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Anita D. Raddatz

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EXPANSION OF TENANTS' RIGHTS AND REMEDIES IN ILLINOIS: *GLASOE v. TRINKLE* AND THE IMPLIED WARRANTY OF HABITABILITY

Landlords' and tenants' expectations regarding their rights and duties in a residential lease have changed dramatically in the last twenty years.¹ The notion that a lease conveys a package of goods and services encompassing not only the dwelling itself, but also heat, light, plumbing, and other modern necessities,² has replaced the feudal concept under which a lease merely gave the tenant a right to possess the land.³ The result is that courts are conditioning a tenant's duty to pay rent on a landlord's fulfillment of his implied duty to supply habitable premises.⁴ The response of many state legislatures to this common law de-

1. This shift in attitudes has been gradual since agrarian economy days. Many academic commentators in the 1960s and 1970s advocated judicial or legislative revision of a landlord's obligation toward rental housing. See generally Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 *FORDHAM L. REV.* 225 (1969-70) (discusses agrarian landlord-tenant law and current developments, and makes suggestions to alleviate problems). For a very generalized view of the development of the common law in this area, see Annotation, 40 *A.L.R.3D* 646 (1971 & Supp. 1984).

2. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970). *Accord* *Trentacost v. Brussel*, 82 N.J. 214, 225, 412 A.2d 436, 442 (1980).

3. The lease was regarded as a land conveyance with the landlord merely giving the tenant a right to possession. See, e.g., *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 189, 293 N.E.2d 831, 837 (1973); *Javins*, 428 F.2d at 1074. Because the lease transaction's essential component was the land, the tenant's rental obligations continued even if the dwelling burned or was otherwise destroyed. The rental obligation ceased only when the landlord repossessed the property or substantially interfered with the tenant's quiet enjoyment of the premises. See generally Lesar, *The Reform of Real Property Law—Symposium: Landlord and Tenant Reform*, 35 *N.Y.U. L. REV.* 1279 (1960); Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 *CORNELL L. REV.* 489 (1971).

4. Courts generally state that this "implied warranty of habitability" means the landlord impliedly represents that facilities vital to the dwelling's use as a residence are free from latent defects and that the premises will remain safe, sanitary, and habitable throughout the lease term. See, e.g., *Kline v. Burns*, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971). For a descriptive analysis of the implied warranty of habitability, see Eaton,

velopment is the enactment of housing and building codes⁵ establishing minimum standards of habitability.⁶ In *Glasoe v. Trinkle*⁷ the Illinois Supreme Court held that the implied warranty of habitability applies to leases of residential property in areas with or without housing or building codes.⁸

Glasoe, a landlord, brought an action against his former tenants, the Trinkles, for back rent.⁹ The tenants raised an affirmative defense of breach of the implied warranty of habitability.¹⁰ They alleged that the landlord had breached the warranty because defects and substandard conditions made the premises unsafe, unhealthful, and unfit for occupancy.¹¹ The trial court dismissed the affirmative defense for failure to

The Implied Warranty of Habitability in Illinois: Prairie State Lags Behind Other Industrial States in Landlord-Tenant Law, 1979 S. ILL. U.L.J. 183, 183-86 (1979-80).

Not every state has adopted the implied warranty of habitability. See, e.g., *Cappaert v. Junker*, 413 So. 2d 378 (Miss. 1982) (lessee takes premises as he finds them, without implied covenant of fitness; lessor is not obligated to make repairs); *Blackwell v. Del Bosco*, 191 Colo. 344, 558 P.2d 563 (1976) (en banc) (no implied warranty for residential premises in landlord-tenant relationship).

5. Although courts sometimes use the terms interchangeably, "building code" and "housing code" are not identical. Building codes protect against faulty design and construction, while housing codes set out minimum living standards in already existing and new residential structures. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM A-28 at 11-12 (Jan. 1966). See also D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 152 (1971) (building codes apply to new construction, while housing codes regulate existing housing and conditions of occupancy).

A typical housing code is found in N.J. STAT. ANN. §§ 55:13A-1 to 13A-28 (West Supp. 1985).

6. Courts and legislatures in at least 40 state jurisdictions and the District of Columbia have judicially adopted or legislatively enacted the implied warranty of habitability. Mallor, *The Implied Warranty of Habitability and the "Non-Merchant" Landlord*, 22 DUQ. L. REV. 637, 637-38 n.3 (1984).

For a comprehensive review of landlord-tenant legislation, see Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3 (1979). The trend is toward increasing the landlord's responsibility to provide suitable premises. For example, many states have enacted statutes modeled after the Uniform Residential Landlord and Tenant Act, UNIF. RESIDENTIAL LANDLORD AND TENANT ACT §§ 1.102-6.104, 7B U.L.A. 427 (1985), or on other model codes detailing landlords' duties and tenants' remedies for breach. Cunningham, *supra*, at 7.

7. 107 Ill. 2d 1, 479 N.E.2d 915 (1985).

8. *Id.* at 10, 479 N.E.2d at 918.

9. *Id.* at 5, 479 N.E.2d at 916.

10. *Id.*

11. *Id.* at 7, 479 N.E.2d at 917. The Trinkles claimed that problems with the plumbing caused their toilet to overflow. In addition, sewage leaked through two bed-

state a cause of action, holding that the Trinkles could not raise the implied warranty of habitability defense because the city in which they lived did not have a housing code applicable to rental housing.¹² The appellate court affirmed the dismissal, holding that because the city did not have an applicable building code, no way existed to prove breach of an implied warranty of habitability.¹³ On appeal, the Illinois Supreme Court reversed, holding that the warranty applies to all leases of residential real estate, regardless of the existence of a housing or building code.¹⁴

Traditionally, parties to a lease looked upon the lease as a land conveyance,¹⁵ carrying only those guarantees associated with land transfer.¹⁶ The tenant took possession of the leased premises subject to the

room ceilings and accumulated in the yard, the bathroom ceiling collapsed, water leaked through the kitchen ceiling, the furnace and space heater did not work properly, the front door was difficult to open and close, the back porch was decaying, windows and doors were improperly sealed, and cockroaches and rodents infested the unit. *Id.*

Among their affirmative defenses, the Trinkles claimed that, because of an unsafe furnace, they were constructively evicted. *Id.* at 6, 479 N.E.2d at 916. The Trinkles counterclaimed for the difference between the rent actually paid and the unit's fair rental market value, the cost to replace beds and bedding damaged by the ceiling leaks, and for higher utility bills resulting from the heating problems. *Id.* at 7-8, 479 N.E.2d at 917. The Trinkles further counterclaimed for the difference in rent between the old and the new premises. *Id.* at 6, 479 N.E.2d at 916. They alleged that the landlord had not returned their security deposit, and counterclaimed for that amount, as well as for indemnification for collect telephone calls that the landlord had charged to their phone. *Id.* at 8, 479 N.E.2d at 917.

The trial court found that the landlord's failure to fix the furnace had constructively evicted the Trinkles, and awarded damages. *Id.* at 8-9, 479 N.E.2d at 917. Glasoe stipulated to the last affirmative defense and last two counterclaims. *Id.* at 9, 479 N.E.2d at 918. The trial court deducted the setoffs from the total amount of rent owed and entered a judgment for the landlord for the balance. *Id.*

12. *Id.*

13. *Glasoe v. Trinkle*, 123 Ill. App. 3d 132, 462 N.E.2d 888 (1984), *rev'd*, 107 Ill. 2d 1, 479 N.E.2d 915 (1985).

14. 107 Ill. 2d at 10, 479 N.E.2d at 918. The court remanded for a determination of whether the implied warranty of habitability was in fact materially breached. *Id.* 15, 479 N.E.2d at 921.

15. Because the land was the integral part of the conveyance, any structures thereon were only incidental to the transfer. *See, e.g., Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (land was the most important part of common law leasehold); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973) (at common law, land and not premises was essential part of lease transaction).

16. The lessor had a duty to deliver the land, but no continuing duty to transfer, repair, or maintain suitable premises. *See generally* 1 AMERICAN LAW OF PROPERTY, §§ 3.37, 3.78 (A. Casner ed. 1952); *Lesar, supra* note 3, at 1285.

doctrine of *caveat emptor*¹⁷ and had no recourse against the landlord for defects either existing in the premises at the lease's inception or that developed over the course of the tenancy.¹⁸ The first major break with this tradition occurred in *Ingalls v. Hobbs*.¹⁹ In *Ingalls* the tenant leased a house for the summer.²⁰ At the time the tenant took possession, the house was infested with bugs.²¹ After the tenant refused to pay rent, the landlord sued.²² The Massachusetts Supreme Judicial Court held that a landlord who rented a furnished house for a summer impliedly agreed that the house was suitable for immediate occupancy.²³ The court stated that in short-term leases of furnished dwellings, the lease is not for the land itself but for the opportunity to enjoy the premises without delay.²⁴

Despite *Ingalls*, independent covenant rules of property law, stating that landlords' and tenants' duties are independent of each other, limited a tenant's remedy for his or her landlord's failure to provide habitable premises.²⁵ The tenant was confined to sue for damages resulting from the landlord's failure to deliver suitable premises.²⁶ The tenant could not withhold rent for defective premises.²⁷ To compensate for these inequalities and to protect parties' expectations, courts in the

17. The tenant takes the premises as he finds them, assuming all risk as to their fitness. W. WALSH, TREATISE ON THE LAW OF PROPERTY § 172 (2d ed. 1937).

18. In fact, unless the landlord expressly agreed to keep the premises in repair, the tenant had the *duty* to repair. 1 AMERICAN LAW OF PROPERTY, § 3.78 (A. Casner ed. 1952). A tenant could, therefore, not refuse to pay rent or insist that the landlord repair the dwelling if substantial defects developed or if the building burned down. *Id.* § 3.103. See, e.g., *Fowler v. Bott*, 6 Mass. 63 (1809) (lessee liable for full rent after mill on premises burned down).

19. 156 Mass. 348, 31 N.E. 286 (1892).

20. *Id.* at 348, 31 N.E. at 286.

21. *Id.* at 349, 31 N.E. at 286.

22. *Id.* at 348, 31 N.E. at 286.

23. *Id.* at 350, 31 N.E. at 286-87.

24. *Id.*, 31 N.E. at 286. The court reasoned that a tenant in this circumstance could not easily determine fitness upon inspection and, therefore, the doctrine of *caveat emptor* created an injustice. *Id.*

25. See 3 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1115 (1980).

26. *Id.* Some courts merely held the lease unenforceable. See, e.g., *Brown v. Southall Realty*, 237 A.2d 834 (D.C. 1968) (lease declared invalid because executed while premises violated housing code).

27. 1 AMERICAN LAW OF PROPERTY, § 3.11 (A. Casner ed. 1952).

1960s and 1970s began applying contract rules to residential leases.²⁸ Under contractual duties, if one party does not perform, the other party is not obligated to perform.²⁹ A landlord's breach of his obligation to provide fit premises thus alters a tenant's duty to pay rent.³⁰ In the seminal case of *Pines v. Perssion*³¹ the Wisconsin Supreme Court held that an implied warranty of habitability exists in every lease and the landlord breaches that warranty if he does not provide housing fit for occupation.³² The court concluded that the old rule of *caveat emptor* ignored the current need to ensure adequate housing for an increasing population.³³ Moreover, *Pines* applied mutually dependent covenant rules, holding that the landlord's breach of his covenant to

28. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

29. See, e.g., *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973) (tenant's obligation to pay rent dependent on landlord's obligation to provide suitable premises); *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470, reh'g denied, 51 Haw. 478 (1969) (tenant's obligation to pay rent dependent on landlord's performance of duty to provide habitable dwelling); *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979) (tenant's obligation to pay rent and landlord's obligation to provide and maintain habitable premises are mutually dependent promises). See generally Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 108-12 (1976) (discusses characterization of lease as contract with mutually dependent promises between landlord and tenant).

30. *Pugh*, 486 Pa. at 284, 405 A.2d at 903.

31. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

32. *Id.* at 596, 111 N.W.2d at 412-13. In *Pines* the lessees (5 students) arranged to rent a furnished house for the school year. They sued the lessor to recover their deposits after finding the house filthy and in violation of numerous building code requirements. *Id.* at 591-93, 111 N.W.2d at 411. The court held that the lessor had breached the lease's implied warranty of habitability and fitness, concluding that such a warranty does exist in residential leases. *Id.* at 595, 111 N.W.2d at 412.

33. *Id.* at 596, 111 N.W.2d at 413. The court referred to a building code and said the code reflected a legislative intent to impose minimum housing standards. Nevertheless, the court based its decision on the general "need and social desirability [for] adequate housing." *Id.* The *Pines* court stated that "[p]ermitt[ing] landlords to rent 'tumbledown' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes." *Id.*

But cf. *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970) (tenant cannot withhold rent based on alleged violations of housing code absent express legislative intent to modify common law landlord-tenant relationship with housing code). Although *Posnanski* may have overruled *Pines sub silentio*, courts frequently cite *Pines* and rarely mention *Posnanski*. See, e.g., *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973) (citing *Pines* for proposition that a lease is a contract); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973) (en banc) (*Pines* abolished doctrine of *caveat emptor*).

provide a habitable house relieved the tenants of liability for rent.³⁴

Nationwide acceptance of the implied warranty of habitability has grown since *Pines*.³⁵ The Illinois Supreme Court followed the general trend in 1972.³⁶ In *Jack Spring, Inc. v. Little*³⁷ two landlords sued their tenants for nonpayment of rent.³⁸ In defense, the tenants alleged various defects³⁹ that violated Chicago building code standards.⁴⁰ Of particular significance was the court's holding that a landlord satisfies the implied warranty of habitability if the premises substantially comply with the applicable building code.⁴¹

34. *Pines*, 14 Wis. 2d at 596, 111 N.W.2d at 413.

35. State courts, as well as state legislatures, have accepted and applied the warranty. See *supra* note 6 and accompanying text. See also RESTATEMENT (SECOND) OF PROPERTY § 5.1 (1977) (landlord breaches an obligation if property leased for residential purposes is not suitable for use).

Recent decisions have further expanded the implied warranty of habitability to include situations in which the landlord is strictly liable in tort for injuries to his tenants. For example, in *Becker v. IRM Corp.*, 38 Cal. 3d 454, 457, 698 P.2d 116, 117, 213 Cal. Rptr. 213, 214 (1985), the court found the landlord liable for tenant injuries caused by a defective shower door. The court based liability on the landlord's implied representation, in renting the unit, of the unit's fitness as a dwelling. *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

Similarly, the Supreme Court of New Jersey held that a landlord breached the implied warranty of habitability when, by providing inadequate security, he failed to prevent a criminal assault on a tenant. *Trentacost v. Brussel*, 82 N.J. 214, 228, 412 A.2d 436, 443 (1980). In *Trentacost* someone who had entered the high crime neighborhood apartment building through an unlocked front door assaulted the tenant. *Id.* at 218, 412 A.2d at 438. See also *Brown v. LeClair*, 20 Mass. App. 976, 482 N.E.2d 870 (1985) (landlord liable for damages after tenant assaulted by neighbor who punched hole through front door of apartment; door provided inadequate security).

36. As late as 1964, an appellate court had rejected the doctrine. See *Eskin v. Freedman*, 53 Ill. App. 2d 144, 203 N.E.2d 24 (1964) (landlord did not impliedly warrant that the rental premises would be safe, healthy, or fit for occupation).

37. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

38. Each landlord brought a forcible entry and detainer action against his tenant pursuant to the Illinois Forcible Entry and Detainer Act. ILL. REV. STAT. ch. 57, §§ 1-22 (1977) (repealed 1982; current version at ILL. REV. STAT. ch. 10, §§ 9-101 to -321 (1983)). The court consolidated the two cases after each tenant contended that the obligation to pay full rent depended on the landlord's fulfillment of his obligation to maintain the premises in a habitable condition. *Jack Spring*, 50 Ill. 2d at 357, 280 N.E.2d at 212.

39. One defendant also alleged wilful neglect and intentional refusal to repair defects. The other defendant alleged that her landlord had promised, then refused, to make certain repairs. *Id.* at 352-54, 280 N.E.2d at 210.

40. CHICAGO, ILL., MUN. CODE §§ 78-11 to -20 (1957) (current version at CHICAGO, ILL., MUN. CODE §§ 78-1 to -72 (1982)).

41. 50 Ill. 2d at 366, 280 N.E.2d at 217. Specifically, the court stated "[w]e hold

After *Jack Spring*, lower Illinois courts interpreted “substantial compliance with the building code” to mean that only tenants leasing premises subject to building or housing codes can bring an action or use a defense based on the implied warranty of habitability.⁴² The Illinois Supreme Court perpetuated this interpretation in *Pole Realty Co.*

that included in the contracts, both oral and written, governing the tenancies of the defendants in the multiple unit dwellings occupied by them, is an implied warranty of habitability which is fulfilled by substantial compliance with the pertinent provisions of the Chicago building code.” *Id.*

The court relied on *Schiro v. W. E. Gould & Co.*, 18 Ill. 2d 538, 165 N.E.2d 286 (1960). The court in *Schiro* stated that all applicable law existing at the time parties enter into a real estate contract automatically becomes part of the contract. *Id.* at 544, 165 N.E.2d at 290. The *Jack Spring* court accordingly held that the Chicago building code became part of the lease and that the landlord’s failure to comply with the code breached the contract. 50 Ill. 2d at 366, 280 N.E.2d at 217. Compare *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (housing code must be read into all housing contracts). See *infra* note 42 and accompanying text.

The author of the Illinois Supreme Court decision in *Glase* dissented in *Jack Spring*, stating that instead of an implied warranty of habitability, he would impose an implied covenant to repair. *Jack Spring*, 50 Ill. 2d at 374, 280 N.E.2d at 221 (Ryan, J., dissenting). See also *infra* note 55 and accompanying text.

42. *E.g.*, *Beese v. National Bank of Albany Park*, 82 Ill. App. 3d 932, 934, 403 N.E.2d 595, 579 (1980); *Dapkunas v. Cagle*, 42 Ill. App. 3d 644, 649-50, 356 N.E.2d 575, 579 (1976), *cert. denied*, 65 Ill. 2d 577 (1977). See also *infra* note 53 and accompanying text.

In contrast to the other implied warranty of habitability cases, *Beese*, *Dapkunas*, and *Auburn v. Amoco Oil Co.*, 106 Ill. App. 3d 60, 435 N.E.2d 780, *cert. denied*, 91 Ill. 2d 567 (1982), each involved tenant actions in tort against the landlord for personal injury. Using the implied warranty of habitability as a sword rather than a shield may have influenced the decisions of the courts. See generally discussion in *Eaton*, *supra* note 4, at 189-93.

Though agreeing with *Beese* and *Dapkunas*, the court in *Auburn* did not actually consider the issue of whether or not the leased dwelling must be subject to a building code before the implied warranty becomes applicable. *Auburn*, 106 Ill. App. 3d at 62, 435 N.E.2d at 781.

The lower courts’ interpretation of *Jack Spring* is understandable. The court in *Jack Spring* relied heavily on, and quoted extensively from, *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). In *Javins* the court concluded that an existing housing code required it to read a warranty of habitability into all residential leases that the code covered. See *id.* at 1080. Thus, even though all urban leases or housing contracts automatically include the housing code, *id.* at 1081, where no housing code exists, there is no way to measure the implied warranty of habitability. Accord *Schiro v. W. E. Gould & Co.*, 18 Ill. 2d 538, 165 N.E.2d 286 (1960) (contracts for sale of real estate are presumed executed in light of existing law and, therefore, a building or housing code existing at the time of contracting is deemed part of the contract).

v. *Sorrells*.⁴³

In *Pole Realty* the landlord sued the tenant for nonpayment of rent and failure to pay heating bills.⁴⁴ The tenant alleged as an affirmative defense that the landlord had breached the implied warranty of habitability because the condition of the residence violated the city housing code.⁴⁵ The appellate court reversed the trial court's conclusion that the implied warranty of habitability enunciated in *Jack Spring* did not apply to single family residences.⁴⁶ The Illinois Supreme Court affirmed this extension of *Jack Spring*.⁴⁷ The court reasoned that the tenant of a single unit dwelling has the same expectations of suitable housing as the tenant of a multiple unit dwelling.⁴⁸ In extending *Jack Spring* to single unit dwellings,⁴⁹ the court reiterated that the warranty is fulfilled when the landlord substantially complies with the applicable building code.⁵⁰

Following *Pole Realty*, the Illinois Supreme Court extended the implied warranty of habitability to new homes without requiring an existing building code.⁵¹ The appellate court in *Glase v. Trinkle*⁵²

43. 84 Ill. 2d 178, 417 N.E.2d 1297 (1981).

44. *Id.* at 179, 417 N.E.2d at 1298.

45. *Id.* at 180, 417 N.E.2d at 1298-99.

46. *Pole Realty Co. v. Sorrells*, 78 Ill. App. 3d 361, 366, 397 N.E.2d 539, 542 (1979), *aff'd in part and rev'd in part*, 84 Ill. 2d 178, 417 N.E.2d 1297 (1981).

47. 84 Ill. 2d at 182, 417 N.E.2d at 1299-1300.

48. *Id.*

49. *Id.* at 182, 417 N.E.2d at 1299. Other jurisdictions have reached similar conclusions. *See, e.g., Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972) (implied warranty of habitability applicable to leased single family home).

50. 84 Ill. 2d at 182, 417 N.E.2d at 1299. After *Pole Realty*, lower Illinois courts variously applied the scope of the implied warranty of habitability. *See infra* notes 51-54 and accompanying text.

The confusion thus engendered was exacerbated by the Illinois appellate court structure. *See Eaton, supra* note 4, at 191. Illinois has one intermediate appellate court and five district courts. *Id.* Conclusions of one district do not bind other districts, but conclusions of any district bind all circuit courts. *Id.* When district court conclusions conflict, the circuit court must adhere to the decision of the appellate court in its district. *Id.*

51. In *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979), the Illinois Supreme Court held that in new home sales, the builder-vendor impliedly warrants that the house is fit for residential use. *Id.* at 39-40, 389 N.E.2d at 1157-58. The court found the house safe, but substantial construction defects made it unfit for its intended use. *Id.* at 36, 389 N.E.2d at 1156. Defects included a basement floor slanted in the wrong direction from the drain, improperly installed siding, and a defective bay window. *Id.* The court analogized the implied warranty of habitability to ¶ 2-314 (implied warranty of merchantability) and ¶ 2-315 (implied warranty of fitness for a partic-

refused, however, to extend the warranty in residential leases, emphasizing the *Pole Realty* notion that the rights created in *Jack Spring* depended upon the existence of a building code.⁵³ Reversing the lower court's decision, the Illinois Supreme Court in *Glasse*⁵⁴ held that neither a building nor a housing code is a prerequisite to finding an implied warranty of habitability.⁵⁵ The court stated that *Jack Spring* referred to a building code only because the leased property happened to be in a city with an applicable building code.⁵⁶ The court reasoned that like tenants living in areas with building or housing codes, tenants living in areas without building or housing codes expect habitable premises.⁵⁷ Because Illinois courts had extended the implied warranty of habitability to the sale of new homes without depending on building

ular purpose) of the Uniform Commercial Code as adopted in Illinois. *Id.* at 42, 389 N.E.2d at 1158. See ILL. REV. STAT. ch. 26, §§ 2-314, 2-315 (1983).

Cf. Park v. Sohn, 89 Ill. 2d 453, 463, 433 N.E.2d 651, 656 (1982) (implied warranty of habitability exists even where builder-vendor has lived in house prior to sale).

52. 123 Ill. App. 3d 132, 462 N.E.2d 888 (1984), *rev'd*, 107 Ill. 2d 1, 479 N.E.2d 915 (1985).

53. *Id.* at 135, 462 N.E.2d at 890. The court said that *Jack Spring* created only a landlord duty to obey building codes and refused to apply the warranty to all leased real estate. *Id.* at 134-35, 402 N.E.2d at 890.

Other Illinois appellate court decisions had previously stressed the necessity of proving building code violations. See, e.g., *Dapkunas v. Cagle*, 42 Ill. App. 3d 644, 356 N.E.2d 575 (1976), *cert. denied*, 65 Ill. 2d 577 (1977) (ruling in *Jack Spring* applied only to areas with applicable building codes).

The court further determined that *Jack Spring* intended only to create a landlord duty to obey building codes, and not new common law in the landlord-tenant relationship. 123 Ill. App. 3d at 135, 462 N.E.2d at 890. The court concluded that because no building code existed in the city, the Trinkles' lease did not contain an implied warranty of habitability. *Id.* at 136, 462 N.E.2d at 891.

54. 107 Ill. 2d 1, 479 N.E.2d 915 (Ill. 1985).

55. *Id.* at 10, 479 N.E.2d at 918. Justice Ryan authored the majority opinion. His authorship is significant because he previously did not consider the implied warranty of habitability to exist in areas without building or housing codes. See *supra* note 41 and accompanying text. His ultimate acceptance of the implied warranty of habitability is indicative of the Illinois courts increasing acceptance of the warranty.

56. *Id.* at 11, 479 N.E.2d at 918-19.

57. *Id.* at 11, 479 N.E.2d at 919. The court also relied on *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979), in which the Pennsylvania Supreme Court held that breach of the implied warranty of habitability does not depend on proof of a housing code violation. The *Pugh* court stated that such a requirement would unnecessarily restrict the situations in which courts could find such breach. *Id.* at 290, 405 A.2d at 906.

The court in *Pugh* also refused to accept the landlord's argument that because a Pennsylvania rent withholding statute showed a legislative intent to improve tenants' remedies, courts should not develop more common law standards. *Id.* at 285, 405 A.2d at 903.

or housing codes, the court found it "illogical and inconsistent" to require a building or housing code for rental housing.⁵⁸

The court further stated that the legislature should establish minimum habitability standards,⁵⁹ but because this had not been done, the court provided some guidelines for determining habitability.⁶⁰ The court also enumerated factors relevant in determining breach of the implied warranty of habitability.⁶¹ These factors include the nature of the defect, its effect on habitability and amount of time it persisted, the age and location of the building, the amount of rent paid, and whether the tenant waived the defect or caused it through abnormal or unusual use.⁶² The court stressed that the defects must be substantial enough to make the premises uninhabitable to a person with reasonable sensitivities.⁶³

58. *Glaoe*, 107 Ill. 2d at 11, 479 N.E.2d at 919. See also Brief of Amicus Curiae in Support of Defendants-Appellants Jerry Trinkle and Diane Trinkle at 9, *Glaoe v. Trinkle*, 479 N.E.2d 915 (Ill. 1985). See *supra* note 51 and accompanying text.

59. 107 Ill. 2d at 12, 479 N.E.2d at 919. One month before the appellate court decision in *Glaoe*, Representatives Johnson and Breslin introduced the Illinois Residential Owner and Resident Act to the Illinois General Assembly. H. 0695, 84th Gen. Assembly (Ill. 1985-86) [hereinafter the Act]. The Act prescribes both owner and resident rights and duties under a dwelling unit rental agreement. *Id.* at 1. Section 2.104 provides that the owner must maintain the premises in a habitable condition at all times, and lists minimum standards of habitability. *Id.* at 17. Section 4.101 provides for tenant remedies when the owner does not comply with the Act's requirements. *Id.* at 27. This bill was tabled one month before the Illinois Supreme Court's decision in *Glaoe*. Telephone interview with Mary Holmes, Supervisor of Journal Room, House of Representatives Clerk's Office, State of Illinois (Sept. 6, 1985).

Two comparable bills, the Tenants Bill of Rights Act and "an act which provides for lessees when lessors fail to maintain premises suitable for habitation," were on interim study. H. 0329, H. 2227, 84th Gen. Assembly (Ill. 1985-86). Telephone interview with Mary Holmes, Supervisor of Journal Room, House of Representatives Clerk's Office, State of Illinois (Sept. 6, 1985).

60. *Glaoe*, 107 Ill. 2d at 13-14, 479 N.E.2d at 919-20. See also *supra* note 4 and accompanying text.

61. 107 Ill. 2d at 14, 479 N.E.2d at 920.

62. *Id.* The court relied on and cited factors enunciated by other courts. *E.g.*, *Kline v. Burns*, 111 N.H. 87, 93, 276 A.2d 248, 252 (1971); *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Berzito v. Gambino*, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973).

63. 107 Ill. 2d at 14, 479 N.E.2d at 920. *Accord* *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (landlord need not ensure that the premises are perfect and aesthetically pleasing).

The court then suggested the following ways for computing damages: (a) the "percentage reduction in use" approach reduces the tenant's rent by a percentage reflecting the diminution in value and enjoyment of the premises resulting from the defects, 107 Ill. 2d at 15-16, 479 N.E.2d at 921; (b) the "difference in value" approach measures damages by (1) the difference between the fair rental value of the premises as warranted

Although the *Glase* court professed to not establish rigid minimum habitability standards, it clearly laid the foundation for such standards by listing factors that lower courts should consider to determine whether a landlord has breached the implied warranty of habitability.⁶⁴ The Illinois Supreme Court falls into line with other jurisdictions that have expanded tenants' rights and established minimum standards of habitability in the absence of effective legislation.⁶⁵ *Glase* indicates a judicial concern for extending the same protections to tenants living in areas without building or housing codes as those living in areas with such codes.⁶⁶ Most tenants probably do not know whether a building or housing code exists in their city and those who are aware of such codes may not be familiar with the required minimum standards.

Because the *Glase* court did not formulate a more specific test, however, problems will occur as lower courts attempt to establish the warranty's contours and apply them on a case-by-case basis.⁶⁷ A particularly problematic situation will confront both landlords and tenants in areas without building or housing codes. Because living stan-

and the fair rental value of the premises during occupancy in the unfit condition, or (2) the difference between the agreed rent and the fair rental value of the premises during occupancy in the unfit condition. *Id.*

The court stated the agreed rent may indicate fair rental value and recommended on remand, if the trial court finds a breach of the implied warranty, that it use the difference in value approach. *Id.* at 17, 479 N.E.2d at 921-22. *Accord* *Hilder v. St. Peter*, 144 Vt. 150, 478 A.2d 202 (1984) (court may look to agreed rent as evidence of fair rental value of premises as warranted).

See generally Fusco, Collins & Birnbaum, *Damages for Breach of the Implied Warranty of Habitability in Illinois—A Realistic Approach*, 55 CHI.-KENT L. REV. 337 (1979) (discusses different damage formulas and recommends "loss of use to tenant" theory, in which damages reflect tenant's loss of use and enjoyment of leased premises due to defective conditions causing lessened habitability).

64. *See supra* notes 61-62 and accompanying text.

65. Recent bills introduced in the Illinois legislature failed to obtain enough legislative support to become law. *See supra* note 59 and accompanying text.

Why no further legislative action has occurred on these bills is unclear. One author suggests that lack of legislative action may indicate a legislative and judicial belief that changing the law on the books will have little effect on the landlord-tenant relationships. Cunningham, *supra* note 6, at 153. *See also* Eaton, *supra* note 4, at 207 (land-owning legislators do not support landlord-tenant reform; landlords are well represented by powerful lobbying groups).

66. *See supra* notes 57-62 and accompanying text.

67. Additionally, each district court must establish its own specific standards, which may or may not conflict with standards established by other district courts, and the circuit courts below will need to harmonize all district court decisions. *See also supra* note 49 and accompanying text.

dards and tenant expectations vary, tenants will not know how to determine whether the premises are habitable. Nor will landlords know exactly when a rental unit's condition is below standard. As a result, landlords found to have breached the implied warranty of habitability may claim lack of due process or notice. Additionally, tenants still will not know when they are justified in withholding or deducting rent because of defective conditions in the rental premises.

The implications of *Glasoe* are uncertain. The next logical step is for Illinois courts to expand residential landlord-tenant law and find landlords liable for personal injuries to the tenant attributable to defective premises⁶⁸ or criminal activity of third persons.⁶⁹ The view that the implied warranty of habitability provides no basis for tort liability is inconsistent with the policies that led to the warranty's creation.⁷⁰ Illinois courts are thus likely to expand the situations in which residential landlords are liable for breach of the implied warranty of habitability.

Glasoe is consistent with the national trend of creating and enforcing tenants' rights.⁷¹ The court recognized a tenant's expectations and rights to safe and sanitary housing and established a rule implying the warranty of habitability in all residential leases. The decision not to articulate precise minimum standards, however, creates more uncertainty for the lower courts, as well as for landlords and tenants. The failure to set minimum standards might, in fact, undermine an otherwise potentially effective tenant remedy for inadequate housing.

Anita D. Raddatz

68. See *supra* note 35 and accompanying text.

69. *Id.*

70. See Mallor, *supra* note 6, at 650-51.

71. See *supra* note 6 and accompanying text.