at 495-96.

181. John H. Watson, *Constructive Eviction*, 19 HARV. L. REV. 50-51 (1905) and Fred W. Bopp III, *The Unwarranted Implication of a Warranty of Fitness in Commercial Leases—An Alternative Approach*, 41 VAND. L. REV. 1057, 1061 (1988).

the neighborhood, and were of a nature to draw, and did draw, odium and infamy upon the said house, as being a place of ill fame, so that it was no longer respectable for moral and decent persons to dwell or enter therein; that all the said immoral, indecent and unlawful practices and proceedings were by the procurement or with the permission and concurrence of the plaintiff; that the defendant, being a person of good and respectable character, was compelled, by the repetition of the said indecent practices and proceedings, to leave the said premises, and did, for that cause, leave the same on or about the beginning of *March*, 1820, after which he did not return thereto, &c. [sic]<sup>182</sup>

The Court noted an uncited essay on the common law of rents by “Baron Gilbert” which states that:

‘A rent is something given by way of retribution to the lessor, for the land demised by him to the tenant, and consequently the lessor’s title to the rent is founded upon this: that the land demised, is enjoyed by the tenant during the term included in the contract; for the tenant can make no return of a thing he has not. If therefore the tenant be deprived of the thing letten, the obligation to pay the rent ceases, because such obligation has its force only from the *consideration*, which was the enjoyment of the thing demised.’ [emphasis in the original]<sup>183</sup>

From this principal, the New York court determined that the tenant’s obligation to pay rent is abrogated if the acts of the landlord effectively expel the tenant from the premises.<sup>184</sup> The Court also concluded that a partial eviction, if caused by the act of the landlord, still entitles the tenant to abandon the whole of the premises and cease paying the entire rent.<sup>185</sup> The Court said, “If the lessor expel the tenant from a part only of the premises, the tenant is discharged from the payment of the whole rent; and the reason for the rule why there shall be no apportionment of the rent in this case as well as in that of an eviction by a stranger, that it is the wrongful act of the lessor himself, ‘that no man may be encouraged to injure or disturb his tenant in his possession, whom, by the policy of the feudal law, he ought to protect and defend.’” (the case does not state the source of the quote though the context appears to indicate Baron Gilbert’s essay on rents)<sup>186</sup> The Court went on to say, “[Being evicted from part of the premises] is such a disturbance, such an injury to its beneficial enjoyment, such a diminution of the consideration upon which the contract is founded, that the law refuses its aid to coerce the

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182. *Dyett v. Pendleton*, 8 Cow. 727, 735-36 (N.Y. 1826).

183. *Id.* at 730.

184. *Id.*

185. *Id.* at 731.

186. *Id.*



payment of any rent.”<sup>187</sup> Though there was no physical eviction of the tenant from the premises in this case, the Court determined:

Here, then is a case, where actual entry and physical eviction are not necessary to exonerate the tenant from the payment of rent; and if the principle be correct as applied to a part of the premises, why should not the same principle equally apply to the whole property demised, where there has been an obstruction to its beneficial enjoyment, and a diminution of the consideration of the contract, by the acts of the landlord, although those acts do not amount to a physical eviction? If physical eviction be not necessary in the one case, to discharge the rent of the part retained, why should it be essential in the other, to discharge the rent of the whole? If I have not deceived myself, the distinction referred to settles and recognizes the principle for which the plaintiff in error contends, that there may be a constructive eviction produced by the acts of the landlord.<sup>188</sup>

In the wake of *Dyett*, courts across the country developed the doctrine of constructive eviction.<sup>189</sup> Four basic requirements evolved: “1) substantial interference with possession; 2) interference by or at the direction of the landlord; 3) that the landlord was notified of the problem; and 4) abandonment of the property by the tenant within a reasonable time.”<sup>190</sup> At first, the doctrine required the tenant to actually abandon the premises, though that requirement has changed in some jurisdictions.<sup>191</sup> Some states have evolved this concept further to create a “duty to maintain” after the commencement of the lease, extending this concept to cover virtually any situation where the premises becomes untenable.<sup>192</sup>

Arkansas recognizes the doctrine of constructive eviction.<sup>193</sup> As the Arkansas Supreme Court said, “the failure on the part of the lessor to perform his covenants in the lease may justify the abandonment of the premises by the lessee, and may work a cessation of the rent.”<sup>194</sup> Arkansas courts equate

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187. *Id.*

188. *Dyett*, 8 Cow. at 731.

189. Murray, *supra* note 5, at 151. See, e.g., *Halifax Eng'g. Inc. v. Doyle, Inc.*, 23 Va. Cir. 466, 466 (1991) (stating that at common law the tenant may vacate the premises and terminate the lease if the landlord breached the covenant of quiet enjoyment) (citing *M.M. Rowe Co. v. Wallerstein*, 133 S.E. 669 (Va. 1926); *Buchanan v. Orange*, 88 S.E. 52 (Va. 1916)).

190. Murray, *supra* note 5, at 151.

191. *Id.*; see, e.g., *Halifax Engineering, Inc. v. Doyle, Inc.*, 23 Va. Cir. 466, 466 (1991) (noting that a tenant may not remain in possession and withhold rental payments).

192. Murray, *supra* note 5, at 154–55.

193. *Fletcher v. Joseph Pfeifer Clothing Co.*, 103 Ark. 318, 318, 146 S.W. 864, 866 (1912).

194. *Tedstrom v. Puddephat*, 99 Ark. 193, 193, 137 S.W. 816, 818 (1911) (citing *Young v. Berman*, 96 Ark. 78, 131 S.W. 62 (1910)); see also *Berman v. Shelby*, 93 Ark. 472, 478,

the concept of constructive eviction with a breach of the landlord's obligation to provide quiet enjoyment.<sup>195</sup> As stated by the Arkansas Supreme Court, "[t]he concepts of constructive eviction and breach of the covenant for quiet enjoyment are very closely related, if not just different names for the same concept."<sup>196</sup> In the absence of language in the lease agreement to the contrary, Arkansas law implies a covenant of quiet enjoyment in all leases.<sup>197</sup>

The Arkansas Court of Appeals recently summarized Arkansas' concept of constructive eviction as follows:

Conduct by a landlord that effectively deprives the tenant of the use and benefit of the premises amounts to a constructive eviction. What particular acts or omissions by the landlord amount to a constructive eviction cannot be defined by a general rule and depend on the facts of each case. The landlord's conduct must be such that it will prevent the tenant's use of the premises for the particular purposes for which it was leased. Constructive eviction depends on the materiality of the deprivation. Similarly, the concept of first breach recognizes that a breach of a lease by one contracting party may release the other party from its contractual duties if the first breach is material and sufficiently serious. In particular, if a landlord breaches his contract to repair or make improvements, the tenant may treat the relations at an end.<sup>198</sup>

In *Fairpark, LLC v. Healthcare Essentials*, even though there was conflicting evidence, the trial court ruled in favor of the tenant, finding that it was constructively evicted because the air conditioning system, which the landlord was contractually obligated to maintain, did not function properly and caused the tenant "severe discomfort and disruption in their work."<sup>199</sup> In *300 Spring Building v. Matthews*, the court found constructive eviction when the landlord, in contravention of the services the landlord promised to furnish in the lease agreement, failed "to furnish water fit for human consumption, heating and air conditioning creating a normal environment, and janitorial services commensurate with the use of the premises."<sup>200</sup> The ten-

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125 S.W. 124, 126 (1910) (holding that failure of a landlord to comply with the terms of a lease justifies releasing the tenants and their personal guarantor, from the lease terms).

195. *Trace X Chem. Inc. v. Highland Res., Inc.*, 265 Ark. 468, 473, 579 S.W.2d 89, 92 (1979).

196. *Id.*

197. *Id.* at 475, 579 S.W.2d at 93 (citing *Dupree v. Worthen Bank & Trust Co.*, 260 Ark. 673, 675, 543 S.W.2d 465, 466 (1976)).

198. *Fairpark, LLC v. Healthcare Essentials*, 2011 Ark. App. 146, at 9, 381 S.W.3d 852, 857 (internal citations omitted).

199. *Id.*

200. *300 Spring Bldg. v. Matthews*, No. CA 89-211, 1990 WL 16721, at 3 (Ark. Ct. App. Feb. 21, 1990).

ant must abandon the premises to have a valid claim for constructive eviction.<sup>201</sup>

Courts have defined "eviction" as "interfering with the tenant's enjoyment of the premises."<sup>202</sup> The extent of the eviction can be an issue in determining whether a tenant is actually constructively evicted by the landlord. As far back as 1880, the Arkansas Supreme Court stated:

With regard to eviction by the landlord himself, the result of all the English authorities is, that if it be of any material part of the demised premises, and not a mere trespass, it suspends the rent during the eviction, for the whole. It is placed upon the ground of the landlord's wrong, in the violation by him of the duty, which springs from the relation, to protect the tenant in his quiet enjoyment of the whole. ... A trespass is not an eviction in all cases. ... Besides, an eviction depends on the materiality of the deprivation. If trifling and producing no inconvenience, it should not be regarded. It depends on circumstances. Twenty inches might be a great deal in the crowded streets of a city, but wholly insignificant in the boundary of a Texas ranche [sic].<sup>203</sup>

Even though Arkansas recognizes the concept of constructive eviction, it is limited to situations where the act of the landlord (or that of someone with superior title to the landlord) creates the eviction.<sup>204</sup> Arkansas courts have not found constructive eviction when the eviction is caused by external factors, such as forces of nature.<sup>205</sup> For instance, in *Rogers v. Rob Roy Plantation Co.*, the tenant leased the property for hay production but could not harvest because the land flooded.<sup>206</sup> Despite the flood that destroyed the hay, the tenant was still obligated to pay the rent and could not claim constructive eviction.<sup>207</sup>

#### D. Suitability of Purpose (a/k/a Implied Warranty of Fitness)

Since part of the rationale supporting the *caveat lessee* doctrine is the idea that tenants can inspect the premises before signing the lease, some states have implied a covenant of suitability of purpose when a building is under construction or incomplete at the time of the lease.<sup>208</sup> In other words,

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201. *Trace X Chem.*, 265 Ark. at 476–78, 579 S.W.2d at 93–94.

202. *Burdan v. Walton*, 286 Ark. 98, 100, 689 S.W.2d 543, 545 (1985) (citing *Fletcher v. Joseph Clothing Co.*, 103 Ark. 318, 146 S.W. 864 (1912)).

203. *Collins v. Karatopsky*, 36 Ark. 316, 329–32 (1880).

204. *See Rogers v. Rob Roy Plantation Co.*, 208 Ark. 429, 431, 186 S.W.2d 661, 661–62 (1945).

205. *See id.*

206. *Id.* at 431, 186 S.W.2d at 661.

207. *Id.* at 431–32, 186 S.W.2d at 662.

208. *Murray*, *supra* note 5, at 153.

if it is not possible to inspect the premises, then the landlord has an obligation to deliver the premises in a condition that is fit for the intended use of the premises under the lease agreement. As explained by one court:

[T]here is a distinct difference between property in existence at the time of the execution of the lease, which the lessee has an opportunity to inspect and use his own judgment as to its fitness or adequacy for the purposes intended, and property or appliances which are either to be built or installed subsequent to the execution of the lease, and of which the lessee of course has no opportunity to inspect.”<sup>209</sup>

The *caveat lessee* doctrine still applies if the building is sufficiently complete to permit inspection.<sup>210</sup> However, the parties can contract in the lease agreement to negate or modify the implied warranty of fitness.<sup>211</sup>

At least one case indicates that Arkansas may recognize an implied warranty of fitness for the intended use when the lease is entered into before the building is substantially complete.<sup>212</sup> This is consistent with the common law justification for the *caveat lessee* doctrine that a tenant has an opportunity to inspect the premises prior to entering into the lease. It is impossible to satisfy the justification if there is no opportunity for the tenant to inspect the premises because the premises are not complete at the time the parties enter into the lease. However, if the building is close enough to complete at the time of the lease that it is possible to inspect the premises, then the *caveat lessee* rule still holds.<sup>213</sup>

#### E. Tort-Style Liability

Some states have abandoned the *caveat lessee* doctrine altogether and switched to a tort-style negligence standard.<sup>214</sup> Most states that have gone this direction have applied a negligence standard to determine the landlord's liability.<sup>215</sup> For instance, Wyoming imposes a duty of reasonable care under

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209. *Woolford v. Elec. Appliances*, 75 P.2d 112, 114 (Cal. Ct. App. 1938); *see also Levitz Furniture Co. of E. Region, Inc. v. Cont'l Equities, Inc.*, 411 So. 2d 221, 223 (Fla. Dist. Ct. App. 1982).

210. *J.D. Young Corp. v. McClintic*, 26 S.W.2d 460, 462 (Tex. Civ. App. 1930) (citing *Oliver v. Hartzell*, 170 Ark. 512, 515, 280 S.W. 979, 981 (1926)), *rev'd on other grounds*, 66 S.W.2d 676 (Tex. Comm'n App. 1933).

211. *Levitz Furniture Co.*, 411 So.2d at 223.

212. *Oliver*, 170 Ark. At 515, 280 S.W. 979, 980–81.

213. *Id.*, 280 S.W. at 980–81 (1926) (holding there was no implied warranty of fitness even when the premises was repeatedly flooding because the tenant had the opportunity to inspect the premises before signing the lease).

214. *Powers*, *supra* note 5, at 366; *see also Neisser*, *supra* note 11, at 527.

215. *Neisser*, *supra* note 11, at 527–28.

the circumstances.<sup>216</sup> However, in some situations, some states have imposed strict liability on landlords.<sup>217</sup> For instance, New Jersey has established strict liability against landlords for injuries resulting from inadequate security.<sup>218</sup> At least in Massachusetts, which has switched completely to tort-style liability for leases, there has been an abandonment altogether of the idea that a lease is a conveyance of property.<sup>219</sup>

Recently, Oklahoma joined the group of states that have imposed tort-style liability for residential leases.<sup>220</sup> The Oklahoma Supreme Court said, “[T]oday this Court supplants the caveat emptor doctrine of landlord tort immunity. In its place, this Court imposes a general duty of care upon landlords to maintain the leased premises, including areas under the tenant’s exclusive control or use, in a reasonably safe condition.”<sup>221</sup> The Court went on to say, “[t]his duty requires a landlord to act reasonably when the landlord knew or reasonably should have known of the defective condition and had a reasonable opportunity to make repairs.”<sup>222</sup> The Court further said, “[t]he landlord’s knowledge is key in triggering the duty to maintain the leased premises in a reasonably safe condition.”<sup>223</sup> The Court clarified that “[o]nly in the presence of a duty neglected or violated will a landlord’s negligence be actionable. By the same token, the landlord’s liability, as any other tortfeasor, may be reduced or absolved by the tenant’s contributory negligence.”<sup>224</sup>

Arkansas has not gone the direction of imposing tort principles to the landlord-tenant relationship. As one commentator noted, there is an inherent difficulty in applying tort principles to the landlord-tenant relationship because “[t]ort law has always had trouble accommodating the distinction between misfeasance and nonfeasance.”<sup>225</sup> Since principal control of the premises is in the hands of tenant, the landlord’s alleged liability typically rests in nonfeasance, rather than misfeasance, almost setting up a strict liability standard for landlords when tort principals are applied.<sup>226</sup>

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216. *Merrill v. Jansma*, 86 P.3d 270, 287 (Wyo. 2004).

217. *Neisser*, *supra* note 11, at 527–28.

218. *Id.* at 528; *see also* *Trentacost v. Brussel*, 412 A.2d 436, 445 (N.J. 1980).

219. *See* *Young v. Garwacki*, 402 N.E.2d 1045, 1049 (Mass. 1980).

220. *See* *Miller v. David Grace, Inc.*, 212 P.3d 1223, 1230 (Okla. 2009).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Browder*, *supra* note 28, at 101.

226. *Id.* at 102.

#### IV. THE RELATIONSHIP BETWEEN THE LANDLORD AND THE TENANT IN ARKANSAS

In Arkansas, a tenant is not considered an invitee of the landlord even though the tenant's presence on the premises contributes to the pecuniary gain of the landlord.<sup>227</sup> "A tenant is not an invitee on her landlord's premises but has a right equal to that of the landlord to exclusive possession of the property."<sup>228</sup> This exclusive right means that the tenant "occupies a position on a parity with that of an owner and precisely opposite to that of an invitee."<sup>229</sup> As the Arkansas Supreme Court said, "The duties owed by a landlord to his tenant are determined by principles quite different from those applicable to the owners or occupiers of land and their invitees."<sup>230</sup>

Furthermore, an employee of a tenant is not an invitee of the landlord.<sup>231</sup> A landlord does not have any duty to see that the premises leased by a tenant are safe for the tenant's employees.<sup>232</sup> However, a prospective tenant is an invitee of a landlord, and the landlord may be liable for harm to the prospective tenant who is "inspecting premises with a view to renting them."<sup>233</sup>

Arkansas law does not impose a higher obligation or duty on the landlord even when the landlord knows that the tenant has a special status.<sup>234</sup> For instance, in *Wheeler v. Phillips Development Corp.*, the Arkansas Supreme Court did not impose a higher obligation or duty on the landlord even though the landlord knew that the apartment complex was leased primarily to "elderly, handicapped, and disabled persons."<sup>235</sup>

Even under the *caveat lessee* doctrine, the landlord still owes certain duties of fair dealing to the tenant as illustrated by the case of *Gurlen v. Henry Management, Inc.* In *Gurlen*, the landlord of an apartment complex

227. *Wheeler v. Phillips Development Corp.*, 329 Ark. 354, 356, 947 SW.2d 380, 382 (1997).

228. *Id.*; see also *Glasgow v. Century Property Fund XIX*, 299 Ark. 221, 222, 772 S.W.2d 312, 312 (1989). At least since the adoption of the Arkansas Residential Landlord-Tenant Act of 2007, the tenant's possessory rights are subject to the rights of the landlord to enter the premises. See ARK. CODE ANN. § 18-17-602.

229. *Knox v. Gray*, 289 Ark. 507, 508, 712 S.W.2d 914, 915 (1986).

230. *Id.*, 712 S.W.2d at 915.

231. *Lacy v. Flake & Kelley Management, Inc.*, 366 Ark. 365, 370, 235 S.W.3d 894, 898 (2006) (citing *Wheeler v. Phillips Development Corp.*, 329 Ark. 354, 947 S.W.2d 380 (1997)).

232. *Id.*

233. *Knox*, 289 Ark. At 508, 712 S.W.2d at 915.

234. See *Wheeler v. Phillips Development Corp.*, 329 Ark. 354, 355, 947 SW.2d 380, 381 (1997).

235. *Id.*, 947 SW.2d at 381.

offered the tenant space in an on-site storage facility.<sup>236</sup> The landlord provided the storage space for free while deciding how much to charge for the space.<sup>237</sup> The tenant moved her property into two of the storage bins and used her own padlocks.<sup>238</sup> However, the tenant did not notify the landlord as to which bins she selected.<sup>239</sup> After the landlord decided to start charging for the storage bins, the landlord posted notices in the apartment complex telling residents to see management about the continued use of the storage bins.<sup>240</sup> The tenant claimed that she never saw the signs.<sup>241</sup> The landlord hired a contractor to go through the bins and dispose of any unclaimed items, which included the tenant's items.<sup>242</sup> The landlord did not attempt to directly contact the tenant beforehand even though the landlord knew that the tenant was using the bins.<sup>243</sup> The landlord relied on the following language in the lease agreement:

All personal property placed in the leased premises, or in the storerooms or in any portion of said premises or any place appurtenant thereto, shall be at risk of the Resident, or the parties owning [sic] the same and Lessor shall in no event be liable for the loss, theft or damage to such property or for any act or negligence of any co-resident or servants of the Residents or occupants, or of any other person v soever [sic] in or about the premises.<sup>244</sup>

The court viewed the language in the lease as creating an exculpatory contract, for which there is "strong disfavor" in the law.<sup>245</sup> Exculpatory clauses must very clearly describe the covered act since they are construed as narrowly as possible by the courts.<sup>246</sup> The Arkansas Court of Appeals found, "While the language of the lease places the risk of loss, theft, or damage to property in the storerooms on the tenant, nothing is said in the lease agreement about intentional actions taken by [the landlord]."<sup>247</sup> The Court of Appeals reversed the summary judgment in favor of the landlord and remanded the case for a determination of the tenant's damages.<sup>248</sup>

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236. *Gurlen v. Henry Management, Inc.*, 2010 Ark. App. 855, at \*2, 2010 WL 5132526, at \*2.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Gurlen*, 2010 Ark. App. at \*2, 2010 WL 5132526, at \*2.

243. *Id.*

244. *Id.* at \*4.

245. *Id.* at \*5.

246. *Id.*

247. *Id.*

248. *Gurlen*, 2010 Ark. App. at \*2, 2010 WL 5132526, at \*2.

Furthermore, the *caveat lessee* doctrine does not give the landlord license to violate the law. The Arkansas Supreme Court has held that landlords cannot use force to retake leased premises, even when the tenant defaults.<sup>249</sup> Arkansas law prohibits self-help action and requires the landlord to use legal process to evict a tenant, even if the lease agreement provides otherwise.<sup>250</sup> Lease terms purporting to give the landlord self-help remedies are invalid.<sup>251</sup>

#### V. ISSUES RELATED TO A CONTRACTUAL OBLIGATION TO MAINTAIN THE PREMISES

Arkansas does not impose an implied obligation for a landlord to maintain the leased premises.<sup>252</sup> However, the *caveat lessee* doctrine does not protect a landlord from performing maintenance obligations that the landlord contracts to perform in the lease agreement. Many lease agreements impose some express maintenance obligation on the landlord. This section will discuss some of the Arkansas cases interpreting express maintenance obligations. Of course, even small wording differences in lease agreements can create different results as most of the cases discussed in this section were determined by the facts and circumstances unique to such case.

Also, an obligation to repair cannot be implied from local custom.<sup>253</sup> As the Arkansas Supreme Court said, “A local custom cannot be shown in order to render the landlord liable for failure to make repairs in contravention of the above well-established rule [i.e., that unless a landlord agrees with his tenant to repair leased premises, he cannot, in the absence of a statute be compelled to do so].”<sup>254</sup>

The measure of damages for a landlord’s failure to fulfill its obligation to provide maintenance are “compensatory only; that is, such damages as result directly from the breach and which would make good the actual loss caused thereby.”<sup>255</sup> The tenant has an obligation to mitigate damages in such instances.<sup>256</sup> This measure of damages is not the same as it is in all states with the Arkansas Supreme Court noting, “In some courts it has been held that he may recover all damages which may result from such breach; in oth-

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249. *Gorman v. Ratliff*, 289 Ark. 332, 337, 712 S.W.2d 888, 890 (1986).

250. *Id.*

251. *Id.* at 891.

252. *Rundell v. Rogers*, 144 Ark. 293, 293, 222 S.W. 19, 20 (1920).

253. *Id.*

254. *Id.*

255. *Young v. Berman*, 96 Ark. 78, 78, 131 S.W. 62, 64 (1910).

256. *Id.*



ers, that the measure of the damages is the diminution in the rental value of the premises by reason of such breach.”<sup>257</sup>

#### A. A Gratuitous Promise to Repair

A gratuitous promise to repair by a landlord that is not supported by consideration is insufficient to impose a duty on the landlord to carry out the promise.<sup>258</sup> In the *Stalter* case, a visitor to the premises had overheard an earlier conversation where the landlord promised the tenant that he would repair a broken step.<sup>259</sup> The visitor, while leaving the premises in a hurry after an argument with the tenant, forgot about the broken step and broke her leg when she fell.<sup>260</sup> A jury awarded the visitor a \$16,000 judgment, but the Arkansas Supreme Court reversed the judgment.<sup>261</sup> The lease agreement between the tenant and the landlord imposed no obligation on the landlord to repair or maintain the premises.<sup>262</sup> Even though the landlord promised to repair the broken step, the promise was merely gratuitous and, therefore, unenforceable.<sup>263</sup> The visitor could not meet the condition precedent to pursue a liability claim against the landlord since the visitor could not prove the landlord had a contractual obligation to the tenant to repair the premises.<sup>264</sup>

In the *Wheeler* case, the landlord’s employee maintained the sidewalks around the apartment complex even though the lease agreement did not impose such an obligation.<sup>265</sup> After a tenant was injured by tripping over a rock on the sidewalk, the apartment manager testified that “it was her duty to manage the apartments and maintain the lawn, stating further that ‘I mow, weedeat, and then clean off the sidewalk.’”<sup>266</sup> The facts in *Wheeler* were exacerbated by the fact that the tenant was blind and the apartment complex primarily served “elderly, handicapped, and disabled persons.”<sup>267</sup> Nevertheless, as a matter of law, the Arkansas Supreme Court determined that no liability could attach to the landlord merely by maintaining the sidewalks absent a contractual obligation to do so.<sup>268</sup>

However, the Court softened the result in *Stalter* and *Wheeler* somewhat in the case of *Thomas v. Stewart*. In the *Thomas* case, the plaintiff’s

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257. *Id.*

258. *Stalter v. Akers*, 303 Ark. 603, 607, 798 S.W.2d 428, 430 (1990).

259. *Id.* at 604, 798 S.W.2d at 429.

260. *Id.*

261. *Id.*

262. *Id.* at 606, 798 S.W.2d at 430.

263. *Id.*

264. *Stalter*, 303 Ark. at 604, 798 S.W.2d at 429.

265. *Wheeler v. Phillips Dev. Corp.*, 329 Ark. 354, 355, 947 SW.2d 380, 381 (1997).

266. *Id.*

267. *Id.* 329 Ark. at 355, 947 SW.2d at 381.

268. *Id.* at 367, 947 SW.2d at 382.

son leaned against a defective second-floor balcony railing and suffered numerous injuries when he fell.<sup>269</sup> A relative of the plaintiff had informed a gentleman named Gordon Reese about the defective railing, and Mr. Reese reportedly agreed to fix the same.<sup>270</sup> The record brought to the Court in the *Thomas* case was evidentially not a model of clarity because the Court could not discern whether Mr. Reese was the owner of the apartment complex or just an employee.<sup>271</sup> The defendant relied on the *Stalter* case and countered that Mr. Reese's promise was merely gratuitous.<sup>272</sup> The trial court granted summary judgment in favor of the landlord, but the Arkansas Supreme Court reversed and remanded.<sup>273</sup> The Court felt that the plaintiff presented two issues for further consideration: (1) whether Mr. Reese's promise to repair the railing involved consideration because the plaintiff renewed its verbal, month-to-month lease; and (2) whether Mr. Reese had the authority to make a binding promise.<sup>274</sup> The decision in *Thomas* weakened the decision in *Stalter* by exposing landlords to a jury on a question of fact when there is an alleged promise by the landlord to make a repair even when the lease imposes no such obligation.

#### B. An Agreement to Repair Casualty Damage

Absent an agreement in the lease agreement, the landlord is not responsible for making repairs or improvements to the premises on account of casualties or forces of nature.<sup>275</sup> At common law, the tenant's obligation to pay rent is not affected by the accidental destruction of the premises by fire or other casualty.<sup>276</sup> However, some lease agreements contain an express obligation for the landlord to repair damages caused by casualties, such as fires, floods or tornadoes or to relieve the tenant of an obligation to pay rent in such cases.<sup>277</sup> For instance, in *E. E. Terry, Inc. v. Cities of Helena and West Helena*, the lease provided that the landlord would repair damages caused by "fire, windstorm or other unavoidable casualty."<sup>278</sup> The buildings leased to the tenant began to cave in and fall down.<sup>279</sup> However, the court deter-

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269. *Thomas v. Stewart*, 347 Ark. 33, 36, 60 S.W.3d 415, 416 (2001).

270. *Id.* at 37, 60 S.W.3d at 417.

271. *Id.* at 42, 60 S.W.3d at 421.

272. *Id.* at 41, 60 S.W.3d at 420.

273. *Id.* at 42, 60 S.W.3d at 421.

274. *Id.*

275. *Jones v. Felker*, 72 Ark. 405, 405, 80 S.W. 1088, 1088 (1904) (holding the tenant to be responsible for rebuilding a fence even though rains caused the need for the rebuilding).

276. *Tedstrom v. Puddephat*, 99 Ark. 193, 193, 137 S.W. 816, 819 (1911).

277. *Id.*

278. *E. E. Terry, Inc. v. Cities of Helena and West Helena*, 256 Ark. 236, 228, 506 S.W.2d 573, 578 (1974).

279. *Id.* 256 Ark. at 236, 506 S.W.2d at 578.

mined that the buildings were collapsing due to deterioration from old age rather than casualty.<sup>280</sup> Deterioration from old age is not the same thing as a casualty such as fire or windstorm, so the landlord had assumed no obligation of repair in that instance.<sup>281</sup> The Court examined a Maryland case that considered, as a matter of first impression, whether decay from old age can be considered the same thing as a casualty caused by an act of God. In the Maryland case, the Maryland Court of Appeals found that acts of God are characterized by some "sudden, unusual, or unexpected action of the elements."<sup>282</sup> The Maryland court found that gradual decay, even from natural causes, does not qualify as an act of God.<sup>283</sup>

The Supreme Court of Arkansas also examined a Massachusetts case from 1849. In *Bigelow v. Collamore*,<sup>284</sup> the landlord leased a water-driven mill to the tenant.<sup>285</sup> The lease contained language that is very similar to language that still appears in many lease agreements today, providing

[T]hat if the premises, or any part thereof, should be destroyed or damaged, during the term, by fire or other unavoidable casualty, so as to be rendered unfit for use and habitation, the rent reserved, or a part thereof, according to the nature and extent of the injury, should be suspended or abated, until the premises should be put in proper condition for use by the lessor.<sup>286</sup>

The lease provided that repairs would be made by the tenant during the term of the lease.<sup>287</sup> The water-wheel frequently broke down and, upon examination, "was found to be so rotten, old, out of repair, and worn out, as to be almost worthless, and not worth repairing."<sup>288</sup> However, there was no evidence to show that the condition of the water-wheel was due to any special cause, sudden event or accident.<sup>289</sup> Consequently, the Massachusetts court found that the landlord was not responsible for the repair of the water-wheel since the damage came from old-age, not from a casualty.<sup>290</sup>

In *Little Rock Ice Co. v. Consumers' Ice Co.*, the lease provided:

In the event of loss by fire or boiler explosion, the lessor shall elect within a reasonable time, whether to repair damage, or cancel lease, and re-

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280. *Id.*

281. *Id.*

282. *Kirby v. Wylie*, 70 A. 213, 215 (Md. 1908).

283. *Id.* at 215.

284. 59 Mass. 226, 226 (1 Cush. 1849).

285. *Id.*

286. *Id.* at 226–27.

287. *Id.* at 228.

288. *Id.* at 227.

289. *Id.*

290. *Id.* at 230–231.

turn notes for rent due, but rent shall continue until such election, and in event of election to rebuild, there shall be no rebate of any part of rent herein provided. Said repairs are to be executed in a reasonable time.<sup>291</sup>

The tenant in *Little Rock Ice Co.* gave evidence that the boilers became so worn that they were likely to explode at any time.<sup>292</sup> The tenant argued that the landlord was responsible for replacing the boilers based on the language in the lease agreement since they were likely to explode at any time.<sup>293</sup> However, the Supreme Court of Arkansas, after considering *Kirby v. Wylie* and *Bigelow v. Collamore*, found that ‘explosion’ “clearly refers to damage done to the boiler by a sudden bursting of it which could not be reasonably foreseen by human agencies, and does not signify a mere want of repair or natural decay or wearing out arising from lapse of time or improper use of the boilers.”<sup>294</sup> The Court stated:

[t]he loss in capacity of the plant arose from the fact that the boilers, through decay and old age, became worn out. As we have already seen, the lessee, having failed to provide against such a contingency, must suffer the consequences of its neglect, and is liable for the rent accruing after the boilers became worn to such an extent that it was dangerous to use them.<sup>295</sup>

### C. Ambiguous Maintenance Terms in a Lease Agreement

Cases often turn on the specific wording of the maintenance clause when the lease contains one. Any ambiguities in a lease agreement are resolved against the party who prepared the lease.<sup>296</sup> In *Huber Rental Properties, LLC v. Allen*, the Court found the following clause to impose liability on the landlord:

8. Maintenance: Please make request for repairs or maintenance to Lessor between 8 a.m. and 5 p.m. Monday through Friday [. . .] In the event of an emergency, please contact the Lessor as soon as possible. No charge is made for maintenance and repairs unless caused by negligence or abuse by the tenant, other residents or guests.<sup>297</sup>

The court found that the reference to the tenant being required to call the landlord for repairs and the landlord paying for the repairs imposed lia-

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291. *Little Rock Ice Co. v. Consumers' Ice Co.*, 114 Ark. 532, 535, 170 S.W. 241, 242 (1914).

292. *Id.* at 536, 170 S.W. at 242.

293. *Id.* at 539, 170 S.W. at 243.

294. *Id.* at 541, 170 S.W. at 244.

295. *Id.* at 542, 170 S.W. at 244.

296. *Huber Rental Properties, LLC v. Allen*, 2012 Ark. App. 642, \_\_S.W.3d \_\_, \_\_.

297. *Id.* at 2, \_\_S.W.3d at \_\_.

bility on the landlord for maintenance.<sup>298</sup> However, the lease also provided that the tenant “shall ‘keep and maintain the premises in a clean and sanitary condition at all times.’”<sup>299</sup> Nevertheless, the court did not find this requirement on the tenant to be enough to overcome the landlord’s general obligation to maintain the premises under the terms of the lease agreement.<sup>300</sup>

A question of fact exists if the terms of the lease agreement are ambiguous regarding the landlord’s duty.<sup>301</sup> The language in the lease agreement may be ambiguous “when there is doubt or uncertainty as to its meaning or it is fairly susceptible of two interpretations.”<sup>302</sup> In *Denton v. Pennington*, the tenant leased space in a building that had a wooden deck.<sup>303</sup> The tenant was injured when he stepped through a board on the wooden deck.<sup>304</sup> The lease stated:

Lessor shall maintain the exterior walls, doors, and roof, *exterior*, interior, plumbing, wiring, heating, ventilation and air conditioning systems of the structure upon the leased premises in a reasonable state of repair as may be required to keep and maintain the same in good and tenable condition, to include changing furnace filters periodically so as to maintain heating and air conditioning units. [emphasis added by the court]<sup>305</sup>

The Court found that the word “exterior” was susceptible to more than one interpretation because it may or may not include the deck.<sup>306</sup> Furthermore, the evidence established that the landlord had an employee who periodically inspected the property, including the deck, sometimes driving in nails that she found protruding from the deck.<sup>307</sup> The Court also found that a material question of fact exists when there are ambiguities of this nature, thus creating a jury question.<sup>308</sup> However, this result could conflict with the decision in *Wheeler v. Phillips Development Corp.* where the Arkansas Supreme Court found summary judgment appropriate in a situation where the apartment manager was operating a weed eater in the vicinity of the sidewalk

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298. *Id.*

299. *Id.*

300. *Id.*

301. *Tennell v. Midtown Apartments Ltd. P’ship.*, No. CA 06-127, 2006 WL 3307466, at \*1 (Ark. App. 2006) (citing *Elkins v. Arkla, Inc.*, 312 Ark. 280, 849 S.W.2d 489 (1003); *Denton v. Pennington*, 82 Ark. App. 179, 119 S.W.3d 519 (2003)).

302. *Tennell*, 2006 WL 3307466, at \*1 (citing *Denton*, 82 Ark. App. At 179, 119 S.W.3d at 519).

303. *Denton v. Pennington*, 82 Ark. App. 179, 181, 119 S.W.3d 519, 520 (2003).

304. *Id.*

305. *Id.* at 182, 119 S.W.3d at 521.

306. *Id.* at 183, 119 S.W.3d at 522.

307. *Id.* at 183–84, 119 S.W.3d at 522.

308. *Id.* at 183, 119 S.W.3d at 522.

where the tenant tripped on a rock.<sup>309</sup> The Arkansas Court of Appeals in *Denton* distinguished *Wheeler* based on the activities of the property manager, which included driving nails back into the deck, sweeping the deck and cutting grass in and around the deck.<sup>310</sup> The Court found that this activity combined with the ambiguous nature of the lease created a jury question.<sup>311</sup>

In *Tennell v. Midtown Apartments Limited P'ship.*, the tenant tripped over a steel plate in the parking lot and suffered injuries.<sup>312</sup> In several places in the lease agreement, the lease used the term “dwelling unit” and the term “premises.”<sup>313</sup> The lease contained the following provisions (emphasis added by the Court):

1. [Midtown] leases to [Tennell], and [Tennell] leases from [Midtown] *dwelling unit* in the project known as Mid Town Apartments, for a term...

15. [Tennell] for [herself] and [her] heirs, executors and administrators agrees as follows:

(b) To keep the *premises* in a safe and sanitary condition, and to comply with all obligations imposed upon TENANTS under applicable provisions of building and housing codes materially affecting health and safety with respect to said *premises* and appurtenances, and to save [Midtown] harmless from all fines, penalties and costs for violations or non-compliance by [Tennell] with any of said laws, requirements or regulations, and from all liability arising out of any such violations or noncompliance.

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17. [Midtown] agrees to comply with the requirement of all applicable Federal, State and local laws, including health, housing and building codes and to deliver and maintain the *premises* in safe, sanitary and decent condition.

18. [Tennell], by the execution of this Agreement, admits that the *dwelling unit* described herein has been inspected by [her] and meets with [her] approval. [Tennell] acknowledges hereby that said *premises* have been satisfactorily completed and that [Midtown] will not be required to repaint, replaster, or otherwise perform any other work, labor, or service

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309. *Denton*, 82 Ark. App. At 184, 119 S.W.3d at 522 (citing *Wheeler v. Phillips Dev. Corp.*, 329 Ark. 354, 947 S.W.2d 380 (1997)).

310. *Denton*, 82 Ark. App. at 184, 119 S.W.3d at 522.

311. *Id.*

312. *Tennell v. Midtown Apartments Ltd. P'ship.*, 2006 WL 3307466, at \*1 (Ark. App. 2006).

313. *Id.* at \*2.

which it has already performed for [Tennell]. [Tennell] admits that [she] has inspected the *unit* and found it to be in good and tenantable condition, and agrees that at the end of the occupancy hereunder to deliver up and surrender said *premises* to [Midtown] in as good condition as when received, reasonable wear and tear excepted.<sup>314</sup>

The Arkansas Court of Appeals interpreted this sloppy drafting to create an ambiguity as to the meaning of the word “premises”.<sup>315</sup> Although the Court acknowledged that the dictionary definition of “premises” is “[a] house or building, along with its grounds,” it still held this language to be ambiguous as to whether the term “premises” encompasses the common areas such as the parking lot.<sup>316</sup> The Court found “it would not make sense for Tennell to be obligated to maintain the common areas because Midtown is the party in control of the common areas.”<sup>317</sup> The Court remanded the case back to the trial court for determination of whether the landlord had liability for the parking lot.<sup>318</sup> However, this unpublished decision does not fit with other decisions in Arkansas and should probably be viewed as an aberration.<sup>319</sup>

#### D. Split Maintenance Obligations

Less clear is the extent of a landlord’s liability when the lease agreement splits the responsibility for maintenance between the landlord and the tenant.<sup>320</sup> When the lease agreement divides responsibility for maintenance, allocating liability is still a matter of contract interpretation that is subject to summary judgment.<sup>321</sup> For instance, in the unpublished decision of *Sweeney v. Storthz*, the lease provided:

Lessee will keep the leased premises, excepting the roof and outside walls, but including plumbing, heating and air condition units, water tower, parking area, sidewalks, sewer lines, water pipes, gas pipes, elec-

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314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Tennell*, 2006 WL 3307466, at \*2.

319. *Eoff v. Warden*, 330 Ark. 244, 244, 953 S.W.2d 880, 881 (1997) (holding that Arkansas does not represent the retention of control doctrine).

320. *Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297 (1997) (discussing a case where the landlord agreed to be responsible for major repairs and the tenant for the minor repairs but not determining which party was responsible for a defective staircase).

321. *Sweeney v. Storthz*, No. CA98-1300, 1999 WL 349786, at \*3 (Ark. App. May 26, 1999).

tric wiring, fixtures, floors, plaster, plate glass and glass in repair and will do all necessary painting throughout the term of this lease.<sup>322</sup>

The plaintiff injured his leg when he fell through a utility box behind the building that should have been covered with a metal plate but was instead covered with a piece of plywood.<sup>323</sup> However, the utility box was not part of the roof or outside walls, so the landlord had no liability.<sup>324</sup> The Eastern District Court of Arkansas, also in an unpublished decision, reached the same conclusion of no liability on the part of the landlord when an employee of a tenant slipped on an oil slick because the lease only obligated the landlord to repair the roof, exterior walls and foundation of the building.<sup>325</sup>

#### E. Obligations to Repair When a Written Lease Agreement Continues on a Month-to-Month Basis After Termination

An interesting question exists when the written lease expires and the parties continue on a month-to-month lease. In *Majewski v. Cantrell*, the parties had a written lease that obligated the landlord to repair the roof.<sup>326</sup> The term of the lease agreement expired but the parties continued their relationship on a month-to-month basis.<sup>327</sup> During the month-to-month period, an employee of the tenant slipped on rainwater that entered through a leak in the roof.<sup>328</sup> The landlord argued that the obligation to repair the roof expired with the written lease even though the record showed that the landlord continued to make repairs as needed.<sup>329</sup> The Court found that the continued repairs to the roof belied any argument that the obligation expired with the written lease so the landlord had liability for the injuries to the tenant's employee.<sup>330</sup>

#### F. Obligation to Reimburse a Tenant for Repairs or Improvements for Wrongful Termination

A tenant has no claim against the landlord for reimbursement for repairs or improvements the tenant makes to the leasehold estate absent an

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322. *Id.* at \*1.

323. *Id.*

324. *Id.* at \*3.

325. *Walker v. Mr. Maint., Inc.*, No. 2:07CV000067, 2009 WL 1405205, at \*6 (E.D. Ark. May 19, 2009).

326. *Majewski v. Cantrell*, 293 Ark. 360, 361-62, 737 S.W.2d 649, 650 (1987).

327. *Id.* at 362, 737 S.W.2d at 650.

328. *Id.* at 361, 737 S.W.2d at 650.

329. *Id.* at 362, 737 S.W.2d at 651.

330. *Id.*



express agreement to the contrary.<sup>331</sup> As the Arkansas Supreme Court said in 1888:

The law imposes no obligation upon a landlord to pay his tenant for improvements made by him upon the demised premises. The tenant is presumed to repair and improve for his own benefit; and his right to the result of his labor expended for that purpose is to reap the enhanced benefit during the term, and, within certain limitations, to remove the improvements before its expiration. It is only by virtue of an express agreement by the landlord to pay for improvements that the tenant can recover their value of him.<sup>332</sup>

According to a more recent Arkansas Court of Appeals decision, "In Arkansas, a lessor has no obligation to pay for repairs or improvements that a lessee makes to a leasehold, unless the lessor agrees to do so."<sup>333</sup> Furthermore, the mere fact that the landlord permitted the installation of improvements, or made no objection to the installation of the improvements, will not obligate the landlord to reimburse the tenant for the cost of the improvements.<sup>334</sup> "At the termination of a lease, the tenant can recover from the landlord for the improvements made by the tenant only in those cases in which the landlord has so agreed to pay the tenant."<sup>335</sup>

However, this rule does not apply if the landlord wrongfully terminates the lease.<sup>336</sup> As stated by the Arkansas Supreme Court in 1905, "When a landlord unlawfully evicts a tenant from the premises, the tenant is entitled to recover as damages whatever loss results to him as a direct and natural consequence of the wrongful act of the landlord."<sup>337</sup>

The doctrine of *caveat lessee* has nothing to do with the measure of damages when a lessor wrongfully terminates a lease. Additionally, it does not bar the tenant from recovering the full measure of its damages, which may include the cost of improvements to the leasehold estate.<sup>338</sup> For purposes of determining damages, "the correct measure of damages is the amount

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331. *National Housewares Corp. v. Trahin*, 247 Ark. 1, 4, 444 S.W.2d 68, 69 (1969). See also *Hale v. Ruff*, CA98-1373, 1999 WL 436281, at \*5 (Ark. Ct. App. June 23, 1999); *Earle's Adm'r v. Hale's Adm'r*, 31 Ark. 470, 471 (1876).

332. *Gocio v. Day*, 51 Ark. 46, 46, 9 S.W. 433, 433 (1888). See also *Kutter v. Smith*, 69 U.S. 491, 500, 17 L. Ed. 830 (1864).

333. *Hale v. Ruff*, CA98-1373, 1999 WL 436281, at \*5 (Ark. Ct. App. June 23, 1999).

334. *Gocio*, 51 Ark. at 46, 9 S.W. at 433.

335. *Capitol Monument Co. v. State Capitol Grounds Comm'n ex rel. Murry*, 220 Ark. 946, 948, 251 S.W.2d 473, 475 (1952).

336. *Hale v. Ruff*, CA98-1373, 1999 WL 436281, at \*5 (Ark. Ct. App. June 23, 1999).

337. *McElvaney v. Smith*, 76 Ark. 468, 468, 88 S.W. 981, 982 (1905). See also *Malone v. Wade*, 148 Ark. 548, 548, 230 S.W. 579, 581 (1921) and *Brickey v. Lacy*, 245 Ark. 860, 863, 435 S.W.2d 443, 445 (1968) and *Burdan v. Walton*, 286 Ark. 98, 101, 689 S.W.2d 543, 545 (1985).

338. *Hale*, 1999 WL 436281, at \*5.

by which the fair market value of the lease exceeds the agreed-upon rent.”<sup>339</sup> The tenant is entitled to recover the cost of repairs and improvements made to the leasehold in situations where the landlord wrongfully terminates.<sup>340</sup> The damages for wrongful eviction include funds expended by the tenant for repairs or improvements that can only be used in the leased premises, such as flooring installed in the premises.<sup>341</sup> The damages are limited to actual and special damages and do not include remote or speculative damages.<sup>342</sup>

For the purpose of valuing the improvements in determining the tenant’s losses for a wrongful eviction, the value of the improvements are to be considered in determining the value of the remaining leasehold interest.<sup>343</sup> Therefore, the proper jury instruction for determining the value of the improvement is to instruct the jury “to consider this evidence [of the value of the improvements], not as measure of damages, but in determining the value of the remaining leasehold interest.”<sup>344</sup> The tenant may also be entitled to some or all of the cost of relocating to another location.<sup>345</sup>

#### VI. TORT CLAIMS IN ARKANSAS RESULTING FROM THE CRIMINAL ACTS OF THIRD PARTIES

At common law, tort liability claims by tenants and guests of tenants arising from injuries caused by the criminal acts of third-parties are subject to the general *caveat lessee* liability limitations.<sup>346</sup> Protecting tenants from criminal acts is much more difficult than protecting tenants from other hazards, such as defects in construction. As pointed out by one court, “The criminal can be expected anywhere, any time, and has been a risk of life for a long time. He can be expected in the village, monastery and the castle keep.”<sup>347</sup> The same court observed, “the landlord cannot be expected to protect them [tenants] against the wiles of felony any more than the society can always protect them upon the common streets and highways leading to their

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339. *Pearson v. Henrickson*, 336 Ark. 12, 19, 983 S.W.2d 419, 423 (1999).

340. *Byers v. Moore*, 110 Ark. 504, 504, 163 S.W. 147, 149 (1913). *See also* *Hale v. Ruff*, CA98-1373, 1999 WL 436281, at \*5 (Ark. Ct. App. June 23, 1999).

341. *Byers*, 110 Ark. at 504, 163 S.W. at 149.

342. *Wakin v. Morgan*, 165 Ark. 234, 234, 263 S.W. 783, 784 (1924) and *Home Co. v. Lammers*, 221 Ark. 311, 316, 254 S.W.2d 65, 67 (1952). *See also* *Reeves v. Romines*, 132 Ark. 599, 201 S.W. 822 (1918) (holding that the wrongfully-evicted tenant could not recover anticipated profits from crops when the tenant pled no other measure of damages).

343. *Pearson*, 336 Ark. at 20, 983 S.W.2d at 424.

344. *Id.*, 983 S.W. 2d at 424.

345. *Byers*, 110 Ark. at 504, 163 S.W. at 149. *See also* *Franks v. Rogers*, 156 Ark. 120, 120, 245 S.W. 311, 312 (1922).

346. *Neisser*, *supra* note 11, at 531 (1990). *See also* *Pippin v. Chicago Hous. Auth.*, 399 N.E.2d 596, 598 (Ill. 1979).

347. *Feld v. Merriam*, 485 A.2d 742, 746 (Pa. 1984).

residence or indeed in their home itself.”<sup>348</sup> Furthermore, there are inherent difficulties in deterring crime. One court noted:

In this day of an inordinate volume of criminal activity, there are a myriad of “security devices” available to the public, including the hiring of armed guards. No one really knows why people commit crime, hence no one really knows what is “adequate” deterrence in any given situation. While bright lights may deter some, they will not deter all. Some persons cannot be deterred by anything short of impenetrable walls and armed guards.

It would be intolerable and grossly unfair to permit a lay jury, after the fact, to determine in any case that security measures were “inadequate,” especially in light of the fact that the decision would always be rendered in a case where the security had in fact proved to be inadequate.<sup>349</sup>

Even in states with long-standing exceptions to the *caveat lessee* doctrine, courts have only recently begun imposing a duty on landlords to protect tenants from criminal acts of third-parties.<sup>350</sup> Those cases that have imposed some duty on landlords have generally followed a tort law approach to liability arising from affirmative acts by the landlord or based on the landlord’s knowledge of the foreseeability of a criminal attack.<sup>351</sup> For instance, South Carolina takes a tort law approach based on affirmative acts of the landlord.<sup>352</sup> South Carolina recognizes a fundamental difference of the landlord-tenant relationship from other relationships such as store owner-invitee and innkeeper-guest.<sup>353</sup> Accordingly, South Carolina does not impose an affirmative duty to protect tenants from criminal activity merely by reason of the relationship, but in order for liability to arise, some negligence on the part of the landlord is required that contributes to the injury caused by the criminal activity.<sup>354</sup> South Carolina also held that an obligation to maintain the premises in a habitable condition does not impose a duty on a landlord to protect tenants from criminal activities of others.<sup>355</sup> However, some courts in

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348. *Id.* at 745.

349. 7735 Hollywood Boulevard Venture v. Super. Ct., 172 Cal. Rptr. 528, 530 (Cal. Ct. App. 1981).

350. Mostafa, *supra* note 1, at 975. *See also* Irene S. Mazuna, Comment, *Condo Associations—New Cop on the Beat: Martinez v. Woodmar IV Condominiums Homeowners Association*, 73 ST. JOHN’S L. REV. 325, 326 (1999).

351. Mostafa, *supra* note 1, at 985. *See also* Cooke v. Allstate Mgmt. Corp., 741 F.Supp. 1205, 1214 (D.S.C. 1990); Johnston v. Harris, 198 N.W.2d 409, 411 (Mich. 1972); Rowe v. State Bank of Lombard, 531 N.E.2d 1358, 1364 (Ill. 1988).

352. *Cooke*, 741 F.Supp. at 1214.

353. *Cramer v. Balcor Prop. Mgmt., Inc.*, 441 S.E.2d 317, 318 (S.C. 1994).

354. *Id.* at 318–19. *See also* *Cooke*, 741 F.Supp. at 1214.

355. *Cramer*, 441 S.E.2d at 319.

other jurisdictions have found that the failure to provide adequate security equates to a breach of the warranty of habitability.<sup>356</sup>

The South Carolina approach is similar to that utilized in Oklahoma where the duty owed by the landlord is

“to use reasonable care to maintain the common areas of the premises in such a manner as to insure that the likelihood of criminal activity is not unreasonably enhanced by the condition of those common premises [. . .] Where the premises provided are inadequately secured due to ineffective or defective materials, a duty on the part of the landlord to provide repairs or modifications would arise upon notification of the defect by the tenant.”<sup>357</sup>

The landlord is not “placed in a position of quasi-guarantor of the tenant’s safety.”<sup>358</sup>

One frequently cited case on this issue is *Kline v. 1500 Massachusetts Ave. Apartment Corp.*<sup>359</sup> The extent of liability imposed on landlords by the court in *Kline* is not followed in many jurisdictions even though many courts consider the case in deciding what, if any, liability to impose.<sup>360</sup>

*Kline* established a duty on the part of landlords in Washington, D.C. to protect tenants from criminal acts.<sup>361</sup> In the *Kline* case, the tenant suffered injuries when she was criminally assaulted and robbed one night by an intruder in the common hallway of her apartment.<sup>362</sup> The tenant moved into the apartment complex seven years earlier when the building had a doorman stationed in the front lobby twenty-four hours a day, an employee stationed at a desk near the elevator, and two attendants in the parking garage.<sup>363</sup> By the time of the attack, the number of attendees and guards had diminished significantly even though there had been an increase in crime at the apartment complex.<sup>364</sup> However, after the original term of the lease expired, the

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356. See, e.g., *Trentacost v. Brussel*, 412 A.2d 436, 443 (N.J. 1980); *Hemmings v. Pelham Wood Ltd. Liab. Ltd. P’ship*, 826 A.2d 443, 453 (Md. 2003). See also *Braitman v. Overlook Terrace Corp.*, 346 A.2d 76, 84 (N.J. 1975) (holding that “[a] residential tenant can recover damages from his landlord upon proper proof that the latter unreasonably enhanced the risk of loss due to theft by failing to supply adequate locks to safeguard the tenant’s premises after suitable notice of the defect.”).

357. *Lay v. Dworman*, 732 P.2d 455, 458 (Okla. 1986).

358. *Id.* at 460.

359. A WestlawNext Search conducted on August 5, 2013 showed 701 citing references for *Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970).

360. Neisser, *supra* note 11, at 533. See also *Lay*, 732 P.2d at 457.

361. *Kline*, 439 F.2d at 481.

362. *Id.* at 478.

363. *Id.* 478–79.

364. *Id.* at, 479.

tenant continued to reside at the complex under a month-to-month tenancy even though the security had lessened over time.<sup>365</sup>

After the court considered the facts, it concluded that the landlord had a duty to protect the tenant from criminal acts.<sup>366</sup> The *Kline* court's holding expanded the exception to the *caveat lessee* doctrine for common areas under the control of the landlord.<sup>367</sup> The court acknowledged that prior case law on the exception "dealt with a physical defect in the building leading to plaintiff's injury, [but] the rationale as applied to predictable criminal acts by third parties is the same."<sup>368</sup> The court also acknowledged several reasons for not making landlords responsible for criminal acts, including:

Judicial reluctance to tamper with the traditional common law concept of the landlordtenant [sic] relationship; the notion that the act of a third person in committing an intentional tort or crime is a superseding cause of the harm to another resulting therefrom; the oftentimes difficult problem of determining foreseeability of criminal acts; the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty; and conflict with the public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector.<sup>369</sup>

Despite recognizing these many reasons for not implying a duty for landlords to safeguard tenants from criminal acts, without any detailed explanation why, the court declared, "[t]he rationale of the general rule exonerating a third party from any duty to protect another from a criminal attack has no applicability to the landlord-tenant relationship in multiple dwelling houses. The landlord is no insurer of his tenant's safety, but he certainly is no bystander."<sup>370</sup> The court held that a landlord with notice that the premises may be subject to criminal attacks has "a duty to take those steps which are within his power to minimize the predictable risk to his tenants."<sup>371</sup> The court went on to hold, "we place the duty of taking protective measures guarding the entire premises and the areas particularly under the landlord's control against the perpetration of criminal acts upon the landlord, the party to the lease contract who has the effective capacity to perform these necessary acts."<sup>372</sup> The court compared the duty to that of an innkeeper to a guest,<sup>373</sup> which is a traditionally high-level duty.

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365. *Id.* at 485.

366. *Id.* at 481.

367. *Kline*, 439 F.2d at 481.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.* at 482.

373. *Kline*, 439 F.2d at 485.

The court in *Kline* also recognized the difficulty in defining the standard of care that a landlord must meet under the new obligations imposed by the decision.<sup>374</sup> The court said,

The specific measures to achieve this standard [of care] vary with the individual circumstances. It may be impossible to describe in detail for all situations of landlord-tenant relationships, and evidence of custom amongst the landlords of the same class of building may play a significant role in determining if the standard has been met.<sup>375</sup>

The Court in *Kline* also recognized the great cost that its decision would cause.<sup>376</sup> The court said:

Granted, the discharge of this duty of protection by landlords will cause, in many instances, the expenditure of large sums for additional equipment and services, and granted the cost will be ultimately passed on to the tenant in the form of increased rents. This prospect, in itself, however, is no deterrent to ou[r] acknowledging and giving force to the duty, since without protection the tenant already pays in losses from theft, physical assault and increased insurance premiums.

The landlord is entirely justified in passing on the cost of increased protective measures to his tenants, but the rationale of compelling the landlord to do it in the first place is that he is the only one who is in a position to take the necessary protective measures for overall protection of the premises, which he owns in whole and rents in part to individual tenants.<sup>377</sup>

In Arkansas a landlord has “no duty to protect a tenant from criminal acts.”<sup>378</sup> As stated by the Arkansas Court of Appeals:

[T]he general rule is that a landlord is under no legal obligation to a tenant for injuries sustained in common areas, absent a statute or agreement, and that, consistent with that principle, it is the general and common law rule that a landlord does not owe a tenant or social guest a duty to protect the tenant or guest from criminal acts.<sup>379</sup>

The leading case in Arkansas on the liability of a landlord to a tenant for criminal acts that occur on the premises is the 1994 case of *Bartley v.*

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374. *Id.* at 486.

375. *Id.*

376. *Id.* at 488.

377. *Id.*

378. *Boren v. Worthen Nat. Bank of Arkansas*, 324 Ark. 416, 421, 921 S.W.2d 934, 938 (1996); *see also* *Nash v. Landmark Storage, LLC*, 102 Ark. App. 182, 185, 283 S.W.3d 605, 608 (2008).

379. *Bussey v. Bearden*, 2011 Ark. App. 353, at 5, 384 S.W.2d 41 (2011).

*Sweetser*. Jenny Bartley was a twenty-one-year-old college student who leased an apartment from the Sweetsters.<sup>380</sup> Early one morning, two men knocked on Ms. Bartley's door.<sup>381</sup> The door of the apartment had no windows and only a simple push-button doorknob lock.<sup>382</sup> Unable to look outside without opening the door, Ms. Bartley opened the door to ascertain who knocked.<sup>383</sup> When Ms. Bartley opened the door, the two men forced their way in and raped her.<sup>384</sup>

Ms. Bartley sued the Sweetsters alleging that the Sweetsters: (i) failed to provide adequate security due to the windowless door and the inadequately lit common areas, and (ii) failed to warn her that the apartment complex was prone to criminal activity.<sup>385</sup> Ms. Bartley argued that the lease prohibited her from installing additional locks on the apartment door and that the Sweetsters retained sole dominion and control over the apartment door and the common areas.<sup>386</sup> Ms. Bartley argued that she may not have been attacked if her door had had a peephole or chain lock.<sup>387</sup>

While acknowledging Arkansas' basic *caveat lessee* approach to landlord liability, Ms. Bartley argued for the adoption of positions accepted by other states, such as that taken in the *Kline* case.<sup>388</sup> She also tried to rely on the case of *Keck v. American Employment Agency*, where the court found that an employer might have liability for sending an employee into a situation where she was abducted and raped.<sup>389</sup> The Arkansas Supreme Court in *Keck* held that an employer may have a duty of care to protect the employee from abduction and rape because of the employer's contractual relationship with the employee, the employer's ability to foresee some danger to her and the employer's degree of control over the situation into which it sent the employee.<sup>390</sup> However, the *Keck* case was not a landlord liability case; instead, it was an employer liability case.<sup>391</sup>

Ms. Bartley also relied on the Western District Court of Arkansas case of *Jackson v. Warner Holdings, Ltd.*<sup>392</sup> In the *Jackson* case, the federal court faced very similar facts to the *Bartley* case. In *Jackson*, an intruder broke

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380. *Bartley v. Sweetser*, 319 Ark. 117, 118, 890 S.W.2d 250, 250 (1994).

381. *Id.* at 119, 890 S.W.2d at 250.

382. *Id.*, 890 S.W.2d at 250.

383. *Id.*, 890 S.W.2d at 250.

384. *Id.*, 890 S.W.2d at 250.

385. *Id.*, 890 S.W.2d at 250.

386. *Bartley*, 319 Ark. at 119, 890 S.W.2d at 250.

387. *Id.* at 119, 890 S.W.2d at 251.

388. *Id.* at 121, 890 S.W.2d at 251.

389. *Id.* at 120, 890 S.W.2d at 251.

390. *Keck v. Am. Empl. Agency, Inc.*, 279, Ark. 294, 302, 652 S.W.2d 2, 6 (1983).

391. *Bartley*, 319 Ark. at 120, 890 S.W.2d at 251.

392. *Id.*, 890 S.W.2d at 251.

into Ms. Cheryl Lynn Jackson's apartment and repeatedly raped her.<sup>393</sup> Ms. Jackson alleged that the attack was caused by the negligence of the landlord for failing to provide "reasonable and adequate" security, adequate door locks and adequate curtains to insure privacy, among other things.<sup>394</sup> The Federal court stated that, at the time, Arkansas had not decided "[w]hether a landlord has a duty to provide adequate security in the form of door locks, lighting and security devices to protect tenants from criminal attacks by third persons."<sup>395</sup> The Federal court acknowledged its obligation to rule as the Arkansas Supreme Court would rule if presented with the same question.<sup>396</sup> The Federal court analyzed three cases: *Joseph v. Riffel*, *Kilbury v. McConnell* and *Keck v. American Employment Agency*.<sup>397</sup> The Federal court interpreted this line of Arkansas Supreme Court cases as marching from a "conservative" approach to landlord liability (*i.e.*, the 1932 case of *Joseph v. Riffel*) to a more moderate approach marked with "reluctance" to continue the total landlord immunity (*i.e.*, the 1969 case of *Kilbury v. McConnell*) to a "liberal" rule of landlord liability (*i.e.*, the 1983 case of *Keck v. American Employment Agency, Inc.*).<sup>398</sup> Even though *Keck* was not a landlord liability case, the Federal court believed that the Arkansas Supreme Court was signaling an intention to follow the logic of *Keck* in landlord-tenant cases because the decision cited a California landlord-tenant case in its recitation of authority for when a third-party could be held liable for the damages suffered by a rape victim.<sup>399</sup> The Federal court concluded:

The progression of the law in Arkansas, as evidenced by the cases discussed above and in other jurisdictions, combined with the analogy to *O'Hara* [the California case] mentioned in *Keck*, and the liberal rules regarding motions to dismiss, persuasively indicate that the Arkansas Supreme Court, if presented with the issue at bar would recognize a duty owed by a landlord to his or her tenants to employ reasonable security measures to avoid foreseeable criminal attacks by third persons.<sup>400</sup>

However, when faced with the facts in *Bartley*, the Arkansas Supreme Court rejected the Federal court's approach.<sup>401</sup> The Court found the Federal court's reliance on *Keck* to be misplaced because the nature of the case did

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393. *Jackson v. Warner Holdings, Ltd.*, 617 F. Supp. 646, 647 (W.D. Ark. 1985).

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.* at 648–49.

399. *Jackson*, 617 F.Supp. at 648 (W.D. Ark. 1985). In *Keck*, the California court found that a landlord may have liability when a woman was raped in her apartment and sued the landlord for failing to take reasonable steps to protect her.

400. *Id.* at 648–49.

401. *Bartley v. Sweetser*, 319 Ark. 117, 120, 890 S.W.2d 250, 251 (1994).



not make it part of Arkansas history of landlord/tenant law.<sup>402</sup> Therefore, the Federal court misconstrued the progression of Arkansas' case law.

The Arkansas Supreme Court noted that some states, such as Massachusetts in the *Kline* case, have recognized a duty on the part of a landlord "to take reasonable steps to protect a tenant from foreseeable criminal acts committed by intruders on the premises."<sup>403</sup> However, the court found that other jurisdictions "have generally found that, as a matter of public policy, it was not fair to impose this duty of protection on the landlord."<sup>404</sup> The court quoted the reasons set forth in *American Law of Landlord Tenant* (1980) by Robert S. Schoshinski for maintaining the common law position against imposing a duty of protection on landlords as follows:

Judicial reluctance to tamper with the common law concept of the landlord-tenant relationship, the notion that the act of a third person in committing an intentional tort or crime is a superseding cause of harm to another...; the often times difficult problem of determining foreseeability of criminal acts; the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty; and the conflict with public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector.<sup>405</sup>

The Arkansas Supreme Court said, "For more than sixty years, this court, when reviewing landlord/tenant cases, has seemed content to adhere to the general rule and common law, and has consistently imposed no legal obligation upon a landlord for a tenant's injury on the premises unless a duty is imposed by statute or agreement."<sup>406</sup> The court found no such obligation in the lease agreement.<sup>407</sup> The court acknowledged that the lease agreement prohibited Ms. Bartley from installing additional locks on the door but rejected the idea that such a prohibition could be read as the landlord assuming a duty of protecting the tenant from criminal behavior.<sup>408</sup> The court found that such a provision "merely assured the Sweetsers access to tenant premises during reasonable hours in order to make an inspection or necessary repairs."<sup>409</sup> The court concluded, "[i]n sum, a landlord, under Arkansas law, is not the insurer of the safety of tenants or others upon the premises."<sup>410</sup>

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402. *Id.*, 890 S.W.2d at 251.

403. *Id.* at 121, 890 S.W.2d at 251.

404. *Id.*, 890 S.W.2d at 251.

405. *Id.*, 890 S.W.2d at 251 (citing Robert S. Schoshinski, *American Law of Landlord Tenant* § 4.14 (1980)).

406. *Bartley*, 319 Ark. at 121, 890 S.W.2d at 251.

407. *Id.* at 122, 890 S.W.2d at 251.

408. *Id.*, 890 S.W.2d at 251.

409. *Id.*, 890 S.W.2d at 251.

410. *Id.*, 890 S.W.2d at 251.

Justice Newbern concurred in the *Bartley v. Sweetser* decision.<sup>411</sup> Justice Newbern argued that a landlord could be found negligent in the landlord-tenant relationship for, among other things, a failure to provide adequate security.<sup>412</sup> Justice Newbern concurred in the decision because he felt the proximate cause of Ms. Bartley's injuries was her decision to open the door, regardless of the types of locks that the landlord may have provided.<sup>413</sup> Notwithstanding, Justice Newbern said:

Negligence is not a static concept. That which was not characterized as negligence 60 years ago might be so characterized today in view of changed conditions. In a proper case, we should be willing to examine whether there is anything about the landlord-tenant relationship which would preclude us from holding that a landlord might be liable for demonstrable negligence causing injury to a tenant.<sup>414</sup>

In the more recent case of *Bussey v. Bearden*, Larry Bussey leased an apartment from Melvin and Mural Bearden.<sup>415</sup> Larry's daughter-in-law, Teresa Bussey, came to his apartment to feed his cat while he was out of town.<sup>416</sup> Unfortunately, Ms. Bussey walked into a burglary being committed by the neighbors from an adjoining apartment that had entered through a common attic.<sup>417</sup> The burglars severely beat Ms. Bussey.<sup>418</sup> Ms. Bussey sued the landlords for breach of a duty to protect apartment guests by allowing a dangerous attic design to remain without taking steps to protect guests or alert tenants about the design.<sup>419</sup> Ms. Bussey sought to distinguish earlier cases through the following language in the lease agreement: "[m]anagement shall not be liable to Resident for any damages to Resident's person or property, or to Resident's agents, employees, guests, or invitees *other than for Management's negligence*" [emphasis added in the Court's decision].<sup>420</sup>

However, the Arkansas Court of Appeals rejected the notion that a carve-out in the lease agreement for the landlord's negligence could be read to create an affirmative obligation on the part of the landlord to prevent criminal acts.<sup>421</sup> The Court said, "[t]his quoted contractual language cannot be stretched to create an exception to the general rule in Arkansas and im-

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411. *Id.*, 890 S.W.2d at 251.

412. *Id.* at 122–23, 890 S.W.2d at 251.

413. *Bartley*, 319 Ark. at 122, 890 S.W.2d at 251.

414. *Id.* at 123, 890 S.W.2d at 251.

415. *Bussey v. Bearden*, 2011 Ark. App. 353, at 1, 384 S.W.3d 41, 42 (2011).

416. *Id.*

417. *Id.* at 2, 384 S.W.3d at 42.

418. *Id.*

419. *Id.*

420. *Id.* at 6, 384 S.W.3d at 44.

421. *Bussey*, 2011 Ark. App. 353, at 6, 384 S.W.3d at 45.

pose an express duty upon the landlord to protect tenants and guests from criminal assault.”<sup>422</sup>

A landlord will typically not be held to have undertaken a duty to protect tenants simply because the landlord instituted some security measures.<sup>423</sup> In *Bussey v. Bearden*, the landlord provided some security by providing “locks and deadbolts on apartment doors, locks on windows, and stringing chicken wire in the common attic areas of the apartments to define the spaces belonging to the separate apartments.”<sup>424</sup> The Arkansas Court of Appeals found that these activities were not enough to push the landlord outside of the *caveat lessee* protections.<sup>425</sup>

In *Hall v. Rental Management, Inc.*, the plaintiff sued the owner of the apartment complex after her son was shot and killed on the premises by a guest of another resident.<sup>426</sup> The plaintiff alleged that the landlord had assumed the duty to provide security.<sup>427</sup> The plaintiff based her case on a security manual provided by the apartment management company that included a section titled “SECURITY” that said:

A feeling of security is important to all residents. If you notice any unusual or suspicious activity, please notify the Resident Manager immediately. All residents are asked to cooperate when seeing abuse to anyone or to the property. Do not open the door to anyone unless you know who it is. If you are in doubt, call the management if necessary.<sup>428</sup>

The security manual also included a section titled “HOUSE RULES” that said:

The management cannot be responsible for your children in the event of parent negligence. We can only see that the grounds and apartment are a safe place to live; but without a parent, it becomes very unsafe and threatens the life of your child.

Because of management’s concern for safety and your peace of mind, children under school age cannot be allowed in public areas such as laundry, office or recreation room, unless accompanied by a parent or guardian.

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422. *Id.*

423. *Id.*; see also *Dailey v. Hous. Auth. for Birmingham Dist.*, 639 So. 2d 1343, 1346 (Ala. 1994) (holding that hiring a security guard indicates an attempt to discourage crime, not a voluntary assumption of the duty to provide protection from all criminals).

424. *Bussey*, 2011 Ark. App. 353, at 7, 384 S.W.3d at 45.

425. See *id.*

426. *Hall v. Rental Mgmt. Inc.*, 323 Ark. 143, 143, 913 S.W.2d 293, 294 (1996).

427. *Id.*, 913 S.W.2d at 294.

428. *Id.* at 143, 913 S.W.2d at 295.

You have the same privacy as if your apartment were a separate home. Each tenant has the same right of privacy and peaceful enjoyment. Since the apartments are close together, you must think of the other people who live next door to you. To give your neighbors the privacy that they deserve, we ask that your children do not play outside beyond the time of 9:00 p.m. each evening.<sup>429</sup>

The plaintiff in *Hall v. Rental Management, Inc.* also introduced the apartment complex's employee procedures manual, which had three pages dedicated to "Security" issues.<sup>430</sup> The manual discussed general security advice and included the following provisions:

On-site management will have to recommend to the Property Manager if security officers are needed. It is important that ALL on-site personnel be security and safety conscious at all times.

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Security patrol may be performed by employees to check the property in the evenings. A regular check will ward off problems and inform the management of any unusual activity.<sup>431</sup>

The manual also said:

Crime is a major worry for residents and there is no substitute for having the property patrolled by well-trained people, whether by our own employees or professional security personnel. Strict management of tenants [sic] behavior and the behavior of guests make it clear from the start that the property is a no-nonsense place. Adhering to strict policy will not be attractive to those who just want to 'hang out.' 'Hanging out' will not be tolerated. This is the beginning of major problems.

Activities that are disturbing and impose on the rights of others will not be tolerated, not only from residents but from others. Activity of this type must never be allowed to get started. Our reputation will serve as some type of security measure.

Residents may blame the management for failing to provide security or for providing it negligently. Legal liability for negligence may perhaps be reduced by hiring an outside Security Patrol.

If there is a problem with security, the resident must contact the RMI office. We will be happy to go to any length to correct the problem.

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429. *Id.*, 913 S.W.2d at 295.

430. *Id.*, 913 S.W.2d at 295.

431. *Id.*, 913 S.W.2d at 295.

It is our goal to at all times provide a safe place for our residents and family. We feel our residents have the right to be safe and live in a peaceful environment.<sup>432</sup>

The landlord also undertook certain safety practices “such as lighting, evening patrols, and communicating with residents regarding suspicious activities.”<sup>433</sup> However, the Arkansas Supreme Court was not persuaded that the combination of the security manuals and safety practices rose to the level of the landlord assuming the obligation to protect tenants from criminal behavior.<sup>434</sup> The Court said, “[w]e are reluctant to hold that a landlord’s use of these modest, conscientious measures imposes a full blown duty to protect tenants from third party criminal activities.”<sup>435</sup>

The case of *Nash v. Landmark Storage* presented an interesting situation where the landlord expressly disclaimed liability for criminal acts of third parties in the lease agreement but posted a sign on the property stating (falsely) that the premises were under video surveillance that the tenant allegedly relied on in selecting the facility.<sup>436</sup> Despite the sign and the leasing agent’s failure to inform the tenant that there was not really any video surveillance, the court found that the unambiguous disclaimer of liability for criminal acts in the lease prevented the tenant from reasonably relying on the sign to create liability on the part of the landlord.<sup>437</sup>

The immunity under *caveat lessee* afforded to landlords also extends to management agents that a landlord may engage to operate leased properties as illustrated by the case of *Lacy v. Flake and Kelley Management, Inc.*<sup>438</sup> The facts in the case of *Lacy v. Flake and Kelley Management, Inc.* are particularly horrific.<sup>439</sup> Monica Lacy, an employee of a business that leased space from U.S. Bank, left her office and was abducted in the parking lot whereupon she was subsequently raped and robbed by four men.<sup>440</sup> The building was managed on behalf of the landlord by Flake & Kelley Management, Inc. (“F&K”).<sup>441</sup> Ms. Lacy filed suit against the landlord and F&K

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432. *Hall*, 323 Ark. at 143, 913 S.W.2d at 296.

433. *Id.* at 143, 913 S.W.2d at 297.

434. *Id.*, 913 S.W.2d at 297.

435. *Id.*, 913 S.W.2d at 297.

436. *Nash v. Landmark Storage, LLC*, 102 Ark. App. 182, 186, 283 S.W.3d 605, 608 (2008).

437. *Id.* at 187–88, 283 S.W.3d at 609–10.

438. *Lacy v. Flake & Kelley Mgmt., Inc.*, 366 Ark. 365, 370, 235 S.W.3d 894, 898 (2006).

439. *Id.* at 366, 235 S.W.3d at 895.

440. *Id.*, 235 S.W.3d at 895.

441. *Id.*, 235 S.W.3d at 895.

on the theory that the defendants were negligent in their failure to provide adequate security.<sup>442</sup>

An important fact in the *Lacy* case was that F&K had contracted with Guardsmark, Inc., a security firm, to provide a lobby guard during the hours that the abduction occurred.<sup>443</sup> However, the contract with Guardsmark did not require the guards to patrol the parking lot or other areas outside of the building.<sup>444</sup> The lease agreement also included the following provisions:

3.14 Tenant and Tenant's agents, employees, and invitees will comply fully with all requirements of Rules of the Building which are attached hereto and, which are a part of this Lease as though fully set out herein:

4.1 Landlord shall have the following rights exercisable without notice or demand and without liability to Tenant for damage or injury to property, persons or business (all claims for damage therefore being hereby released by Tenant), and without effecting an eviction or disturbance of Tenant's use or possession of the Premises or giving rise to any claim for setoffs or abatement of rent:

(g) To take all such reasonable measures as Landlord may deem advisable for the security of the Building and its occupants, including without limitation, the search of all persons entering or leaving the Building, the evacuation of the Building for cause, suspected cause, or for drill purposes, the temporary denial of access to the Building, and the closing of the Building after normal business hours and on Saturdays, Sundays and holidays, subject, however, to Tenant's right to admittance when the Building is closed after normal business hours under such reasonable regulations as Landlord may prescribe from time to time, which may include by way of example but not limitation, that persons entering or leaving the Building, whether or not during normal business hours, identify themselves to a security officer by registration or otherwise and that such persons establish the right to enter or leave the Building.<sup>445</sup>

The plaintiff argued that the language of this lease agreement imposed sufficient burdens on the landlord (and consequently, its agent, F&K) to create a duty to provide security for the building and protect the tenants from third-party criminal activities.<sup>446</sup> The Court allowed that this language in the lease agreement may have created a duty to monitor entry into the building and possibly protect against criminal activities arising from such entry.<sup>447</sup> However, the language of the lease, and the conduct of F&K on

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442. *Id.*, 235 S.W.3d at 895.

443. *Id.*, 235 S.W.3d at 895.

444. *Lacy*, 366 Ark. at 366, 235 S.W.3d at 895.

445. *Id.* at 368, 235 S.W.3d at 896.

446. *Id.*, 235 S.W.3d at 896.

447. *Id.* at 370, 235 S.W.3d at 898.

behalf of the landlord, did not create a “comprehensive duty” to protect against all criminal activities that may occur on the premises, including criminal activities that may occur in the parking lot.<sup>448</sup>

The *Lacy* case can therefore be cited for two propositions. First, an agent of a landlord has no duty, and thus no liability, greater than that of the landlord even though the agent’s business may be to manage leased property.<sup>449</sup> Second, even if a landlord assumes some duty to provide protection (*i.e.*, safeguarding the entryway), such assumption does not create a comprehensive duty extending to all areas or ways that a tenant may be harmed.<sup>450</sup>

## VII. TORT CLAIMS BY THIRD PARTIES AGAINST LANDLORDS IN ARKANSAS

### A. General Obligation of Landlords to Third Parties

The *caveat lessee* doctrine also provides protection for landlords against injuries suffered by third parties on the property.<sup>451</sup> However, some states impose on the landlord the same duty to all persons lawfully upon the leased premises as the landlord owes the tenant.<sup>452</sup> Ohio held that “it is improper to treat a tenant’s guest as a licensee with regard to a landlord and to hold that a landlord merely owes a tenant’s guest the duty to refrain from wanton or willful misconduct.”<sup>453</sup>

Under Arkansas law, it is irrelevant whether a third party visitor to leased property is classified legally as a “licensee” or an “invitee” as long as the third-party visitor is present with the consent of the tenant.<sup>454</sup> As the Ar-

448. *Id.*, 235 S.W.3d at 898.

449. *Id.*, 235 S.W.3d at 898.

450. *Lacy*, 366 Ark. at 370, 235 S.W.3d at 898.

451. Of course, some states have abandoned this concept along with the abandonment of the *caveat lessee* doctrine, such as Massachusetts. *See, e.g.*, *Young v. Garwacki*, 380 Mass. 162, 168, 402 N.E.2d 1045, 1049 (1980).

For parties to be in a landlord-tenant relationship, there are three essential elements that must be met to establish the relationship:

- (1) Contract, either express or implied.
- (2) The occupancy of the tenant must be in subordination to the rights of the landlord, and a reversionary interest must remain in the landlord.
- (3) There must be a transmission of the estate to the tenant, and he must gain possession of the demised premises.

*Gray v. Davis*, 270 Ark. 917, 921, 606 S.W.2d 607, 610 (Ct. App. 1980); *see also* *Smith v. Campbell*, 71 Ark. App. 23, 26 S.W.3d 139 (2000); *Love v. Cahn*, 93 Ark. 215, 215, 124 S.W. 259, 262 (1909).

452. *Shump v. First Cont’l-Robinwood Assoc.*, 644 N.E.2d 291, 296 (1994); *see also* *Belikka v. Green*, 762 P.2d 997, 1003 (Or. 1988).

453. *Shump*, 644 N.E.2d at 296.

454. *Stalter v. Akers*, 303 Ark. 603, 605, 798 S.W.2d 428, 429 (1990); *see also* *Miller v. Centerpoint Energy Resource Corp.*, 98 Ark. App. 102, 110, 250 S.W.3d 574, 580 (2007).

kansas Supreme Court held in the *Stalter* case, the legal status of the injured party “was immaterial in determining the rights and obligations between these parties so long as the appellee was on the premises with the consent of the lessee.”<sup>455</sup>

The Arkansas Supreme Court held that a third party visitor could only seek recovery from the landlord for injuries caused by a defective condition if the landlord had a contractual obligation to the tenant to maintain or repair the premises.<sup>456</sup> The Court held that, as a condition precedent to a liability claim against the landlord, “the injured third party must establish a landlord’s contractual duty to repair a defect in the premises before he may recover for an injury suffered upon leased property over which the landlord has relinquished possession and control to a tenant.”<sup>457</sup>

In *Eoff v. Warden*, a visitor to the premises was injured in the parking lot.<sup>458</sup> The visitor tried unsuccessfully to argue that the landlord had retained possession and control of the parking lot of the apartment complex.<sup>459</sup> However, since Arkansas does not recognize the retention of control exception to the *caveat lessee* doctrine, the landlord had no liability.<sup>460</sup> Nevertheless, Justin Corbin wrote a strong dissent to the majority’s decision.<sup>461</sup> Justin Corbin saw the decision in *Eoff* to be an extension of the landlord’s immunity from liability since no case involving injury to visitors in common areas controlled by the landlord existed in Arkansas.<sup>462</sup> Justice Corbin distinguished the holding in the earlier *Stalter v. Akers* case by pointing out that the injury to the visitor occurred on “a house the control of which had clearly been relinquished to the tenant.”<sup>463</sup> However, in the *Eoff* case, the landlord had control of the parking lot lighting and where the parking barriers were located.<sup>464</sup> Justice Corbin opined:

If a landlord may not be held responsible for negligence in creating or maintaining an ill-lighted apartment-house parking lot which is alleged to be a trap for the unwary, is the tenant responsible? If not the tenant,

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(applying a *caveat lessee* analysis to a subtenant who claimed to be a licensee of the prime landlord). Under Arkansas law, a subtenant is not considered to be in privity of estate with the original landlord while an assignee is in privity. *Abernathy v. Adous*, 85 Ark. App. 242, 149 S.W.3d 884 (2004).

455. *Stalter*, 303 Ark. at 605, 798 S.W.2d at 429.

456. *Id.* at 606, 798 S.W.2d at 430.

457. *Id.* at 607, 798 S.W.2d at 430.

458. 330 Ark. 244, 244, 953 S.W.2d 880, 881 (1997).

459. *Id.*, 953 S.W.2d at 881.

460. *Id.*, 953 S.W.2d at 881.

461. *Id.* at 244, 953 S.W.2d at 882.

462. *Id.*, 953 S.W.2d at 882.

463. *Id.*, 953 S.W.2d at 882.

464. *Eoff*, 330 Ark. at 244, 953 S.W.2d at 882.



then is the alleged negligence simply a wrong without a remedy? There is no need to reach such a result.<sup>465</sup>

## B. Injuries to Employees

In *Steward v. McDonald*, Professional Services Industries, Inc. leased space from William and Jeannine Steward (the “Stewards”).<sup>466</sup> Mr. McDonald was injured when a riser broke on a staircase that was also missing a handrail.<sup>467</sup> Mr. McDonald sued the Stewards under the general unsafe-place-to-work statute, which stated in “pertinent part: Every employer and every owner of a place of employment, place of public assembly, or public building, now or hereafter constructed shall construct, repair, and maintain it so as to render it safe [emphasis in the original quotation by the Court].”<sup>468</sup> The trial court interpreted this statute to impose a duty on the landlord of a place of business to provide a safe place to work.<sup>469</sup> However, the Arkansas Supreme Court reversed the trial court, holding “the general assembly did not intend for the phrase ‘every owner of a place of employment’ to expand or extend a landlord’s duty to provide a safe place to work for his tenant’s employees.”<sup>470</sup>

In reaching this conclusion, the Court relied on two principles of statutory construction: (1) “that statutes will not be taken in derogation of the common law unless the act shows that such was the intent of the legislature” and (2) that statutes are strictly construed “that impose duties or liabilities unknown at common law in favor of those upon whom the burden is sought to be imposed, and nothing will be taken as intended that is not clearly expressed.”<sup>471</sup> The Court found that the General Assembly did not intend to expand the liability of a landlord, stating, “Had the legislature intended a radical change in the law to extend causes of action for negligence based on a landlord’s duty to his tenant, the Act [the unsafe-place-to-work statute] would have expressed such an intention in some plain and unmistakable terms.”<sup>472</sup>

In a concurrence to the *Steward* decision, Justice Brown disagreed with the majority’s interpretation of the unsafe-place-to-work statute.<sup>473</sup> Justice Brown felt that the word “owner” in the statute was a clear reference to

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465. *Id.*, 953 S.W.2d at 882.

466. *Steward v. McDonald*, 330 Ark. 837, 839, 958 S.W.2d 297, 298 (1997).

467. *Id.*, 958 S.W.2d at 298.

468. *Id.*, 958 S.W.2d at 298.

469. *Id.*, 958 S.W.2d at 298.

470. *Id.* at 840, 958 S.W.2d at 298.

471. *Id.* at 841–42, 958 S.W.2d at 299.

472. *Steward*, 330 Ark. at 843, 958 S.W.2d at 300.

473. *Id.* at 844, 958 S.W.2d at 300 (Brown, J., concurring).

landlords.<sup>474</sup> He believed the statute established a statutory duty on a landlord to deliver a building intended as a workplace to the tenant in a safe condition.<sup>475</sup> Justice Brown referred to the law of West Virginia, which adopted a nearly identical law to Arkansas the same year that Arkansas passed the law.<sup>476</sup> When faced with similar facts, West Virginia interpreted the statute to require a landlord to provide a safe building for employees.<sup>477</sup>

### C. Injuries to Third Parties Off-Premises

In *Bryant v. Putnam*, the landlords knowingly leased a house without a fence to a tenant who owned dogs.<sup>478</sup> The dogs often roamed free and bit Mr. Bryant who was a pedestrian walking near the home.<sup>479</sup> Mr. Bryant sued the landlords on the theory that the landlords were negligent in leasing a house without a fence to a tenant with dogs (there was some dispute over whether the landlords knew the dogs were a vicious breed).<sup>480</sup> Though other states have extended liability to landlords where third-parties were injured on the property or where the landlord knew of the dangerous propensity of the animal, Arkansas declined to extend any liability to a landlord under these circumstances.<sup>481</sup>

## VIII. CONCLUSION

This article began by posing the question of whether Arkansas can still be truly considered a *caveat lessee* state. Based on a review of the applicable case law and statutes, it is fair to continue classifying Arkansas as a *caveat*

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474. *Id.*, 958 S.W.2d at 300.

475. *Id.*, 958 S.W.2d at 300.

476. *Id.* at 845, 958 S.W.2d at 301.

477. *Id.* at 845, 958 S.W.2d at 301 (reviewing W. VA. CODE 21-3-1 (2013) and *Pack v. Van Meter*, 177 W. Va. 485, 354 S.E.2d 581 (W. Va. 1986)). *See also Pack*, 177 W. Va. at 489, 354 S.E.2d at 585 (imposing liability on a landlord by interpreting a statute that said, “Every employer and every owner of a place of employment, place of public assembly, or a public building, now or hereafter constructed, shall so conduct, repair and maintain the same as to render it reasonably safe.” (quoting W.VA. CODE 21-3-1)).

478. *Bryant v. Putnam*, 322 Ark. 284, 286, 908 S.W.2d 338, 338 (1995).

479. *Id.*, 908 S.W.2d at 338.

480. *Id.*, 908 S.W.2d at 338.

481. *Id.*, 908 S.W.2d at 338. For instance, in New York, courts extended the retention of control exception to the *caveat lessee* doctrine to include an obligation to exclude vicious animals. *See Siegel v. 1536-46 St. Johns Place Corp.*, 57 N.Y.S.2d 473, 474 (City Ct. 1945); *see also Linebaugh By and Through Linebaugh v. Hyndman*, 213 N.J. Super. 117, 121, 516 A.2d 638, 640 (App. Div. 1986) *aff’d*, 106 N.J. 556, 524 A.2d 1255 (N.J. 1987). However, New York does not expand the liability to animals where the landlord has no knowledge of the animal or its dangerous proclivities. *See Strunk v. Zoltanski*, 62 N.Y.2d 572, 575, 468 N.E.2d 13, 15 (N.Y. 1984).

*lessee* jurisdiction. However, this is not to say that the *caveat lessee* doctrine exists in Arkansas in its pure common law form, nor is it accurate to say that there are not many reasons for landlords to also beware. Arkansas courts have recognized exceptions to the *caveat lessee* doctrine, including the latent defect exception and the negligently repaired exception.<sup>482</sup> Arkansas also recognizes the constructive eviction defense for tenants.<sup>483</sup> Additionally, Arkansas likely recognizes the implied warranty of fitness for premises that are incomplete at the time the lease is executed.<sup>484</sup> Also, landlords can be held liable for reimbursing a tenant for the cost of improvements made by the tenant in the case of a wrongful eviction.<sup>485</sup>

Furthermore, landlords are often exposed to liability in Arkansas through contractual maintenance obligations that may have ambiguities leading to questions for a jury to resolve.<sup>486</sup> Additionally, ambiguities can arise from the course of conduct of the parties, leading to liability exposure.<sup>487</sup>

Other jurisdictions have established more exceptions to the *caveat lessee* doctrine than Arkansas, some going so far as to eliminate the doctrine entirely.<sup>488</sup> Other exceptions include a public use exception, a common area exception, and breach of an implied warranty of habitability for residential properties.<sup>489</sup> Those that have abandoned the doctrine have mostly opted for a tort-style “reasonable person” approach to liability.<sup>490</sup>

While Arkansas has considered abandoning the doctrine, the Arkansas Supreme Court has held firm to the doctrine.<sup>491</sup> Additionally, the Arkansas General Assembly recently codified Arkansas’s version of the *caveat lessee* doctrine, finding in the preamble to the bill that “the Supreme Court has properly and correctly interpreted and applied the law and that existing law should not be altered or extended.”<sup>492</sup> Given the state of the law in Arkansas, landlords and tenants should make their intentions regarding the terms of a lease agreement clear in a written lease for the protection of both parties. Of

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482. Sparks v. Murray, 120 Ark. 17, 20, 178 S.W. 909, 910 (1915); Haizlip v. Rosenberg, 63 Ark. 430, 433, 39 S.W. 60, 60 (1897).

483. Fletcher v. Joseph Pfeifer Clothing Co., 103 Ark. 318, 324, 146 S.W. 864, 866 (1912).

484. Oliver v. Hartzell, 170 Ark. 512, 515–16, 280 S.W. 979, 980–81 (1926).

485. Pearson v. Henrickson, 336 Ark. 12, 20, 983 S.W.2d 419, 424 (1999).

486. Denton v. Pennington, 82 Ark. App. 179, 183, 119 S.W.3d 519, 521 (2003).

487. See, e.g., Thomas v. Stewart, 347 Ark. 33, 41, 60 S.W.3d 415, 420 (2001).

488. Sargent v. Ross, 113 N.H. 388, 397, 308 A.2d 528, 533–534 (1973).

489. Propst v. McNeill, 326 Ark. 623, 627, 932 S.W.2d 766, 768 (1996). See also Milligan v. Chesterfield Vill. GP, L.L.C., 239 S.W.3d 613, 629 (Mo. Ct. App. 2007); Lemle v. Breeden, 51 Haw. 426, 433, 462 P.2d 470, 474 (1969).

490. Sargent, 113 N.H. at 397, 308 A.2d at 534.

491. Propst, 326 Ark. 623, 626–27, 932 S.W.2d at 768.

492. 2005 Ark. Acts 928 (codified at ARK. CODE ANN. § 18-16-110 (2012)).

course, there will be many situations where the parties will decide to use an abbreviated lease agreement or simply operate on an oral agreement. Acknowledging this, attorneys and others advising landlords and tenants should emphasize the importance of a written document. Toward that end, attached as an Addendum is a selection of proposed form language that can be used and adapted in lease agreements in the event it is the desire of the parties to assign maintenance obligations in a manner other than that provided by common law.

### ADDENDUM

#### To Include a Warranty of Habitability:

This paragraph represents an attempt to craft a model warranty of habitability that, in the experience of the author, could be reasonably acceptable to landlords who are in the business of providing residential properties for lease (as opposed to landlords who are not routinely engaged in such business, such as a homeowner or administrator of an estate who is temporarily leasing a house because such a landlord may not be familiar with, or capable of, providing the services typically offered by professional residential landlords).

Landlord hereby covenants with Tenant that the Premises shall be maintained in a habitable condition. For purposes of this Agreement, "habitable condition" shall mean (and shall be limited to): (i) maintaining the roof and building envelope from intrusion of water; (ii) only if the Premises is provided with central heat and air conditioning, maintaining the heating, ventilation and air condition system in a manner that it can cool the Premises to at least 75°F during the summer months and heat the Premises to at least 70°F, both temperatures to be measured at the location of the thermostat; (iii) providing functioning sewer service; (iv) providing functioning potable water service; (v) providing safe electrical service in the Premises; and (vi) maintaining the Premises in compliance with all applicable building and housing codes (provided, such covenant shall not obligate Landlord to make modifications that are not required under applicable law because the Premises qualifies for an exception under applicable grandfathering).

Landlord has no duty to inspect the Premises and is depending on Tenant to notify Landlord of any necessary repairs or maintenance. Landlord shall not be responsible for inspecting the Premises to determine whether it is in a habitable condition but shall undertake such maintenance or repairs as are necessary to restore the Premises to a habitable condition within a reasonable time after Landlord's receipt of notice, such time to be not less than [ ] days and not more than [ ] days; provided, Landlord shall undertake the repairs as quickly as possible if necessary

for the safety of the occupants of the Premises. Landlord has no obligation to conduct after-hours or weekend repairs unless (i) the repair is necessary for the safety of the occupants of the Premises or (ii) Tenant agrees to pay for the additional cost of such after-hours or weekend repairs.

Tenant's remedies for Landlord's failure to maintain the Premises in habitable condition after notice and opportunity to cure the same in accordance with the foregoing paragraph shall be limited to: (i) withholding payment of rent for the days that the Premises remains uninhabitable; and (ii) recovering the cost of temporary alternative housing (not to exceed \$\_\_\_\_\_ per day) if the Premises remains uninhabitable for more than [specify number of days] days; provided, in lieu of restoring the Premises to a habitable condition, Landlord may terminate this Agreement and have no further liability after delivering notice of termination by paying Tenant the reasonable costs of moving to new housing (not to exceed \$\_\_\_\_\_). In the event the Premises are not in a habitable condition due to a casualty beyond the control of Landlord, Landlord shall have the option to terminate this Agreement in lieu of paying Tenant for the cost of temporary alternative housing or moving to new housing. The maintenance obligations of Landlord pursuant to this Section do not obligate Landlord to pay the cost of the utility service unless otherwise provided in this Agreement. The maintenance obligations of Landlord pursuant to this Section do not include temporary service outages caused by forces beyond Landlord's control (such as an electrical service disruption caused by a storm). Tenant is responsible for the cost of replacing light bulbs and air filters.

Tenant shall immediately reimburse Landlord for the cost of the maintenance or repairs necessitated by the negligence or intentional misconduct of Tenant or its guests. Landlord shall have no liability to Tenant for damages resulting from maintenance or repairs necessitated by the negligence or intentional misconduct of Tenant or its guests. Landlord shall not be liable for damages to Tenant caused by the negligence or intentional misconduct of third-parties, including other tenants, unless Landlord has received written notice of the same and had an opportunity to repair the same in accordance with the timeframes for repair specified in this Section. Such waiver of liability includes, without limitation, damage to or hazardous conditions created in the common areas shared with other tenants. Landlord hereby covenants with Tenant that the Premises shall be maintained in a habitable condition. For purposes of this Agreement, "habitable condition" shall mean (and shall be limited to): (i) maintaining the roof and building envelope from intrusion of water; (ii) only if the Premises is provided with central heat and air conditioning, maintaining the heating, ventilation and air condition system in a manner that it can cool the Premises to at least 75°F during the summer months and heat the Premises to at least 70°F, both temperatures to be measured at the location of the thermostat; (iii) providing functioning

sewer service; (iv) providing functioning potable water service; (v) providing safe electrical service in the Premises; and (vi) maintaining the Premises in compliance with all applicable building and housing codes (provided, such covenant shall not obligate Landlord to make modifications that are not required under applicable law because the Premises qualifies for an exception under applicable grandfathering).

Landlord has no duty to inspect the Premises and is depending on Tenant to notify Landlord of any necessary repairs or maintenance. Landlord shall not be responsible for inspecting the Premises to determine whether it is in a habitable condition but shall undertake such maintenance or repairs as are necessary to restore the Premises to a habitable condition within a reasonable time after Landlord's receipt of notice, such time to be not less than [ ] days and not more than [ ] days; provided, Landlord shall undertake the repairs as quickly as possible if necessary for the safety of the occupants of the Premises. Landlord has no obligation to conduct after-hours or weekend repairs unless (i) the repair is necessary for the safety of the occupants of the Premises or (ii) Tenant agrees to pay for the additional cost of such after-hours or weekend repairs.

Tenant's remedies for Landlord's failure to maintain the Premises in habitable condition after notice and opportunity to cure the same in accordance with the foregoing paragraph shall be limited to: (i) withholding payment of rent for the days that the Premises remains uninhabitable; and (ii) recovering the cost of temporary alternative housing (not to exceed \$\_\_\_\_\_ per day) if the Premises remains uninhabitable for more than [specify number of days] days; provided, in lieu of restoring the Premises to a habitable condition, Landlord may terminate this Agreement and have no further liability after delivering notice of termination by paying Tenant the reasonable costs of moving to new housing (not to exceed \$\_\_\_\_\_). In the event the Premises are not in a habitable condition due to a casualty beyond the control of Landlord, Landlord shall have the option to terminate this Agreement in lieu of paying Tenant for the cost of temporary alternative housing or moving to new housing. The maintenance obligations of Landlord pursuant to this Section do not obligate Landlord to pay the cost of the utility service unless otherwise provided in this Agreement. The maintenance obligations of Landlord pursuant to this Section do not include temporary service outages caused by forces beyond Landlord's control (such as an electrical service disruption caused by a storm). Tenant is responsible for the cost of replacing light bulbs and air filters.

Tenant shall immediately reimburse Landlord for the cost of the maintenance or repairs necessitated by the negligence or intentional misconduct of Tenant or its guests. Landlord shall have no liability to Tenant for damages resulting from maintenance or repairs necessitated by the negligence or intentional misconduct of Tenant or its guests. Landlord shall not be liable for damages to Tenant caused by the negligence or inten-

tional misconduct of third-parties, including other tenants, unless Landlord has received written notice of the same and had an opportunity to repair the same in accordance with the timeframes for repair specified in this Section. Such waiver of liability includes, without limitation, damage to or hazardous conditions created in the common areas shared with other tenants.

To Include a Comprehensive Maintenance Obligation:

This language is primarily for use in the context of residential housing.

Landlord hereby covenants with Tenant that the Premises shall be maintained in working order and in a habitable condition. For purposes of this Agreement, "habitable condition" shall mean: (i) maintaining the roof and building envelope from intrusion of water; (ii) only if the Premises is provided with central heat and air conditioning, maintaining the heating, ventilation and air condition system in a manner that it can heat the Premises to at least 70°F and cool the Premises to at least 75°F, both temperatures to be measured at the location of the thermostat; (iii) providing functioning sewer service; (iv) providing functioning potable water service; (v) providing safe electrical service in the Premises; and (vi) maintaining the Premises in compliance with all applicable building codes (provided, such covenant shall not obligate Landlord to make modifications that are not required under applicable law because the Premises qualifies for an exception under applicable grandfathering).

In addition to maintaining the Premises in a habitable condition, Landlord's maintenance obligations shall also include maintaining and repairing all mechanical, electrical and structural elements of the Premises, including common areas shared with other tenants associated with the Premises, subject to the following maintenance obligations that are the responsibility of Tenant: [List of Tenant maintenance obligations such as mowing or maintaining the landscaping].

Landlord has no duty to inspect the Premises and is depending on Tenant to notify Landlord of any necessary repairs or maintenance. Landlord shall not be responsible for inspecting the Premises to determine whether it is in a habitable condition but shall undertake such maintenance or repairs as are necessary to restore the Premises to a habitable condition within a reasonable time after Landlord's receipt of notice, such time to be not less than [ ] days and not more than [ ] days; provided, Landlord shall undertake the repairs as quickly as possible if necessary for the safety of the occupants of the Premises. Landlord has no obligation to conduct after-hours or weekend repairs unless (i) the repair is necessary for the safety of the occupants of the Premises or (ii) Tenant agrees to pay for the additional cost of such after-hours or weekend repairs.

Tenant's remedies for Landlord's failure to maintain the Premises in habitable condition after notice and opportunity to cure the same in accordance with the foregoing paragraph shall be limited to: (i) withholding payment of rent for the days that the Premises remain uninhabitable; and (ii) recovering the cost of temporary alternative housing (not to exceed \$\_\_\_\_\_ per day) if the Premises remain uninhabitable for more than [specify number of days] days; provided, in lieu of restoring the Premises to a habitable condition, Landlord may terminate this Agreement and have no further liability after delivering notice of termination by paying Tenant the reasonable costs of moving to new housing (not to exceed \$\_\_\_\_\_). In the event the Premises are not in a habitable condition due to a casualty beyond the control of Landlord, Landlord shall have the option to terminate this Agreement in lieu of paying Tenant for the cost of temporary alternative housing or moving to new housing. The maintenance obligations of Landlord pursuant to this Section do not obligate Landlord to pay the cost of the utility service unless otherwise provided in this Agreement. The maintenance obligations of Landlord pursuant to this Section do not include temporary service outages caused by forces beyond Landlord's control (such as an electrical service disruption caused by a storm). Tenant is responsible for the cost of replacing light bulbs and air filters.

Tenant shall immediately reimburse Landlord for the cost of the maintenance or repairs necessitated by the negligence or intentional misconduct of Tenant or its guests. Landlord shall have no liability to Tenant for damages resulting from maintenance or repairs necessitated by the negligence or intentional misconduct of Tenant or its guests. Landlord shall not be liable for damages to Tenant caused by the negligence or intentional misconduct of third-parties, including other tenants, unless Landlord has received written notice of the same and had an opportunity to repair the same in accordance with the timeframes for repair specified in this Section. Such waiver of liability includes, without limitation, damage to or hazardous conditions created in the common areas shared with other tenants.

To Include a Maintenance Obligation Limited to the Building Envelope, HVAC System and Common Areas:

This language is primarily for use in the context of a commercial lease.

Landlord shall maintain the roof, exterior walls and structural components, sprinkler system, exterior canopies, gutters, water spouts, utility services extending to the service connection, landscaping, HVAC (heating, ventilation and air conditioning) system, common areas shared with other tenants (if any), parking lot and driveway in satisfactory condition during the term (subject to contribution from Tenant for damage to any of these structures caused by Tenant, its employees, agents, licensees or invitees). Landlord shall not be responsible for any damages caused by



failure to maintain any of the foregoing items unless and until Landlord has received written notice of a problem and has had a reasonable time to repair the same, such time to be not less than [ ] days and not more than [ ] days after Landlord's receipt of such notice. Landlord has no obligation to conduct after-hours or weekend repairs unless Tenant agrees to pay for the additional cost of such after-hours or weekend repairs. Tenant shall keep and maintain, at its sole cost and expense, in good order and repair, all of the Premises for which the Landlord is not obligated to repair and maintain, including, without limitation, the interior of the Premises, generally, plate glass, storefront and doors, interior plumbing and electrical systems and fixtures, Tenant's trade fixtures, vents and fans, cleanliness of the sidewalk directly in front of Tenant's Premises, and any portion of the Premises which is designated for the exclusive use of Tenant.

To Disclaim Liability for Criminal Acts:

Though Arkansas does not impose liability on landlords for the criminal acts of third parties absent an assumption of an obligation to do so in the lease agreement, landlords may be concerned that including maintenance obligations in a lease could be interpreted as an assumption of that duty. The following language is intended to disclaim liability for criminal acts in those situations where a landlord may be hesitant to undertake maintenance obligations because of the associated potential for liability due to criminal acts.

Notwithstanding any provision of this Agreement making Landlord responsible for any maintenance, repair or upkeep of the Premises (if any), Landlord expressly disclaims, and Tenant waives, any liability related to any damages, whether to persons or property, caused by the criminal acts of third parties. No undertaking by Landlord, or provision of security devices (which may include, without limitation, locks, gates, lights or security guards), shall be deemed an assumption of a duty by Landlord to protect against criminal acts of third parties. Landlord shall not be liable to Tenant for the failure or inadequacy of any such security devices (if any).