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LANDLORD AND TENANT-LIABILITY OF LANDLORD TO PERSONS ON THE PREMISES-THE "CONCEALED DEFECTS" EXCEPTION

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LANDLORD AND TENANT—LIABILITY OF LANDLORD TO PERSONS ON THE PREMISES—THE "CONCEALED DEFECTS" EXCEPTION—Plaintiff sought to recover for injuries suffered in consequence of the defective condition of a stairway in the manufacturing plant leased by her employer from defendant. The stairway was in the sole control of the tenant at the time of the injury; the lease stipulated that no warranty was made as to the condition of the premises; and the sole obligation to repair was borne by the tenant. Liability was claimed, however, upon the contention that the stairway had been in dangerous condition at the time of the letting. It was apparently little used, and plaintiff had used it only once before in eight months. No claim was made that the nature of her purpose at the time of the injury did not preclude use of one of the stairways customarily used. There was no evidence that either the landlord or the tenant knew of the condition, but whatever danger existed was apparently entirely patent. On appeal from the United States District Court for the Eastern District of Tennessee, *held*, judgment directing a verdict in favor of the landlord reversed. Liability can be predicated on grounds of negligence when premises are let in an unsafe and dangerous condition, if the lessor knew or should have known of the dangerous condition. An employee of the tenant stands in the position of a third person whose right to recovery is not barred by any contract between his employer and the landlord. *Kaylor v. Magill*, (6th Cir. 1950) 181 F. (2d) 179.

Although the lessor is generally said to make no warranty as to the condition of the premises demised and therefore to bear no liability to the tenant or to another standing in his right for an injury resulting from a dangerous condition thereon,[1] all of the courts recognize, inter alia, an exception to this rule in the case of such a condition the existence of which the lessor concealed from the tenant at the time of the letting. As this exception is most generally stated, there is imposed on the landlord the obligation to disclose to his prospective tenant the existence of a condition of which he is cognizant and which he knows to be dangerous, if he can anticipate that the tenant will not discover its existence in the usual course of occupation.[2] As to the logical basis for the imposition of this obligation, the courts are not in agreement: some see it to be in the nature of fraud when the lessor conceals such a condition from the tenant;[3] others see it

[1] Robbins v. Jones, 15 C.B. (n.s.) 221 (1863); Cowen v. Sunderland, 145 Mass. 363, 1 Am. St. Rep. 469 (1887); Akerley v. White, 58 Hun. 362, 12 N.Y.S. 149 (1890); McKenzie v. Cheetham, 83 Me. 543, 22 A. 469 (1891); Fraser v. Kruger, (8th Cir. 1924) 298 F. 693; Harris v. Lewistown Trust Co., 326 Pa. 145, 191 A. 34 (1937); 1 TIFFANY, LANDLORD AND TENANT §§ 86a, 96a (1912); PROSSER, TORTS § 81 (1941); TORTS RESTATEMENT §356 (1934); Harkrider, "Tort Liability of a Landlord," 26 MICH. L. REV. 260 and 383 (1928); Eldredge, "Landlord's Tort Liability for Disrepair," 84 UNIV. PA. L. REV. 467 (1936); 49 MICH. L. REV. 449 (1951); cases collected in 34 L.R.A. 609, 824 (1897), 34 L.R.A. (n.s.) 798 (1911), 50 L.R.A. (n.s.) 286 (1914).

[2] Cowen v. Sunderland, supra note 1; McKenzie v. Cheetham, supra note 1; Fraser v. Kruger, supra note 1; 1 TIFFANY, LANDLORD AND TENANT § 86d (1912); PROSSER, TORTS § 81a (1941); Harkrider, "Tort Liability of a Landlord," 26 MICH. L. REV. 260 at 264 (1928).

[3] Akerley v. White, supra note 1; Fraser v. Kruger, supra note 1; Brown v. Webster Realty Co., 7 N.J. Misc. 587, 146 A. 671 (1929); O'Neil v. Brown, 158 Ky. 118, 164

instead to be negligence;[4] a few cases seem to confuse this matter with the incipient nuisance idea, categorizing as "third persons" some persons usually thought to stand in the right of the tenant, for the purpose of application of the idea.[5] Since the landlord can be held liable only for injuries of which his breach of the obligation was proximate cause, the application of the "concealed defect" exception is limited to those cases where the tenant had no actual knowledge of the dangerous condition.[6] A good many cases make some reference to "constructive knowledge" on the part of the landlord as satisfying the requirement that he know of a defect in order to be under an obligation to disclose its existence to his tenant;[7] it is seldom, however, that the courts responsible for the reference mean other than that the landlord, while not actually knowing of a dangerous condition, possesses such information as would lead a reasonable man to suspect the existence of one. The language of the Tennessee cases, however, going back to the holding in the *Willcox* cases,[8] would seem to put upon the

S.W. 315 (1914); Morgan v. Sheppard, 156 Ala. 403, 47 S. 147 (1908); PROSSER, TORTS § 81a (1941).

[4] Honan v. Kinney, 205 Minn. 485, 286 N.W. 404 (1939); 1 TIFFANY, LANDLORD AND TENANT § 86d (1912). Tiffany sees basing liability on fraud as requiring an illogical limitation on the class of persons whose rights can be derived therefrom, § 96b.

[5] Deutsch v. Max, 318 Pa. 450, 178 A. 481 (1935), overruled in Harris v. Lewistown Trust Co., 326 Pa. 145, 191 A. 34 (1937); Reichenbacher v. Pahmeyer, 8 Ill. App. 217 (1881), impliedly overruled in Soibel v. Oconto Co., 299 Ill. App. 518, 20 N.E. (2d) 309 (1939).

The practically uniform holding today is that the tenant's employee or guest, or another entering under his title, has no greater right than the tenant himself with respect to injury due to dangerous conditions on the premises. Soibel v. Oconto Co., supra; Harris v. Lewistown Trust Co., supra; Fraser v. Kruger, supra note 1. It is probable that there is no room left for application of a nuisance theory for the benefit of persons on the premises. Harris v. Lewistown Trust Co. supra. Cf. Morgan v. Sheppard, supra note 3. See cases collected at 110 A.L.R. 756 (1937).

[6] Newman v. Golden, 108 Conn. 676, 144 A. 467 (1929); Moynihan v. Allyn, 162 Mass. 270, 38 N.E. 497 (1894); Akerley v. White, supra note 1; Harrill v. Sinclair Refining Co., 225 N.C. 421, 35 S.E. (2d) 240 (1945); Harris v. Lewistown Trust Co., supra note 1.

[7] Elijah A. Brown Co. v. Wilson, 191 Ga. 751, 13 S.E. (2d) 779 (1941); Dennis v. Rockefeller Center, 270 App. Div. 524, 60 N.Y.S. (2d) 515 (1946); Breimhorst v. Beckman, 227 Minn. 409, 35 N.W. (2d) 719 (1949).

[8] Lucy Hines v. Willcox, 96 Tenn. 148, 328, 33 S.W. 914, 34 S.W. 420 (1896); Stenberg v. Willcox, 96 Tenn. 163, 328, 33 S.W. 917, 34 S.W. 420 (1896); Willcox v. Lillie Hines, 100 Tenn. 524, 45 S.W. 781 (1898); (on second appeal) Willcox v. Lucy Hines, 100 Tenn. 538, 46 S.W. 297 (1898). The cases involved claims against a landlord for injuries consequent to the collapse of a second story porch which was a part of the demised premises, brought respectively by the tenant, a boarder, and a child of the tenant. Possibly the landlord could have been held liable upon traditional grounds of misfeasance, for there was evidence presented that a carpenter had made repairs to the porch on the landlord's order, following complaint by the tenant, but negligently failed to discover the principal structural defects, and had told the tenant, "The porch is all safe now." Willcox v. Lillie Hines, 100 Tenn. 524 at 530.

The Stenberg case is often cited as extending the "public use" exception to the case of a boarding house, and there is language therein to support this. See Eldredge, "Landlord's Tort Liability for Disrepair," 84 UNIV. PA. L. REV. 467 at 489 (1936); 49 MICH. L. REV. 449 (1951).

landlord the additional obligation to inspect the premises before leasing them, and to charge him with liability on account of not only those defects of which he had some knowledge or suspicion but also those which he could have found by making a "reasonable inspection."[9] This liability is seen to rest on a negligence theory.[10] The approach has been widely criticized,[11] though largely because of its inconsistency with an analysis of the "concealed defect" exception on a fraud theory.[12] In accord with the usual limitation,[13] the Tennessee court will not hold a landlord liable for an injury caused by a defect of which the tenant had actual knowledge,[14] nor of which he could have become aware.[15] The in-

[9] The same rule, now codified, was adopted by decision by the Louisiana court. Lasyone v. Zenoria Lumber Co., 163 La. 185, 111 S. 670 (1927). It has also been so held by other courts, on the foundation of a statute placing the obligation to repair dwelling houses on the fee owner, whether in possession or not. See cases collected at 93 A.L.R. 783 (1934); 101 A.L.R. 408 (1936); 132 A.L.R. 865 (1941); Harkrider, "Tort Liability of a Landlord," 26 MICH. L. REV. 260 and 383 at 383 (1928).

There is basis for Tiffany's contention that the Tennessee court would limit the application of the Willcox approach to those cases where all courts would hold the landlord liable for having failed to disclose facts which would reasonably lead him to suspect the existence of a concealed defect. 1 TIFFANY, LANDLORD AND TENANT § 86d (1912). In Edington v. Kreis-Keener Shoe Co., 153 Tenn. 323, 283 S.W. 987 (1926), a tenant was held to have failed to show that the landlord by a reasonable inspection could have discovered the improper construction of a ceiling which would tend to be dangerously weakened by a leak in the roof overhead. In Bishop v. Botto, 16 Tenn. App. 178, 65 S.W. (2d) 834 (1932) (cert. den. by Tennessee Supreme Court), a landlord was not charged with knowledge of the existence of a capped cistern which exploded, although it was only a few inches beneath the soil under the house. In Diamond v. Drew, 17 Tenn. App. 488, 68 S.W. (2d) 955 (1933) (cert. den. by Tennessee Supreme Court), no recovery on the Willcox theory was allowed a tenant injured by the collapse of a platform from the failure of its supporting sleeper, although the sleeper was assumed to have been in a state of dangerous decay at the time of the letting, because the landlord had no reason to suspect the existence of such a condition. No Tennessee cases, with the possible exception of the Willcox cases themselves, found liability of a landlord solely on failure to inspect portions of the premises not remaining under his control.

[10] Hines v. Willcox, 96 Tenn. 328 at 332, 33 S.W. 914 (1896).

[11] "Hines v. Willcox is a new departure in the law of landlord and tenant." Comment of annotator, 34 L.R.A. 824 (1896). "The views expressed in Willcox v. Hines . . . do not command our assent." Holmes, J., in O'Malley v. Twenty-Five Associates, 178 Mass. 555 at 559, 60 N.E. 387 (1901). PROSSER, TORTS §81a (1941); Harkrider, "Tort Liability of a Landlord," 26 MICH. L. REV. 260 at 266-7 (1928), and cases there cited.

[12] Fraser v. Kruger, (8th Cir. 1924) 298 F. 693.

[13] Cases cited in note 6 supra.

[14] Gary v. Spitler, 10 Tenn. App. 34 (1929) (cert. den. by Tennessee Supreme Court); Hamilton v. Moore, 14 Tenn. App. 584 (1932) (cert. den. by Tennessee Supreme Court); Haire v. American Trust and Banking Co., 19 Tenn. App. 656, 94 S.W. (2d) 59 (1935) (cert. den. by Tennessee Supreme Court); Louden v. Cline, 8 Tenn. C.C.A. (Higgins) 272 (1918) (cert. den. by Tennessee Supreme Court). Indeed, rather than being more ready than most courts to impose liability on a landlord, perhaps the Tennessee court is quite the contrary, in view of its decision in Manes v. Hines and McNair Hotels, 184 Tenn. 210, 197 S.W. (2d) 889 (1946). There a landlord was held blameless to his tenant for her fall upon a part of the floor of a common corridor made slippery by a radiator leak and by the landlord's application of oil to preserve the floor from decay. The court stated that since the tenant knew of the slippery condition, she could have walked around it. And in Hamilton v. Moore, supra, recovery was denied a tenant

stant holding purports to be made solely within the "concealed defect" exception and to follow the *Willcox* approach thereto. It would seem, however, to be in conflict not only with the great majority of the decisions relating to this exception, but also with the most liberal application which could be made of the *Willcox* rule itself. It cannot be admitted that the employee of the tenant should have any greater rights than the tenant himself,[16] nor that a landlord should bear any obligation or liability on account of an entirely patent defect in a part of the premises within the tenant's sole control.[17]

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injured by the collapse of a stairway, despite a covenant by the landlord to repair; it was held that since she knew of the danger and could have moved out, she assumed the risk of injury by remaining in possession of the premises.

[15] No merit was seen, however, in the landlord's contention on appeal that the lower court erred in excluding evidence that other persons in the Hines household considered the porch manifestly unsound even after the repairs to it. Willcox v. Lillie Hines, 100 Tenn. 524 at 535.

[16] Haire v. American Trust and Banking Co., supra note 14. See cases cited in note 5 supra.

[17] Furthermore, the holding in Manes v. Hines and McNair Hotels, q.v., supra note 14, would seem to bar this plaintiff from recovery on grounds of assumption of risk or contributory negligence, she having used the unsafe stairway when other, safe ones were available.