

1977

# Julian Barlow, Charles Clegg, and Dixie Clegg v. Charles Keener : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JULIAN BARLOW, CHARLES :  
CLEGG, and DIXIE CLEGG, :

Plaintiffs and Respondants, :

vs. :

CHARLES KEENER, :  
Defendant and Appellant. :

Case No. 15609

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APPELLANT'S BRIEF

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APPEAL FROM THE JUDGMENT OF THE THIRD  
DISTRICT COURT FOR SALT LAKE COUNTY, THE  
HONORABLE ERNEST F. BALDWIN, JR., JUDGE,  
AND FROM THE ORDER OF THE SAME COURT, THE  
HONORABLE DAVID B. DEE, JUDGE.

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Case No. 15609  
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APPELLANT'S BRIEF  
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STATEMENT OF THE KIND OF CASE

This is an action by a landlord for unlawful  
detainer against a tenant upon the basis of non-payment of  
rent.

DISPOSITION IN LOWER COURT

The case was never tried. From a judgment enter-  
ing the default of Defendant, and awarding damages and  
costs to Plaintiffs, Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and  
remand of the case for trial, with instructions.

STATEMENT OF FACTS

Plaintiffs' Complaint alleged a landlord/tenant  
relationship between the parties, and sought relief based

upon Utah's Unlawful Detainer Statute, Utah Code §78-36-1 et. seq. (1953 as amended). The grounds alleged are non-payment of rent. Defendant's Amended Answer alleges four defenses. The one of particular concern to this appeal is the Fourth Defense, that being a breach by the landlord of the warranty of habitability implied in the rental agreement between the parties.

The matter was set for a Pre-Trial Settlement Conference on November 21, 1977, pursuant to an order of Judge Ernest F. Baldwin, Jr. His order required the attendance of the parties and their counsel, and specifically noted that motions for summary judgment would not be heard at the hearing. Appellant was unable to attend said hearing because he could not be located by his attorney, who had lost contact with him. This was known to opposing counsel more than six months prior to said hearing.

At the Pre-Trial Settlement Conference, counsel for the tenant/defendant/appellant explained to the court the absence of his client. However, counsel stated that he was prepared to proceed to trial, in that evidence and testimony was available even in the absence of his client to substantiate the Fourth Defense in Defendant's Answer. The Judge refused to recognize warranty of habitability as a defense to an action for unlawful detainer. Instead, the Court entered the default of Defendant and granted Plaintiffs judgment as prayed in his Complaint, over the objection of defense counsel.

A motion for relief from judgment was timely filed. Following argument, at which time neither Plaintiff

nor their attorney appeared, Judge David B. Dee denied said motion. The matter now comes before this Court for determination of whether a warranty of habitability is implied in a rental agreement, the breach thereof constituting a defense to an unlawful detainer action, and whether a Defendant has a right to a trial in his absence when his attorney is authorized and prepared to proceed to trial.

#### ARGUMENT

POINT I. A WARRANTY OF HABITABILITY IS IMPLIED IN EVERY RESIDENTIAL AGREEMENT, AND THE BREACH THEREOF CONSTITUTES A DEFENSE TO AN EVICTION ACTION BASED UPON NON-PAYMENT OF RENT.

The concept of a warranty of habitability contains three elements. The first is that the warranty exists by implication in all residential landlord/tenant agreements to the effect that the premises are fit for its intended use, human occupancy. The second element is that the warranty is mutually dependant upon the tenant's covenant to pay rent. The third is that the breach of the warranty by the landlord justifies the tenant in suspending the payment of rent. In turn, the breach of the warranty is a defense to an action by a landlord under Utah's Unlawful Detainer Statute, and forms the basis for a court order compelling a landlord to render the premises habitable. The court can also determine the rental value of the premises in an uninhabitable condition, if any, and require a tenant to pay a reduced amount of rent for such a period.

The existence of a warranty of habitability

derives historically from combining principles of property,

contract and tort law, as developed below. It prevails in a substantial majority of jurisdictions in this country today.

- A. EVERY RESIDENTIAL RENTAL AGREEMENT IS BOTH A CONVEYANCE AND A CONTRACT. MODERN CONTRACT PRINCIPLES AND THE REMEDIES PROPOUNDED THEREUNDER ARE FULLY APPLICABLE TO THE AREA OF LANDLORD-TENANT LAW AND SHOULD BE APPLIED INSTEAD OF TRADITIONAL PROPERTY LAW WHICH NO LONGER RELATES TO TODAY'S RENTAL TRANSACTIONS AND URBAN REALITIES.

At common law, leaseholds and landlord-tenant law were governed by traditional property law principles. leasehold was treated as a conveyance of an interest in land, carrying with it the doctrine of caveat emptor; 40 ALR3d 649. The lessor merely covenanted that he had the legal right to transfer possession and that he would assure the tenant's quiet enjoyment of the leasehold. The lessor had no obligation to repair nor did he impliedly warrant the habitability of the premises or their fitness for any particular purposes; 49 AmJur2d, Landlord and Tenant §769.

These common law property precepts originated in feudal England, a largely agrarian, non-industrial society where the tillable land itself was generally the basis of the bargain. The concept that the lessor was not obligated to repair was settled law by 1485; Javins v. First National Realty Corporation, 138 U.S. App. D.C. 369, 428 F.2d 1071 (1970), cert. denied, 400 U.S. 925, 91 S.Ct. 186, 27 L.Ed. 2d 185 (1970), at 1077. These principles also developed before the concept of mutually dependant covenants; 6 Williston Contracts, §890 (3d ed. 1962).

The prospective tenant was expected to inspect the property and any structures thereon prior to the conveyance. Since his primary interest was in the tillable land itself, any buildings thereon were merely incidental. The early lessee's living quarters were simple structures containing none of the sophisticated conveniences and utilities we commonly associate with today's residential dwelling unit. Almost any problem that could arise regarding the dwelling could easily be handled by the lessee. Today, the situation is much different, as expressed in Javins, supra:

Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in "a house suitable for occupation." Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like to "jack-of-all-trades" farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property. Id., at 1078 (Emphasis added).

Because leaseholds originated as conveyances of real property interests, the law governing leaseholds has developed to control all leases as if they were concerned only with an interest in land. This has remained the governing

common law even though today very few lessees are interested in the land, but rather, contract for the use of the dwelling space.

When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services - a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance. Id., at 1074 (Emphasis added).

In reality, today's tenant has entered into a consumer contract for the use of the dwelling upon the land. The modern tenant generally considers the lease in terms of contract law, as to his or her expectations.

Many jurisdictions in this country are realizing that the old rules of property law governing leases are inappropriate to apply to modern lease transactions. They have recognized, as urged by the legal scholars, that the essential nature of today's lease is contractual and that contract principles provide a much more rational framework for the apportionment of landlord-tenant responsibilities than at common law; see Lesar, The Landlord-Tenant Relation in Prospective; and 3 S. Williston, A Treatise on the Law of Contracts §890, at 580-581, (3d ed. 1962).

The Hawaii Supreme Court, in a very well reasoned decision, Lemle v. Breeden, 462 P.2d 470 (Haw. 1969), totally rejected caveat emptor as a valid principle in modern lease law and applied contract principles to reach its decision. It held as follows:

[A] lease is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship. Id., at 474.

The Court drew this conclusion from its reasoning that:

The rule of Caveat Emptor in lease transactions at one time may have had some basis in social practice as well as in historical doctrine. At common law leases were customarily lengthy documents embodying the full expectations of the parties. There was generally equal knowledge of the condition of the land by both the landlord and tenant. The land itself would often yield the rents and the buildings were constructed simply, without modern conveniences like wiring or plumbing. Yet, in an urban society where the vast majority of tenants do not reap the rent directly from the land but bargain primarily for the right to enjoy the premises for living purposes . . . common law conceptions of a lease and the tenant's liability for rent are no longer viable. Id., at 472.

The Court in Lemle, drew support for its constructional lease for a dwelling unit from several impressive authorities.<sup>1</sup>

Despite its common law origins, the modern lease is a contract which should be viewed in law with the same regard as consumer contracts in sales and other areas. It must be recognized that a habitable dwelling unit is the essence of today's lease and that the obligations which arise from the nature of the transaction must be applied as in a contract.

B. LEASE TRANSACTIONS ARE A CONTRACTUAL  
RELATIONSHIP FROM WHICH AN IMPLIED  
WARRANTY OF HABITABILITY AND FITNESS

<sup>1</sup> Skillern, "Implied Warranties in Leases: The Need for Change", 44 Denver L. J. 387 (1967); Schoshinski, "Remedies of the Indigent Tenant: Proposal for Change", 54 Geo. L. J. 519 (1966); note "The Indigent Tenant and the Doctrine of Constructive Eviction", 63 U.L.Q., 461 (1968); and Reste Realty Corp. v. Cooper, 53 N.J. 444, 152 A.2d 268 (1959).

FOR THE PURPOSE INTENDED IS A  
NECESSARY IMPLICATION.

An early decision adopting this position was Pines v. Persson, 111 N.W.2d 409, 14 Wis.2d 590, (1961). Recognizing the basis incompatibility between the common law and modern housing and health regulations, the Court abolished caveat emptor and established an implied warranty of habitability as a means of enforcing Wisconsin's health and building codes.

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. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, caveat emptor. Permitting landlords to rent "tumbledown" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners. Id., at 412-3 (Emphasis added).

Several other jurisdictions have found Pines persuasive. In Reste Realty Corporation v. Cooper, 251 A.2d 268, New Jersey (1969), the New Jersey Supreme Court established an implied warranty that the "premises are suitable for the leased purposes and conform to local codes and zoning laws"; Id., at 272. The Court assailed the common law "no repair" rule as incompatible with modern times. The court also stressed the landlord's superior bargaining power and knowledge of defects and his ability to remedy them. In the more recent cases of Foisy v. Wyman, 515 P.2d 160, (Wash. 1973); Steele v. Latimer, 521 P.2d 304, (Kan. 1974); Brown v. Robyn Realty Company, 367 A.2d 184,

(Del., 1976); Brown v. Southall Realty Co., 237 A.2d 834, (D.C. Ct. of App. 1968); Javins, supra, and Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (N.J. 1970); the courts have all taken the Pines position that the municipal health and building codes by necessity require that a warranty of habitability be implied in all residential lease agreements.

It has come to be recognized that ordinarily the lessee does not have as much knowledge of the condition of the premises as the lessor. Building code requirements and violations are known or made known to the lessor, not the lessee. He is in a better position to know of latent defects, structural and otherwise, in a building which might go unnoticed by a lessee who rarely has sufficient knowledge or expertise to see or to discover them. A prospective lessee . . . cannot be expected to know if the plumbing or wiring systems are adequate or conform to local codes. Nor should he be expected to hire experts to advise him. Ordinarily, all this information should be considered readily available to the lessor who in turn can inform the prospective lessee. These factors have produced persuasive arguments for re-evaluation of the caveat emptor doctrine and, for imposition of an implied warranty that the premises are suitable for the leased purposes and conform to local codes and zoning laws. Id., at 272. (Reste)

In another landmark case establishing the implied warranty of habitability, Mease v. Fox, 200 N.W.2d 791, (Iowa 1972), the court emphasized the inequality of bargaining positions.

The trend of modern decisions adopting an implied warranty concept is grounded, in part, on a felt need to re-assess the real as opposed to theoretical meaning of a lease:

'There is clearly discernible tendency on the part of the courts to cast aside the technicalities in the interpretation of leases and to concentrate

their attention, as in the case of other contracts, on the intention of the parties . . . 6 Williston on Contracts, Sect. 890 A, pp. 592-93 (3d ed. 1962).

In addition . . . cases [have] recognized landlord's superior position to know of housing law violations and to discover deficiencies in the premises to be leased. The frequent inequality in bargaining power was acknowledged; where housing is in short supply the potential lessee is in no position to dicker about even the most basic necessities. Id., at 794.

It is clear that the court recognized that a modern lease is in reality a consumer contract entered into by parties in unequal bargaining positions. (See also, Javins, *supra*)

The Javins, *supra*, decision is most illustrative of the unequal bargaining position between a landlord and tenant and the concept of caveat lessee. The court analogized the recent development of warranty doctrines in consumer and tort law to modern lease transactions and noted the absence of compelling reasons why these doctrines should not be applied to landlord-tenant law. Id., at 1079. The Court examined the position of today's urban tenant:

The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock. Finally, the findings by various studies of the social impact of bad housing has led to the realization that poor

housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum. *Id.*, at (footnotes omitted, emphasis added).

Other recent and significant cases have stressed the virtual impossibility of a tenant conducting an adequate inspection of modern apartments. In Lemle, *supra*, the Hawaii Supreme Court analogized the warranty of fitness and merchantability implied in the sale of goods to the leasing of real property. The court concluded that an implied warranty of habitability and fitness for the purposes intended in the lease of a dwelling house, was a "just and necessary implication." *Id.*, at 474. These cases have held that public policy compels that landlord to bear primary responsibility for maintaining safe, clean and habitable housing, since this was the very essence of what the tenant bargained for; see Green v. The Superior Court of the City and County of San Francisco, 517 P.2d 1168, 111 Cal. Rptr. 704, (1974) and Marini v. Ireland, 265 A.2d 526, (New Jersey, 1970).

[I]t is eminently fair and just to charge a landlord with the duty or warranting that a building or part thereof rented for residential purposes is fit for that purpose at the inception of the term and will remain so during the entire term. *Id.*, at 529.

Approximately 35 jurisdictions in this country have expressly or impliedly embraced the implied warranty of habitability.<sup>2</sup>

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<sup>2</sup> Javins v. First National Realty Corp., *supra*; Green v. Superior Court of City and County of San Francisco, *supra*; Hill v. Municipal Court, 10 Cal.3d 641, 111 Cal. Rptr. 721, 517 P.2d 1185 (1974); Hinson v. Delis, 26 Cal. App.3d 62, (cont.)

A good overall review of significant cases from various jurisdictions, which have upheld the warranties of habitability and fitness for intended use can be found at 40 ALR 3d 653. Overwhelmingly, the modern trend of the case law supports the existence of an implied warranty of habitability in residential rental agreements.

C. THE TENANT'S DUTY TO PAY RENT IS  
DEPENDENT UPON THE LANDLORD'S

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(2 cont.)

102 Cal. Rptr. 661 (1972); Tonetti v. Penati, 48 A.D.2d 25, 367 N.Y.S.2d 804 (1975); Morbeth Realty Corp. v. Velez, 73 Misc.2d 996, 343 N.Y.S.2d 406 (1973); Amanuensis Ltd. v. Brown, 65 Misc.2d 15, 318 N.Y.S.2d 11 (1971); Lemle v. Breeden, supra; Lund v. MacArthur, 51 Haw. 473, 462 P.2d 482 (1969); Boston Housing Authority v. Hemingway, 363 Mass. 184 293 N.E.2d 831 (1973); King v. Moorehead, 495 S.W.2d 65 (Mo.Ct. App. 1973); Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Timber Ridge Town House v. Dietz, 133 N.J. Super. 577, 338 A.2d 21 (1975); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Marini v. Ireland, supra; Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (1970); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Jack Spring, Inc. v. Little, 50 Ill.2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, Iowa, 200 N.W.2d 791 (1972); Glyco v. Schultz, Ohio Mun.Ct., 62 Ohio Op.2d 227, 289 N.E.2d 919 (1972); Presson v. Mountain States Properties, Inc., 18 Ariz. App. 176, 501 P.2d 17 (1972); Tucker v. Crawford, Del. Super. 315 A.2d 737 (1974); Gable v. Silver, 258 So.2d 11 (Fla. App. 1972); Quesenbury v. Patrick, CCH Poverty, L.Rep. ¶15,803 (El Paso County Court., Colo. 1972); Givens v. Gray, CCH Poverty L.Rep. ¶15,412 (Ga.App. 1972); Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812 (1974); Poisv v. Wyman, supra; Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973); Brown v. Robyn Realty Co., Del. Super., 367 A.2d 183 (1976); Evans v. Does, La.App., 283 So.2d 804 (1973); Old Town Development Co. v. Langford, Ind. Ct. App., 349 N.E.2d 744 (1976); Brown v. Southall Realty Co., supra; Quevedo v. Braga, Super., 140 Cal.Rptr. 143 (1977); Kintner v. Harr, 408 P.2d 487, 146 Mont. 461 (1965) - R.C.M. 1947 §42-201; Jarrell v. Hartman, 6 Ill. Dec. 812, 363 N.E.2d 626 (1977); South Austin Realty Ass'n v. Sombright, 5 Ill. Dec. 472, 361 N.E.2d 795 (1977); Pines, supra.

PERFORMANCE OF HIS IMPLIED WARRANTY OF HABITABILITY AND FITNESS FOR THE PURPOSE INTENDED AND THE LANDLORD'S BREACH OF THESE WARRANTIES MAY BE RAISED AS A DEFENSE TO AN UNLAWFUL DETAINER ACTION BASED ON NON-PAYMENT OF RENT.

In the substantial majority of the previously cited cases, the courts have held that the relationship of the landlord and his tenant is a contractual one, with the covenant to pay rent mutually dependent upon the landlord's covenant to maintain a habitable dwelling.

The significance of this new framework for apportionment of landlord-tenant responsibilities and establishing dependent covenants is that all the remedies for breach of contract are available to the tenant. The failure of the landlord to supply a habitable rental unit amounts to a failure of consideration thereby breaching the contract, and justifying rent abatement.

Logically then, the tenant whose landlord fails to maintain the premises in a habitable condition should be able to rescind the contract by abandoning the premises (constructive eviction) without incurring liability for rent, as in Reste, deduct the costs necessary to make the dwelling habitable (repair and deduct) under Marini; bring an action for damages (retroactive rent abatement) to be measured by the difference in value as between what the reasonable rental value is of the uninhabitable dwelling and the contractual rental rate, as in Marini, Barzito, Quevedo, and Jarrell; bring an action for specific performance to compel the landlord to provide that which was bargained for; or entitle the tenant to rent abatement by withhold-

ing rent and raising the landlord's breach in defense to an action for summary dispossession, as in Academy Spires.

In Utah, the only remedies available to the tenant have been constructive eviction and housing code enforcement by State or municipal building inspectors. But these remedies are inadequate and impractical for several reasons.

The constructive eviction defense is an impractical remedy in that it requires the tenant to vacate the premises. This is a very burdensome requirement especially in today's housing market. The vacancy rate overall is higher than that for the segment of our population of low income persons those most often subjected to uninhabitable conditions. Compounding this problem is the lack of habitable housing in the Wasatch front markets. The most recent survey indicates that there is an immediate need of repair or replacement of 24,321 units in Salt Lake City which is 17 percent of all housing units for that city alone.<sup>3</sup> The same study indicates there are 12,953 low income renters in the Salt Lake City vying for the limited low-priced rental units available. Therefore, the tenant would most likely find himself in an equally delapidated dwelling upon moving. Constructive eviction is also an inadequate remedy in that the tenant must be able to prove the rental unit was indeed uninhabitable. This defense would be unnecessary where an implied warranty of habitability exists.

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<sup>3</sup> Statistical Analysis of Utah Housing Conditions and Needs (1977), prepared by the Housing Development Division Department of Community Affairs, State of Utah.

Housing Code enforcement is far from effective as the Javins, supra, noted. The ineffectiveness of this method stems from the court's unwillingness to recognize housing violations as crimes and impose fines, and when they do, they are often minimal and simply treated as a cost of doing business. 66 Columbia L R. 1254, 1279 (1966).

And if the inspection results in a condemnation, the tenant is again subjected to the problem of finding another adequate and affordable dwelling. A presidential commission reported that inadequate enforcement has led to

" . . . thousands of landlords in disadvantaged neighborhoods openly violating building codes with impunity, thereby providing a constant demonstration of flagrant discrimination by legal authorities . . . [I]n most cities, few building code violations are corrected, even when tenants complain directly to municipal building departments . . . [T]he open violation of codes [acts] as a constant source of distress to low-income tenants and creates serious hazards to health and safety in disadvantaged neighborhoods." Report of the National Advisory Commission on Civil Disorders, 472 (Bantam ed., 1968).

The warranty of habitability defense goes to the very essence of the dispute in an action for unlawful detainer for non-payment of rent. If the warranty is substantially breached, the tenant's obligation is reduced. When demand is made, the amount of the demand is inaccurate and an excess of the tenant's obligation. The lack of effective remedies for the tenant has no doubt led to the current situation of large numbers of dilapidated dwellings and units in substantial violation of the housing codes. For these reasons, it is urged that this court recognize breach

of the warranty of habitability as a defense to an unlawful detainer action based on non-payment of rent.

D. SOUND PUBLIC POLICY DICTATE THE  
CREATION OF A WARRANTY OF HABITABIL-  
ITY.

In assessing the competing interests between landlords and tenants, an equitable balance weighs heavily in favor of the tenant for the establishment of a warranty of habitability. Support can be found in legislative policies and decisions creating housing and health codes. When comparing the foregoing legal arguments with the equities presented in the landlord-tenant relationship, the tenant should be favored in that his reasonable expectations have not been met when a landlord violates such a housing or health code. The courts and states' legislatures have long been aware of the fact that inadequate and substandard housing has an overwhelmingly negative effect on the individuals who are unfortunate enough to live in it and on society in general; see, Edwards v. Habib, 397 F.2d 687, (D.C. Cir. 1968), at 701, and Cf. Brown v. Board of Education of Topeka, 344 U.S. 1, 345 U.S. 972, 347 U.S. 483, 98 L.2d 873, 74 S.Ct. 686, 38 ALR.2d 1180 (1954).

"Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from housing may despoil a community as an open sewer may ruin a river." Berman v. Parker, 348 U.S. 26, 32-33, 75 S.Ct. 98 102, 99 L.Ed. 27 (1954). See also Frank v.

State of Maryland, 359 U.S. 360, 371,  
79 S.Ct. 804, 811, 3 L.Ed.2d 877.  
(1969): "The need to maintain basic,  
minimal standards of housing, to prevent  
the spread of disease and of that per-  
vasive break-down in the fiber of a people  
which is produced by slums and the ab-  
sence of the barest essentials of civ-  
ilized living, has mounted to a major  
concern of American government." Edwards,  
supra, at 701.

Such harm is recognized by legislators or govern-  
ment entities desiring and requiring the maintenance of  
housing and health codes. This is based upon the realiza-  
tion that urban blight results from the non-enforcement  
of the landlord's duty to repair. Uninhabitable conditions  
are a contributing cause of juvenile delinquency, crime,  
and other social problems. It can also cause damages or  
increase costs to nearby conscientious landowners.

Whether established judicially or by a legislature,  
the determination has been made throughout our country that  
it is desirable to impose duties on a property owner to  
maintain habitable conditions. Otherwise, enforcement of  
the health and building codes would be frustrated. The  
tenant simply is not in a position to perform substantial  
repairs and maintenance, nor should he be required to do so.

A landlord's interests merit consideration. The  
major argument raised is that forcing the landlord to strict  
compliance with the housing code, and/or allowing rent abate-  
ment, will place him out of business and take more units  
off the market. However, this argument finds little support;  
see Ackerman, Regulating Slum Housing Markets on Behalf  
of the Poor: Of Housing Codes Housing Subsidies and  
Become Redistribution Policy, 80 Yale L.J. 1093, 1997 (1971).

Also, the landlords who are faced with this problem are in substantial violation of state and local housing codes and are therefore guilty of criminal activity. For the court to cater to their demands would be a travesty of justice and flies in the face of equity from a "clean hands" viewpoint.

From a business analysis, the landlord who fails to care for his tenants and allows his rental property to fall into a serious state of disrepair has nothing to lose but his return on investment. The landlord has simply made a bad business investment and must now suffer the consequences. To allow such a landlord to recoup his losses by collecting rent for providing less than is required by law is neither equitable nor just.

Ultimately, the landlord's economic loss or hardship and the losses accruing to tenants and society in general overwhelmingly favor the tenant's remedy.

POINT II. THE TRIAL COURT COMMITTED  
REVERSIBLE ERROR IN ENTERING  
THE DEFAULT OF APPELLANT  
BASED UPON HIS NON-APPEARANCE  
AT THE PRE-TRIAL SETTLEMENT  
CONFERENCE.

By entering the default of Appellant and granting judgment as prayed, the lower court struck his Answer to the Complaint. This was done in spite of counsel's representation that the lawsuit could be effectively defended even in the absence of his client. As previously mentioned, the court's ruling implied that the Judge did not recognize warranty of habitability as a defense to an eviction action. Said ruling also seems to indicate a position that the non-appearance

of a defendant in a civil proceeding relieves a plaintiff from presenting a prima facie case and denies any opportunity to defend the action. In this matter, counsel was prepared to offer documentation and expert testimony as to the condition of the premises subject to the rental agreement. The non-appearance of his client does not justify the denial of an opportunity to present a defense.

Case law support of Appellant's position exists. In Hiltibrand v. Brown, 134 Colo. 52, 234 P.2d 618 (1951), the Plaintiff did not appear in person at trial and the trial judge dismissed the action based upon said non-appearance. The Colorado Supreme Court reversed the dismissal.

Whether plaintiff could have produced sufficient evidence to avert a motion for dismissal at the conclusion of her case is beside the question, but clearly she was entitled to introduce whatever evidence was available in support of her cause of action, and the court erred in denying her that right. Id., at 619.

This holding should apply equally to the presentation of a defense to a cause of action, where evidence in support of a defense is available. In the present case, it should be noted that not only was the presentation of a defense denied, but also, no opportunity to cross-examine plaintiffs' witnesses was allowed.

In Coulas v. Smith, 96 Ariz. 325, 395 P.2d 527 (1964), the Arizona Supreme Court addressed a factual situation in which a responsive pleading is filed to a lawsuit.

It should therefore be stated that once an answer is filed and the case at issue, a default judgment is not proper,

and if the defendant fails to appear at the trial a judgment on the merits may be entered against him upon proper proof. Id., at 530.

The court, in making its ruling construed its rule of civil procedure comparable to Rule 55 of the Utah Rules of Civil Procedure. Its holding, as applied to the present case, indicates that it was error not to require a showing of plaintiffs' case, since an answer was filed. In turn, had plaintiffs been required to present its case, the defendant would have had an opportunity to defend. In another case, Walker v. Kendig, 107 Ariz. 510, 489 P.2d 849 (1971), the Arizona court elaborated on its reluctance to grant default judgments.

Our courts exist for the purpose of providing an effective and fair tribunal in which parties to a dispute may resolve their grievances. An order which in effect grants judgment by default without regard to the merits of a case is a harsh order and justified only in circumstances where no reasonable excuse is present. Id., at 852.

The facts and circumstances of the instant case are not such as to justify action on a default basis.

Courts in Utah, and this Court are in agreement that, as a matter of general policy, whenever the interests of justice and fair play will be served thereby, the trial court should exercise its discretion liberally in favor of giving the parties an opportunity for a hearing on the merits of a case.<sup>4</sup> In McKean v. Mountain View Memorial Estates, Inc.

<sup>4</sup> Utah Com. Sav. Bank v. Trumbo, 17 U. 198, 53 P. 1033 (1898); Locke v. Peterson, 3 U.2d 415, 285 P.2d 1111 (1955); Heath v. Fabian and Clendenin, 14 U.2d 60, 377 P.2d 189 (1962); Barber v. Calder, 522 P.2d 700 (Ut. 1974)

17 U.2d 323, 411 P.2d 129 (1966), this Court explained that the "purpose of a default judgment is to conclude litigation when a defendant fails to plead or otherwise defend an action"; id., at 130. Such a situation did not exist in the present case.

In Warden v. Lamb, 98 Cal. App. 738, 277 P. 867 (1929), the District Court of Appeal, Third District declined to find authorization for a trial court to enter default against the party defendant who had filed an answer, regardless of whether defendant appears at trial.

In case the defendant fails to appear, the plaintiff's sole remedy is to move the court to proceed with the trial and introduce whatever testimony there may be to sustain the plaintiff's cause of action. Id., at 868.

Again, Plaintiffs' cause of action in the present case has never been presented in court. In U.S. Fidelity & Guarantee Co. v. State, 136 Mont. 148, 345 P.2d 734 (1959), the Montana Supreme Court found that a responsive pleading (in this case a motion for change of venue) constituted an appearance, rendering the subsequent default judgment improper.

The authorities on the issue appear to be in agreement, and combined with the principles of basic fairness, there is no reason to justify the granting of a default judgment, and the opportunity to present a defense.

#### CONCLUSION

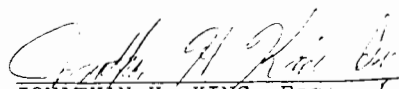
For the foregoing reasons, argument and law, this Court is urged to reverse the judgment rendered below, and remand the case for trial with instructions that a

warranty of habitability is implied in residential lease agreements, and its breach constitutes a defense to an unlawful detainer action based upon non-payment of rent.

Such a holding would take cognizance of modern realities that the basis of the rental agreement is a habitable dwelling space, that the modern agreement is both a contract and a conveyance, and that a landlord is required to maintain dwellings in a habitable condition fit for its intended use. A breach of the warranty of habitability reduces a tenant's mutually dependent covenant to pay rent to the extent of the landlord's breach. Such a holding is solidly supported as appropriate implementation of public policy.

It is also urged that this Court find the entry of defendant's default and granting of judgment without requiring the presentation of evidence, or the opportunity for counsel to offer a defense to constitute reversible error.

Respectfully submitted,

  
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Utah Legal Services, Inc.

#### CERTIFICATE OF DELIVERY

I hereby certify that on this 27<sup>th</sup> day of March, 1978, I delivered two copies of the foregoing Appellant's Brief to Jay E. Jensen, 900 Kearns Building, Salt Lake City, Utah 84101.