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Property Law - A Fresh Look at Contractual Tenant Remedies under the North Carolina Residential Rental Agreements Act - *Miller v. C.W. Myers Trading Post, Inc.*

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NOTES

PROPERTY LAW—A FRESH LOOK AT CONTRACTUAL TENANT REMEDIES UNDER THE NORTH CAROLINA RESIDENTIAL RENTAL AGREEMENTS ACT—*Miller v. C.W. Myers Trading Post, Inc.*

INTRODUCTION

In 1977, the North Carolina General Assembly enacted the Residential Rental Agreements Act, which set forth new rights and obligations for residential landlords and tenants in North Carolina.[1] The most significant change in the law brought about by the new Act was the creation of an implied warranty of habitability.[2] Although the Act created new rights for tenants, it did not set forth specifically any remedies through which a tenant could enforce these new rights, except to say that they were enforceable "by civil action, in addition to other remedies of law and in equity."[3] In fact, the Act contains provisions bearing upon the tenant's contractual remedies that arguably are inconsistent: the Act provides that the tenant's obligation to pay rent is dependent upon the landlord's obligation to provide habitable premises,[4] but the tenant may not "unilaterally withhold rent prior to a judicial determination of a right to do so."[5]

In spite of this inconsistency, the North Carolina appellate courts did not have occasion to clarify the tenant's contractual remedies under the Act until 1987. In *Miller v. C. W. Myers Trading Post, Inc.*,[6] the North Carolina Court of Appeals for the first

1. N.C. GEN. STAT. §§ 42-38 to 42-44 (1984).

2. Fillette, *North Carolina's Residential Rental Agreements Act: New Developments for Contract and Tort Liability in Landlord-Tenant Relations*, 56 N.C.L. REV. 785, 787 (1978).

3. N.C. GEN. STAT. § 42-44(a) (1984).

4. N.C. GEN. STAT. § 42-41.

5. N.C. GEN. STAT. § 42-44(c) (1984).

6. 85 N.C. App. 362, 355 S.E.2d 189 (1987).

time addressed the question of whether a tenant could recover rent paid when the landlord failed to perform his obligations under the Act.[7] The court answered this question affirmatively[8] and held further that the tenant's damages should be in the amount of the difference between the fair rental value of the premises as warranted and the fair rental value of the premises in their defective condition for each rental period during which the premises were not habitable.[9] The courts and legislatures of other states have declared numerous specific tenant remedies for breach of the implied warranty of habitability.[10] Although the court in *Miller* declared only one specific remedy, the court showed a willingness to consider other remedies in the future.[11]

This note will examine some of the other contractual remedies that the North Carolina courts could make available to tenants for breach of the implied warranty of habitability. The *Miller* case suggests that the courts would hold that some of these remedies are available under the Act but that others are not. This note will address the issues of why some of these remedies should or should not be available under *Miller* and the Act. Since the North Carolina courts seem to be willing to consider other remedies under the Act, lawyers who represent North Carolina tenants should familiarize themselves with these remedies and urge the North Carolina courts to adopt them.

THE CASE

In *Miller*, tenants sued their landlord, seeking a "retroactive rent abatement"[12] for the landlord's alleged violations of the Residential Rental Agreement Act. After filing an answer and deposing

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7. *Id.* at 367, 355 S.E.2d at 192.

8. *Id.* at 368, 355 S.E.2d at 193.

9. *Id.* at 370-71, 355 S.E.2d at 194.

10. *See generally* R. CUNNINGHAM, W. STOEBURK, AND D. WHITMAN,, THE LAW OF PROPERTY §§ 6.41-45 (1984).

11. The court cited several cases from other jurisdictions that declared a variety of tenant remedies. 85 N.C. App. at 367-68, 355 S.E.2d at 192. The court also said, " . . . we must consider what remedies are available apart from a tort action" 85 N.C. App. at 367, 355 S.E.2d at 192, indicating that there are several available remedies. The court then said, "[w]e limit our consideration solely to the appropriateness of the rent abatement remedy sought by the plaintiffs," explaining why other remedies would not be considered.

12. *Miller*, 85 N.C. App. at 364, 355 S.E.2d at 190.

the tenants, the landlord moved for summary judgment.[13] In support of the summary judgment motion, the landlord filed only the tenants' depositions, which showed that the premises were not habitable during the rental period.[14] In opposition, the tenants relied on their verified complaint.[15] The trial court ruled in favor of the landlord on the motion for summary judgment and the tenants appealed.[16]

The court of appeals reversed.[17] The court recognized that it was deciding a case of first impression in considering what contractual remedies are available to tenants under the Residential Rental Agreements Act.[18] The court made it clear, however, that, in this case, its consideration would be limited to the appropriateness of the only remedy the tenants sought: retroactive rent abatement.[19] The court held that provisions of the Residential Rental Agreements Act, when construed together, allowed the tenant to recover rent paid when the landlord breached the implied warranty of habitability.[20] The court went on to hold that the tenants' damages should be in the amount of the difference between the fair rental value of the premises as warranted and the fair rental value of the premises in their defective condition.[21] Therefore, the landlord cannot avoid his obligations under the Act by renting the defective premises at a fair rental rate.[22]

BACKGROUND

A. *General*

Statutory schemes like the Residential Rental Agreements Act and judicial reform like the *Miller* case represent a drastic departure from the common law landlord-tenant rules. At common law, the tenant took the leased premises subject to the doctrine of *caveat emptor*; that is, the landlord was not normally required to

13. *Id.*
14. *Id.* at 364-65, 355 S.E.2d at 190-91.
15. *Id.* at 364, 355 S.E.2d at 190.
16. *Id.* at 364, 355 S.E.2d at 190-91.
17. *Id.* at 364, 355 S.E.2d at 191.
18. *Id.* at 367, 355 S.E.2d at 192.
19. *Id.*
20. *Id.* at 368, 355 S.E.2d at 193.
21. *Id.* at 370-71, 355 S.E.2d at 194.
22. *Id.* at 370, 355 S.E.2d at 194.

deliver the premises in any particular condition.[23] *Caveat emptor*, as it relates to landlord-tenant law, has two historical origins. First, at the time *caveat emptor* developed, the courts treated leases not as contracts but as conveyances of land for a term.[24] The property rules relating to conveyances did not include the modern contract doctrine of mutually dependent covenants.[25] Thus, once the landlord conveyed the premises to the tenant, the landlord had no more obligations.[26] The second historical origin of *caveat emptor* as it relates to landlord-tenant law lies in the rural agrarian context in which the doctrine developed.[27] As a part of the conveyance, the land was more important than the structures.[28] The tenant farmer was usually more capable of repairing the structures than the landlord.[29] The structures themselves and the various possible repairs were simple compared with those of today.[30] Therefore, the landlord was not expected to keep the structure habitable.

The practical effect of *caveat emptor* was that, once the lease was executed, the landlord owed the tenant no more contractual obligations. The instant of conveyance became important because at that point, absent fraud or mistake, the common law deemed the tenant to have inspected the premises and accepted them as they were.[31] Therefore, the tenant owed the landlord rent even if the structures were completely destroyed.[32] The common law relieved the tenant of his obligation to pay rent only if the landlord repossessed the premises or interfered with the tenant's right to quiet enjoyment.[33] Possession, not service, was the most important aspect of the lease.[34] "The ideal landlord delivered possession, then

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23. CUNNINGHAM, *supra* note 10, § 6.36 at 301.

24. 2 R. POWELL, THE LAW OF REAL PROPERTY § 221(1) (P. Rohan 1986).

25. Lemle v. Breeden, 51 Haw. 426, 429, 462 P.2d 470, 472 (1969); S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890 (3d ed. 1962).

26. *Lemle*, 51 Haw. at 429, 462 P.2d at 472.

27. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

28. *Id.*

29. *Id.*

30. Teller v. McCoy, 162 W. Va. 367, 253 S.E.2d 114, 118 (1978).

31. *Lemle*, 51 Haw. at 429, 462 P.2d at 472.

32. Boston Housing Auth. v. Hemingway, 363 Mass. 184, 189, 293 N.E.2d 831, 837 (1973).

33. *Id.*

34. Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L.

did nothing more; the ideal tenant paid his rent and demanded nothing more than possession."[35]

Early attempts to reform the harsh common law rules came from both the courts and the legislatures. There were two types of judicial reform: exceptions to the common law rules and the doctrine of constructive eviction. Exceptions to the common law rules were generally narrow. Some courts implied a warranty of habitability but only in short term leases of furnished dwellings.[36] Other courts implied a warranty of habitability only in leases restricting the tenant to a particular use where the tenant accepted the premises before they were completely constructed.[37] One court held that when a multi-story apartment building burned down the tenants of the upper floors were relieved of their obligation to pay rent.[38] The doctrine of constructive eviction, on the other hand, was a broader reform. Under that doctrine, courts refused to enforce leases against tenants after the landlord had forced the tenant to leave by breaching his duty to assure quiet possession.[39] For the tenant to prevail, the landlord's breach had to be wrongful, it had to render the premises unusable to the tenant, and the tenant had to leave the premises within a reasonable time.[40] American courts used constructive eviction as a substitute for mutual dependence of covenants.[41]

The early legislative attempts to reform the harsh common law rules came in the form of housing codes. The housing codes required landlords to meet minimum standards relating to number of occupants, sanitary conditions, ventilation, light, fire safety, heat, hot water, etc.[42] The landlord's obligations under the codes were usually enforced not by the tenants but instead by municipal agencies.[43] When the landlord failed to meet the minimum standards, the municipal agencies could usually vacate the premises,

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REV. 489, 490 (1971).

35. *Id.*

36. *See, e.g.*, Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).

37. *See, e.g.*, Woolford v. Electric Appliances, Inc., 24 Cal. App. 2d 385, 75 P.2d 112 (1938).

38. Graves v. Berdan, 26 N.Y. 498 (1863).

39. Note, *supra* note 34, at 491.

40. CUNNINGHAM, *supra* note 10, at § 6.33.

41. *Lemle*, 51 Haw. at 430, 462 P.2d at 473.

42. CUNNINGHAM, *supra* note 10, § 6.37 at 307.

43. *Id.* at 309.

demolish the premises, or criminally prosecute the landlord.[44] Housing codes failed to improve the plight of residential tenants because the municipal agencies were understaffed and underfunded, leased premises were not inspected regularly, and many inspectors were corrupt.[45]

Although they failed to improve the plight of residential tenants, the housing codes did lead to meaningful judicial reform in the late 1960s and early 1970s.[46] The leading case[47] was *Javins v. First National Realty Corp.*[48] In *Javins*, the United States Court of Appeals, District of Columbia Circuit, held that the law implied into every lease covered by the housing codes a warranty that the premises met the standards set out in the codes.[49] The court said that, if the landlord breached the implied warranty, the tenant was entitled to all the usual contract remedies.[50] The court's specific holding was that, where a landlord tried to evict a tenant for nonpayment of rent, the court could find that the tenant owed no rent because the landlord breached the implied warranty of habitability.[51] The court reached this holding by treating the lease not as a conveyance but as a contract. The tenant's obligation to pay rent and the landlord's obligation to provide habitable premises therefore were mutually dependent.[52] During the next few years, the high courts of California,[53] Illinois,[54] Iowa,[55] Massachusetts,[56] New

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44. *Id.*

45. *Id.* at 309-10.

46. Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. REV. 503, 521 (1982). According to Glendon, President Johnson's Great Society made this judicial reform possible by making legal aid more available so that more tenants could take their landlords to court in housing disputes.

47. *Id.* at 525.

48. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970) (tenants alleged numerous violations of the Housing Regulations).

49. *Id.* at 1072-73.

50. *Id.* at 1073.

51. *Id.* at 1082.

52. *Id.*

53. Green v. Superior Court, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974) (tenant submitted an inspection report showing eighty Housing Code violations in the building in question).

54. Pole Realty Co. v. Sorrells, 84 Ill. 2d 178, 49 Ill. Dec. 283, 417 N.E.2d 1297 (1981) (tenant alleged not only breach of the implied warranty but also that the deteriorated condition of the building required her to hire an exterminator).

55. Mease v. Fox, 200 N.W.2d 791 (Iowa 1972) (after a tenant was struck by a falling bathroom ceiling, a housing inspector declared the premises to be a public nuisance).

Jersey,[57] Pennsylvania,[58] Texas,[59] Washington,[60] and West Virginia[61] followed the *Javins* court and implied warranties of habitability into residential landlord-tenant law.

Legislatures also were responsible for meaningful landlord-tenant reform beginning in the late 1960s.[62] Most of these Acts create statutory implied warranties of habitability and are based on the Commission for Uniform State Law's Uniform Residential Landlord Tenant Act[63] (hereinafter "the URLTA") published in 1972.[64] Under the URLTA, landlords must "comply with the requirements of applicable building and housing codes materially affecting health and safety" and "make all repairs . . . necessary to put and keep the premises in a fit and habitable condition."[65] The

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56. *Boston Housing Auth.*, 363 Mass. 184, 293 N.E.2d 831 (defects included leaking ceilings, wet walls, improper heating, broken doors and windows, and rodents and vermin).

57. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970) (tenant claimed he was entitled to setoff after he paid to have a cracked, leaking toilet repaired).

58. Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979) (tenant alleged breach of the implied warranty and also that she was entitled to setoff in an amount she claimed to have spent to repair a broken lock).

59. Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978) (tenant alleged latent defects such as ancient plumbing that burst, faulty wiring, and structural defects causing bricks of the building to fall).

60. Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).

61. Teller v. McCoy, 162 W. Va. 367, 253 S.E.2d 114 (1978).

62. Glendon, *supra* note 46, at 523.

63. 7B U.L.A. 427-508 (1972).

64. *See generally* CUNNINGHAM, *supra* note 10, § 6.39 at 323 n.15. According to Cunningham, the following state statutes are based on the URLTA: ALASKA STAT. §§ 34.03.010 to 34.03.380 (Michie 1977 and Supp. 1979); ARIZ. REV. STAT. §§ 33-1301 to 33-1381 (West 1974 and Supp. 1981-82); CONN. GEN. STAT. ANN. §§ 47a-1 to 47a-20 (West 1978 and Supp. 1980); FLA. STAT. ANN. §§ 83.40 to 83.63 (West Supp. 1982); IOWA CODE ANN. §§ 562A.1 to 562A.37 (West Supp. 1981-82); KAN. STAT. ANN. §§ 58-2540 to 58-2573 (1976 and Supp. 1981); KENTUCKY REV. STAT. §§ 383.505 to 383.715 (Bobbs-Merrill Supp. 1980); MONT. CODE ANN. §§ 70-24-101 to 70-24-442 (1981); NEB. REV. STAT. §§ 76-1401 to 76-1449 (1976); NEV. REV. STAT. §§ 118A.010 to 118A.530 (1979); NEW MEXICO STAT. ANN. §§ 47-8-1 to 47-8-51 (Supp. 1981); OHIO REV. CODE §§ 5321.01 to 5321.19 (Baldwin 1980); OKLA. STAT. ANN. TIT. 41, §§ 101 to 135 (West Supp. 1981-82); OREGON REV. STAT. §§ 91-700 to 91-865 (1979); TENN. CODE ANN. §§ 66-28-101 to 66-28-516 (1955 and Supp. 1987); VA. CODE §§ 55-248.2 to 55-248.40 (1981); WEST'S REV. CODE WASH. ANN. §§ 59.18.010 to 59.18.900 (Supp. 1981). The North Carolina Residential Rental Agreements Act is also based on the URLTA. Fillette, *supra* note 2, at 787. Perhaps Cunningham did not include the North Carolina Act because it is far less detailed than the other acts and the URLTA itself.

65. UNIFORM RESIDENTIAL LANDLORD TENANT ACT, §§ 2.104(a)(1) to (a)(6).

URLTA provides the tenant with a number of remedies, which will be discussed below. State statutory implied warranties of habitability based on the URLTA are generally very similar to the URLTA and to each other.[66] Under them all, the landlord must maintain the premises in a habitable condition regardless of whether a housing code applies.[67] If a housing code does apply, the landlord must exceed its requirements if that is necessary to maintain the premises in a habitable condition.[68]

B. North Carolina

The common law doctrine of *caveat emptor* was in full force in North Carolina until the legislature passed the Residential Rental Agreements Act in 1977.[69] As recently as 1956, the Supreme Court of North Carolina held that if the landlord did not expressly promise the tenant that he "would be safe in the leased premises," the law would not imply such a promise.[70] In the 1970 case of *Thompson v. Shoemaker*,[71] a tenant sued her landlord, alleging that she was entitled to recover back rent paid because her leased premises violated the housing codes and because she had been constructively evicted.[72] However, she had not actually left the premises.[73] The trial court sustained the landlord's demurrers and the tenant appealed.[74] On appeal, the tenant argued that she was entitled to recover even though she had not actually left the premises because she had been unable to leave.[75] She argued that she was unable to leave because she could not afford to and because, due to the housing shortage, she had nowhere else to go. The court of appeals rejected her arguments. The court pointed out that the ten-

66. CUNNINGHAM, *supra* note 10, § 6.39 at 324.

67. *Id.* at 325.

68. *Id.*

69. Brooks v. Francis, 57 N.C. App. 556, 558-59, 291 S.E.2d 889, 890-91 (1982) ("The rule of *caveat emptor* has been commonly applied by the courts of this state in the landlord tenant context . . . . The passage of the residential Rental Agreements Act created a new standard of care owed by landlord to tenant in North Carolina however." [citations omitted]).

70. Robinson v. Thomas, 244 N.C. 732, 735-36, 94 S.E.2d 911, 914 (1956) (tenant sued landlord for damages for injury resulting from a fall when the porch collapsed).

71. 7 N.C. App. 687, 173 S.E.2d 627 (1970).

72. *Id.* at 688, 173 S.E.2d at 628-29.

73. *Id.* at 688, 173 S.E.2d at 628.

74. *Id.* at 688, 173 S.E.2d at 629.

75. *Id.* at 690, 173 S.E.2d at 630.

ant could afford to pay rent during the tenancy and therefore, the court reasoned, she could afford to move.[76] Furthermore, the court found the existence of a housing shortage in Charlotte to be debatable and, therefore, not judicially noticeable.[77] Thus, a tenant who paid her rent in full could recover nothing from the landlord even though the premises for which she was paying violated the housing codes.

The first inroad into the doctrine of *caveat emptor* in North Carolina was made in 1974.[78] The supreme court held that homebuilders owe to new home-buyers and subsequent home-buyers an implied warranty that the home was free from major structural defects and was constructed in a manner that satisfied the prevailing standards for workmanlike quality.[79] However, the courts refused to go any further.[80] In the wake of the supreme court decision implying a warranty of habitability in new homes, a tenant asked the court of appeals to follow the "spirit of the times" and imply a warranty of habitability in leased premises. The court of appeals refused.[81] In a seven sentence opinion, the court pointed out that it was bound by opinions of the supreme court and that, furthermore, the General Assembly had recently refused to reform North Carolina landlord-tenant law. The supreme court denied certiorari.[82]

In 1977, the General Assembly did reform North Carolina landlord-tenant law by passing the Residential Rental Agreements Act.[83] Patterned after the URLTA,[84] the Residential Rental Agreements Act applies to all residential rentals except hotels and motels.[85] The Act declares that the tenant's obligation to pay rent and the landlord's obligation to provide a habitable premises are mutually dependent.[86] Under the Act, the landlord must maintain the premises in compliance with the housing codes and in a habitable

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76. *Id.*

77. *Id.*

78. Fillette, *supra* note 2, at 786.

79. Hartley v. Ballou, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974) (basement of home began to fill up with water after plaintiffs had purchased the home).

80. Fillette, *supra* note 2, at 786.

81. Knuckles v. Spaugh, 26 N.C. App. 340, 215 S.E.2d 825, *cert. denied*, 288 N.C. 241, 217 S.E.2d 665 (1975).

82. 288 N.C. 241, 217 S.E.2d 665 (1975).

83. N.C. GEN. STAT. §§ 42-38 to 42-44.

84. 7B U.L.A. 427-508.

85. N.C. GEN. STAT. § 42-39.

86. N.C. GEN. STAT. § 42-41.

condition.[87] Additionally, the landlord must keep common areas, facilities, and services safe and in good working order.[88] The tenant cannot waive his rights under the Act by accepting the landlord's breach of his obligations.[89] If the landlord and tenant want to agree that the tenant will perform specified work on the premises, they must do so by contract, in writing, separate from the lease agreement, and supported by adequate consideration other than the lease itself.[90] The tenant's obligation to keep the premises in a safe and sanitary condition and the landlord's obligation to provide a habitable premises are mutually dependent.[91] The Act provides that the tenant can enforce his rights by "civil action, in addition to other remedies of law and in equity."[92] The Act defines an "action" to include "recoupment, counterclaim, defense, setoff, and any other proceeding including an action for possession."[93] However, the Act provides that "[t]he tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so."[94]

Thus, by enacting the Residential Rental Agreements Act, the General Assembly implied a warranty of habitability in residential leases in North Carolina. However, the legislature provided only very general guidance on the subject of remedies, apparently leaving it for the courts to say what specific remedies are available to the tenant. The legislature did indicate that the courts are to treat leases not as conveyances but as contracts with mutually dependent covenants.[95] However, the legislature may have limited the available contractual remedies by declaring that the tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so.[96] The courts will be called on to decide if, and to what extent, the tenant's contractual remedies are limited in North Carolina. The *Miller* case sheds light on how this question will be resolved.

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87. N.C. GEN. STAT. § 42-42(a).
88. *Id.*
89. N.C. GEN. STAT. § 42-42(b).
90. *Id.*
91. N.C. GEN. STAT. §§ 42-43 and 42-41.
92. N.C. GEN. STAT. § 42-44(a).
93. N.C. GEN. STAT. § 42-40(1).
94. N.C. GEN. STAT. § 42-44(c).
95. N.C. GEN. STAT. § 42-41.
96. N.C. GEN. STAT. § 42-44(c).

ANALYSIS

Prior to *Miller*, one could argue that the tenant's contractual remedies were not limited at all in North Carolina because, when a tenant withheld rent, he did not do so unilaterally if the landlord had breached the implied warranty of habitability.[97] In other words, one could argue that N.C. Gen. Stat. § 42-44(c) (1984), which provides that the tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so, applies only when the landlord has not breached the implied warranty of habitability. However, the court in *Miller* indicated that it would give section 42-44(c) greater effect than this. The court indicated that section 42-44(c) does apply when the landlord has breached the implied warranty of habitability. The court was quite correct in this regard because it is bound to give effect to statutes passed by the legislature. However, notwithstanding section 42-44(c), the North Carolina courts can and should in the future make available to tenants meaningful contractual remedies for breach of the implied warranty of habitability. Under *Miller*, the key question in analyzing these remedies will be whether they constitute unilaterally withholding rent prior to a judicial determination of a right to do so.

In *Miller*, the court began by acknowledging that, historically, North Carolina followed the doctrine of *caveat emptor* in landlord-tenant law.[98] The court was quick to point out that the legislature eliminated the doctrine of *caveat emptor* in residential landlord-tenant settings when it passed the Residential Rental Agreements Act.[99] The court then noted that the legislature did not make clear what remedies are available under the Act.[100] The court then framed the issue in the case: "This then, is a case of first impression in that we must consider what remedies are available apart from a tort action. We limit our consideration solely to the appropriateness of the rent abatement remedy sought by the plaintiffs."[101]

The court began discussing the relevant law by acknowledging the pre-Act case of *Thompson v. Shoemaker*,[102] which held that a

97. Fillette, *supra* note 2, at 790.
98. *Miller*, 85 N.C. App. at 366, 355 S.E.2d at 191.
99. *Id.* at 366, 355 S.E.2d at 192.
100. *Id.* at 367, 355 S.E.2d at 192.
101. *Id.*
102. 7 N.C. App. 687, 173 S.E.2d 627 (1970). *See supra* text accompanying

tenant could not recover rent paid to the landlord even if the premises were not habitable during the rental period.[103] Next, the court pointed out that in leading cases from other jurisdictions, the courts have held that where the law recognizes an implied warranty of habitability, tenants may use the basic common law contract remedies of damages, reformation, and rescission to enforce their rights.[104] The court specifically noted cases that held that a tenant can recover rent paid when the landlord breaches the implied warranty.[105] Turning to the situation in North Carolina, the court mentioned three relevant provisions of the Residential Rental Agreements Act. First, N.C. Gen. Stat. § 42-41 (1984) makes the tenant's obligation to pay rent and the landlord's obligation to provide a habitable premises mutually dependent.[106] Second, N.C. Gen. Stat. § 42-44(a) (1984) provides that the tenant can enforce his rights under the Act by civil action or by other legal and equitable remedies.[107] Third, the court mentioned section 42-44(c), which of course provides that the tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so.[108] With no further reasoning the court said, "[w]e construe these provisions to provide an affirmative cause of action to a tenant for recovery of rent paid based on the landlord's noncompliance with [the implied warranty]."[109] The court therefore overruled *Thompson v. Shoemaker*.[110]

By including section 42-44(c) among the statutes relevant to the question of what remedies are available for breach of the implied warranty, the court in *Miller* closed the door on the argument that that statute does not apply where the implied warranty has been breached. The court was correct. Section 42-44(c) is a subsection of a statute addressed exclusively to remedies under the Act.[111] The statute on remedies is never applicable unless some ob-

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note 71.

103. *Miller*, 85 N.C. App. at 367, 355 S.E.2d at 192.
104. *Id.* at 367-68, 355 S.E.2d at 192.
105. *Id.* at 368, 355 S.E.2d at 192.
106. *Id.* at 368, 355 S.E.2d at 192.
107. *Id.* at 368, 355 S.E.2d at 193.
108. *Id.*
109. *Id.*
110. *Id.*
111. § 42-44. General remedies and limitations.
(a) Any right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity.
(b) Repealed by Session Laws 1979, c. 820, s. 8.

ligation under the Act has been breached. Thus, by including section 42-44(c) in the statute on tenant remedies, the legislature indicated that the tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so even if the landlord has breached the implied warranty.

Although the court in *Miller* indicated that it would construe section 42-44(c) to limit the tenant's contractual remedies under the Act, the court held that the tenant was entitled to the contractual remedy of damages and indicated that other contractual remedies might be available under the Act as well. In framing the issue in the case, the court spoke in terms of several available contractual remedies but then explained that it was bound to decide on the availability of only one remedy because the tenant in the case sought only one remedy.[112] Then the court made it clear that it was considering cases from other jurisdictions that made available to tenants a variety of remedies for breach of the implied warranty of habitability.[113] By alluding to the existence of contractual remedies other than the one sought by the tenant in *Miller*, the court showed a willingness to consider those other remedies in the future.[114] Some of those other remedies will now be examined in light of the *Miller* case and the Residential Rental Agreements Act, particularly, section 42-44(c).

Termination is a common tenant remedy for breach of the implied warranty. Under the URLTA, the tenant may terminate the lease where the landlord materially breaches the implied warranty of habitability and where the tenant gives the landlord notice of the breach, time to cure the breach, and notice of the tenant's intent to vacate the premises in the event that the landlord fails to cure the breach.[115] Jurisdictions that have adopted statutory implied warranties based on the URLTA have provided the tenant a

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(c) The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so.

(d) A violation of this Article shall not constitute negligence per se. (1977, c. 770, s. 1; 1979, c. 820, s. 8.)

112. *Miller*, 85 N.C. App. at 367, 355 S.E.2d at 192.

113. *Id.* at 367-68, 355 S.E.2d at 192.

114. Indeed, even the discussion of the retroactive rent abatement remedy sought by the tenant in *Miller* was raised on the court's own motion. "Although the parties have not expressly raised the issue, we deem it important to consider initially the appropriateness of the theory upon which the plaintiffs have based their claim for relief . . . ." 85 N.C. App. at 366, 355 S.E.2d at 191.

115. UNIFORM RESIDENTIAL LANDLORD TENANT ACT, § 4.101(a).

termination remedy by statute.[116] In jurisdictions where the law provides that the landlord's obligations and the tenant's obligations are mutually dependent, the courts generally have held that the tenant may terminate the lease if the landlord breaches the implied warranty.[117]

Under the Residential Rental Agreements Act and *Miller*, North Carolina tenants should be able to terminate their leases if their landlords breach the implied warranty. The Act expressly provides that tenants can enforce the landlords' obligations through remedies of law.[118] The court in *Miller* specifically recognized leading cases from other jurisdictions in which the courts held that, where the law recognizes an implied warranty of habitability, tenants may use the basic common law contract remedy of rescission to enforce their rights.[119] The terms rescission and termination are frequently used interchangeably.[120] Since the Act provides that the implied warranty can be enforced through remedies at law and since the court in *Miller* recognized termination (rescission) as a common remedy at law, termination should be recognized as a remedy available to tenants for enforcement of the implied warranty in North Carolina. Furthermore, section 42-41 makes the landlord's obligations and the tenant's obligations mutually dependent. As mentioned above, courts generally allow tenants to terminate their leases for breach of the implied warranty where the law provides that the landlord's and the tenant's obligations are mutually dependent.[121] Finally, termination is not unilaterally withholding rent prior to a judicial determination of a right to do so under section 42-44(c) because the tenant does not withhold the rent unilaterally. If the tenant stops paying rent but continues to occupy the premises, then his action is clearly unilateral. However, if the tenant stops paying rent and delivers possession of

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116. CUNNINGHAM, *supra* note 10, § 6.41 at 332-33.

117. *Id.* at 333.

118. N.C. GEN. STAT. § 42-44(a).

119. *Miller*, 85 N.C. App. at 367, 355 S.E.2d at 192.

120. CUNNINGHAM, *supra* note 10, § 6.41 n.3. Termination is the more correct term for the remedy for breach of the implied warranty. Rescission refers to the undoing of a contract or lease from its inception, whereas termination refers to the prospective undoing of a contract or lease. BLACK'S LAW DICTIONARY 1174, 1319 (5th ed. 1979). Since the tenant will usually have lived in the premises and paid rent prior to seeking to undo the lease, termination is the most accurate term.

121. *Supra* note 117 and accompanying text.

the premises back to the landlord, then the transaction is not nearly so one-sided. Therefore, if the tenant terminates the lease for breach of the implied warranty, his actions should not be characterized as unilateral.[122]

Many states have statutory or judicially enacted schemes whereby a tenant can get a prospective reduction in rent for the landlord's breach of the implied warranty. Under the URLTA, the court can order the tenant to pay the rent into court until the court can determine who, as between the landlord and the tenant, is entitled to what portion of the rent.[123] A variety of similar schemes have been adopted by the various states.[124] Some statutes go further than the URLTA scheme in that they provide that the rent paid into court should be used to repair the premises.[125] Under others, the tenant pays the rent to a court-appointed administrator[126] or into escrow.[127] Another approach is to allow the tenant to sue for a judicial declaration of a right to withhold rent.[128]

The Residential Rental Agreements Act provides for prospective rent reduction under some circumstances. Section 42-41, cited by the court in *Miller*,[129] provides that the tenant's obligation to pay rent and the landlord's obligation to provide habitable premises are mutually dependent. A number of cases in other jurisdictions have held that where the landlord's and the tenant's obligations are mutually dependent, the tenant may withhold rent if the landlord breaches the implied warranty.[130] Moreover, section 42-44(c), also cited by the court in *Miller*,[131] provides that the tenant

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122. Even though termination does not violate N.C. Gen. Stat. 42-44(c), the tenant should still get a judicial determination of a right to terminate before doing so. If the landlord sues and the court determines that the tenant did not have a right to terminate, the tenant could be liable to the landlord on the lease.

123. UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 4.105(a).

124. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 111, §§ 127 F, 127 H, and ch. 239 § 8A (West 1985); N.Y. REAL PROP. ACTS. LAW § 778 (McKinney 1979).

125. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 111, §§ 127 F, 127 H, and ch. 239 § 8A.

126. *See, e.g.*, N.Y. MULT. DWELL. LAW § 302-a (McKinney 1974).

127. *See, e.g.*, 35 PA. CONS. STAT. ANN. § 1700-1 (Purdon 1977).

128. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 111, §§ 127 C-127 H (West 1985).

129. 85 N.C. App. at 368, 355 S.E.2d at 192.

130. *See, e.g., Green*, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168; *Javins*, 428 F.2d 1071; *Boston Housing Auth.*, 363 Mass. 184, 293 N.E.2d 831; *Marini*, 56 N.J. 130, 265 A.2d 897; *Teller*, 162 W. Va. 367, 253 S.E.2d 114 .

131. *Supra* note 111 and accompanying text; *Miller*, 85 N.C. App. at 368, 355

may not unilaterally withhold rent prior to a judicial determination of a right to do so. By reverse inference, this statute allows the tenant to prospectively reduce his rent if (1) he does not actually withhold rent; (2) he does withhold rent, but not unilaterally; or (3) he does withhold rent unilaterally, but with a judicial determination of a right to do so. Therefore, any of the prospective rent reduction remedies mentioned above[132] involving a judicial determination that the tenant has a right to withhold rent should be available under the Act. Furthermore, some of these remedies should be available under the Act for the separate reason that, under them, the tenant does not actually withhold the rent. For instance, where the tenant pays the rent into court,[133] to a court appointed administrator,[134] or into escrow,[135] he has not actually withheld the rent. Finally, one of these remedies should be available under the Act for the further reason that, under it, the tenant does not act unilaterally. Where the tenant pays the rent into court and the court uses the rent to repair the premises,[136] the tenant does not act unilaterally because the landlord receives the benefit of having his rental property repaired.

In many jurisdictions, a tenant can assert breach of the implied warranty as a defense to the landlord's action for back rent or to evict the tenant for nonpayment of rent. This was not possible at common law because the lease was treated as a conveyance rather than a contract and, therefore, the tenant's obligations were not dependent on the landlord's obligations.[137] Constructive eviction, in a sense, served as a substitute for dependency of covenants.[138] Constructive eviction has failed to afford the tenant adequate relief in more modern times because it requires the tenant to abandon the premises. Frequently, the tenant has nowhere else to go.[139] Therefore, some legislatures have passed statutes that allow the tenant to withhold rent when the landlord breaches the implied warranty and then raise that breach as a defense if the landlord sues for back rent or to evict the tenant for nonpayment of

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S.E.2d at 193.

132. *Supra* notes 123-28 and accompanying text.

133. *Supra* notes 123 and 124.

134. N.Y. MULT. DWELL LAW § 302-a.

135. 35 PA. CONS. STAT. ANN. § 1700-1.

136. MASS. GEN. LAWS ANN. ch. 111, §§ 127F; 127H; and ch. 239 § 8A.

137. *Boston Housing Auth.*, 363 Mass. at 189, 293 N.E.2d at 837.

138. *Lemle*, 51 Haw. 426, 430, 462 P.2d at 473 (1969).

139. King v. Moorehead, 495 S.W.2d 65, 76-77 (Mo. App. 1973).

rent.[140] This result has been achieved judicially in other states,[141] with the courts frequently citing mutual dependence of obligations as their rationale.[142]

Under the Residential Rental Agreements Act, it appears that a tenant cannot raise breach of the implied warranty of habitability as a defense to the landlord's action to evict the tenant for nonpayment of rent unless the tenant has previously obtained a judicial determination of a right to withhold rent. Section 42-44(c) provides that a tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so. By including section 42-44(c) among the statutes relevant to the question of what remedies are available for breach of the implied warranty,[143] the court in *Miller* indicated that that statute applies even where the landlord has breached the implied warranty. Moreover, the legislature's inclusion of section 42-44(c) in the statute devoted to remedies indicates that the tenant may not exercise those remedies if he has unilaterally withheld rent prior to a judicial determination of a right to do so.[144] The statute on remedies provides that the tenant may enforce the landlord's obligations under the Act by civil action.[145] The Act defines civil action to include defense.[146] Therefore, it appears that, under the Act, a tenant may not raise a breach of the implied warranty as a defense to the landlord's action to evict the tenant for nonpayment of rent unless the tenant has complied with section 42-44(c).

Perhaps the General Assembly required a prior judicial determination of a right to withhold rent because it recognized that sometimes the court would find that the tenant did not have a right to withhold rent. To protect both the landlord and the tenant, this finding should be made before the tenant begins withholding rent. If the tenant withholds rent and it is later determined that he did not have a right to withhold rent, by that time he may unwilling or unable to pay.[147] Thus, the requirement of a prior judicial determination of a right to withhold rent protects the

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140. *See, e.g.*, N.Y. MULT. DWELL. LAW § 302-a; UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 4.105(a) (1972).

141. *See, e.g.*, Lau v. Bautista, 61 Haw. 144, 149-50, 598 P.2d 161, 165 (1979).

142. *See supra* note 130 and accompanying text.

143. *Miller*, 85 N.C. App. at 368, 355 S.E.2d at 193.

144. *Supra* note 111 and accompanying text.

145. N.C. GEN. STAT. § 42-44(a).

146. N.C. GEN. STAT. § 42-40(1).

147. CUNNINGHAM, *supra* note 10, § 6.43 at 349.

landlord. Moreover, if the court determines for the first time that the tenant did not have a right to withhold rent after he has already done so, then he can be evicted because he mistakenly believed that the premises were not habitable. Thus, the requirement of a prior judicial determination of a right to withhold rent also protects the tenant.

However, section 42-44(c) does not indicate what sort of a prior judicial determination is required.[148] In deciding, courts should remember that the purpose of section 42-44(c) is to protect the tenant from eviction and to insure that the landlord receives the rent due when he has not breached the implied warranty.[149] The judicial determination should be minimally burdensome to the tenant because poor tenants are reluctant to sue their landlords.[150] The courts should fashion a procedure that will encourage the parties to negotiate rather than litigate.[151] The courts should also remember that the landlord can still bring an eviction action or an action for back rent and, therefore, all issues need not be resolved in the prior judicial determination.

For example, the courts could find that section 42-44(c) requires the tenant to file an affidavit or swear before a magistrate or judge alleging facts that show that the landlord is maintaining the premises in breach of the implied warranty. The landlord should be given notice and a brief time—perhaps a week—in which to protest the tenant's claims. If the landlord does not answer within the time specified, the magistrate or judge should determine that the tenant is entitled to withhold rent until the landlord corrects the alleged defects. If the landlord does answer within the specified time, then the magistrate or judge should make a factual determination as to whether the landlord has established that he is not breaching the implied warranty. If the landlord fails to carry this burden, the magistrate or judge should determine that the tenant is entitled to withhold rent until the landlord corrects the alleged defects. In any event, the magistrate or judge could in his discretion recommend that any portion of the rent be escrowed or paid into court. The landlord should be able to sue the tenant for eviction for nonpayment of rent or for back rent at any time. However, if the tenant has obtained a prior judicial determination of a right

148. Fillette, *supra* note 2, at 789.
149. *See supra* text accompanying note 147.
150. *Boston Housing Auth.*, 363 Mass. at 193, 293 N.E.2d at 839.
151. Fillette, *supra* note 2, at 789.

to withhold rent, then he should be able to raise that as a complete defense to eviction. Thus, in the landlord's action against the tenant, the only issue would be to what extent the rent was abated by the landlord's breach of the implied warranty.[152] The question of whether there was a breach[153] would have already been decided in the prior judicial determination.

Under this procedure, the tenant is protected because he can find out for certain whether he can be evicted before he begins withholding rent. If the landlord is not breaching the implied warranty, he is protected because the tenant will have to continue paying rent. Even if he is breaching the implied warranty, the court can protect his right to receive a portion of the rent by recommending that it be escrowed or paid into court. This procedure would not discourage the tenant from taking action because he would be required only to fill out a simple affidavit or appear before a magistrate or judge. To make the procedure even more simple, the affidavit could be printed on a standard form with space for the tenant to explain particular defects. If the defects alleged do in fact exist, then the landlord will likely choose to repair them before contesting the tenant's affidavit. Thus, the parties will be encouraged to negotiate rather than litigate. Finally, the question of to what extent the rent should be reduced is preserved for the landlord to raise later.

An argument can be made, based on a Massachusetts case, that a tenant need not comply with section 42-44(c) in order to raise breach of the implied warranty as a defense where the landlord's suit is for back rent rather than eviction.[154] The case is *Boston Housing Authority v. Hemingway*.[155] The *Boston Housing Authority* case held that the landlord's and the tenant's obligations under the lease are mutually dependent.[156] At the time *Boston Housing Authority* was decided, a Massachusetts statute set out the procedures through which a tenant could withhold rent in response to the landlord's breach of the implied warranty.[157] In *Boston Housing Authority*, the court held that if the tenant failed to

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152. *Javins*, 428 F.2d at 1082-83.

153. *Id.*

154. *See supra* note 111 and accompanying text for an explanation as to why the tenant must comply with N.C. Gen. Stat. 42-44(c) in order to raise breach of the implied warranty as a defense in general.

155. *Boston Housing Auth.*, 363 Mass. 184, 293 N.E.2d 831.

156. *Id.* at 198-99, 293 N.E.2d at 842-43.

157. *Id.* at 192, 293 N.E.2d at 839.

follow the statutory procedure, then he could not raise a breach of the implied warranty as a defense in an eviction action.[158] However, the tenant could raise a breach of the implied warranty as a defense in an action for back rent regardless of whether he had followed the statutory procedures.[159] The court reasoned that, "these remedial statutes do not have any substantive effect on the tenant's rental obligations under the common law."[160]

The present state of landlord-tenant law in North Carolina is similar to that of Massachusetts at the time *Boston Housing Authority* was decided. In North Carolina, as in Massachusetts, the landlord's and the tenant's obligations under the lease are mutually dependent.[161] Section 42-44(c) is included in the statute devoted to remedies for breach of the implied warranty,[162] and the court in *Miller* included section 42-44(c) among the statutes relevant to the question of what remedies are available to the tenant for breach of the implied warranty.[163] These facts indicate that, like the statute construed in *Boston Housing Authority*, section 42-44(c) sets up a statutory procedure through which a tenant can withhold rent in response to the landlord's breach of the implied warranty. The tenant in North Carolina, as in Massachusetts, must follow the statutory procedure if he is to raise the breach of the implied warranty as a defense in an eviction action.[164] However, the North Carolina courts should hold, as did the Massachusetts court, that a tenant should never have to pay the full rent for rental premises that are not habitable. If section 42-42, which provides that the tenant's obligation to pay rent and the landlord's obligation to provide a habitable premises is to be given any effect, the courts should hold that a tenant can raise a breach of the implied warranty as a defense in a suit for back rent regardless of whether or not he has complied with section 42-44(c).

Another common tenant remedy for breach of the implied warranty is the self-help remedy of repair and deduct. Basically,

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158. *Id.* at 202, 293 N.E.2d at 845.

159. *Id.*

160. *Id.* at 201-02, 293 N.E.2d at 844. By "common law," the court seemed to be referring to its holding that the landlord's and the tenant's obligations are mutually dependent.

161. N.C. GEN. STAT. § 42-41.

162. *Supra* note 111 and accompanying text.

163. *Supra* note 111 and accompanying text; *Miller*, 85 N.C. App. at 368, 355 S.E.2d at 193.

164. *See supra* text accompanying notes 143-46.

where the repair and deduct remedy is available, the tenant may cure any breaches of the implied warranty of habitability at his own expense and then deduct the amount expended from the rent due to the landlord.[165] Under the URLTA repair and deduct provision, the tenant must give the landlord advance written notice of his intent to repair and deduct and the amount that the tenant can deduct is limited.[166] The *Restatement (Second) of Property* also authorizes a repair and deduct remedy.[167] A comment under this Restatement section discusses several issues relating to repair and deduct. For instance, the comment provides that the tenant must be able to prove to the landlord that he actually applied the sum deducted to curing the breach of the implied warranty.[168] The amount expended cannot exceed the amount of rent due for the rental period.[169] The cost of the repairs must be reasonable, taking into consideration such factors as the age and overall condition of the building, the condition of the neighborhood, and the feasibility of putting the building to alternative uses.[170]

The North Carolina courts should construe the Residential Rental Agreements Act so as to provide the tenant with a repair and deduct remedy. The Act provides that the tenant may enforce the implied warranty of habitability by civil action.[171] The Act defines civil action to include recoupment.[172] Recoupment is the defendant's right to reduce the plaintiff's damages because of a right in the defendant arising out of the same transaction, or the defendant's right to keep back something that is due because there is an equitable reason to withhold it.[173] Thus, the tenant recoups when he uses rent to cure the landlord's breach of the implied warranty and seeks to reduce the landlord's damages accordingly if the landlord sues the tenant for the rent. Repair and deduct, then, is essentially a type of recoupment. Therefore, repair and deduct is one of the tenant remedies provided for in the Act.

Repairing and deducting may be interpreted as not unilaterally withholding rent prior to a judicial determination of a right to

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165. *Marini*, 56 N.J. at 146-47, 265 A.2d at 535.
166. UNIFORM RESIDENTIAL LANDLORD TENANT ACT §§ 4.103 and 4.104.
167. RESTATEMENT (SECOND) OF PROPERTY § 11.2 (1977).
168. *Id.*
169. *Id.*
170. *Id.*
171. N.C. GEN. STAT. § 42-44(a).
172. N.C. GEN. STAT. § 42-40(1).
173. BLACK'S LAW DICTIONARY, 1146-47 (5th ed. 1979).

do so. Where the tenant applies rent to repairing the premises, his action should not be characterized as unilateral because the landlord receives the benefit of having his rental property repaired. Furthermore, the tenant has not actually withheld the rent. Actually, the tenant has given the rent to the landlord in the form of repair to the rental property rather than in cash.

Another common tenant remedy for breach of the implied warranty of habitability is recovery of damages.[174] The *Miller* case makes it clear that North Carolina tenants are entitled to recover damages from their landlords when the landlords breach the implied warranty of habitability.[175] The court in *Miller* also held that the tenants' damages should be in the amount of the difference between the fair rental value of the premises as warranted and the fair rental value of the premises in their defective condition.[176] This damages formula is the best damages formula available and the North Carolina courts should stand by it with only slight modification.

The courts of other states have adopted three basic formulas

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174. *See, e.g.*, UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 4.101(b).

175. *Miller*, 85 N.C. App. at 367, 355 S.E.2d at 192.

176. *Id.* at 370-71, 355 S.E.2d at 194. In Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692 (1987), the court of appeals followed and explained *Miller* on this point. In *Cotton*, tenants sued their landlord for breach of the implied warranty, seeking damages and injunctive relief. The trial court granted a directed verdict in favor of the landlord on the issue of damages. The tenants raised two arguments on appeal. First, the tenants argued that they were entitled to a complete refund of all of the rent they had paid for rental periods during which the landlord maintained the rental premises in violation of the housing code. The tenants reasoned that the fair rental value of the premises in their defective condition was zero during that time because the housing code prohibits a landlord from renting vacant premises which are being maintained in violation of the code. The court rejected this argument, holding that "[t]he measure of the unit's fair rental value is not the price at which the owner could *lawfully* rent the unit to a new tenant in the open market, but the price at which he could rent it if it were lawful for him to do so." *Cotton*, at 538, 358 S.E.2d at 692. Second, the tenants argued that the trial court should not have directed a verdict in favor of the landlord on the issue of damages. The court of appeals agreed. At trial, the landlord argued that he was entitled to a directed verdict on the issue of damages because the tenants did not offer direct evidence as to the unit's fair rental value in its defective condition. The court of appeals held that the tenant did not have to offer opinion evidence as to what the premises would rent for on the open market. *Id.* at 539, 358 S.E.2d at 695. Instead, the tenant could offer evidence as to the condition of the premises and, from that evidence, the jury could determine the fair rental value. *Id.* That is what the tenant in *Cotton* did, and, therefore, the trial court erred when it directed a verdict in favor of the landlord on the issue of damages.

for calculating a tenant's damages for breach of the implied warranty.[177] The first formula is the formula adopted in *Miller*. Under that formula, the tenant's damages are equal to the amount of the difference between the fair rental value of the premises as warranted and the fair rental value of the premises in their defective condition for each rental period during which the premises were maintained in breach of the implied warranty.[178] This formula will be referred to as the "as-warranted" formula because it is based on the fair rental value of the premises had they been maintained as they were warranted under the implied warranty of habitability.

Under the second formula, the tenant's damages are equal to the amount of the difference between the agreed rent and the fair rental value of the premises in their defective condition for each rental period during which the premises were maintained in breach of the implied warranty.[179] This formula will be referred to as the "agreed rent" formula because it is based on the rental rate agreed upon by the landlord and the tenant for each rental period.

Under the third formula, the tenant's damages are calculated by first estimating the percentage by which the tenant's enjoyment of the premises is diminished because of the landlord's breach of the implied warranty. The tenant's damages will be equal to this percentage of the monthly rent for each month that the landlord breached the implied warranty.[180] This formula will be referred to as the "percentage diminution" formula because it is based on the percentage by which the tenant's enjoyment of the premises is diminished applied to the agreed rent.

The court in *Miller* alluded to the problem with the agreed rent formula. "The implied warranty of habitability entitles a tenant in possession of leased premises to the value of the premises as warranted, which may be greater than the rent agreed upon or paid."[181] The agreed rent formula allows the landlord to reduce the damages he will owe for breaching the implied warranty by charging less rent for the premises in their defective condition than he would charge for the premises if they were habitable. A landlord

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177. CUNNINGHAM, *supra* note 10, § 6.42 at 337.

178. *See, e.g., Green*, 10 Cal. 3d at 639, 111 Cal. Rptr. at 719, 517 P.2d at 1183; Steele v. Latimer, 214 Kan. 329, 336, 521 P.2d 304, 311 (1974); *Boston Housing Auth.*, 363 Mass. at 202, 293 N.E.2d at 845.

179. *See, e.g.*, Kline v. Burns, 111 N.H. 87, 93-94, 276 A.2d 248, 252 (1971).

180. *See, e.g.*, McKenna v. Begin, 5 Mass. App. Ct. 304, 310, 362 N.E.2d 548, 553 (1977), *appeal after remand* 3 Mass. App. Ct. 168, 325 N.E.2d 587 (1975).

181. *Miller*, 85 N.C. App. at 370, 355 S.E.2d at 194.

could totally avoid his obligations under the implied warranty by renting the defective premises at its fair rental value. This would be against the public policy behind the implied warranty, which is to require landlords to provide habitable premises regardless of how much rent is charged. This public policy is evidenced in North Carolina by provisions in the Act prohibiting agreements "with the purpose or effect of evading the landlord's obligations under [the Act]"[182] and prohibiting the landlord from asserting that the tenant waived his rights under the Act by accepting the premises in their defective condition.[183]

Although an argument can be made that the percent diminution formula is better than the as-warranted formula, the court in *Miller* was correct in adopting the as-warranted formula. The argument in favor of the percent diminution formula is based on a Massachusetts case, *McKenna v. Begin*,[184] in which the court ultimately discarded the as-warranted formula in favor of the percent diminution formula.

In *McKenna*, the Appeals Court of Massachusetts remanded an implied warranty case and instructed the trial court to apply the as-warranted formula.[185] The court added that in no event should the tenant's damages exceed the actual rent paid.[186] This admonition was apparently in response to a criticism of the as-warranted formula: where the difference between the fair rental value of the premises as warranted and the fair rental value of the premises in their defective condition is greater than the agreed rent, theoretically, the landlord would have to pay the tenant to live in the premises. This result has been characterized as absurd.[187] However, this result is not the reason the court ultimately discarded the as-warranted formula.

On remand, the trial judge calculated the fair rental value of the premises in their defective condition by dividing the cost required to repair the premises by the number of months of remaining useful life for the building. The trial judge estimated the fair rental value to be the agreed rent minus that amount.[188] On appeal after remand, the same appeals court pointed out that the trial

182. N.C. GEN. STAT. § 42-42(c).
183. N.C. GEN. STAT. § 42-42(b).
184. 5 Mass. App. Ct. 304, 362 N.E.2d 548 (1977).
185. 3 Mass. App. Ct. at 170, 325 N.E.2d at 590 (1975).
186. *Id.* at 174, 325 N.E.2d at 592.
187. CUNNINGHAM, *supra* note 10, § 6.42 at 338.
188. *McKenna*, 5 Mass. App. Ct. at 308-09, 362 N.E.2d at 548, 551-52.

judge's method was improper because it emphasized the cost required to repair the premises when in reality low income tenants usually cannot afford to repair their leased premises and because it could lead to anomalous results.[189] Rather than discard the trial judge's method, however, the appeals court discarded the entire as-warranted formula.[190]

The appeals court in *McKenna* should have retained the as-warranted formula. The court could have corrected the emphasis on the cost required to repair the defects and the anomalous results by instructing the trial judge to continue to use the as-warranted formula but to calculate the fair rental value of the premises in their defective condition based on the evidence and without resorting to the agreed rent or the cost required to repair the premises. Instead, the court adopted the percent diminution formula, which, like the agreed rent formula, is based on the amount of monthly rent agreed upon by the landlord and the tenant. Since the tenant's damages are computed by subtracting a percentage from the agreed rent, the landlord can avoid his obligation to provide habitable premises by renting the defective premises for less than what their fair rental value would be if they were habitable. Again, this is against the public policy behind the implied warranty of habitability.[191]

The as-warranted formula is better than either of the alternative formulas because it is not based on the agreed rent and, therefore, does not permit the landlord to avoid his obligation to provide a habitable premises. The North Carolina courts could easily avoid the situation where the landlord has to pay the tenant to live in the premises by holding, as the Massachusetts court did, that the tenant's damages cannot exceed the actual rent paid. Therefore, the court in *Miller* chose the correct damage formula.

CONCLUSION

In *Miller v. C.W. Myers Trading Post, Inc.*, the Court of Appeals of North Carolina clarified the North Carolina Residential Rental Agreements Act by holding that, where a landlord breaches

189. *Id.* The anomalous results referred to are, for example, that a defect in a new building would entitle a tenant to less damages than would the same defect in an older building because, in the newer building, the cost to repair would be divided by a larger number of remaining months of useful life.

190. *Id.* at 310, 362 N.E.2d at 552.

191. *See supra* text accompanying notes 182 and 183.

the implied warranty of habitability, the tenant is entitled to a retroactive rent abatement in the amount of the difference between the fair rental value of the premises as warranted and the fair rental value of the premises in their defective condition. The court was correct in holding that a tenant is entitled to damages where the landlord breaches the implied warranty because that holding is consistent with the principle codified in the Residential Rental Agreements Act that the tenant's obligation to pay rent and the landlord's obligation to provide a habitable premises are mutually dependent. The damage formula chosen by the court is the best damage formula available because it is the only damage formula that does not permit the landlord to avoid his obligation to provide a habitable premises by reducing the rent charged.

Miller tells us two things about the future of implied warranty of habitability law in North Carolina. First, *Miller* tells us that, even when the landlord has breached the implied warranty, the court still intends to give effect to the statutory provision that prohibits the tenant from unilaterally withholding rent prior to a judicial determination of a right to do so. This indicates that the tenant's remedies for breach of the implied warranty may be more limited in North Carolina than in some other states which do not have a similar provision. Second, *Miller* tells us that the court is ready to consider some of the other common tenant remedies for breach of the implied warranty and determine whether they also are available under the Act.

Analysis of *Miller* and the Residential Rental Agreements Act indicates that other common tenant remedies such as termination, repair and deduct, prospective rent abatement, and the defense of breach of the implied warranty should be available in North Carolina. Lawyers who represent North Carolina tenants should study these remedies and argue that they are available to their clients who are tenants in substandard rental housing.

Johnny Foster