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Landlord and Tenant-Patent Defects In A Common Area

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RECENT DECISIONS

Landlord and Tenant—PATENT DEFECTS IN A COMMON AREA—*Aragona Enterprises v. Miller*, 213 Va. 298, 191 S.E.2d 804 (1972).

When a landlord retains control of a portion of the premises for common use by multiple tenants, he must exercise ordinary care to keep that common area in a condition reasonably safe for its intended use.¹ Since the landlord incurs no liability when the premises are under the exclusive control of one tenant,² the prerequisites of liability for an injury resulting from a defective condition in a common area are that the landlord must have reserved the area for common use for himself and the tenants, and that he must have retained control of the area himself rather than have vested it in one tenant or the tenants in common.³

Jurisdictions are split on the question of the landlord's liability for an injury resulting from an open and obvious condition existing at the time of the letting.⁴ Some would obligate the landlord to use ordinary care to

¹ 49 AM. JUR. 2d *Landlord and Tenant* § 810 (1970); RESTATEMENT (SECOND) OF TORTS § 360 (1965); Annot., 25 A.L.R. 2d 364 (1952). For a statement of Virginia law see *Taylor v. Virginia Constr. Corp.*, 209 Va. 76, 161 S.E.2d 732 (1968).

² Under the common law a landlord makes no implied warranty of suitability where exclusive possession of the entire premises is transferred to a tenant. Absent fraud or misrepresentation, a tenant takes the premises as he finds them, and a landlord owes no duty as to conditions existing at the time of the letting. 49 AM. JUR. 2d *Landlord and Tenant* § 768 (1970); 1 H. TIFFANY, REAL PROPERTY § 99 (3rd ed. 1939); Note, *Landlord and Tenant: Defects Existing at the Time of the Lease*, 35 IND. L. J. 361 (1960); accord, *Luedtke v. Phillips*, 190 Va. 207, 211, 56 S.E.2d 80, 82-83 (1949); *Caudill v. Gibson Fuel Co.*, 185 Va. 233, 239-41, 38 S.E.2d 465, 469 (1946). The primary exception to this rule of caveat emptor appears in the lease of furnished premises for a temporary purpose. See Comment, *Implied Warranty of Habitability in Lease of Furnished Premises for Short Term: Erosion of Caveat Emptor*, 3 U. RICH. L. REV. 322 (1969).

³ See 52 C. J. S. *Landlord and Tenant* § 417 (6) (1968); 4D PERSONAL INJURY, ACTIONS • DEFENSES • DAMAGES § 1.05 [4] [a] (1971); cf. *Wagman v. Boccheciampe*, 206 Va. 412, 416, 143 S.E.2d 907, 909 (1965) (no liability where common area is not put to its intended use); *Berlin v. Wall*, 122 Va. 425, 436, 95 S.E. 394, 398 (1918) (landlord not liable where he retains control but clearly indicates that area is not reserved for common use). See also Comment, *Landlord's Control of Leased Premises*, 11 CLEV. MAR. L. REV. 151 (1962).

⁴ See 52 C. J. S. § 417 (6) (1968); 4D PERSONAL INJURY, ACTIONS • DEFENSES • DAMAGES § 1.05 [4] [a] (1971). But see 1 H. TIFFANY, REAL PROPERTY § 109 (3rd ed. 1939) (no mention of a split in authority). To imply that there are two clear cut views on the issue of a landlord's liability for patent defects existing in a common area at the time of the letting is misleading. It would be more accurate to say that there are two approaches to the problem. See notes 5 and 6 *infra*.

keep the common area in safe condition without regard to the existence of the defect when the lease became effective.⁵ Others follow the Massachusetts rule, which holds that the tenant takes the use of the common area as he finds it, and that the landlord is bound to keep it in a condition only as safe as that which existed at the inception of the tenancy.⁶

In one approach, the landlord-tenant relationship is controlled by the law of property which views a lease as a sale of an estate. This traditional approach evolved in the rural, agrarian society of the past where possession of land was the aim of the bargain, and it resulted in the doctrine of caveat emptor. On the other hand, the current approach to a landlord's liability for a common area seems to be a part of the modern developments in the law which recognize that the traditional view is inadequate for a multi-dwelling urban society. See generally Comment, *Judicial Expansion of Tenants' Private Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489 (1971); Comment, *Protection of Tenants: The Extent of the Landlord's Duty*, 1971 L. & SOC. ORDER 612.

The current law in Virginia is probably representative of the position of most jurisdictions. While Virginia pays lip service to the modern approach concerning a landlord's duty towards a common area, it has not yet discarded the influence of caveat emptor. Compare *Taylor v. Virginia Constr. Corp.*, 209 Va. 76, 161 S.E.2d 732 (1968), with *Aragona Enterprises v. Miller*, 213 Va. 298, 191 S.E.2d 804 (1972).

⁵ This approach represents a severance of the law of property's influence on a landlord's obligation towards a common area. A landlord has a duty to exercise ordinary care to keep a common area reasonably safe for its intended use, which is analogous to that imposed on a possessor of land who, for some benefit, expressly or impliedly invites persons to enter thereon. Any person lawfully upon a common area is afforded the status of an invitee of the landlord. As such, an invitee does not stand in the tenant's shoes, and the tenant's knowledge of an unsafe condition existing at the time of the lease is not imputed to him. Thus, the effective date of a particular tenant's lease is not determinant in fixing a landlord's duty. Under this view, a landlord is not an insurer of the safety of his tenants and guests, because he is required only to exercise reasonable care, and he can defeat the recovery of an injured person by showing contributory negligence. See 49 AM. JUR. 2d *Landlord and Tenant* § 811 (1970); 52 C. J. S. *Landlord and Tenant* § 417 (6) (1968); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 63 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 360, Explanatory Notes § 360, comment *b*, at 251 (1965). See, e.g., *City of Fairbanks v. Schaible*, 375 P.2d 201 (Alas. 1962); *Presson v. Mountain State Properties, Inc.*, 18 Ariz. App. 176, 501, P.2d 17 (1972); *Harper v. Vallejo Housing Authority*, 104 Cal. App. 2d 621, 232 P.2d 262 (1951); *Williamson v. Wilmington Housing Authority*, 208 A.2d 304 (Del. 1965); *Rahn v. Beurskens*, 66 Ill. App. 2d 423, 213 N.E.2d 301 (1966); *Primus v. Bellevue Apartments*, 241 Iowa 1055, 44 N.W.2d 347 (1950).

⁶ See, e.g., *Keeney v. Di Cicco*, 353 Mass. 773, 234 N.E.2d 292 (1968) (no liability where tenant failed to show what the condition of the common area was at the time of the letting); *Wheeler v. Boston Housing Authority*, 341 Mass. 510, 170 N.E.2d 465 (1960) (tenant's child could not recover where condition existed at time of the letting); *Marsh v. Goldstein*, 341 Mass. 83, 167 N.E.2d 158 (1960) (new tenancy at will created when new landlord acquired title, although tenant had no knowledge of conveyance; new landlord was not liable to guest of tenant injured by defect which existed before conveyance); 1 H. TIFFANY, REAL PROPERTY § 109 (3rd ed. 1939); Annot., 25

The Virginia Supreme Court faced this split of authority in the recent case of *Aragona Enterprises v. Miller*.⁷ The plaintiff in *Aragona* recovered damages in a wrongful death action against the defendant, owner of an apartment complex, when a 20 month old child drowned in a drainage canal 60 feet from her parents' apartment. The defendant's property line and the center line of a 100 foot drainage easement of the City of Virginia Beach coincided with the middle of the 70 foot wide canal. From the apartment units to the steep canal bank was an open grass area maintained by the defendant. The plaintiff contended that Aragona was negligent in failing to exercise reasonable care to maintain the area between the apartment units and the canal in a safe condition by not erecting a barrier to prevent children from falling into the canal.⁸

The Virginia Supreme Court, reversing the judgment for the plaintiff, held that "[a] landlord is not liable to a tenant or to members of his family, whether adult or infant, [for injury] resulting from an open and obvious condition existing at the inception of the tenancy, and of which the tenant knew or had means of knowing equal to the landlord."⁹ The court also rested its decision on its finding that the canal was not in a reserved area controlled by the landlord, and that the landlord, who did not create this

A.L.R. 2d 364, 387 (1952) (discussion of Massachusetts rule). By this traditional approach, the duty and liability of a landlord are determined by the landlord-tenant relationship rather than the law of invitation. A landlord is obligated only to exercise reasonable care to keep the common area in repair, or in as safe a condition as existed at the inception of the tenancy. A tenant takes a common area as he finds it or as it reasonably appears to be, no matter how patent and dangerous the condition. Those who lawfully enter by a tenant's right are deemed to have no greater right against the landlord than the tenant. Thus, a tenant, his family, or guest can recover from a landlord only by showing that the unsafe condition did not exist at the time of the letting.

⁷ 213 Va. 298, 191 S.E.2d 804 (1972) (3-2 decision) (Cochran & Carrico J. J., dissenting).

⁸ The child disappeared from her parents' apartment while her mother was talking to a neighbor at the door and twenty minutes later was found in the drainage canal. The facts indicate that the city drainage easement extended fifteen feet from the canal bank into the grass area maintained by Aragona. Although the manager of the apartment complex admitted knowing that this area between the apartment units and the canal was used by the tenants, he testified that such use was neither permitted nor denied. *Id.* at 299, 191 S.E.2d at 805. "Elsewhere in the apartment complex a recreational area [swimming pool deck] had been extended by Aragona over the canal itself." *Id.* at 304, 191 S.E.2d at 808. Thus, Aragona owned the land up to the middle of the canal, and was free to use it subject to the city's easement.

⁹ *Id.* at 299-300, 191 S.E.2d at 805. The court cites *Berlin v. Wall*, 122 Va. 425, 437, 438, 95 S.E. 394, 398 (1918), as a source of this rule. However, the rule seems more a quote of *Berlin's* statement of a landlord's duty towards premises in a tenant's possession than a summary of the text at the pages actually cited. See *Berlin v. Wall*, 122 Va. 425, 436, 95 S.E. 394, 398 (1918).

obvious danger, had no duty to insure the safety of the tenants or their children.¹⁰

In sharp contrast, the dissenting opinion concluded that while the tenant would be barred from recovery due to his knowledge of an open and obvious danger, any negligence of the parent-tenant cannot be imputed to the child. It reasoned that the result of the majority's holding imposes "[t]he bar of assumption of the risk . . . upon children who are incapable of knowing or appreciating the risk."¹¹

The reasoning behind the majority opinion follows the Massachusetts rule,¹² while that of the dissent more nearly reflects the current view. The decision halts a trend in Virginia case law away from the previously adopted Massachusetts rule.¹³ By imputing the assumption of the risk and contribu-

¹⁰ 213 Va. at 303, 191 S.E.2d at 807. The court could have denied recovery either on its rule that a tenant's family stands in his shoes, or on its finding that the canal was not a reserved common area. Since a determination that a particular portion of the premises is retained by a landlord for common use is a prerequisite of any duty on his part, the court need not have issued its rule concerning the tenant's family. See note 3 *supra*.

¹¹ *Id.* at 303-04, 191 S.E.2d at 809. The dissenting opinion recognized that while a landlord is not an insurer of his tenant's safety, he still owes a duty to those lawfully using a common area to exercise ordinary care to keep such place in a reasonably safe condition. It did not accept the majority's position that this obligation excluded a tenant's family where an unsafe condition was patent at the time of the lease. In fact, the dissent clearly pointed out that such a result is contrary to Virginia law on the negligence of children. See *Morris v. Peyton*, 148 Va. 812, 821, 139 S.E. 500, 502-03 (1927) (a child under seven years of age is incapable of negligence); *Tugman v. Riverside & Dan River Cotton Mills, Inc.*, 144 Va. 473, 477, 479-81, 132 S.E. 179, 180-81 (1926) (what is an obvious danger to an adult may not be obvious to a child; negligence of a parent cannot be imputed to his child).

¹² Although *Aragona* indicates that Virginia follows the Massachusetts rule, this does not seem to be entirely true. The court would apparently place only a tenant's family in his shoes, while it would allow invitees, not in a tenant's family, to recover whether or not the patent condition existed at the time of the letting. See *City of Richmond v. Grizzard*, 205 Va. 298, 136 S.E.2d 827 (1964), where although the defect was not patent at the time of the letting, the court, in holding the landlord liable, stressed the invitee status of the plaintiff and stated the duty of a landlord in language that did not indicate a different result had the condition been obvious. See note 14 *infra*.

¹³ Virginia adopted the Massachusetts rule in *Berlin v. Wall*, 122 Va. 425, 95 S.E. 394 (1918), where the court posed two grounds for denying recovery where an injury to a tenant's child resulted from a patent danger which existed at the time of the letting. First, the court stated the then general rule:

The landlord is under no obligation to the tenant to change the mode of construction of the passageways, stairs, or platforms, used in common by the tenants, and to construct them upon a different plan, in order to make them more safe, provided the mode of construction was apparent at the time of the letting. His obligation has been said to be merely to keep such a place 'in such condition as it was in, or purported to be in, at the time of the letting,' meaning there-

tory negligence of a parent-tenant to his child, it contradicts Virginia law concerning the negligence of infants and does not conform to the current rationale concerning the basis of the landlord's liability for a common area.

The trend away from the Massachusetts rule took the form of moving the question of a landlord's liability from the realm of the law of landlord and tenant into the law of invitation as it applies to occupiers of land.¹⁴ It

by such condition as it would appear to be in to a person of ordinary observation, and having reference to the obvious condition of things existing at the time of the letting. *Id.* at 437, 95 S.E. at 398.

The second basis for denying recovery in *Berlin* was the court's finding that while the unsafe condition was controlled by the landlord, it was not an area reserved for common use. *Id.* at 432, 95 S.E. at 398. However, the court, not satisfied with the mere fact that the area was not reserved for use, stressed that the landlord had exercised reasonable care to make the common room safe by erecting a barrier around the dangerous area. The court distinguished the situation in *Berlin* from the case where a landlord was held liable because no such barrier was erected. *Id.* at 433, 95 S.E. at 398. In effect, *Berlin* was really decided on the fact that the landlord had exercised reasonable care and had no duty to protect the tenant and his family when the landlord's safety measures were disregarded.

¹⁴ Since *Berlin*, the court has not stated the duty of a landlord towards a common area in the restrictive language found therein. See note 13 *supra*. In *Williamson v. Wellman*, 156 Va. 417, 158 S.E. 777 (1931), the court recognized that the duty a landlord owes to a person using a common area under the law in Massachusetts was not in accord with the duty imposed in other states. In what seems to be a break with the Massachusetts rule the court stated without analyzing the distinction, that it would apply the "law" to the facts before it. The court noted that a landlord who chose to utilize a common approach to multiple units did so to lessen the expense of providing separate ingress and egress, and that the tenants and all who had dealings with them were required to use this common approach. This situation imposed a duty on a landlord analogous to that imposed upon any owner of land who invited persons to enter thereon. *Id.* at 422-23, 158 S.E. at 778-79. Thus, the court in *Williamson* defined a landlord's duty without the limitations found in the Massachusetts rule:

A landlord who rents out parts of a building to various tenants reserving the halls, stairways and other approaches for the common use of his tenants, is under an implied duty to use reasonable care to keep such places in a reasonable safe condition, and is liable for injuries to persons . . . for his failure to perform that duty. *Id.* at 425, 158 S.E. at 779.

This liability was seen as extending to anyone free from contributory negligence. *Id.* While the defect in *Williamson* was found not to be obvious, the court implied that it was common knowledge that a wooden platform would decay. *Id.* at 426, 158 S.E. at 780.

The court continued to express the duty of a landlord towards a common area unrestricted by the peculiarity of the Massachusetts rule. See *Langhorne Road Apartments, Inc. v. Bisson*, 207 Va. 474, 150 S.E.2d 540 (1966) (court rejected Massachusetts rule as it applies to accumulations of snow on common areas); *Wagman v. Bocchiampe*, 206 Va. 412, 143 S.E.2d 907 (1965) (decision rested on fact that child did not put stairway railing to its intended use rather than *Berlin* reasoning that railing existed at inception of tenancy); *City of Richmond v. Grizzard*, 205 Va. 298, 136 S.E.2d

culminated in *Taylor v. Virginia Construction Corp.*,¹⁵ where the court recognized that the right of a person lawfully using a common area to recover for injury caused by a landlord's negligence was independent of the tenant's rights. In *Taylor*, the court held that the liability of a landlord was derived from the invitee status of the person who accepted a landlord's invitation to use a common area. The landlord's duty was seen as analogous to that of the owner of land who invited persons to enter thereon.¹⁶

In *Aragona* the majority opinion expressed an unwillingness to make a landlord an insurer of the safety of his tenants and their children.¹⁷ While recognizing that children are adventurous, and that the dangers of canals, busy streets and rivers naturally attract them, it failed to adequately distinguish between those situations where a danger exists on adjoining land, and the situation in *Aragona* where the potential danger existed on the landlord's property.¹⁸ The difference is the status given to the injured party; this status determines the liability by designating the degree of care owed.¹⁹ This distinction should be especially important if the landlord's liability for injury in the common area is not derived from his relationship with the tenant, but rather as previously held, is independent of whether he would

827 (1964) (invitee status of persons lawfully using common area affirmed; court relied on RESTATEMENT OF TORTS § 360, which is contrary to Massachusetts rule); *Revell v. Deegan*, 192 Va. 428, 433, 65 S.E.2d 543, 545 (1951) (landlord not liable because he did not have actual or constructive knowledge of defect).

¹⁵ 209 Va. 76, 161 S.E.2d 732 (1968). In *Taylor*, the court held a landlord liable where a tenant's child injured his hand in a defective entrance door, a condition that did not exist at time of letting. An exculpatory clause in the tenant's lease was ruled inapplicable to the common area, and not binding on the child whose cause of action was personal to him.

¹⁶ *Id.* at 80, 161 S.E.2d at 735. *Taylor* states that a tenant's child is not restricted in his right to recover because of the lease between the tenant and the landlord, and that the child's cause of action is derived from the landlord's invitation to use the common area. This contrasts sharply with the result of *Aragona*, which seems to establish a "privity of family" by which a tenant's family is bound by the lease.

¹⁷ The court in *Aragona* concerned itself with the burden that it would impose on landlords whose apartment complex adjoined a beach, ocean, or other potential danger. 213 Va. 298, 303, 191 S.E.2d 804, 807.

¹⁸ See *Jones v. United States*, 241 F.2d 26 (4th Cir. 1957) (unsafe condition existed on the land of an adjoining property owner); *Golf Club Co. v. Rothstein*, 97 Ga. App. 128, 102 S.E.2d 654, *aff'd* 214 Ga. 187, 104 S.E.2d 83 (1958) (ravine situated on landlord's property); *Roberson v. City of Kinston*, 261 N.C. 135, 134 S.E.2d 193 (1964) (drainage ditch not located on land of landlord); *Fitch v. Selwyn Village, Inc.*, 234 N.C. 632, 68 S.E.2d 255 (1951) (creek located on the landlord's property).

¹⁹ Where an unsafe condition exists on a landlord's property, persons lawfully thereon have the status of invitee or licensee, and a landlord owes a corresponding degree of care. However, where an unsafe condition exists on land adjoining that of a landlord, it is the owner of such land, not the landlord, upon whom the law places an obligation.

be liable to the tenant.²⁰ In effect, the majority opinion ignored the trend in Virginia law which established that as to a common area members of a tenant's family do not stand in the tenant's shoes with respect to the duties and liabilities of a landlord.²¹

Posing another ground to deny liability, the court in *Aragona* held that the canal and its embankment were neither intended for use by the tenants nor part of a reserved common area.²² While this is probably true, the grass area leading up to the bank was intended for use, and the canal constituted a danger to those using it. Certainly a landlord would not intend that children use or even come in contact with such a potential danger. However, the law requires that a landlord exercise due care to make such area safe, not merely assume that persons will avoid unsafe conditions.²³

The dissenting opinion impliedly accepted the trend of Virginia case law away from the Massachusetts rule, and concluded that the jury had a basis to find *Aragona* negligent.²⁴ Although the dissent acknowledged that as a

²⁰ If the Massachusetts rule is followed, it does not matter whether the defect exists on the landlord's property or that adjoining it because there is no duty as to a condition that is obvious at the time of the letting. However, where the landlord's duty is based upon the law of invitation he could be liable for injury caused by an unsafe condition regardless of when it came into existence.

²¹ This result could cause injustice in a multi-dwelling unit situation with a high turn-over of tenants. If a landlord allowed an obvious, unsafe condition to develop in a common area, the family of tenant "A" who moved in before the defect arose could recover for an injury caused by the defect, but the family of tenant "B" whose lease became effective while the defect existed would be automatically barred from recovery.

Another problem which may be encountered in applying the rule in *Aragona* is that of defining the scope of the family. Does the category include a maiden aunt living with a tenant who contributes a small amount for her room and board, or an emancipated child who returns to take Sunday dinner with his family? What about the fairly common situation where several single persons rent an apartment but only one of them actually signs the lease? Accepting that invitees not in a tenant's family may recover where a patent defect existed at the time of the letting, it seems illogical to arbitrarily bar the recovery of a class as artificial as a tenant's family.

²² 213 Va. at 303, 191 S.E.2d at 807.

²³ This is the thought behind the court's reasoning in its second ground for not holding the landlord liable in *Berlin v. Wall*. See note 13 *supra*.

In *Primus v. Bellevue Apartments*, 241 Iowa 1055, 44 N.W.2d 347 (1950), a landlord was held liable when a child caught his hand in an unguarded gear box of a common washing machine. The child recovered because the landlord did not exercise ordinary care to maintain the common area in a reasonably safe condition for its intended use. It seems highly unlikely that the landlord in *Primus* could have escaped liability by merely saying that he did not reserve the gear box for children to place their hands into. Yet, this type defense seems to have been approved in *Aragona*.

²⁴ 213 Va. at 304, 191 S.E.2d at 808. The dissenting opinion recognized that the majority decision would force tenants and their families to assume the risk of any and all obvious conditions, no matter how great the danger or foreseeable the injury:

general rule a tenant would be barred from recovering damages due to an obvious danger existing at the inception of the tenancy, it recognized that in Virginia what is obvious to an adult may not be obvious to an infant, and that a child less than seven years old is incapable of negligence. Further, it noted that the negligence of a parent cannot be imputed to his child.²⁵

Thus, the decision rendered in *Aragona* affects the law in Virginia as to the right of a tenant's family to recover for an injury caused by patent defects in the common area, by imputing the negligence of a parent-tenant to his child, and rejecting the established principle that the right of a person lawfully using a common area to recover for injury caused by a landlord's negligence is not derived from the tenant's right. The court decreed that members of the tenant's family stand in his shoes as to obvious and open dangers existing at the inception of the tenancy, but apparently would allow all others rightfully upon a common portion of the premises to recover independent of the tenant's knowledge of an unsafe condition.²⁶ The unfortunate result is that a landlord can avail himself of the rule of *Aragona* to defeat recovery when similar defects injure a tenant's child, while he must prove contributory negligence to defeat recovery by an adult guest. The duty of a landlord to his tenant's children should be no less than his obligation to any other adult or child invited to use the common area. The majority has concerned itself with the task of not making a landlord the insurer of the children of his tenant's safety, and in effect has made "the tenants in such a complex insurers of the safety of their infant children as to any open and obvious danger existing at the inception of their leases, regardless of the landlord's negligence."²⁷

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The duty of a landlord to his tenants' children for unreasonably hazardous conditions should reflect the degree of foreseeability of danger to the children, who because of their tender age and immaturity cannot discover or appreciate the risk, and the cost or burden of preventing such accidents in comparison with the risk to the children. [cite] Here the hazard to children of falling in the canal was foreseeable and could have been eliminated or greatly reduced at relatively slight expense to the landlord. *Id.* 305, 191 S.E.2d at 809.

²⁵ *Id.* at 304-05, 191 S.E.2d at 808. If the court was not imputing the negligence of the parent to his child, then there must be some form of "privity of family" which makes a child a party to the lease. See note 16 *supra*.

²⁶ See note 12 *supra*.

²⁷ 213 Va. at 305, 191 S.E.2d at 809.