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Oklahoma Landlords Beware: *Miller v. David Grace, Inc.* Abandons Caveat Emptor in Residential Leases

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"[T]here is no law against letting a tumble-down house."[1]

I. Introduction

For many years, it was perfectly legal to lease a "tumble-down house" in Oklahoma, because state law held that a residential landlord was immune from tort suits initiated by tenants who had been injured by the leased premises.[2] This common law theory of landlord tort immunity, known as caveat emptor,[3] meant that once a tenant took possession of leased premises, she "assum[ed] all risk of personal injury from defects therein," and the landlord could not be held responsible for the defective conditions.[4] Caveat emptor denied tenant-plaintiffs the opportunity to recover for often horrific injuries caused by the negligence of their landlord.[5]

As of June 30, 2009, these injustices became a thing of the past. In *Miller v. David Grace, Inc.*,[6] the Oklahoma Supreme Court finally abandoned caveat emptor as it pertains to residential leases. The court replaced the increasingly obsolete doctrine of landlord tort immunity with a duty on residential landlords "to maintain the leased premises, including areas under the tenant's exclusive control or use, in a reasonably safe condition."[7]

The *Miller* decision brings Oklahoma in line with the rest of the country, as a majority of states have already abandoned caveat emptor.[8] *Miller* is an important step in protecting the rights of Oklahoma tenants; allowing tenants

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1. Young v. Garwacki, 402 N.E.2d 1045, 1047 (Mass. 1980) (quoting Robbins v. Jones, [1863] 143 Eng. Rep. 768, 776 (N.S.)).

2. *See* Lavery v. Brigance, 1925 OK 702, 242 P. 239.

3. Caveat emptor is Latin for "Let the buyer beware." BLACK'S LAW DICTIONARY 236 (8th ed. 2004). In the context of landlord-tenant law, it is alternately referred to as caveat lessee. *See, e.g.*, Sargent v. Ross, 308 A.2d 528, 534 (N.H. 1973).

4. Godbey v. Barton, 1939 OK 19, ¶ 5, 86 P.2d 621, 622.

5. *See, e.g.*, *Lavery*, ¶ 2, 242 P. at 240 (describing how a landlord's failure to plug a hole in an uncapped gas pipe led to "an explosion of gas which burned [the tenant] badly, set the house on fire, and damaged [the tenant's] belongings").

6. 2009 OK 49, ¶ 24, 212 P.3d 1223, 1230.

7. *Id.*

8. *See id.* ¶ 20, 212 P.3d at 1230 n.4 (listing court decisions overruling caveat emptor); Merrill v. Jansma, 2004 WY 26, ¶ 21, 86 P.3d 270, 280 (Wyo. 2004) (noting that "forty-plus states . . . have done away with landlord immunity").

to recover for personal injuries caused by defective premises will encourage landlords to make repairs and maintain the safety of the leased property.[9]

The *Miller* opinion left some important issues unresolved, however. This case note, after discussing the historical background of caveat emptor in the United States and Oklahoma in Part II, as well as the specifics of the *Miller* case in Part III, focuses on resolving those unaddressed issues surrounding the new duty upon landlords. Although the *Miller* court's adoption of a duty of reasonable care for residential landlords is strongly supported by public policy concerns such as tenant expectations and fairness, Part IV.A discusses why the court should have explained its adoption of a negligence standard as opposed to a strict liability standard, especially when only strict liability would allow tenants to recover in cases involving latent defects. Part IV.B explains how the *Miller* court could have more fully delineated the scope of the new landlord duty of reasonableness, and used that opportunity to extend the scope of the duty to all foreseeable plaintiffs. Finally, Part IV.C shows that although the holding in *Miller* is clearly restricted to residential leases, the policy justifications behind its decision are also applicable to commercial leases, suggesting that in the future commercial landlord tort immunity should also be eliminated. Part V offers a brief conclusion of these issues.

II. Historical Background

From sixteenth-century England to the present day, landlord-tenant law related to tort liability evolved greatly.[10] The past century saw jurisdictions move at various speeds away from the early common law doctrine of caveat emptor, first adopting common law exceptions to landlord immunity, and later developing statutory or implied warranties of habitability.[11] A complete abrogation of caveat emptor and its subsequent replacement with a duty of reasonable care has been the latest step in the process.[12]

A. Caveat Emptor

The doctrine of caveat emptor has its roots in early property law; in sixteenth-century England, when a person purchased land, it was his

9. *See Miller*, ¶ 18, 212 P.3d at 1228 (noting that the current system of caveat emptor "discourages repairs and rewards inattentive landlords").

10. *See* W.E. Shipley, Annotation, *Modern Status of Landlord's Tort Liability for Injury or Death of Tenant or Third Person Caused by Dangerous Condition of Premises*, 64 A.L.R.3d 339, 341-43 (1975).

11. *See* Jean C. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 31, 98.

12. *See* Shipley, *supra* note 10, at 346.

responsibility as buyer to inspect the property prior to purchase.[13] Unless buyer and seller made an express contract otherwise, the purchaser of real property took the land "as is."[14]

During this time period, the law treated a lease as a conveyance of an estate in land.[15] This made sense at the time, when leases primarily "involved the transfer of land for agricultural purposes" and structures on the land "were of secondary importance."[16] Treating a lease as akin to the sale of a time-limited interest in land meant that caveat emptor remained in full force, leaving the tenant responsible for any defects or inadequacies in the land.[17]

Traditionally, the landlord had no general duty to deliver to the tenant "a physically safe and habitable leasehold."[18] Nor did the landlord have any responsibility to repair or maintain the premises during the term of the lease.[19] As a result, once the landlord delivered the premises, he was immune to tort actions from tenants or third parties who were injured by defects in the premises.[20]

Prior to the Industrial Revolution, the doctrine of caveat emptor did not place a particularly onerous burden on tenants.[21] Using the land mostly for agrarian purposes, a tenant was

> capable of inspecting the real estate for defects prior to the inception of the lease, for even if there were improvements on the property, they were relatively simple in design. As for defects arising during the term of the lease, [a tenant] probably had both the skill and the financial resources to make the necessary repairs.[22]

As the world became increasingly urbanized, particularly in the twentieth century, justifications behind the rule of caveat emptor weakened.[23] Courts moved away from the concept of residential leases as conveyances and toward

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13. Love, *supra* note 11, at 27.

14. *Id.*

15. *See* Shipley, *supra* note 10, at 342 (noting that although term leases may have originally been construed as contractual arrangements, during feudal times leases were treated as "a sale of the exclusive possession and control of the land for the term").

16. Love, *supra* note 11, at 26.

17. *See* Shipley, *supra* note 10, at 342.

18. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT ch. 17, reporter's note at 2 (1977).

19. Love, *supra* note 11, at 28.

20. Shipley, *supra* note 10, at 344.

21. *See* Love, *supra* note 11, at 28.

22. *Id.*

23. *See id.*

a view of leases as contractual agreements.[24] This was largely due to the fact that courts began to view the modern residential lease as "an obligation to provide a dwelling space and essential services" rather than as a transfer of land.[25]

When entering into a lease, residential tenants are now far more interested in obtaining "adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance" for their dwelling place than they are in obtaining the land itself.[26] Also, as building technologies have become more complex and mechanical, it is increasingly unlikely that modern tenants possess the requisite skills or financial ability to make repairs to defective premises themselves.[27]

Ill-equipped either to uncover defects before taking possession or to repair defects that arise after possession, modern tenants are forced to rely on their landlords to ensure the safety of the premises.[28] Unfortunately, continued adherence to caveat emptor in many jurisdictions in the early twentieth century meant that most landlords had no legal duty to protect their tenants against personal injuries caused by the premises and could not be held liable for such harm.

B. Common Law Exceptions to Caveat Emptor

The harshness of caveat emptor in light of modern apartment dwelling encouraged the development of a number of exceptions to landlord tort immunity that allowed tenants to recover for physical injuries under certain circumstances.[29] Generally, a landlord was liable for a tenant's physical injuries if the injury was caused by "(1) a hidden danger in the premises of which the landlord but not the tenant is aware, (2) premises leased for public use, (3) premises retained under the landlord's control, such as common stairways, or (4) premises negligently repaired by the landlord."[30] An additional exception allowed recovery against a landlord for injuries caused by "defects constituting a violation of a provision of the applicable building

24. *Id.* at 99.

25. *Id.* at 92.

26. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970).

27. *Id.* at 1078-79 ("[T]oday's city dweller . . . is unable to make repairs like the 'jack-of-all-trades' farmer who was the common law's model of lessee. . . . Low and middle income tenants . . . would be unable to obtain any financing for major repairs since they have no long-term interest in the property.").

28. *Id.* at 1079.

29. *See* Shipley, *supra* note 10, at 344-46; *see also* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT ch. 17, reporter's note at 2 (1977).

30. Sargent v. Ross, 308 A.2d 528, 531 (N.H. 1973).

or housing code."[31] Another recent common law exception to landlord tort immunity imposes a duty upon landlords to exercise reasonable care to protect their tenants from foreseeable criminal activities.[32]

These common law exceptions to landlord tort immunity offered some protection to tenants; however, if a tenant's situation did not fit into one of the specified exceptions, caveat emptor controlled, and the tenant could not recover.[33]

C. Implied Warranty of Habitability and Statutory Reforms

Frustrated with the "inflexibility of the standard exceptions" to landlord tort immunity, some courts looked to other options.[34] The development of an implied warranty of habitability applicable to residential leases was one method advanced as a way to protect tenants injured by defective premises.[35] An implied warranty of habitability "imposes a duty on the landlord to put the premises in habitable condition at the inception of the lease and to maintain the premises in such condition for the duration of the lease."[36] Jurisdictions that have adopted an implied warranty of habitability by judicial decision include Wisconsin,[37] Hawaii,[38] the District of Columbia,[39] New Jersey,[40] New Hampshire,[41] Illinois,[42] Iowa,[43] Massachusetts,[44] California,[45] Kansas,[46] and Missouri.[47] Some jurisdictions have held that a breach of the warranty of

31. Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 755 (Ind. App. 1976).
32. *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970).
33. *See* Shipley, *supra* note 10, at 346.
34. *Id.*
35. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 17.6 cmt. a (1977) ("[T]his Restatement takes the position that there is an implied warranty of habitability by the landlord in regard to residential property. . . . By analogy to the negligence per se doctrine, when the landlord violates this duty, he becomes subject to liability for physical harm resulting from such violation.").
36. Love, *supra* note 11, at 101.
37. Pines v. Perssion, 111 N.W.2d 409 (Wis. 1961).
38. Lemle v. Breeden, 462 P.2d 470 (Haw. 1969).
39. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).
40. Marini v. Ireland, 265 A.2d 526 (N.J. 1970).
41. Kline v. Burns, 276 A.2d 248 (N.H. 1971).
42. Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972).
43. Mease v. Fox, 200 N.W.2d 791 (Iowa 1972).
44. Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973).
45. Green v. Superior Court of San Francisco, 517 P.2d 1168 (Cal. 1974).
46. Steele v. Latimer, 521 P.2d 304 (Kan. 1974).
47. Detling v. Edelbrock, 671 S.W.2d 265 (Mo.1984).

habitability can form the basis for holding the landlord liable in tort for a tenant's personal injuries.[48]

Other states have chosen to adopt statutory reforms to landlord tenant law.[49] Often, though not always, modeled on the Uniform Residential Landlord Tenant Act, such legislation generally "require[s] landlords to maintain the premises in a fit, safe and habitable condition."[50] Similar to a breach of an implied warranty habitability, a landlord's breach of a statutory duty could result in tort liability for a tenant's physical injuries.[51]

D. A Negligence Standard Emerges

Applying tort principles of negligence was another option taken by courts interested in ridding themselves of caveat emptor.[52] Beginning with *Sargent v. Ross* in 1973, courts began to abandon common law caveat emptor wholesale by officially requiring landlords to "exercise reasonable care not to subject others to an unreasonable risk of harm . . . and act as a reasonable person under all the circumstances, including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk."[53]

Sargent involved the death of the tenant's four-year-old child, who fell from the apartment's extremely steep stairway, which had been built by the landlord.[54] Because the stairway was under the sole control of the tenant, it was not used in common by other tenants, and there was no evidence of a latent defect, the defendant-landlord argued that he owed no tort duty to the

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48. *See, e.g.*, Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. App. 1976); Allen v. Lee, 538 N.E.3d 1073 (Ohio Ct. App. 1987); *see also* Montanez v. Bagg, 510 N.E.2d 298 (Mass. App. Ct. 1987).

49. *See* Stephen J. Maddex, Note, Propst v. McNeill*: Arkansas Landlord-Tenant Law, A Time for Change*, 51 ARK. L. REV. 575, 597-600 (1998).

50. Merrill v. Jansma, 2004 WY 26, ¶ 14, 86 P.3d 270, 277 (Wyo. 2004).

51. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 17.6 (1977).

> A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenants by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of: (1) an implied warranty of habitability; or (2) a duty created by statute or administrative regulation.

Id.

52. *See* Sargent v. Ross, 308 A.2d 528, 534 (N.H. 1973) (noting that applying a negligence standard of reasonableness to landlords "best expresses the principles of justice and reasonableness upon which our law of torts is founded.").

53. Shipley, *supra* note 10, at 346 (referencing *Sargent*, 308 A.2d 528).

54. 308 A.2d at 529-30.

plaintiff.[55] Rather than trying to fit this fact pattern into one of the recognized common law exceptions to caveat emptor, the New Hampshire Supreme Court found it "more realistic" to abandon the convoluted system of exceptions, and completely reversed the old policy of residential landlord tort immunity.[56] Recognizing that other immunities from tort liability had been on the decline,[57] the court felt landlords deserved no special protections from the law, and should be subject to a duty of reasonable care.[58]

States that followed *Sargent*'s lead in using a negligence standard for landlords included Alaska,[59] Idaho,[60] Nebraska,[61] Nevada,[62] New Jersey,[63] New Mexico,[64] Utah,[65] Vermont,[66] and Wisconsin.[67] Tenants in these states became free to recover in tort for personal injuries caused by the defective premises. By 2004, more than forty states had adopted some form of judicial or legislative reform to lessen the sting of caveat emptor.[68]

E. Caveat Emptor in Oklahoma

Caveat emptor has deep roots in Oklahoma, as the Oklahoma Supreme Court acknowledged in *Godbey v. Barton*.[69] In *Godbey*, a toddler drowned after falling into a fifteen-foot deep, water-filled pit located near the house his parents had leased.[70] The plaintiff-parents admitted that they had first discovered the pit, which was concealed from view by tall weeds, before the accident.[71] In ruling for the landlord, the court noted:

> The cases are practically agreed that where the right of possession and enjoyment of the leased premises passes to the lessee, in the absence of concealment or fraud by the landlord as to some defect

55. *Id.* at 530.
56. *Id.* at 533.
57. *Id.* (noting that sovereign tort immunity, parental tort immunity, real estate vendor's immunity, and marital tort immunity have been eroded in New Hampshire).
58. *Id.* at 534.
59. Newton v. Magill, 872 P.2d 1213 (Alaska 1994).
60. Stephens v. Stearns, 678 P.2d 41 (Idaho 1984).
61. Tighe v. Cedar Lawn, Inc., 649 N.W.2d 520 (Neb. Ct. App. 2002).
62. Turpel v. Sayles, 692 P.2d 1290 (Nev. 1985).
63. Anderson v. Sammy Redd & Assocs., 650 A.2d 376 (N.J. Super. Ct. App. Div. 1994).
64. Gourdi v. Berkelo, 1996-NMSC-076, 122 N.M. 675, 930 P.2d 812.
65. Williams v. Melby, 699 P.2d 723 (Utah 1985).
66. Favreau v. Miller, 591 A.2d 68 (Vt. 1991).
67. Pagelsdorf v. Safeco Ins. Co. of Am., 284 N.W.2d 55 (Wis. 1979).
68. *See* Merrill v. Jansma, 2004 WY 26, ¶ 16, 86 P.3d 270, 278 (Wyo. 2004).
69. 1939 OK 19, ¶ 5, 86 P.2d 621, 622.
70. *Id.* ¶ 2, 86 P.2d at 622.
71. *Id.*

> in the premises known to him and unknown to the tenant, the rule of caveat emptor applies and the tenant takes the premises in whatever condition they may be in, thus assuming all risk of personal injury from defects therein.[72]

Although Oklahoma adhered to caveat emptor under the common law, the state was an early adopter of landlord-tenant statutory reforms. In 1921, Oklahoma adopted statutory requirements regulating the duties of residential landlords that required landlords to make the premises fit for occupation and repair any defects not caused by the tenant's own negligence.[73]

Even with statutory reforms, Oklahoma landlords remained immune from tort suits. The Oklahoma Supreme Court made it clear early on that the statutory provisions provided no remedy for recovery for personal injuries caused by poorly maintained or defective premises;[74] recovery was restricted to statutory remedies that allowed the tenant to recover the cost of repairs to the premises by withholding rent, or to vacate the premises.[75]

Because Oklahoma's statutes offered no relief to tenants who suffered personal injuries, plaintiffs turned to common law exceptions to caveat emptor. In Oklahoma, a tenant-plaintiff could recover for personal injuries caused by a landlord's negligent repairs, because landlords who undertake to make repairs must do so in a reasonably safe manner.[76] Since 1950, Oklahoma landlords also have had a duty to exercise reasonable care to safely maintain common areas such as entryways, stairs, and porches that are used by multiple

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72. *Id.* ¶ 5, 86 P.2d at 622 (quoting J.E. O'B., Annotation, *Who Is a Stranger or Third Person Within the Rule Regarding Landlord's Liability to Stranger or Third Person Where Premises Are in a Ruinous Condition or Condition Amounting to a Nuisance When Leased*, 110 A.L.R. 756, 756 (1937)).

73. *See* Lavery v. Brigance, 1925 OK 702, ¶ 6, 242 P. 239, 241 (citing § 7370, Okla. Comp. Stats. 1921); *see also* Marjorie Downing, *The Oklahoma Residential Landlord and Tenant Act--The Continuing Experience*, 17 TULSA L.J. 97, 100 n.18 (1981) ("The Oklahoma residential landlord's obligation to maintain rental property has long been defined by statute."). The current Oklahoma Residential Landlord and Tenant Act can be found at 41 OKLA. STAT. §§ 101-136 (2001).

74. *See, e.g.*, Alfe v. N.Y. Life Ins. Co., 1937 OK 243, ¶ 10, 67 P.2d 947, 948; Staples v. Baty, 1952 OK 98, ¶ 4, 242 P.2d 705, 706.

75. *See Lavery*, ¶¶ 7-8, 242 P. at 241. The notes in the *Restatement (Second) of Property* warn, "It would be disconcerting if the tenant who fell through the rotten floor of his kitchen could withhold rent until the hole was repaired, but could not recover for the personal injury he had sustained." RESTATEMENT (SECOND) OF PROP. § 17.6 reporter's note at 8 (1977). This was essentially the state of the law in Oklahoma under *Lavery* and *Godbey*.

76. *See* Crane Co. v. Sears, 1934 OK 375, ¶ 28, 35 P.2d 916, 920, (referencing Horton v. Early, 1913 OK 508, 134 P. 436) ("[W]here the landlord is under no obligation to make repairs, but undertakes to make them gratuitously, he will be liable for his negligence in making such repairs."); *see also* Buck v. Miller, 1947 OK 172, 181 P.2d 264.

tenants, or by both tenants and the landlord, because these common areas were deemed to be under the control of the landlord, rather than the tenant.[77] In 1986, this duty to maintain common areas was expanded to require residential landlords to maintain the common parts of the property "in such a manner as to insure that the likelihood of criminal activity is not unreasonably enhanced by the condition of those common premises."[78]

As a result of these latter two exceptions to landlord tort immunity, a case often depended greatly on who had control of the defective premises.[79] If the landlord lacked control over the defect, the landlord would not be liable.[80] For example, in *Cordes v. Wood*, the Oklahoma Supreme Court cited approvingly *Plott v. Cloer*,[81] a Georgia Court of Appeals decision. In *Plott*, the tenant-plaintiff was sexually assaulted after an assailant climbed into her duplex's second-story window, which the tenant had left open.[82] In the tenant's suit against the landlord for failing to maintain the safety of the premises, the Georgia Court of Appeals held the landlord had relinquished complete control of the premises to the tenant and thus the landlord was not liable for her injuries.[83]

As a result of the Oklahoma Supreme Court's decision in *Cordes*, if a defect causing personal injuries was located in a part of the premises over which the tenant had exclusive control and was not caused by the landlord's negligent repairs, no exception to caveat emptor applied.[84] The landlord remained immune from suit, no matter how horribly injured the plaintiff was as a result of the landlord's neglect.[85] The Oklahoma Supreme Court's holding in *Miller*

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77. *See* Arnold v. Walters, 1950 OK 198, ¶ 14, 224 P.2d 261, 263 (quoting 32 AM. JUR. *Landlord & Tenant* § 688 (1941)); *see also* Geesing v. Pendergrass, 1966 OK 149, 417 P.2d 322.

78. Lay v. Dworman, 1986 OK 85, ¶ 9, 732 P.2d 455, 458.

79. *See* Cordes v. Wood, 1996 OK 68, ¶ 11, 918 P.2d 76, 78-79 (noting that one of "the cornerstones of this duty" is "exclusivity of control").

80. *Id.* ¶ 16, 918 P.2d at 80.

81. 464 S.E.2d 39 (Ga. Ct. App. 1995).

82. *Id.* at 40.

83. *See id.*

84. *Cordes*, ¶ 16, 918 P.2d at 80.

85. *See, e.g.*, Lavery v. Brigance, 1925 OK 702, ¶ 9, 242 P. 239, 241. The plaintiff in *Lavery* was injured in a gas explosion caused by the landlord's failure to seal a hole in the gas pipe. *Id.* Ruling in favor of the landlord under caveat emptor, the Oklahoma Supreme Court commented:

> [W]e cannot doubt that this plaintiff has been badly injured. Yet, however strongly her plight may appeal to our sympathies, we must not lose sight of the fact that 'hard cases make bad law,' and allow ourselves to be governed accordingly. However deserving of relief this plaintiff may be, we must conclude that, as to these defendants, she must bear her injuries uncompensated.

completely changed this reliance on strict common law exceptions.

III. Miller v. David Grace, Inc.

A. Facts and Procedure

Lora Ann Miller moved into a second-floor unit at River Chase Apartments, owned and operated by First Choice Management (the landlord), on July 29, 2002.[86] The apartment included a wooden balcony with a metal railing.[87] While inspecting the unit as instructed by the landlord, Ms. Miller discovered the railing on the balcony was loose.[88] Twice, Ms. Miller informed the apartment manager about the loose railing, but no repairs were completed, despite the manager allegedly promising something would be done.[89] Ms. Miller later testified that she feared someone might fall because of the loose railing, which she believed was dangerous due to a missing screw.[90]

The problem with the balcony was even more severe than she knew: the opposite side of the railing was missing *several* screws, and the floor was cracked where the balcony was supposed to be attached to the deck.[91] On August 18, 2002, Ms. Miller was standing on the balcony; as she leaned forward with her hand on the railing, the entire railing collapsed.[92] Both the railing and Ms. Miller fell from the second floor to the ground.[93] Ms. Miller suffered multiple injuries from the fall.[94]

Eleven months before this incident, the landlord had hired David Grace, Inc. (the contractor) to bring all the apartments' balconies up to code; the contractor claimed it was never notified of issues regarding the repairs.[95]

Ms. Miller filed suit against both the landlord and the contractor, alleging that the landlord "owed her a duty to repair the defective railing," and the contractor owed her "a duty to construct and install a safe balcony railing."[96] The landlord and contractor each moved separately for summary judgment, alleging no duty was owed to Ms. Miller under *Godbey v. Barton* and that the

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Id.

86. Miller v. David Grace, Inc., 2009 OK 49, ¶ 2, 212 P.3d 1223, 1226.
87. *Id.*
88. *Id.*
89. *Id.* ¶ 3, 212 P.3d at 1226.
90. *Id.*
91. *Id.*
92. *Id.* ¶ 4, 212 P.3d at 1226.
93. *Id.*
94. *Id.*
95. *Id.* ¶ 5, 212 P.3d at 1226.
96. *Id.* ¶ 6, 212 P.3d at 1226.

balcony "was an open and obvious condition."[97] The landlord also maintained that Ms. Miller retained "exclusive" control of the balcony.[98] The trial court granted summary judgment to both defendants without explanation.[99]

Ms. Miller appealed, and the Court of Civil Appeals affirmed the summary judgment for the landlord, but reversed as to David Grace, Inc. "because [Ms. Miller's] negligence action stem[med] from an improperly installed railing, not from [the] Contractor's alleged duty to warn her of the defective condition."[100] On certiorari, Ms. Miller urged the Oklahoma Supreme Court to overrule *Godbey* and impose upon residential landlords a duty of reasonable care.[101]

B. The Court's Opinion

In a 5-4 opinion authored by Justice Colbert, the Oklahoma Supreme Court held that the doctrine of caveat emptor as applied to residential leases will no longer be followed by this state, and that it is replaced by "a general duty of care upon landlords to maintain the leased premises, including areas under the tenant's exclusive control or use, in a reasonably safe condition."[102] Because there was a material dispute of fact as to whether the landlord breached its duty of care and whether the balcony railing was an open and obvious danger, the court reversed the earlier summary judgments and remanded the case for further proceedings.[103]

The court began by noting that it would employ a de novo standard of review, as summary judgment and the existence of a legal duty are both questions of law.[104] Moving into its analysis of the case, the court considered Miller's first argument, that section 118 of the Oklahoma Landlord Tenant Act had eliminated the common law doctrine of caveat emptor.[105] The court quickly dispensed with that theory, pointing out that although the Landlord Tenant Act

> imposes a duty upon the landlord to "[m]ake all repairs and do whatever is necessary to put and keep the tenant's dwelling unit and premises in a fit and habitable condition," it does not create a tort remedy for personal injuries sustained as a result of a landlord's breach of those duties. It merely regulates the

97. *Id.* ¶ 7, 212 P.3d at 1226.
98. *Id.*
99. *Id.* ¶ 9, 212 P.3d at 1226.
100. *Id.*
101. *Id.*
102. *Id.* ¶ 24, 212 P.3d at 1230.
103. *Id.* ¶ 33, 212 P.3d at 1232.
104. *Id.* ¶¶ 10-11, 212 P.3d at 1227.
105. *Id.* ¶ 12, 212 P.3d at 1227.

> contractual rights and obligations of the residential parties and does not enlarge the landlord's duty under common law.[106]

Having established that the Oklahoma Landlord Tenant Act offered no relief to the plaintiff, the court then turned to the question of whether the landlord and contractor owed a duty of care to Miller under the common law.[107] The landlord and contractor argued that *Godbey v. Barton* precluded recovery by Miller in tort.[108] The court acknowledged that caveat emptor was the current law in Oklahoma for landlord tort liability:

> [T]he right of possession and enjoyment of the leased premises passes to the lessee, in the absence of concealment or fraud by the landlord as to some defect in the premises known to him and unknown to the tenant, the rule of caveat emptor applies and the tenant takes the premises in whatever condition they may be in, thus assuming all risk of personal injury from defects therein.[109]

Noting that Oklahoma has adopted a number of exceptions to caveat emptor over the years,[110] the court commented that a landlord could be held liable for negligent repairs,[111] failing to maintain common areas under his control,[112] or when his acts or omissions enabled a third party to commit criminal acts upon a tenant.[113] If, however, a tenant could not manage to fit his case into one of these narrow exceptions to caveat emptor, he could not recover for personal injuries caused by a neglectful landlord.[114] The court admitted that the status quo in Oklahoma "discourages repairs and rewards inattentive landlords with immunity from suit while impeding a tenant's recovery for a landlord's utter disregard for a tenant's health, safety, and welfare."[115]

The court then turned its attention to other jurisdictions, noting that many had abrogated caveat emptor as applied to residential leases.[116] In particular, the court focused on *Young v. Garwacki*,[117] in which the Supreme Judicial Court of Massachusetts adopted a duty of reasonableness for residential

106. *Id.* ¶ 13, 212 P.3d at 1227.
107. *Id.* ¶¶ 14-16, 212 P.3d at 1227-28.
108. *Id.* ¶ 14, 212 P.3d at 1227.
109. *Id.* ¶ 16, 212 P.3d at 1228.
110. *Id.* ¶¶ 17-18, 212 P.3d at 1228.
111. *See* Buck v. Miller, 1947 OK 172, ¶ 21, 181 P.2d 264, 267.
112. *See* Arnold v. Walters, 1950 OK 198, ¶ 14, 224 P.2d 261, 263.
113. *See* Lay v. Dworman, 1986 OK 85, ¶ 9, 732 P.2d 455, 458.
114. *Miller*, ¶ 18, 212 P.3d at 1228.
115. *Id.*
116. *See id.* at 1229 n.4 (listing states that have abandoned caveat emptor).
117. 402 N.E.2d 1045 (Mass. 1980).

landlords.[118] Prior to *Young*, landlords in Massachusetts had no duty to safely maintain premises unless there was a separate covenant to do so; landlords were also not legally responsible for existing defects unless the landlord had failed to warn about hidden problems.[119]

After repeatedly referring to the rule as "archaic," the Oklahoma Supreme Court officially overruled *Godbey* and abandoned caveat emptor in favor of a reasonableness standard similar to that articulated in *Young*.[120] The court was careful to note that this new duty of care hinges on the landlord's knowledge of the defect.[121] Ultimately, the landlord now has a duty "to act reasonably when the landlord knew or reasonably should have known of the defective condition and had a reasonable opportunity to make repairs."[122]

Returning to the facts of the *Miller* case, the court concluded that it was clear "that [the] Landlord knew or should have known that the balcony railing was unsafe," in light of the undisputed testimony that Ms. Miller had informed the apartment manager about the loose railing.[123] "Upon [Ms. Miller's] notice to Landlord of the dangerous condition, Landlord had a duty to exercise reasonable care to restore [her] balcony to a safe condition."[124]

Turning next to the defendants' "open and obvious" argument, the court recited the familiar rule that there is no duty to protect others "from dangers so 'open and obvious' as to reasonably expect others to detect them for themselves."[125] There is, however, still a duty "'to warn others of any hidden dangers, traps, snares, pitfalls, and the like.'"[126] Here, there was evidence of hidden defects in the balcony and railing that were not known to Ms. Miller.[127] The court noted "[t]hese latent defects present material issues of fact which preclude summary judgment" and are relevant to the question of "whether the dangerous condition was open and obvious" to Ms. Miller.[128] The court ruled that whether a danger was open and obvious to Ms. Miller was a question of fact for the jury, and the trial court erred in granting judgment to the landlord and contractor without the jury's consideration.[129]

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118. *Miller*, ¶ 23, 212 P.3d at 1230.
119. *See id.* ¶ 22, 212 P.3d at 1229.
120. *Id.* ¶¶ 24-25, 212 P.3d at 1230.
121. *Id.* ¶ 28, 212 P.3d at 1230.
122. *Id.* ¶ 24, 212 P.3d at 1230.
123. *Id.* ¶ 25, 212 P.3d at 1230.
124. *Id.*
125. *Id.* ¶ 29, 212 P.3d at 1231 (citing Jack Healey Linen Serv. Co. v. Travis, 1967 OK 213, ¶ 5, 434 P.2d 924, 926-27).
126. *Id.* (quoting *Jack Healey*, ¶ 5, 434 P.2d at 926-27).
127. *Id.* ¶ 30, 212 P.3d at 1231.
128. *Id.*
129. *Id.* ¶ 31, 212 P.3d at 1231.

Finally, the Oklahoma Supreme Court agreed with the Court of Civil Appeals that the contractor mistakenly relied on an argument that no duty was owed to Ms. Miller because of the railing's open and obvious condition.[130] The court pointed out that Ms. Miller's claim against the contractor derives "from [the] Contractor's failure to construct and install a safe balcony railing, not [the] Contractor's failure to warn of a hazardous condition," and therefore the contractor is not entitled "to a 'no duty' defense based on an open and obvious danger."[131]

IV. Analysis: What the Court Left Out of Miller

Miller was a decisive victory for residential tenants in Oklahoma. Allowing tenants to recover for personal injuries encourages safety and responsibility on the part of landlords; however, the Oklahoma Supreme Court left a few issues unaddressed in the *Miller* opinion that may affect the case's legacy.

A. Strict Liability Ignored?

In *Miller*, the court imposed a duty to act reasonably in maintaining leased premises in a safe condition, giving tenants a cause of action based in negligence if they were injured by a defect.[132] Apart from a brief comment that "today's pronouncement does not make the landlord an insurer of the tenant's safety," the court did not have much to say about alternatives to a negligence standard for a landlord's actions.[133] The court should have more fully explained the reasoning behind its choice to adopt a negligence-based standard as opposed to imposing a strict liability on landlords who fail to maintain the premises.

Historically, strict liability has most often been applied to situations where society requires defendants to compensate victims for harm caused by the inherent and abnormal risks in the defendants' activities, which "are not of themselves considered blameworthy" and may even be considered desirable.[134] Strict liability is commonly applied to products manufacturers who are liable in tort for any injury resulting from a defect in their product.[135] Unlike a negligence cause of action, which requires the plaintiff to show that the defendant "had actual or constructive knowledge of the defect that caused the

130. *Id.* ¶ 32, 212 P.3d at 1231-32.

131. *Id.* ¶ 32, 212 P.3d at 1232.

132. *Id.* ¶ 24, 212 P.3d at 1230-31.

133. *Id.* ¶ 28, 212 P.3d at 1231.

134. Francis M. Dougherty, Annotation, *Strict Liability of Landlord for Injury or Death of Tenant or Third Person Caused by Defect in Premises Leased for Residential Use*, 48 A.L.R.4TH 638, 641 (1986).

135. *See id.*

injury," a strict liability action does not demand the defendant have notice of the defect.[136]

Proponents of a strict liability standard for landlords argue that renting residential premises to tenants is akin to products manufacturers making and distributing their products to consumers, as both landlords and manufacturers are putting their "product" into the stream of commerce to be used by unsuspecting "consumers."[137] Those in favor of strict liability for landlords note that landlords are more familiar with the premises than their tenants are, and can more easily uncover defects on the property.[138] This is similar to a primary rationale behind products liability; namely that the manufacturer of a product is more familiar with its potential defects than consumers are, putting the manufacturer in a better position to guard against the product's dangers.[139]

In 1985, the California Supreme Court used the products liability analogy in *Becker v. IRM Corp.* to hold a residential landlord strictly liable for a tenant's injuries caused by a defective glass shower door in the apartment's bathroom.[140] The *Becker* Court noted that it was fair to extend strict liability to landlords because it is the landlord rather than the tenant who is better equipped to inspect the premises or make repairs, and the landlord is more financially able to bear the costs of injuries resulting from defects.[141]

California's experiment with strict liability for landlords was a failed one: *Becker* was overruled by *Peterson v. Superior Court* in 1995.[142] California reverted back to using a negligence standard for landlord tort liability, commenting that "the decision in *Becker* went far beyond holding landlords liable for injuries caused by their own fault, and imposed liability for injuries caused by defects that the landlord had not created, that would not have been disclosed by a reasonable inspection, and of which the landlord had no knowledge."[143]

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136. *Id.* at 642.

137. *See* Becker v. IRM Corp., 698 P.2d 116, 119, 122 (Cal. 1985) (citing Vandermark v. Ford Motor Co., 391 P.2d 168 (Cal. 1964) ("[A]ll those who are part of the 'overall producing and marketing enterprise . . . should bear the cost of injuries from defective products'"; "[L]andlords are part of the 'overall producing and marketing enterprise' that makes housing accommodations available to renters."), *overruled by* Peterson v. Superior Court, 899 P.2d 905 (Cal. 1995).

138. *See* Love, *supra* note 11, at 134.

139. *See id.*

140. *See* 698 P.2d at 124.

141. *Id.* at 122-23.

142. 899 P.2d 905 (Cal. 1995).

143. *Id.* at 912.

The *Peterson* court also noted that the application of strict liability to landlord-tenant law had received a "chilly reception," with the few jurisdictions that addressed the *Becker* holding rejecting it outright.[144] No other state has judicially adopted a strict liability standard for landlords; they have preferred instead to impose a duty of reasonable care which requires that the landlord knew or should have known about the defect.[145]

Oklahoma also adopted a negligence standard rather than strict liability for landlords in *Miller*.[146] The court offered few reasons behind its decision. It stressed the importance of the landlord's knowledge of the defect as a precursor to liability, yet did not explain—as the *Peterson* court did in California—why the landlord's knowledge of the defect ensures fairness in imposing liability on him.[147] The court addressed none of the benefits of strict liability—the landlord is in better position to repair, the landlord is better able to financially bear the burden of liability, strict liability is easier to prove than negligence—but chose instead to ignore the issue completely.

The court also should have explained why it felt fault liability was better equipped to deal with situations such as latent defects which are undiscoverable to both the landlord *and* the tenant. Under a negligence standard, if the defect is undiscoverable by the landlord, meaning he did not and reasonably could not have known about it, it is the tenant who must bear the burden of his loss, because in this situation, no duty is imposed on the landlord.[148] Under strict liability, however, the tenant could recover even if the defect was undiscoverable by the landlord. Is adhering to a negligence standard in cases of latent defects fair when the landlord has the option of buying liability insurance to spread the costs of his risk whereas the tenant must rely solely on his own savings and personal health insurance to pay for his injuries?[149]

Some have speculated that imposing strict liability would result in fewer housing options available to low income tenants because landlords would leave the market rather than face the increased possibility of successful lawsuits over defective premises.[150] The risk of the housing market contracting as a result of the adoption of a strict liability standard is probably not greater

144. *Id.* at 909.

145. *See id.* at 909-10 (referencing other states' decisions to avoid strict liability in favor of negligence).

146. *See* Miller v. David Grace, Inc., 2009 OK 49, ¶ 24, 212 P.3d 1223, 1230.

147. *See id.* ¶ 28, 212 P.3d at 1230-31.

148. Olin L. Browder, *The Taming of a Duty— The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 138 (1982).

149. *See* Love, *supra* note 11, at 135.

150. *See id.* at 136.

than the risk of that outcome occurring in jurisdictions that have adopted other landlord-tenant reforms such as the implied warranty of habitability.[151] Low income tenants who lack insurance are also those who would benefit most from a strict liability standard imposed on defective premises.[152]

The Oklahoma Supreme Court did not address the cost considerations behind strict liability in general, nor did it consider the option of imposing strict liability only in the limited circumstance of latent defects. While in many cases a negligence standard is sufficient to allow an injured tenant to recover, the court should have addressed more fully other potential options such as strict liability, or at least discussed why a negligence standard was preferable.

B. To Whom Do Landlords Owe the Duty of Reasonable Care?

Although the Oklahoma Supreme Court imposed upon landlords a duty to use reasonable care in maintaining their premises, it left open-ended the question of to whom that duty is owed.[153] In its opinion, the court discusses at length the Massachusetts case *Young v. Garwacki*, the holding of which focused on extending a landlord's duty of reasonable care to the guest of a tenant, not the tenant herself.[154] The facts of *Miller* differ from *Young* in that in the Oklahoma case, it was the tenant who was injured by the landlord's negligence rather than a visitor.[155]

Because the *Miller* fact pattern involved a tenant who clearly had the right to be on the leased property, the court did not address whether a non-tenant plaintiff injured on the premises would have a cause of action against the landlord. It would have been beneficial for future suits had the court taken the initiative to preemptively define the group of plaintiffs to whom the landlord owes the duty of reasonable care. Rather than adhering to the outdated distinctions between invitees, licensees, and trespassers, landlord tort liability in Oklahoma should extend to all foreseeable plaintiffs who are injured by the premises.

In Oklahoma, "it is well-settled . . . that the duty of care which an owner . . . of land has toward one who comes upon his or her land and is injured because of the condition of the premises, varies with the status occupied by the entrant."[156] The different common law statuses recognized include trespassers, who enter another's land without the owner's permission; licensees, who enter

151. *See id.*
152. *Id.*
153. *See* Miller v. David Grace, Inc., 2009 OK 49, ¶ 24, 212 P.3d 1223, 1230.
154. 402 N.E.2d 1045, 1049 (Mass. 1980).
155. *See Miller*, ¶ 1, 212 P.3d at 1223; *Young*, 402 N.E.2d at 1046.
156. Scott v. Archon Group, L.P., 2008 OK 45, ¶ 18, 191 P.3d 1207, 1211.

another's land for their own benefit or pleasure with the permission of the owner; and invitees, who enter another's land with the owner's permission for the purpose of a common interest between the visitor and the owner.[157]

Landowners owe trespassers a duty to avoid injuring them "willfully or wantonly."[158] Licensees are owed "a duty to exercise reasonable care to disclose . . . the existence of dangerous defects known to the owner, but unlikely to be discovered by the licensee," meaning the property owner must warn the licensee of hidden dangers on the property.[159] Landowners owe the highest duty to invitees; the owner must exercise "reasonable care to keep the premises in a reasonably safe condition for the reception of the visitor."[160] Landowners have no duty to protect any class of entrants from open and obvious dangers on the property.[161]

In light of the holding in *Miller*, these distinctions are outdated and should not affect a landlord's duty to exercise reasonable care in maintaining the premises. This is primarily due to practical concerns derived from the distinction between invitees and licensees.

In Oklahoma, most social guests are considered licensees because they are coming onto the land primarily for their own benefit, such as a free meal or social visit.[162] "For an entrant to become an invitee, some public or business purpose must predominate, rather than a purpose of providing companionship or having social relations."[163] If social guests of tenants are considered licensees, they would not be entitled to the full duty of reasonableness articulated in *Miller*; instead of having a duty to maintain the premises in a reasonably safe condition as for an invitee, landlords would only be required to warn guests of hidden dangers rather than repair the defects.

A 1959 case, *Pruitt v. Timme*, appears to resolve this conflict by treating the plaintiff, a social guest of one of the tenants, as an invitee of landlord.[164] The facts of this case are rather sparse, and it is not clear why the plaintiff was considered an invitee of the landlord, or if her visit had some sort of business purpose that benefited the landlord so as to take her out of the licensee category and into that of an invitee.[165]

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157. Brown v. Nicholson, 1997 OK 32, ¶ 6, 935 P.2d 319, 321.

158. *Scott*, ¶ 19, 191 P.3d at 1211 (citing Pickens v. Tulsa Metro. Ministry, 1997 OK 152, ¶ 10, 951 P.2d 1079, 1083).

159. *Id.* (citing *Pickens*, ¶ 10, 951 P.2d at 1083).

160. *Id.* at 1212 (citing *Pickens*, ¶ 10, 951 P.2d at 1083-84).

161. *Id.* (citing *Pickens*, ¶ 10, 951 P.2d at 1084).

162. Osborne M. Reynolds, Jr., *Licensees in Landoccupiers' Liability Law— Should They Be Exterminated or Resurrected?*, 55 OKLA. L. REV. 67, 68 (2002).

163. *Id.* at 69.

164. 1959 OK 276, ¶ 6, 349 P.2d 4, 4.

165. *But see* Reynolds, *supra* note 158, at 70 ("[A] social visitor to a tenant in an apartment

A better solution would be to extend the landlord's duty to exercise reasonable care to all foreseeable plaintiffs. Such a system would be more flexible than rigid status-based classes of eligible plaintiffs.[166] It would "shift[] the focus of the judicial inquiry from the technical classification of the plaintiff's status to the more appropriate question of whether there was a foreseeable risk of harm to the plaintiff."[167]

Determining whether a particular plaintiff was under a foreseeable risk of harm would not be terribly taxing for courts to decide. In earlier cases dealing with common law exceptions to caveat emptor, the Oklahoma Supreme Court acknowledged that foreseeability was a "cornerstone" of a landlord's duty to reasonably protect tenants from criminal attacks.[168] If the court is equipped to determine whether a "criminal act which resulted in injury to [tenant]" was the kind of event a landlord "could reasonably be expected to prevent," then the court should be able to determine whether the plaintiff was someone the landlord could reasonably expect to be injured by a particular act.[169]

Assuming the court found the plaintiff to be subject to a foreseeable risk of harm, any plaintiff could recover, regardless of their status as an invitee, licensee, or trespasser. The plaintiff's status might be considered as a factor,[170] but would no longer be entirely dispositive of the issue. Lessening the influence of the old common law entrant statuses would help deserving (i.e., foreseeable) plaintiffs recover from neglectful landlords.

C. Should Landlord Tort Immunity Also Be Eliminated From Commercial Leases?

In *Miller*, the court clearly restricts its holding to residential landlords.[171] The ruling is supported largely by concerns such as reasonableness and a desire to protect tenants from "a landlord's utter disregard for a tenant's health, safety, and welfare."[172] Because these concerns are equally applicable to commercial leases, the duty of reasonable care to maintain the premises in a safe manner that was articulated in *Miller* should also be imposed on commercial landlords.

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house may be an invitee as to the landlord of that house since the premises on which the 'apartment business' is maintained are presumably open for the purpose of such visits.").

166. Love, *supra* note 11, at 123.

167. *Id.*

168. Cordes v. Wood, 1996 OK 68, ¶ 11, 918 P.2d 76, 78-79.

169. *Id.* ¶ 12, 918 P.2d at 79.

170. Love, *supra* note 11, at 123.

171. *See* Miller v. David Grace, Inc., 2009 OK 49, ¶ 19, 212 P.3d 1223, 1228 ("Oklahoma's adherence to the caveat emptor doctrine obscures rather than illuminates the proper considerations which govern a court's determination of a residential landlord's duty.").

172. *Id.* ¶ 18, 212 P.3d at 1228.

Because residential tenants usually have far less bargaining power than their landlords, landlord-tenant law reforms have often focused more on protections for residential tenants.[173] Commercial tenants are seen as more sophisticated and better able than their residential counterparts to either properly inspect the premises or bargain for better terms with their landlord.[174] As a result, reforms to commercial landlord-tenant law have somewhat lagged behind reforms affecting residential leases, noticeably in the area of landlord tort liability for personal injuries.

In *Miller*, the court extensively and approvingly reviewed the *Young v. Garwacki* decision of the Supreme Judicial Court of Massachusetts, wherein Massachusetts adopted a duty for landlords to exercise reasonable care in maintaining leased residential premises.[175] The Oklahoma Supreme Court praised the Massachusetts court's decision to abandon the "archaic" rule of caveat emptor in regards to residential leases.[176] Massachusetts retains that archaic rule when it comes to commercial leases, though it does recognize two common law exceptions to liability.[177]

In the Massachusetts case *Humphrey v. Byron*, the plaintiff was the sole employee of a small silkscreen printing company which had leased a building, including the basement.[178] The plaintiff was injured in a fall down the basement stairs, which lacked a railing and were described as wobbly.[179] If the plaintiff in *Humphrey* had been a residential tenant leasing an apartment in that building, he would have been entitled to recover under *Young*; however, because the plaintiff was a commercial tenant who could not fit his cause of action into the recognized common law exceptions, he was denied recovery.[180]

Under *Miller*, the result would be same if this case occurred in Oklahoma; a residential tenant could recover whereas a commercial tenant could not. The Oklahoma Supreme Court has acknowledged that "differentiation between commercial and residential tenants" can be justified in order to give "the residential tenant protections which are not particularly needed by commercial

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173. Maddex, *supra* note 48, at 593.

174. Todd D. Ruggiero, Brown v. Green *and* Hadian v. Schwartz*: Determining Who Is Responsible for Major Structural Repairs in Commercial Leases*, 28 PAC. L. J. 417, 423-24 (1997).

175. 402 N.E.2d 1045 (Mass. 1980).

176. *Miller*, ¶ 23, 212 P.3d at 1230.

177. *See* Humphrey v. Byron, 850 N.E.2d 1044, 1049 (Mass. 2006) ("[A] lessor of commercial premises is liable in tort for personal injuries only if either (1) he contracted to make repairs and made them negligently, or (2) the defect that caused the injury was in a 'common area,' . . . over which the lessor had some control.").

178. *Id.* at 1046.

179. *Id.*

180. *Id.* at 1050.

tenants."[181] It is not necessarily true, however, that commercial tenants do not need the same duty of reasonableness to maintain safe premises imposed on their landlords as residential tenants do.

As the plaintiff tried to argue in *Humphrey*, not all commercial tenants are sophisticated bargainers with the ability to knowledgably inspect the premises for defects; tenants that are small businesses may have "a short-term lease, limited funds, and limited experience dealing with such defects."[182] When commercial tenants—regardless of size—inspect their premises, they are usually looking for "space requirements, adequate location, parking, and other conditions related to conducting a profitable business," rather than structural defects that might harm them or their customers.[183] Small business owners in particular are unlikely to be able to afford inspectors to search for defects or legal counsel to help negotiate more favorable terms in the lease.[184]

In *Miller*, the court commented, "The expectation that a landlord act reasonably is inherent in contemporary residential leases."[185] This expectation is also inherent in modern commercial leases, particularly those involving small businesses that are not equipped to inspect the premises themselves. Even large businesses expect their landlord to act reasonably in maintaining the premises. Landlords should not be allowed to disregard the "health, safety, and welfare" of those who use their premises merely because the tenant is commercial rather than residential. Adhering to caveat emptor for commercial leases requires the tenant to bear the burden of the landlord's negligence, even where the landlord acts unreasonably. Commercial tenants should be given the same protections of reasonableness regarding landlord tort liability as residential tenants.

V. Conclusion

With the holding in *Miller v. David Grace, Inc.*, Oklahoma has joined the majority of states in protecting the right of residential tenants to recover from negligent landlords. The court's decision recognized that the nature of residential leases has changed greatly since the common law doctrine of caveat emptor first emerged in agrarian England. By adopting a negligence standard,

181. Wagoner v. Bennett, 1991 OK 70, ¶ 19, 814 P.2d 476, 480.

182. *Humphrey*, 850 N.E.2d at 1048.

183. Maddex, *supra* note 48, at 594.

184. Donald R. Pinto, *Modernizing Commercial Lease Law: The Case for an Implied Warranty of Fitness*, 19 SUFFOLK U. L. REV. 929, 950 (1985).

185. Miller v. David Grace, Inc., 2009 OK 49, ¶ 26, 212 P.3d 1223, 1230.

the court eliminated the confusion and rigidity that accompanied the prior system of common law exceptions to landlord tort immunity.

While it is now clear that residential landlords are under a duty to exercise reasonable care to maintain the leased premises, the *Miller* opinion should have explained more fully why the court chose to adopt a negligence standard rather than imposing strict liability on landlords. Strict liability may even have been the better decision for Oklahoma tenants under limited circumstances related to latent defects.

The court also should have better defined the field of persons to whom the duty of reasonable care is owed. Under Oklahoma's current recognition of different statuses of entrants on land, the scope of the landlord's duty to the plaintiff depends on whether the plaintiff is a trespasser, licensee, or invitee. The court should have taken the opportunity in *Miller*, as the Massachusetts court did in *Young*, to extend the duty of care to those plaintiffs under a foreseeable risk of harm from the defective premises.

Finally, the holding in *Miller* should be extended not only to residential landlords, but also to commercial landlords. In contemporary commercial leases, tenants—especially small businesses—are not always able to adequately inspect the premises or negotiate more satisfactory terms, due to a lack of financial or technical ability. If a fault-based standard such as the duty of reasonableness imposed on residential landlords is extended to commercial leases, commercial landlords could justly be held accountable for failing to adequately maintain or repair the premises in line with the tenant's expectations.

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