Mississippi College Law Review

Volume 3 | Issue 2 Article 7

6-1-1983

Landlord and Tenant - Exculpatory Clause in Lease Void as against Public Policy - Cappaert v. Junker

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LANDLORD AND TENANT—Exculpatory Clause in Lease Void as Against Public Policy—*Cappaert v. Junker*, 413 So. 2d 378 (Miss. 1982).

FACTS AND HOLDING

On February 1, 1980, De Ette Junker moved into the Pecan Ridge Apartments in Vicksburg, Mississippi. Her apartment was on the second floor, and could be reached only by a set of metal stairs which Ms. Junker used in common with two other tenants. Three weeks after moving in, she signed a standard form lease which contained a liability clause exculpating the landlord, F. L. Cappaert, from any future acts of negligence. On the afternoon of April 25, 1980, after a rain, Ms. Junker slipped and fell on the stairway, sustaining severe injuries to her hip and lower back. She brought suit against Mr. Cappaert and recovered a judgment of $20,000.[1]

Immediately after the trial began, Mr. Cappaert sought to amend his answer in order to introduce the exculpatory clause of the lease as evidence that Ms. Junker had expressly assumed the risk for injuries caused by his negligence. The trial judge allowed the amendment, but refused to allow the jury to be instructed as to the provisions of the clause on the grounds that it should be void as against public policy. On appeal the Mississippi Supreme Court affirmed, holding that in the future exculpatory clauses in residential leases, insofar as they defeat the liability of a landlord for "negligence in maintaining the common area on the leased premises," shall be void as contrary to public policy.[2]

BACKGROUND

An exculpatory clause in a property lease is designed to insure that the lessor is immune to tort liability for any acts of negligence for which a court will allow him the affirmative defense of assumption of risk.[3] Until recently such clauses have been held valid,[4]

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1. Cappaert v. Junker, 413 So. 2d 378 (Miss. 1982). The exculpatory clause in question read as follows:

> The Lessor shall not be liable to Lessee, or to Lessee's employees, patrons and visitors, or to any other person for any damage to person or property caused by any act, omission or neglect of Lessor or any other tenant of said demised premises, and Lessee agrees to hold Lessor harmless from all claims for any such damage, whether the injury occurs on or off the leased premises.

Id. at 379.

2. *Id.* at 382.

3. 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 233[4], at 370.18 (rev. ed. 1982); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 469B (1965); 57 AM. JUR. 2D *Negligence* § 23 (1971).

4. *E.g.*, O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 155 N.E. 2d 545 (1958). For collated cases upholding the validity of exculpatory clauses see Annot., 49 A.L.R. 3d 321, 328 (1973).

even though public policy clearly favors the notion that a person should be responsible for negligent conduct. To understand why courts have validated an apparently disfavored agreement, it is necessary to consider the history of a lessor's immunity in general.

The earliest leases, dating from the eleventh century, were essentially construed as contracts.[5] By the sixteenth century, however, leaseholds were firmly established as conveyances of property and a lease was considered to be the equivalent of a "sale of the premises for an indicated term."[6] Once the lease was executed, the lessor effectively surrendered possession and control of the property to the lessee.[7] Moreover, given the predominantly agricultural nature of leaseholds, and the general absence of structures on the leased property, the prospective lessee was better able to inspect the premises prior to leasing them and then later to maintain them himself.[8] Under these conditions the immunity of the lessor for any injuries the lessee might suffer during the term of the lease seemed self-evident, and no one was likely to question the doctrine of *caveat* lessee.[9]

Like most rules of law, the complementary doctrines of *caveat* lessee and lessor's tort immunity began, over a period of time, to generate exceptions. Beginning in the nineteenth century, as population shifted along the rural-to-urban continuum, the creation of exceptions accelerated.[10] Even though courts continued to assume that a lease was a conveyance of property, and thereby refused to shift the burden of liability from lessee to lessor, they were not unmindful of the injustices resulting from the increased vulnerability of lessees.[11] Fewer and fewer leaseholds consisted

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5. Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 KAN. L. REV. 369 at 371 (1961).

6. R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:10, at 109 (1980); 2 R. POWELL, *supra* note 3, ¶ 221[1], at 179; W. PROSSER, *supra* note 3, § 63, at 399; Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 23-26 (1975).

7. 2 M. FRIEDMAN, FRIEDMAN ON LEASES § 17.1, at 705 (1974); W. PROSSER, *supra* note 3, § 63, at 400; R. SCHOSHINSKI, *supra* note 6, § 4:1 at 186; Love, *supra* note 6, at 49.

8. Quinn and Phillips, *The Law of the Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 226-27 (1969); R. SCHOSHINSKI, *supra* note 6, § 4:1, at 187.

9. 2 R. POWELL, *supra* note 3,¶ 233 [1] at 332-33, ¶ 225 [2][9] at 254; R. SCHOSHINSKI, *supra* note 6, § 3:10, at 110, § 4:1, at 186.

10. R. SCHOSHINSKI, *supra* note 6, § 4:1, at 187; Annot., 64 A.L.R. 3d 339, 342 (1975).

11. Love, *supra* note 6, at 49. Courts in one jurisdiction have set aside the traditional rule of lessor immunity altogether, substituting a standard of reasonable care which must be met by the lessor under virtually all circumstances. Sargent v. Ross, 113 N.H. 338, 308 A. 2d 528 (1973). Courts in three other jurisdictions have shown a willingness to follow *Sargent* in reasoning that the implied warranty of habitability requires that the lessor be held to the ordinary negligence standard. Crowell v. McCaffrey, 377 Mass. 433, 386 N.E. 2d 1256 (1979); Pagelsdorf v. Safeco Ins. Co., 91 Wis. 2d 734, 284 N.W. 2d 55 (1979); Shroades v. Rental Homes, Inc., 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981); Annot., 64 A.L.R.3d 339 (1975).

of rural farm land inhabited by people whose experience and skills allowed them to prevent the occurrence of dangerous conditions. Instead, the greater number of leaseholds were now complex urban structures inhabited by people who lacked the self-sufficiency of the rural lessee and who were dependent on the lessor to insure that the leased premises were reasonably safe.[12] Faced with these changed conditions, yet evidently reluctant to overturn the traditional rule of tort immunity for the lessor, the courts over time devised ways to avoid that rule by finding exceptions to its applicability.[13]

As the courts found exceptions to the lessor's tort immunity, the lessor responded by seeking out methods of keeping that immunity intact. Hence the exculpatory clause, inserted in the lease to modify tort liability by contract, and aimed at expressly shifting the burden of the risk back to the lessee.[14]

Ironically, it seems certain that statutes adopted by a number of states in the late nineteenth century which were intended to impose a duty of repair on urban lessors, also paved the way for lessors to avoid any duty whatsoever. The following language is typical:

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12. R. SCHOSHINSKI, *supra* note 6, § 4:1, at 187.

13. At common law, the lessor's immunity to tort liability has now been excepted in seven ways. If the lessee is injured because of latent defects which the lessor knew or should have known about but failed to disclose at the time the lease was executed, the lessor will be held liable. RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) § 17.1 (1977); RESTATEMENT (SECOND) OF TORTS § 358 (1965). Should the premises be leased for the purpose of admitting the public, the lessor will be liable for injuries to third persons resulting from latent defects. RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) § 17.2 (1977); RESTATEMENT (SECOND) OF TORTS § 359 (1965). In the case of furnished, single-family dwellings leased for a short period, the lessor will be held to a standard of due care on the grounds that the lessee lacks the leisure time to inspect the premises. R. SCHOSHINSKI, *supra* note 6, § 3:11, at 110; Love, *supra* note 6, at 54. When a lease contains a covenant to repair, the lessor will be held liable for injuries resulting from breach of the covenant. RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) § 17.5 (1977); RESTATEMENT (SECOND) OF TORTS § 357 (1965). In the absence of a specific covenant to repair, the lessor will still be held liable if he voluntarily undertakes to perform repairs and does so negligently. RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) § 17.7 (1977); RESTATEMENT (SECOND) OF TORTS § 362 (1965). In the case of leases involving multi-family dwellings such as apartment houses or complexes, the lessor remains liable for injuries caused by failure to maintain common areas and approaches in a reasonably safe condition. Here the original conditions giving rise to lessor's immunity (*i.e.*, that the lessor has yielded possession and control of the demised premises) no longer apply. RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) §§ 17.3, 17.4 (1977); RESTATEMENT (SECOND) OF TORTS §§ 360, 361 (1965). Finally, courts will impose tort liability under a type of negligence *per se* theory should the lessor be found to have violated the provisions of a housing code which carries criminal sanctions. RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) § 17.6 (1977); RESTATEMENT (SECOND) OF TORTS § 285(b) (1965).

14. Comment, *Exculpatory Clauses in Leases*, 8 CLEV.-MAR. L. REV. 538 (1959); Note, *Country Club Apartments v. Scott: Exculpatory Clauses in Leases Declared Void*, 32 MERCER L. REV. 419, 421 (1980).

> The lessor of a building for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable.[15]

As one writer has observed, the phrase "In the absence of an agreement to the contrary" clearly suggests that exculpatory clauses can be employed and will be enforced.[16] It is not surprising, then, that the standard form leases which evolved in the twentieth century typically contained clauses exculpating the lessor from liability for any future acts of negligence.[17]

When they are confronted with the affirmative defense of express assumption of risk evidenced by an exculpatory clause in an executed lease, courts must essentially balance the value of freedom of contract and the value of encouraging widespread consciousness of the duty to exercise due care.[18] Traditionally, courts have found that the value of freedom of contract is paramount.[19] Courts have also been disposed to uphold the validity of exculpatory clauses on the theory that a rental lease primarily represents a private transaction and therefore lies beyond the reach of public policy.[20] In addition, a few courts have validated exculpatory clauses because evidence indicated that the clause was agreed to by the lessee in consideration of lower rent.[21]

Even when courts have found exculpatory clauses valid, the

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15. CIVIL CODE OF CALIF., § 1942 (1872), *quoted in* Comment, *supra* note 14, at 538-39.

16. Comment, *supra* note 14, at 539.

17. R. SCHOSHINSKI, *supra* note 6, § 4:10, at 206; Love, *supra* note 6, at 81. The exculpatory clause at issue in the instant case, *supra* note 1, may be compared with the following typical "standard form" exculpatory clause:

> It is mutually agreed between the parties hereto that the lessor shall not be liable for any damage of whatsoever kind, or by whomsoever caused, to person or property of the lessee or to anyone on or about the premises by consent of the lessee, however caused and whether due in whole or in part to acts of negligence on the part of the lessor, his agents or servants, whether such acts be active or passive, and the lessee agrees to hold the lessor harmless against all such damage claims.

Jones, *An Exculpatory Provision That Will Protect the Lessor*, 1946 INS. L.J. 79, 93 (1946), *quoted in* R. SCHOSHINSKI, *supra* note 6, § 4:10, at 207.

18. *See* Papakalos v. Shaka, 91 N.H. 265, 18 A. 2d 377 (1941); McCutcheon v. United Home Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971), *noted in* Note, *supra* note 14, at 421 n. 15. *See also* Jackson v. First Nat'l Bank, 415 Ill. 453, 114 N.E. 2d 721 (1953).

19. Baker v. Wheeler, Lacey & Brown, Inc., 272 Ala. 101, 128 So. 2d 721 (1961); O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 155 N.E. 2d 545 (1958); Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929); Bryans v. Gallagher, 407 Pa. 142, 178 A. 2d 766 (1962); R. SCHOSHINSKI, *supra* note 6, § 4:10, at 207-08.

20. Eastern Ave. Corp. v. Hughes, 228 Md. 477, 180 A.2d 486 (1962); O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 155 N.E. 2d 545 (1958); Kirshenbaum v. General Outdoor Advertising Co., 258 N.Y. 489, 180 N.E. 245 (1932); R. SCHOSHINSKI, *supra* note 6, § 4:10, at 208.

21. Cannon v. Bresch, 307 Pa. 31, 160 A. 595, 597 (1932); R. SCHOSHINSKI, *supra* note 6 § 4:10, at 208.

clause has been construed strictly in favor of the lessee.[22] In some instances in which courts have apparently upheld the general rule of validity, the construction against the lessor has been so strict that "the obvious intent and result is the practical emasculation of the clauses."[23]

The use of strict construction has not been the only means employed by courts to avoid the potentially harsh effects of exculpatory clauses. As in the case of the *caveat* lessee rule, the rule that exculpatory clauses will be upheld has generated a number of exceptions. Thus courts have diverged from the rule and invalidated exculpatory clauses where the parties to a lease were in positions of unequal bargaining power,[24] where the negligence of the lessor was gross, or merely active rather than passive, [25] where the lessee clearly lacked awareness or understanding of the significance of the clause,[26] where particular circumstances might render the clause unconscionable,[27] where the lease was residential rather than commercial,[28] where a ruling which validated the clause would permit the lessor to escape a

22. *See generally* 2 M. FRIEDMAN, *supra* note 7, § 17.1 at 711-13 (listing various fact situations which courts have found not to be covered by the terms of exculpatory clauses); R. SCHOSHINSKI, *supra* note 6, § 4:11, at 209 (additional fact situations not covered); 57 AM. JUR. 2D *Negligence* § 31 (1971).

23. Annot., 49 A.L.R.3d 321, 327 (1973).

24. Kay v. Cain, 154 F.2d 305 (D.C. Cir. 1946) (dictum); Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971); Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (1955); Galligan v. Arovitch, 421 Pa. 301, 219 A.2d 463 (1966) (dictum); Annot., 49 A.L.R.3d 321, 339-42 (1973). R. SCHOSHINSKI, *supra* note 6, § 4:12, at 212.

25. Baker v. Wheeler, Lacey and Brown, Inc., 272 Ala. 101, 128 So. 2d 721 (1961); Mills v. Rappert, 167 Cal. App. 2d 58, 333 P.2d 818 (1959); Brady v. Glosson, 87 Ga. App. 476, 74 S.E.2d 253 (1953); Schratter v. Development Enterprises, Inc., 584 S.W.2d 459 (Tenn. App. 1979); Queen Ins. Co. v. Kaiser, 27 Wis. 2d 571, 135 N.W.2d 247 (1965); 2 M. FRIEDMAN, *supra* note 7, § 17.1, at 709; Annot., 49 A.L.R.3d 321, 342-44.

26. Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971); Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind.1976) (dictum); 2 M. FRIEDMAN, *supra* note 7, § 17.1 (Supp.1982); Annot., 49 A.L.R.3d 321, 344-45 (1973).

27. Hawes v. Central of Ga. R. Co., 117 Ga. App. 771, 162 S.E.2d 14 (1968); Strauch v. Charles Apartments Co., 1 Ill. App. 3d 57, 273 N.E.2d 19 (1971); Casey v. Lupkes, 286 N.W.2d 204 (Iowa 1979); Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (1955); College Mobile Home Park and Sales, Inc. v. Hoffman, 72 Wis. 2d 514, 241 N.W.2d 174 (1976); R. SCHOSHINSKI, *supra* note 6, § 4:12, at 213; Love, *supra* note 6, at 85-86; Annot., 49 A.L.R.3d 321, 345 (1973). *See generally* Comment, *A Flexible Approach to the Problem of Exculpatory Clauses in the Standard Form Lease*, 1972 WIS. L. REV. 520 (1972) (suggesting that courts measure all standard form exculpatory clauses in landlord tenant leases by the test of "unconscionability").

28. Henrioulle v. Marin Ventures, Inc., 20 Cal. 3d 512, 575 P. 2d 465, 143 Cal. Rptr. 247 (1978); Kuzmiak v. Brookchester, Inc., 33 N.J. Super 575, 111 A.2d 144 (1955); McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971) (limited to multi-family dwellings); 2 M. FRIEDMAN, *supra* note 7, § 17.1 at 709; R. SCHOSHINSKI, *supra* note 6 § 4:12, at 210.

statutory duty,[29] and where the lease involved public housing.[30]

The courts of only one jurisdiction—New Hampshire—have gone so far as to hold that *any* attempt by a landlord to bargain away liability for future negligence will be found void as contrary to public policy.[31] Other courts have distinguished between residential and commercial leases, ruling that exculpatory clauses in most residential leases will be voided as against public policy.[32] Such a distinction appears to have the effect of overturning the general rule that exculpatory clauses will be upheld,[33] since attempts at exculpation in commercial leases are frequently defeated under the unconsionability provision of the Uniform Commercial Code.[34] Given the commercial character of leases in large apartment complexes, courts in the future possibly will treat exculpatory clauses in such quasi-commercial leases after the fashion of the 1963 California case of *Tunkl v. Regents of University of California*,[35] where the court proposed to test the validity of exculpatory clauses by asking whether a given clause contravened some "public interest."[36] Although designed for application to business leases, the *Tunkl* test could also be used to evaluate such standard form apartment complex leases as the one in the instant case.

Although courts have been slow to obviate the rule granting

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29. Tenants Council of Tiber Island - Carrollsburg Square v. De Franceaux, 305 F. Supp. 560 (D.D.C. 1969); Panaroni v. Johnson, 158 Conn. 92, 256 A.2d 246 (1969); Boyd v. Smith, 327 Pa. 306, 94 A.2d 44 (1953); 2 M. FRIEDMAN, *supra* note 7, § 17.1, at 710; R. SCHOSHINSKI, *supra* note 6, § 4:12, at 211; Annot., 49 A.L.R.3d 321, 351-55 (1973).

30. Housing Authority of Birmingham Dist. v. Morris, 244 Ala. 557, 14 So. 2d 527 (1943); Texas v. Housing Authority of Dallas, 495 S.W.2d 887 (Tex. 1973); Thomas v. Housing Authority of Bremerton, 71 Wash. 2d 69, 426 P.2d 836 (1967); 2 M. FRIEDMAN, *supra* note 7, § 17.1, at 710; R. SCHOSHINSKI, *supra* note 6, § 4:12 at 211.

31. Papakolos v. Shaka, 91 N.H.265, 18 A.2d 377 (1941). Refusing to allow the defendant's assumption of risk argument, the court applied "our rule that one may not by contract relieve himself from the consequences of the future non-performance of his common-law duty to exercise ordinary care." *Id.* at 379.

32. Tenants Council of Tiber Island - Carrollsburg Square v. De Franceaux, 305 F. Supp. 560 (D.D.C. 1969); Henrioulle v. Marin Ventures, Inc., 20 Cal. 3d 512, 573 P.2d 465, 143 Cal. Rptr. 247 (1978); Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, lll A.2d 144 (1955); McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971). *But see* College Mobile Home Park and Sales, Inc. v. Hoffman, 72 Wis. 2d 514, 241 N.W.2d 174, 177 (1976) (arguing that the categorical distinction between residential and commercial leases is "artificial and arbitrary," and that each case should be tried according to the facts of its particular setting).

33. Annot., 49 A.L.R.3d 321, 346 (1973).

34. U.C.C. § 2-302 (1978); Love, *supra* note 6, at 85-86; Comment, *supra* note 27, at 529-30.

35. 60 Cal. 2d 92, 483 P. 2d 441, 32 Cal. Rptr. 33 (1963).

36. The relevant portion of the opinion reads as follows:

> In placing particular contracts within or without the category of those affected with a public interest, the courts have revealed a rough outline of that type of transaction in which exculpatory provisions will be held invalid. Thus the attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. It concerns business of a type generally thought suitable for public regulation. The party seek-

validity to exculpatory clauses,[37] state legislatures have proven more responsive to the demands created by the changed nature of most leaseholds. In *Cappaert v. Junker*, the Mississippi Supreme Court cites four states with statutes voiding exculpatory clauses in residential leases,[38] but the actual list of states with similar statutes is much longer.[39] Given the fact that most of these statutes have been passed within the last ten to fifteen years,[40] and given the strict scrutiny courts have begun applying to exculpatory clauses in recent decades, it is not surprising that the Mississippi Supreme Court has brought itself in line with an increasingly clear trend in the law.

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ing exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

383 P. 2d at 444-46 (footnotes omitted).

37. In its opinion in the instant case, the Mississippi Supreme Court cites eight jurisdictions in which an exculpatory clause was judicially voided as against public policy (Florida, Indiana, New Hampshire, New Jersey, Texas, Washington, Wisconsin, and the District of Columbia), Cappaert v. Junker, 413 So. 2d 378, 381 (Miss. 1982), but only New Hampshire courts have clearly set the rule aside altogether, Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941).

38. *Cappaert*, 413 So. 2d at 381. The states cited with applicable statutes are Illinois: ILL. ANN. STAT. ch. 80, § 91 (Smith-Hurd Supp. 1980); Maryland: MD. REAL PROP. CODE ANN. § 8-105 (1974); Massachusetts: MASS. GEN. LAWS ANN. ch. 186, §15 (West Supp. 1980); and New York: N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1978). The Maryland statute applies only to portions of the premises retained under the lessor's control. RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) § 17.3, Comment m. (1977).

39. ALASKA STAT. § 34.03.040(a)(3) (Supp. 1982); ARIZ. REV. STAT. ANN. § 33-1315 (A)(3)(1974); CAL. CIVIL CODE § 1953 (West Supp. 1982) (clause unenforceable if it purports to relieve the lessor from a statutory duty); CONN. GEN. STAT. § 47a-4(a)(3)(1981); DEL. CODE ANN. tit. 25, § 5515 (1974); FLA. STAT. ANN. § 83.47 (West Supp. 1982); GA. CODE ANN. § 61-102 (Supp.1981) (applied in County Club Apartments, Inc. v. Scott, 246 Ga. 443, 271 S.E.2d 841 (1980)); HAWAII REV. STAT. § 521-33 (1976); IOWA CODE ANN.§ 562 A.11 (West Supp. 1982); KAN. STAT. ANN. § 58-2547(a)(4) (Supp. 1979); KY. REV. STAT. ANN. § 383.570(1)(d) (1979); MONT. CODE ANN. § 70-24-202(3) (1981); NEB. REV. STAT. § 76-1415(1)(d) (1981); NEV. REV. STAT. § 118 A. 220(1)(d) (1979); OHIO REV. CODE ANN. § 5321.13(D) (Baldwin 1980); OKLA. STAT. ANN. tit. 41, § 113(A)(4) (West Supp. 1981); TENN. CODE ANN. § 66-28-203(a)(2) (1982); VA. CODE § 55-248.9(a)(4) (1981); WASH. REV. CODE ANN. § 59.18.230(2)(d) (Supp. 1982); RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) § 17.3 Comment m (1977); R. SCHOSHINSKI, *supra* note 6, § 4:13, at 34 n. 76 (Supp. 1982).

40. Most of the statutes passed in recent years are patterned closely after the MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-406 (Tent. Draft 1969) or the UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.403 (1972).

LESSOR'S IMMUNITY AND EXCULPATORY CLAUSES IN MISSISSIPPI

The history of the lessor's tort immunity in Mississippi has been generally consistent with the larger history outlined above.[41] In the early case of *Jones v. Millsaps*,[42] the Mississippi Supreme Court established the rule that there is no implied warranty of habitability in leaseholds, and concomittantly that there is no liability on the lessor's part for injuries suffered by the lessee.[43] The lessee "takes the premises as he finds them," and "must use his own faculties, and judge for himself if the premises he desires to lease are in repair, and are suitable for his use."[44] The message is clear: *caveat* lessee. At the same time the court, in distinguishing another case, gave notice of one of the traditional exceptions to the rule of lessor's immunity, that of negligence involving common areas.[45]

In later cases the court recognized exceptions as to negligent repairs[46] and latent defects.[47] It also confirmed the suggestion in *Jones* that there should be an exception for common areas retained under the lessor's control.[48] To date the court has refused to grant an exception in cases where injuries to the lessee occur as a result of the lessor's breach of a contractual duty to repair,[49]

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41. For a more detailed discussion of the history of Mississippi law in the area of lessor's immunity, see Note, *Landlord and Tenant—Express Exculpatory Provision That Does Not Contravene Public Policy is Valid and is to Be Given Full Effect*, 50 MISS. L.J. 921, 922-35 (1979) (analyzing Smith v. Smith, 375 So. 2d 1041 (Miss. 1979)).

42. 71 Miss. 10, 14 So. 440 (1893).

43. *Id.* at 15, 18, 14 So. 440-41.

44. *Id.* at 18, 14 So. 441.

45. Justice Woods observed regarding the case of Looney v. McLean, 129 Mass. 33 (1880), that it had held that "a landlord who lets rooms in a tenement house to different tenants, with a right of way in common over a staircase, is bound to keep such staircase in repair; but that is not the case at bar." *Id.* at 17-18, 14 So. 441. For the list of common law exceptions to the rule of lessor's immunity, see *supra* note 13.

46. Green v. Long, 152 Miss. 117, 118 So. 705 (1928) (no implied covenant to repair, but repairs voluntarily undertaken and negligently performed may result in liability); *accord* Ford v. Pythian Bondholders Protective Comm., 223 Miss. 630, 78 So. 2d 743 (1955); Kassis v. Perrone, 209 So. 2d 444 (Miss. 1968).

47. Rich v. Swalm, 161 Miss. 505, 137 So. 325 (1931) (as a rule the lessee takes the premises as he finds them, but liability may result if the lessor fails to make known dangerous conditions existing on the premises at the time of the lease); *accord* Loflin v. Thornton, 394 So. 2d 905 (Miss. 1981).

48. Hiller v. Wiley, 192 Miss. 488, 6 So. 2d 317 (1942) (sustaining suggestions of error in decision rendered in Hiller v. Wiley, 192 Miss. 488, 5 So. 2d 489 (1942)) (there will be liability for injuries suffered by the tenant as a result of the landlord's failure to maintain common areas and approaches in a reasonably safe condition).

49. *Rich*, 161 Miss. at 507-08, 137 So. at 327 (where the lessor covenants to repair, the action should be for breach of contract rather than for tort damages); *accord* Ford v. Pythian Bondholders Protective Comm., 223 Miss. at 641-46, 78 So. 2d at 747-49 (refusing to apply RESTATEMENT (SECOND) OF TORTS § 357 (1965), which states the common law rule holding the lessor liable for damages resulting from breach of a covenant to repair).

unless the lease-contract specifies that the lessor will repair a particular, designated defect and the injuries to the lease result from his failure to do so.[50]

In regard to exculpatory clauses in leases, the first case to reach the court was *Smith v. Smith* in 1979.[51] Prior to that date the court had considered exculpatory clauses only in the context of common carrier contracts, and had found them void for public policy reasons.[52] In *Smith*, the plaintiff had leased space in a shopping center from the defendant. The lease contained a clause whereby the lessor agreed to maintain the roof, the foundation, and the exterior walls in "a tenantable condition."[53] The lease also contained an exculpatory clause by which the lessee agreed not to hold the lessor liable for "any damages to persons or property...."[54] The roof subsequently leaked, damaging a substantial amount of merchandise, and the plaintiff sued. The defendant answered that the exculpatory clause was a "complete defense."[55]

The majority in *Smith* held that the exculpatory clause was valid, in effect allowing the defendant-lessor to give with one hand and take away with the other.[56] Paying virtually no attention to the issue of the defendant's express covenant to repair,[57] the majority instead addressed itself to the exculpatory clause and the reasons for upholding it.[58] The operative fact in the case would appear to be the possibility that the defendant was negligent in failing to keep his promise to repair, coupled with the court's reluctance in the past to recognize such negligence as an exception to the rule on lessor's immunity.[59] Rather than confront the issue of Mississippi's failure to recognize the common law exception, the

50. Hodges v. Hilton, 173 Miss. 343, 161 So. 686 (1935) (the landlord promised to repair an unsafe porch).

51. 375 So. 2d 1041 (Miss. 1979).

52. Illinois Central R. R. Co. v. Harris, 108 Miss. 574, 67 So. 54 (1914) (upholding exculpatory agreement would contravene the comparative negligence statute); Western Union Tel. Co. v. Bassett, 111 Miss. 468, 71 So. 750 (1916) (telegraph companies are common carriers under MISS. CONST. art. 7, § 195, and cannot limit their liability for negligence).

53. 375 So. 2d at 1042.

54. *Id.*

55. *Id. See* MISS. CODE ANN. § 11-7-59 (1972).

56. The opinion is analyzed more fully in Note, *supra* note 41, at 935-39.

57. *See supra* note 53 and accompanying text.

58. 375 So. 2d at 1042-43. In validating the clause, the court considered three factors: the lessor did not retain control over the inventory of the store, there was no public interest involved, and there was no unequal bargaining power.

59. Note, *supra* note 41, at 937.

court narrowed its scope to one clause in the lease instead of two.[60] Had the court taken the initiative and established the exception for Mississippi law,[61] it may in turn have found that this newly-recognized positive duty could not be bargained away without contravening public policy.[62]

In the instant case, the court is once again preoccupied with the relationship between a common law exception to the doctrine of lessor's tort immunity and an exculpatory clause. The court begins its argument by defining a lease as "a conveyance of property for a specified period of time,"[63] i.e., it defines a lease by the traditional common law standard.[64] On that assumption, the rule of *caveat* lessee established in *Jones v. Millsaps* still applies[65] and Cappaert, even if negligent, will not be held liable for the injuries to Junker. However, Cappaert is not immune from liability at common law, because Mississippi courts recognize the exception for common areas.[66] The question then becomes: If the lessor here is liable for injuries to the lessee, can he avoid the liability under the exculpatory clause in the lease?[67]

Having noted the conflicting decisions from other jurisdictions as to the validity of exculpatory clauses, the court chooses to join with those who are willing to void the clause under certain circumstances.[68] Its rationale is twofold. First, a lease such as the one in this case, between one landlord and multiple tenants, cannot be construed as a private affair lacking public interest. The traditional image of a single landlord and single tenant, bargaining at arm's length in a private transaction, does not coincide with the realities of modern apartment house living, where one lessor

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60. In a dissenting opinion, Justice Sugg (joined by Robertson, P. J. and Bowling, J.) contrives an equitable method for giving validity to both clauses. Citing the strong policy which favors giving effect to the intent of the parties to a contract, Justice Sugg argues that the exculpatory clause could be held valid except insofar as it would defeat the intent of the repair clause. 375 So. 2d at 1043-44. (Sugg, J., dissenting). Note that Justice Sugg's argument also avoids the issue of whether Mississippi should recognize the common law exception as regards covenants to repair.

61. *See generally,* Note, *supra* note 41, which makes a strong case in favor of such an initiative.

62. Such a conclusion would coincide with the rationale of the instant case. Cappaert v. Junker, 413 So. 2d 378, 382 (Miss. 1982).

63. 413 So. 2d at 379. Justice Sugg wrote for the unanimous court. Note that Justice Sugg's construction of a lease as a conveyance appears to contradict his construction of a lease as a contract in the *Smith* dissent, 375 So. 2d 1041, 1043-44 (Miss. 1979) (Sugg, J., dissenting). The contradiction may perhaps be explained by the differences in the fact situations between the two cases (*e.g.*, *Smith* involved a commercial lease and damage to property while *Cappaert* involved a residential lease and injury to a person), or it may have resulted from the traditional confusion of the two concepts. 1 M. FRIEDMAN, *supra* note 7, § 11.

64. R. SCHOSHINSKI, *supra* note 6 and accompanying text.

65. 413 So. 2d at 379; *see supra* notes 42-45 and accompanying text.

66. 413 So. 2d at 379.

67. *Id.* at 380.

68. *Id.* at 382.

may have executed standard form leases with hundreds or even thousands of lessees.[69] Second, and more significantly, the lessor here should not be allowed to avoid tort liability for his breach of a positive duty so firmly rooted in common law. The rule having clearly established that a landlord shall be liable for his negligence in failing to maintain to a reasonable degree of safety those common areas retained under his control, the court finds that "the exculpatory clause, insofar as it seeks to immunize appellant against damages caused by his negligence in maintaining the common area on the leased premises..., is void as against public policy."[70]

The court concludes that it is not expressing an opinion as to whether or not the exculpatory clause is valid in regard to areas of the leased premises not under the lessor's control, because that question is not before it.[71] The court then goes on to distinguish *Smith*, observing that there the lessor was not under a common law duty to repair the roof. In the words of the court, "[t]he present case is entirely different from *Smith*...."[72]

CONCLUSION

As regards the principal issues in *Cappaert*, the state of the law in Mississippi is as follows. First, the common law rule is still intact which grants a landlord immunity from liability for injuries to a tenant. Three traditional exceptions to this rule have been clearly established—undisclosed latent defects, negligent repairs voluntarily undertaken, and unsafe common areas—but Mississippi remains among the minority in its refusal to recognize the exception for breach of a covenant to repair. It is problematical whether the court would recognize other common exceptions should such cases come before it.[73] Second, that rule is also still intact granting validity to exculpatory clauses in residential leases but the court has now established an exception to that rule as regards common areas and approaches. Given the court's reason for doing so—that a firmly established common law duty ought not be bar-

69. *Id.* at 381. The court draws extensively from the rationale of the similar case of McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971).

70. 413 So. 2d at 382.

71. *Id.*

72. *Id.*

73. In *Cappaert* the court, in discussing the duty which a landlord has under exceptions to the rule of immunity, refers to "common law or statutory duty." *Id.* This seems to indicate that Mississippi would recognize the exception, which has been established elsewhere, holding the landlord liable should he breach a statutory duty.

gained away—it seems certain that it would also void clauses seeking to exculpate a landlord from liability for injuries resulting from undisclosed latent defects, or for injuries resulting from negligent repairs voluntarily undertaken.

While the court could have declared all exculpatory clauses in residential leases void, it is unreasonable to find fault with it for not doing so. Like other courts which have considered exculpatory clauses, the court in *Cappaert* was forced to balance two objectives which are both firmly supported by public policy: the freedom to contract, and the necessity of exercising due care. The scales tipped toward the latter policy in this fact situation—most notable among the facts being the apartment complex setting—but in another fact situation the scales could tip the other way. Mississippi is far from being an urban state, and many if not most of the rental leases are still for one- or two-family dwellings. A blanket invalidation of exculpatory clauses in residential leases could conceivably interfere unreasonably with agreements that are genuinely private affairs, and could defeat legitimate contractual intentions.

One avenue the courts in Mississippi might wish to explore in the future is pointed out in the early case of *Illinois Central R.R. Co. v. Harris.*[74] In *Harris* the Mississippi Supreme Court voided an exculpatory clause because it would effectively repeal the state's comparative negligence statute.[75] Under the comparative negligence standard, liablity is apportioned according to degrees of negligence; an exculpatory clause contravenes the standard because it fixes the liability *a priori* on one side only. It is not beyond the realm of credibility to predict that the court might in some future case apply the *Harris* rationale.

It is a stronger possibility that the Mississippi legislature will take the matter out of the court's hands. As pointed out earlier, approximately one half of the states in the United States have now enacted statutes which declare exculpatory clauses in rental leases to be void, and nearly all of these statutes have gone on the books within the last decade.[76] Bills modeled on the Uniform Residential Landlord-Tenant Act have been introduced in each of the last six sessions of the Mississippi legislature, and have been killed each time,[77] but one senses that the persistence of the sponsors

74. 108 Miss. 574, 67 So. 54 (1914).

75. The court argued that "the policy of the state, reflected in its laws, cannot be bargained away in this manner." *Id.* at 578, 67 So. 56.

76. R. SCHOSHINSKI, *supra* note 6, § 4:13 at 48 n.76 (Supp. 1983); RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) § 17.3 Comment m (1977).

77. The (Jackson) Clarion-Ledger, Feb. 2, 1983, at B6, col. 2.

will inevitably be rewarded. To recast an old legal chestnut, one can argue that since the reason for the rule exists, the rule should exist.

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