WISCONSIN HOUSING CODES NOT AN IMPLIED PART OF A LEASE

After inspecting an apartment in Posnanski's building and finding its condition good except for the locks on the doors, Hood made an oral month-to-month lease with Posnanski. After occupying the apartment for several months Hood vacated; he was several months in arrears in rent. In defense of Posnanski's suit for payment of rent, Hood alleged that the existence of several violations of the Milwaukee Housing Code voided his obligation to pay the accrued rent. Hood testified that the violations existed because Posnanski failed upon notice to repair the plaster on the ceiling of the bathroom and kitchen, the oil leaks which made the furnace inoperative, and the locks on the door. The trial court found for the plaintiff; the defendant appealed and the Supreme Court of Wisconsin affirmed in *Posnanski v. Hood*.[1] The court, concerned with the city council's method of enforcing the city housing code, found no indication that the city council intended the housing code regulations to be an implied part of any lease.[2] The defendant urged that the lease contract was illegal because it violated public policy, but the Wisconsin Supreme Court held that the defense of an illegal contract was not available to the defendant.

The Milwaukee housing ordinance at issue in *Posnanski* was enacted to cope with housing problems in the city. The Wisconsin Supreme Court in an earlier decision took notice of existing substandard conditions, and recognized that the stated purpose of the housing code was to eliminate them.[3] However, the *Posnanski* court followed the traditional common law concept which considers each leasehold an

1. 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

2. *Id.* at 182, 174 N.W.2d at 533.

3. Dickhut v. Norton, 45 Wis. 2d 389, 397, 173 N.W.2d 297, 300 (1970). Defendant had reported violations of the Milwaukee Housing Code. Upon receiving notice of violations, the landlord immediately informed the defendant that his lease was terminated. The Wisconsin Supreme Court found that the defendant could raise the defense of retaliatory eviction but he would have to prove that the conditions existed, that the landlord knew the defendant had reported the conditions, and that the landlord's sole purpose of termination was retaliatory. *Id.* at 399, 173 N.W.2d at 302.

estate,[4] treats covenants as independent,[5] and, holds that a housing regulation ordinance does not enlarge the scope of the landlord and tenant relationship.[6]

In reaching its decision the *Posnanski* court relied heavily on *Saunders v. First National Realty Corp.*,[7] in which the landlord filed actions for possession because of nonpayment of rent.[8] The defendants in *Saunders* offered proof of approximately 1,500 violations of the housing regulations of the District of Columbia. However, the trial court refused to admit the evidence and entered judgment against the defendants for possession.[9] The *Saunders* court "refused to hold that violations occurring after the tenancy is created void the lease."[10] The *Posnanski* court reiterated the *Saunders* opinion in refusing to grant relief to the defendant.[11]

Remedies for the slum tenant have been explored and various legal techniques have been suggested. Principal among these are illegal contract, rent withholding, and constructive eviction, but these three have met with limited success in the courts.[12] The illegal contract theory tried by the defendant in *Posnanski* has met with success only when a violation occurred prior to occupancy.[13] In *Brown v. Southall Realty Co.*[14] the Court of Appeals for the District of Columbia found the lease void because the landlord had notice of the violations and was notified by the housing division to correct the violations prior to renting again. The landlord executed a lease without making any repairs and the court held the lease void as an illegal contract.[15]

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4. I AMERICAN LAW OF PROPERTY § 3.11 (Casner ed. 1952).
5. *Id.*
6. Metcalf v. Chiprin, 217 Cal. App. 2d 305, 31 Cal. Rptr. 571 (1963); Rubinger v. Del Monte, 217 N.Y.S.2d 792 (Sup. Ct. 1961); Davar Holdings, Inc., v. Cohen, 255 App. Div. 445, 7 N.Y.S.2d 911 (1938), *aff'd*, 280 N.Y. 828, 21 N.E.2d 882 (1939).
7. Saunders v. First National Realty Corp., 245 A.2d 836 (D.C. Mun. App. 1968), *rev'd sub nom.* Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970). This reversal came after the *Posnanski* decision.
8. 245 A.2d at 837.
9. *Id.*
10. *Id.* at 838.
11. 46 Wis. 2d at 179, 174 N.W.2d at 531.
12. Falick, *A Tort Remedy for the Slum Tenant*, 58 ILL. BAR JOURNAL 204 (1969); Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966) [hereinafter cited as Schoshinski].
13. Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Mun. App. 1968).
14. *Id.*
15. *Id.* at 836.

When the violations occur during the tenancy, as in *Posnanski* and *Saunders,* it is suggested by one writer that the primary weapon at the tenant's disposal is the withholding of some or all of the rent.[16] Although rent withholding has been legalized by statute in some jurisdictions,[17] absent such statutory power the *Posnanski* court was unwilling to allow this as a means of housing code enforcement.[18] The *Posnanski* decision indicated that the defendant could have used the statutory defense of constructive eviction;[19] however, Hood did not plead it or in any way indicate any intention to use it.[20]

The plea of constructive eviction is the remedy when the tenant's right to quiet enjoyment (the right to enjoy the premises unimpaired) has been breached.[21] However, implicit in a pleading of constructive eviction is actual abandonment of the premises, for unless there has been abandonment, the tenant's quiet enjoyment (theoretically) has not been interrupted.[22] But it seems impractical to expect a slum tenant to have an adequate amount of housing at his disposal or the financial resources to make it feasible for him to move in order to get the violations corrected. There should be relief at equity for the tenant; he should not be required to vacate the premises.[23]

Housing regulations impose upon a landlord a duty to maintain the premises.[24] Courts have consistently found the landlord liable in actions for personal injuries caused by his failure to comply with the regulations.[25] Thus, when it is not possible for the tenant to seek other housing and the tenant's relief at law is not adequate, he should be able to turn to equity.

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16. Schoshinski at 528.

17. N.Y. Soc. Welfare Law § 143b (McKinney 1966); *see also* Cal. Civ. Code § 1942 (Deering 1961); N.D. Cent. Code § 47-16-13 (1959).

18. 46 Wis. 2d at 183, 174 N.W.2d at 533.

19. Wis. Stat. § 234.17 (1957). *Lessee may surrender premises, when*
Where any buildings, which is leased or occupied, is . . . so injured by the elements, or any other cause as to be untenantable, and unfit for occupancy, . . . the lessee or occupant may . . . quit and surrender possession of the leasehold premises . . . and he is not liable to pay . . . rent for the time subsequent to the surrender. *Id.*

20. 46 Wis. 2d at 176, 174 N.W.2d at 529.

21. Moynihan, Introduction to the Law of Real Property 72 (1962).

22. *Id.*

23. Schoshinski at 532.

24. Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960); Altz v. Leiberson, 233 N.Y. 16, 134 N.E. 703 (1922).

25. Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960); Altz v. Leiberson, 233 N.Y. 16, 134 N.E. 703 (1922).

Relief based on the illegal contract theory, reduced to its simplest form, amounts to acceptance of an implied covenant of habitability. Although this theory did not exist at common law, it is gaining ground with the passage of housing code regulations.[26] Courts are re-examining the old doctrine of *caveat emptor* and finding it no longer applicable.[27] There is an indication that the slum tenant is about to receive a long-awaited, much-needed remedy in court. A Hawaii case, *Lemle v. Breeden*,[28] has stated that a lease for residential premises contains an implied warranty of habitability and fitness. The Supreme Court of Hawaii recognized that the modern lease is much different than the lease at common law, and affirmed the fact 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."[29] Since the court found this relationship, the court implied a "warranty of habitability and fitness for the purposes intended . . . ."[30]

Following the lead of *Lemle*, the United States Court of Appeals for the District of Columbia reversed and remanded the *Saunders* case, *supra*,[31] in *Javins v. First National Realty Corp.*[32] The appellate court acknowledged in *Javins* that common law rulings concerning leases were not applicable to the modern urban dwelling lease, and held that the housing code regulation by its terms applied to the repair and maintenance of the unit during the term of a lease.[33] The *Javins* court held "that the Housing Regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing that they cover."[34] Thus, a major step for tenant remedies has been made.

The *Posnanski* court was unnecessarily concerned with whether the legislature intended the housing regulations to be enforced administratively or by the terms of a lease. The intent of the council was clear; it passed the regulations to help eliminate the problem of sub-

26. Schoshinski at 532.
27. Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268, 272 (1969); Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 412 (1961).
28. 51 Hawaii 426, 462 P.2d 470 (1969).
29. *Id.* at —, 462 P.2d at 474.
30. *Id.*
31. Saunders v. First National Realty Corp., 245 A.2d 836 (D.C. Mun. App. 1968), *rev'd sub nom.* Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).
32. 428 F.2d 1071 (D.C. Cir. 1970).
33. *Id.* at 1081.
34. *Id.* at 1082.

standard housing. The *Javins* court even relied on the earlier Wisconsin Supreme Court decision of *Pines v. Perssion*.[35] The *Javins* court said: "We think the conclusion reached by the Supreme Court of Wisconsin as to the effect of a housing code on the old common law rule cannot be avoided:[36]

> ... [T]he legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties [to repair] on a property owner—which has rendered the old common-law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards."[37]

The *Posnanski* court could have taken a progressive step forward and reinforced the decisions of *Lemle* and *Pines*. By considering the enforcement issue, *Posnanski* followed the traditional view, and failed to recognize tenants' rights.

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35. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

36. 428 F.2d at 1082.

37. 14 Wis. 2d at 596, 111 N.W.2d at 412-13, *quoted in* 428 F.2d at 1082.