

Tenants: What to do If Your Rental Needs Repairs

Introduction

This publication has information on tenants' repair remedies in the State of Washington. Federal, state and local laws apply to the relationship between landlords and tenants. This publication explains:

- the tenant repair remedies provided in the Residential Landlord-Tenant Act ("the Act"), found at [RCW 59.18](#)
- the Warranty of Habitability
- how to get unsafe or uninhabitable premises inspected

Call Northwest Justice Project's CLEAR line at 1-888- 201-1014, or see <http://www.washingtonlawhelp.org>, for more publications on landlord-tenant matters, including:

- [Eviction and Your Defense](#)
- [Your Rights as a Tenant in Washington](#)
- [Can I Get My Security Deposit Back?](#)
- [Public Housing Evictions](#)
- [HUD Housing Evictions](#)
- [Tenants' Rights Under the Mobile Home Landlord Tenant Act.](#)

Important

Read this whole publication carefully before you try to use any of the remedies we describe.

To use the Act's repair remedies, you must be up-to-date in rent and any utilities in your name.

Both you and the landlord must perform duties and use remedies under the Act in good faith.

Under the Act, you cannot withhold rent, even if the landlord has not made repairs. (See "Remedies under the Act," and "Warranty of Habitability," below.)

If you get an unlawful detainer (eviction) notice, talk with a lawyer and read our publications [Your Rights as a Tenant in Washington](#) and [Eviction and Your Defense](#). When you talk to the lawyer, have all written materials relating to your tenancy with you, including your lease or rental agreement, rent receipts, and any written notices you have given to or gotten from the landlord. (Keep copies of all documents.)

What are the landlord's repair and maintenance duties?

This publication explains the landlord's duties under the Act related to repair and keeping up the premises.

- ◆ Our publications called [Your Rights as a Tenant in Washington](#) and [Eviction and Your Defense](#) explain **other landlord duties**, including the duty not to discriminate and the duty not to do unlawful lockouts, utility shutoffs, or property seizures.
- ◆ [Our Your Rights as a Tenant in Washington](#) publication explains **your duties** under the Act.

You can find the law online at <http://apps.leg.wa.gov/rcw/default.aspx?cite=59.18> (landlord's duties are [here](#), tenant's duties are [here](#)) or at your local law library.

The Landlord Must:

- Keep the premises fit for human habitation at all times during the tenancy.
- Maintain the premises to comply substantially with all state and local laws that substantially affect your health and safety.
- Maintain all structural components (chimney, roof, floors, and so on) in reasonably good repair.
- Keep any shared or common areas reasonably clean and safe.
- Provide a reasonable program for the control of insects, rodents and other pests, except when infestation is caused by you. (In the case of a single-family residence, the landlord does not have to control infestation that happens after you have moved in.)
- Make repairs and arrangements needed to put and keep the premises in as good condition as by law or rental agreement it should have been at the beginning of your tenancy, except where the condition is due to normal wear and tear.
- Provide you reasonably adequate locks and give you keys.
- Maintain all electrical, plumbing, heating and other facilities and appliances supplied by the landlord.
- Maintain the dwelling in a reasonably weather-tight condition.

- Provide garbage cans, and arrange for regular removal of waste except in the case of a single-family residence.
- Provide facilities adequate to supply heat and water (including hot water) as you reasonably require.
- Provide you written notice that the rental unit is equipped with smoke detectors and that it is your duty to keep them up.

The Landlord Must Not:

- Enter into a rental agreement for premises that have been condemned or declared unlawful to occupy by a government agency responsible for code enforcement.
- Intentionally shut off any of your utility services including water, heat, electricity or gas, except for a temporary interruption for needed repairs. (See our [Eviction and Your Defense](#) publication.)
- Retaliate against you for: (a) good faith complaints concerning health and safety issues to government authorities or (b) good faith attempts to enforce your rights under the Act. (See "Retaliation," below.)

The Landlord's Potential Liability

- The landlord may be liable for damages and penalties for intentionally renting property that has been condemned or declared unlawful to occupy.
- The landlord is not liable for defective conditions caused by you, or by your family or guests.
- The landlord is not liable for

defective conditions caused by your unreasonable refusal to allow the landlord to enter to make repairs.

My rental needs repairs. What should I do?

You Must Provide Written Notice!

First you must give the landlord **written notice** of what needs fixing. You must do so even if the landlord already knows about the needed repairs and even if you have already told the landlord verbally. A sample notice asking for repairs is in this publication. **If you use this letter, attach a copy of [RCW.18.060](#) to it. (You can find it at <http://apps.leg.wa.gov/rcw/default.aspx?cite=59.18.060>.)**

In your notice, put your name, the date, the owner's name, your address. Describe what needs repair. You may also include a copy of the landlord's duties under the Act.

In writing up a notice of needed repairs, go through the entire rental premises, listing needed repairs room-by-room. Also list any repairs needed to the outside or common areas.

The Act requires "delivery" of a notice asking for repairs. To prove "delivery" you should either:

- send the notice by certified mail and by regular U.S. mail or
- personally give it to the landlord or to the person who collects the rent. (Try to have a neutral witness to the method of delivery. This can help prove delivery of the notice.)

If the owner is different from the manager, you can send copies of the notice to both. You do not have to.

You should keep, for your records, copies of

all notices delivered to the landlord, if possible in a file along with the lease, any rent receipts and any written notices or letters you have gotten from the landlord.

What does the landlord have to do after getting notice?

The landlord must start making repairs as soon as possible after getting your written notice, and no later than the following time limits:

- **24 hours** to begin to restore heat, hot or cold water, electricity, or to fix a very hazardous condition.
- **72 hours** to begin to fix a refrigerator, range and oven, or major plumbing fixture supplied by the landlord.
- **10 days** to begin making repairs in all other cases.

If the landlord cannot meet these timelines because of circumstances beyond his/her control, s/he must still have the repairs finished as soon as possible.

Can I report to government agencies to get repairs made?

You may notify local health or building departments of possible health or building code violations. (See "Building Code Enforcement/Government Inspection and Rent Escrow," below.) So long as you are in compliance with the Act, the landlord must not retaliate against you for good faith complaints to government authorities. (See "Retaliation," below, and our publication called [Your Rights as a Tenant in Washington](#).)

If the landlord does not make a repair after getting your written notice of the problem, calling a local code inspector to ask for an inspection may be the motivation the

landlord needs to fix things. It will also help to document the existence of the condition and the landlord's knowledge of it.

If you are injured due to a hazardous condition on the premises, or if the landlord retaliates action against you, proof that you called the code inspector can be very important. If the inspector finds a violation of the building codes, s/he will usually send the landlord a letter explaining the obligation to comply with all applicable codes. Sometimes the landlord may be fined or be given some other penalty. If a place is in bad enough condition, the city may condemn some or all of the building and may make you move out on very short notice.

What can I do if the landlord does not make repairs?

If the landlord does not make repairs within a reasonable time after getting written notice from you, and after the applicable 24 hour, three-day or 10-day period to begin repairs is up, you have these choices:

- **Move out:** You may terminate the rental agreement by giving written notice to the landlord and moving out immediately without further obligation under the rental agreement. You will be entitled to a refund of any prepaid rent. You will also be entitled to a refund of the security deposit in accordance with the security deposit rules. (See our [Your Rights as a Tenant in Washington](#) and [Can I Get My Security Deposit Back?](#) publications.)
- **File a lawsuit:** You may sue the landlord in state court for any remedy provided by the Act or otherwise provided by law.

- **Arbitration or mediation:** If the landlord agrees, you may try to settle the dispute through arbitration or mediation.
- **Try other remedies:** You may try other remedies available under the Act. (See below.)

What does the Act say I can do if the landlord will not make repairs?

You may use the following remedies only if:

- you are current in rent and utilities and
- the landlord does not start repairs within the required time period after getting your written notice

Can I withhold rent?

No. The Act says you cannot withhold rent, even if the landlord has not made repairs. If you withhold rent, you lose the right to use the limited repair remedies under the Act. The landlord can issue a three-day “pay or vacate” notice and to start an unlawful detainer (eviction) action in court. (See our [Eviction and Your Defense](#) publication.)

What is “Repair and Deduct?” Can I use it to make repairs?

If the landlord has not started the repair within the required time period after getting proper written notice, or if the landlord does not promptly finish the repairs (and if you cannot or do not want to move out), you may have the repair done and then deduct the actual costs from future rent payments. You can deduct up to two months' worth of rent. This means you could pay no rent for two months in a row, if you paid the maximum amount on repairs.

Example 1:

Your rent is \$750 a month. You made a repair in March that cost \$1,500. You could deduct \$750 from the April rent and another \$750 from the May rent. You would not have to pay any rent for April or May.

Example 2:

Your rent is \$750 a month. The repair cost was \$1,000. You could deduct \$750 from April's rent and the final \$250 from May's rent.

You cannot deduct more for each repair than two months' rent. You cannot deduct more than two months' rent in any 12-month period.

In order to use the Repair and Deduct remedy:

- You must be current in rent and any utilities in your name.
- You must deliver a written notice to the landlord or to the person who collects the rent as described above. See the sample notice at the end of this publication.
- You must wait until the applicable period, 24 hours, three days, or ten days, is up before going ahead with the repair and deduct remedy. (See "Time Period for Landlord to Begin Making Repairs," above.)
- You must serve, by first class mail or in person, your own good faith written estimate of the cost of having the repair performed (as well as the written notice) if the repair must be performed by a licensed or registered repair person; or the cost of the repair will be more than two months' rent.

You may submit the written estimate at the

same time as your written notice of the needed repair.

If the specific needed repair requires the landlord to begin the repair within ten days (See "Time Periods," above), you may not enter into a contract for repairs for **two days** after delivering the written estimate. So you should serve the written estimate at the same time as the written notice asking for repairs or as soon as possible afterwards. **This two-day period does not apply if the repairs must be made within 24 hours or within three days.**

You may have the repair made if the landlord does not start repairs within the required time periods after receipt of the written notice of the needed repair and written estimate. You must make arrangements to pay the repair person.

You must give the landlord a chance to inspect the work. You should give the landlord written notice that the repairs have been finished and are available for inspection within a reasonable time.

After the landlord has inspected the work or has been given a reasonable opportunity to inspect the work, you may deduct the cost of repairs from the **next month's** rent.

Can I use "Repair and Deduct" to make repairs myself?

Yes, as long as:

- the cost of the repair is not more than the amount of one month's rent and
- the repair does not require a licensed repair person.

If you make the repairs yourself, you can deduct a maximum of the amount of one month of rent from the next month's payment of rent.

Example: Your rent is \$800 a month. In March, you made four separate repairs that each cost you \$200. You could deduct \$800 from April's rent. You would not pay any rent in April.

You cannot deduct more than one month's rent for each self-help repair. You cannot deduct more than one month's rent in any twelve-month period.

In order to use Repair and Deduct:

- You must be current in rent and any utilities in your name.
- You must deliver a written notice to the landlord or to the person who collects the rent as described above. (See the sample notice at the end of this publication.)
- You must wait until the proper period - 24 hours, three days, or ten days - has run before you start with the repair and deduct remedy. (See "Time Period for Landlord to Begin Making Repairs," above.)
- You do not have to provide a separate written estimate of the cost of repairs for a self-help repair.
- You must make the repair in a workman-like manner.
- You must give the landlord a chance to inspect the work. You should give the landlord written notice that the repairs have been finished and are ready for inspection. The written notice may suggest a date for an inspection.
- You may also put in writing that if the landlord does not reply by that date or suggest another date for the inspection, you will assume that the landlord approves of the work

without inspection.

After the landlord has inspected the work or has been given a reasonable chance to do so, you may deduct the cost of repairs from the **next month's** rent.

Can building code enforcement/government inspection help with repairs?

Any time you are worried about the conditions of the place where you live, you may notify the city or county office that enforces the housing and building code and ask for an inspection. If the city or county office agrees to an inspection, the inspector may conduct the entire inspection or do a preliminary inspection, then refer the rest to another agency, such as the health department.

If the inspection finds problems or defects in violation of the building code, the city or county can make the landlord make needed repairs or vacate the building.

Many code violations do not require vacating the building. But if the place is in very bad condition, the city or county may require you to vacate on very short notice.

The response of local government officials to your request for inspection or code enforcement will vary dramatically depending on the particular city or county where you live. This is because of many factors: available resources; government policy choices on how to spend limited resources; specific language of building codes (or whether the local government has adopted a building code); and whether the dwelling unit is in an urban or rural area.

What is rent escrow? Can I use it to get repairs made?

If you cannot make repairs using Repair and

Deduct (example: if the repairs would cost more than one month's rent), and if the conditions of the dwelling unit substantially endanger or impair your health and safety, you may deposit rent payments into an escrow account instead of giving it to the landlord.

RCW [59.18.115](#) governs rent escrow accounts. An escrow account is an account maintained by a person authorized by law to hold money until certain conditions are met, in this case - until the landlord fixes the defects.

The rent escrow remedy is technical and complicated. To use the rent escrow remedy, you must meet certain conditions and carefully follow the steps outlined below.

- You must be up-to-date in rent and any utilities in your name.
- The landlord must have failed to start repairs within the required time period (see “Time Periods,” above) after getting written notice from you of a needed repair. (See “Written Notice Required,” above.)
- You must determine in good faith that other repair remedies (example: repair and deduct) will not fix things.
- A local government representative must certify in writing that the defect exists and substantially endangers your health or safety.
 - a. You may ask the city or county inspection office to do a “rent escrow inspection” and to certify the results in writing within five days. (See Rent Escrow Inspection Request form included with this publication.)
 - b. You should attach a copy of the

notice asking for repairs that you gave to the landlord.

- c. The response of local governments to requests for rent escrow inspections will depend on where you live. In some parts of the state you cannot get the necessary certification from the local government. (Without a government certification, you cannot use the rent escrow remedy.)
 - The inspector must give the landlord 24 hours’ notice before the inspection date and time. The landlord can be present. The landlord cannot keep the inspector from entering the premises.
 - The inspector must certify in writing that the conditions found can be a “substantial risk” to health and safety or make the premises “substantially unfit for human habitation.” Such conditions may include, but are not limited to:
 - a. Structural problems. Examples: the house falling down, walls sagging, exposure of the tenants to the weather because the roof leaks, or broken windows or doors.
 - b. Inadequate plumbing and sanitation that directly exposes you to risk of illness or injury.
 - c. Lack of water, or of hot water.
 - d. Heating or ventilation systems are not working or are hazardous.
 - e. Substantial problems with wiring and electrical service, defective or inadequate exits, and conditions that increase the risk of fire.
- Notice of Escrow: You must mail first-class or hand-deliver to the landlord a written notice of the rent escrow, along

with the written certification by the city or county, no more than 24 hours after you first deposit your rent in escrow. (See Notice of Rent Escrow in this publication.)

- After the inspector has certified the dwelling unit as eligible for escrow and before you place rent in an escrow account, TALK TO A LAWYER.
- Either you or the landlord may file a lawsuit to ask for the release of rent money deposited in escrow. The court or arbitrator may determine whether past, present, or future rent should be reduced because of any defects.
- A rent escrow account can be hard and expensive to set up. This remedy is often best used to motivate the landlord to make repairs without actually taking the final step of depositing your rent into the account.

What is the Warranty of Habitability?

It is the concept that by putting the place up for rent, the landlord is making an unspoken promise (warranty) that it is in fact fit for people to live in. (This concept does not apply to commercial spaces.) If the premises are not in fact fit to live in, the landlord has violated the warranty.

A warranty of habitability is implied by operation of law in all residential tenancies. It is not written into your lease agreement. **It does not need to be.** Any language in your (written or verbal) lease agreement that says that the warranty does not apply violates state law. You cannot waive or bargain it away in exchange for lower rent.

The implied warranty of habitability was independently created by the Washington Supreme Court in the case of Foisy v.

Wyman, 83 Wn.2d 22, 515 P.2d 160 (1973). A copy of this case is included with this publication.

There is also a warranty of habitability in Washington law: the [Residential Landlord Tenant Act](#). It says landlords must “keep the premises fit for human habitation at all times during the tenancy” and must keep the premises to comply substantially with all state and local laws that substantially affect your health and safety. (See “Landlord’s Repair and Maintenance Duties,” above.)

How does the Warranty of Habitability apply to my landlord?

Basically, it is the landlord's guarantee that the place is safe enough for you to live in.

No landlord can require you to waive (give up) this warranty as a condition of your tenancy. Any provision of a rental agreement that states that the premises are not governed by the warranty of habitability, or tries to limit the landlord’s duties to maintain and repair the dwelling unit that are required by the Act and housing codes, is unlawful and unenforceable.

How does the Warranty of Habitability apply to me?

If the place is partially or totally uninhabitable because the landlord did not make needed repairs, you may be able to claim a partial or total rent reduction for the period that the premises were uninhabitable.

But: The repairs must be major, affecting the safety and livability of the place. Minor housing code violations may not amount to a breach (violation) of the warranty of habitability if they do not affect your ability to live there safely.

Rent withholding is usually a very dangerous and unwise strategy, particularly for month-to-month tenants. We cannot predict how much rent you could safely withhold.

Can I use the Warranty of Habitability as a defense to an eviction action?

Maybe. The Landlord's breach of the implied warranty of habitability may be a defense to an unlawful detainer (eviction) action based on nonpayment of rent. This defense relies upon the *Foisy* case, not on the Residential Landlord-Tenant Act. (See "What is the Warranty of Habitability," above for more on the *Foisy* case.)

If you claim a "breach of the warranty of habitability" defense in an eviction action based on alleged non-payment of rent, the court will look at two things:

- It will decide whether the unit was totally or partially uninhabitable (unlivable) during your tenancy.
- It will decide what the reduction in the rental value for the unit should be during the term of your tenancy.

Courts find that making such decisions is very hard without expert testimony. It is also hard to make such a decision at an unlawful detainer show cause hearing where the court can only give your case a few minutes.

There is no one standard for calculating the reduction in rental value. Different judges may treat the same set of facts in different ways.

If the amount of unpaid or withheld rent (the amount of rent due under the rental agreement minus the amount actually paid) is less than the amount of reductions

allowed by the court, the court should dismiss the landlord's eviction action.

If the court determines that you owe some amount of rent, even as little as one dollar, and you did not tender the rent owed within three days of service of a three-day pay or vacate notice, the court could order that a writ of restitution restoring the landlord to possession of the premises be issued and enter a judgment for the amount of rent determined to be owed, plus court costs, plus attorney fees. (See our [Eviction and Your Defense](#) publication.)

Example of what the court might do

Say under your rental agreement, you pay \$600 rent each month. You have paid that \$600 for six months (\$3,600 altogether). Then you missed one month's rent payment. The landlord files an eviction action alleging nonpayment of rent.

If the court decides that the apartment is only worth \$400 a month because of problems or defects affecting habitability, you would owe a total of \$2,800 over the seven-month period (the six months you paid and the one month you did not). You have already paid \$3,600. You do not owe rent. The court should not evict you. Also, the landlord would have to lower the rent to \$400 a month until the apartment is fixed.

If the court found that the apartment was worth more than you actually paid (\$3,600 total payments divided by seven months equals \$514 a month), the court would probably rule in favor of the landlord, order that you be evicted, and give the landlord a judgment for the unpaid rent, court costs and attorney's fees. (See our [Eviction and Your Defense](#) publication.)

What evidence can I use to back up my claim?

It is very useful and inexpensive to get reports and testimony from housing code inspectors. (See “Building Code Inspection/Government Inspection,” above.)

Photos can help a lot.

It is best to have a witness testify about rental values in your area, and what the rental unit was actually worth considering the defects.

The hardest thing will be estimating the proper rental value. The judge may appreciate any help that you can offer through testimony from someone with experience in property valuation. Examples: building inspectors, some housing authority employees, or real estate agents.

You should know what a witness will say before s/he says it in court or in a statement you hand in to the court.

Can I sue the landlord for a rent reduction?

Maybe, but it may be hard. It is possible to use a breach of the warranty of habitability claim to sue your landlord for a court-ordered rent reduction, even when the landlord has not filed an eviction action. But courts have problems determining the seriousness of the defects and the proper amount of the rent reduction.

If you believe the needed repairs are bad enough to justify a rent reduction, you can sue in Small Claims Court to try to force the landlord to return rent that you have already paid. (See the “[Small Claims Court](#)” publication available at washingtonlawhelp.org.) Or you can sue in Superior Court for past and future reduction of rent.

You have the right to present a breach of the warranty of habitability claim as a defense to an eviction for nonpayment of rent. But it can be risky. You generally should not withhold part or all of the rent on the assumption that a court will agree with you on how much the apartment was actually worth. If you guess wrong and the court thinks you withheld too much, you may be evicted without the chance to make up the difference.

What if the landlord tries to get back at me for complaining to the city?

State law prohibits the landlord from retaliating or threatening to retaliate against (getting even with) you for good faith complaints to government agencies about conditions that endanger your health or safety, or for exercising any of your rights under the Act. Sending a written notice requesting repairs is an exercise of your rights under the Act.

Examples of retaliatory actions include:

- Threatening or filing an eviction
- Raising the rent
- Reducing services
- Increasing your obligations

If the landlord tries to do any of these things within 90 days of your complaint to a government agency or other exercise of your rights under the Act, the action is presumed to be retaliatory. The landlord may rebut (prove wrong) this presumption.

A notice issued by the landlord is presumed not to be retaliatory if you are behind in rent or not in compliance with the rental agreement. You may rebut (prove wrong) this presumption.

What if I need legal help?

- **Apply online with [CLEAR*Online](http://nwjustice.org/get-legal-help) - <http://nwjustice.org/get-legal-help>**
or
- **Call CLEAR at 1-888-201-1014**

CLEAR is Washington's toll-free, centralized intake, advice and referral service for low-income people seeking free legal assistance with civil legal problems.

- **Outside King County:** Call 1-888-201-1014 weekdays from 9:10 a.m. until 12:25 p.m. CLEAR works with a language line to provide interpreters as needed at no cost to callers. If you are deaf or hard of hearing, please call 1-888-201-1014 using

your preferred TTY or Video relay service.

- **King County:** Call 211 for information and referral to an appropriate legal services provider Monday through Friday from 8:00 am – 6:00 pm. You may also call (206) 461-3200, or the toll-free number, which may be useful when calling from a pay phone, 1-877-211-WASH (9274). 211 works with a language line to provide interpreters as needed at no cost to callers. Deaf and hearing-impaired callers can call 1-800-833-6384 or 711 to get a relay operator at no cost, who will then connect them with 211. You can also get information on legal service providers in King County through 211's website: www.resourcehouse.com/win211/.
- **Persons 60 and Over:** Persons 60 or over may call CLEAR*Sr at 1-888-387-7111, regardless of income.

6330EN

This publication provides general information concerning your rights and responsibilities. It is not intended as a substitute for specific legal advice.

This information is current as of March 2013.

© 2013 Northwest Justice Project — 1-888-201-1014

(Permission for copying and distribution granted to the Alliance for Equal Justice and to individuals for non-commercial use only.)

NOTICE REQUESTING REPAIRS

Date: _____

Landlord's name and address:

Dear _____:

This is to notify you that the rental unit at _____ which you manage and which I occupy needs repairs for the following defects:

1. _____
2. _____
3. _____

The Washington Residential Landlord Tenant Act requires that the landlord begin to make repairs requested by a tenant within a specific time period as follows:

1. Twenty-four (24) hours to repair the loss of hot or cold water, heat or electricity, or a condition imminently hazardous to life.
2. Seventy-two (72) hours when the defect deprives the tenant of the use of a refrigerator, range and oven, or a major plumbing fixture supplied by the landlord.
3. Ten (10) days in all other cases.

A list of landlord responsibilities required by the act is attached. If the repairs are not completed within the applicable period of time, I intend to use the remedies provided in the Landlord-Tenant Act.

Sincerely,

(sign your name)

(print your name)

RENT ESCROW INSPECTION REQUEST

Date: _____

Name and Address of City Building Department:

Dear Building Inspector:

I believe I am living in substandard conditions. I have provided written notice to my landlord and have had no response. I am requesting that you do an inspection of the premises with regard to specific substandard and dangerous conditions covered by RCW 59.18.115. The conditions which need inspection include:

- | | | | |
|-------|---|-------|----------------------------|
| _____ | rodent/pest infestation | _____ | electrical/wiring problems |
| _____ | plumbing, sewage | _____ | water heater/pipes |
| _____ | structural problems
(roof/walls/windows) | _____ | heating system/stove |

In particular, I am having trouble with

Under the law, the landlord must be given 24-hour notice of the date and time of the inspection so that he has an opportunity to be present.

My landlord is:

Name: _____

Address: _____

Phone: _____

My address is: _____

_____. Please call me to arrange a date and time for inspection. I can be reached at _____ or _____.

Sincerely,

(Tenant's Signature)

NOTICE TO LANDLORD OF RENT ESCROW

Name of Tenant: _____

Address of Tenant: _____

Name of Landlord: _____

Address of Landlord: _____

Name and Address of Escrow: _____

Date of Deposit of rent escrow: _____

Amount of rent deposited into Escrow: _____

The following condition(s) have been certified by a local building official to endanger, impair, or affect substantially the health or safety of a tenant:

I have determined in good faith that I am unable to repair these conditions through use of repair remedies authorized by RCW 59.18.100.

Written notice of the conditions needing repair was provided to the landlord on _____, and ___ days have elapsed and the repairs have not been made.

Funds have been deposited into escrow as described above.

Under penalty of perjury of the laws of the State of Washington, I certify that:

1. I have read the foregoing Notice to the Landlord of Rent Escrow, know the contents thereof and sign of my own free will; and
1. I mailed/delivered a copy of this Notice, together with a copy of the certification of condition(s), to the landlord at the above address on _____, 20__.

Dated _____, at _____, Washington.
(City)

Tenant's Signature

Cite as: 83 Wash.2d 22, 515 P.2d 160 (1973)

Supreme Court of Washington, En Banc.

Ronald D. FOISY and Marilyn E. Foisy, his wife, Respondents,

v.

Richard Kent WYMAN, a single man, Appellant.

No. 42605.

Oct. 25, 1973.

Rehearing Denied Dec. 13, 1973.

Unlawful detainer action. The Superior Court, King County, F. A. Walterskirchen, J., entered judgment in favor of landlord, and tenant appealed. The Supreme Court, Hunter, J., held that in all contracts for renting of premises, oral or written, there is an implied warranty of habitability and breach of this warranty constitutes a defense in an unlawful detainer action, that fact that tenant knew of a substantial number of defects when he rented premises and fact that rent was reduced did not remove tenant from protection of implied warranty of habitability, that testimony relating to housing code violations was admissible, and that evidence of condition of premises was relevant to issue of rent due and owing.

Reversed and remanded with directions.

Brachtenbach, J., dissented and filed opinion in which Wright J., concurred.

Ryan, Judge pro tem., concurred in result of the dissent and filed opinion.

West Headnotes

[1] Landlord and Tenant 291(12)

233k291(12) Most Cited Cases

Tenant, in unlawful detainer action, should have been permitted to introduce evidence in support of his theory of defense that landlord's failure to maintain premises in a habitable condition constituted a failure of consideration upon part of landlord and relieved tenant of his obligation to pay rent. [RCWA 59.12.030](#), [59.12.170](#).

[2] Landlord and Tenant 125(1)

233k125(1) Most Cited Cases

[2] Landlord and Tenant 290(3)

233k290(3) Most Cited Cases

In all contracts for renting of premises, oral or written, there is an implied warranty of habitability and breach of this warranty constitutes a defense in an unlawful detainer action. [RCWA 59.12.030](#), [59.12.170](#).

[3] Landlord and Tenant 125(1)

233k125(1) Most Cited Cases

Fact that tenant knew of a substantial number of defects when he rented premises and that rent was reduced did not remove tenant from protection of implied warranty of habitability, as this type of bargaining by landlord with tenant is contrary to public policy and purpose of doctrine of implied warranty of habitability. Laws 1973, 1st Ex.Sess. ch. 207.

[4] Municipal Corporations 122.1(4)

268k122.1(4) Most Cited Cases

(Formerly 268k122(4))

Copy of housing code, which was printed by authority of city, was prima facie evidence that the ordinances as printed and published were duly passed, and was properly authenticated. [RCWA 5.44.080](#).

[5] Landlord and Tenant 291(12)

233k291(12) Most Cited Cases

Testimony relating to housing code violations was admissible in unlawful detainer action. [RCWA 59.12.030](#), [59.12.170](#).

[6] Landlord and Tenant 291(12)

233k291(12) Most Cited Cases

Evidence of condition of premises was relevant, in unlawful detainer action, to issue of rent due and owing. [RCWA 59.12.030](#), [59.12.170](#).

[7] Landlord and Tenant 125(1)

233k125(1) Most Cited Cases

Housing code violations in and of themselves do not establish a prima facie case that the premises are uninhabitable, but are evidence which aids in establishing that the premises are uninhabitable. [RCWA 59.12.030](#), [59.12.170](#).

[8] Landlord and Tenant 290(3)

233k290(3) Most Cited Cases

Unlawful detainer statutes are designed for defenses such as breach of implied warranty and habitability. [RCWA 59.12.030](#), [59.12.170](#).

[9] Landlord and Tenant 290(3)

233k290(3) Most Cited Cases

Since affirmative defense of breach of implied warranty of habitability goes directly to issue of rent due and owing, which is one of basic issues in an unlawful detainer action, such defense is available in an unlawful detainer action. [RCWA 59.12.030](#), [59.12.170](#).

[10] Landlord and Tenant 291(1)

233k291(1) Most Cited Cases

Landlord's three-day notice to pay rent or vacate premises, which called for payment of balance due under lease plus a certain amount for two months that tenant remained on premises after expiration of lease, was in substantial compliance with statute, even

though amount demanded was more than trial court found was actually due and owing, where there was a conflict as to amount of monthly rental due for months following expiration of lease. [RCWA 59.12.030](#), [59.12.170](#).

[11] Constitutional Law ↪46(1)

92k46(1) Most Cited Cases

Where substantial legislative or decisional changes in applicable statutory provisions have been made, thereby precluding imposition of challenged provision, the constitutional issue need not be resolved.

****161** Legal Services Center, Steve Frederickson, Seattle, for appellant.

***23** Thomas J. Isaac, Seattle, for respondents.

****162** HUNTER, Associate Justice.

This is an unlawful detainer action in which the plaintiff (respondent), Ronald D. Foisy, is seeking the possession of his real property, unpaid rent and damages. The defendant (appellant), Richard Kent Wyman, appeals from a judgment in favor of the plaintiff.

In his complaint, the plaintiff alleged in effect: (1) That on December 31, 1970, the defendant took possession of a house which the plaintiff is seeking to recover, pursuant to a 6-month lease requiring \$300 to be paid for said term, plus water and other utility charges; (2) that during the term of the lease

the defendant paid the sum of \$95, leaving \$205 still owing for the 6-month period; (3) That the defendant remained upon the premises after the expiration of the lease; (4) That the rental payment after the expiration of the lease was to be \$75 per month; (5) That after the defendant refused to pay the accrued rent, the plaintiff served a 3-day notice to pay rent or vacate upon the defendant on August 27, 1971; (6) That the defendant failed to pay any of the amounts owing after the 3-day notice was served upon him.

The defendant's answer raised several affirmative defenses including breach of implied warranty of habitability.

During trial the defendant testified that he took possession of the house on March 3, 1971. It appears that the ***24** parties executed the lease in question on March 8, 1971, although the lease was dated December 31, 1970, and was to cover a term of six months, which was to commence on January 1, 1971, and end on June 30, 1971.

The lease in question also contained an option to purchase. The testimony of the defendant indicates that he thought he was purchasing the house rather than renting it. His testimony also indicates that the house contained a number of defects when he entered into the lease and it indicates that he was aware of some of the defects when he agreed to rent the house, but not all of them.

The trial court concluded that the defendant was guilty of unlawful detainer of the premises rented to him by the plaintiff. However, it refused to enforce the provisions of what it termed the 'purported lease.' It found that the reasonable rental for the period of occupancy of the premises was

the sum of \$50 per month commencing with March 3, 1971, until such time as the defendant removed himself. In effect, the court held the lease was invalid. The court also held that a writ of restitution should issue to the sheriff to require the surrender of possession if the defendant did not voluntarily withdraw and that damages for the period March 3, 1971, through April 3, 1972, were to be doubled if the defendant did not surrender the premises by April 3, 1972. The defendant appeals, although the plaintiff does not cross-appeal from the court's findings.

[1] The primary contention raised by the defendant is that the trial court erred in refusing to accept evidence as to his affirmative defense of breach of implied warranty of habitability. The defendant argues that the plaintiff's failure to maintain the premises in a habitable condition constitutes a failure of consideration upon the part of the plaintiff and relieves the defendant of his obligation to pay rent. We agree that the tenant should have been permitted to introduce evidence at trial in support of this theory of defense.

The premises in question, according to the testimony of the defendant, contained a number of defects including a lack of heat, no hot water tank, broken windows, a broken *25 door, water running through the bedroom, an improperly seated and leaking toilet, a leaking sink in the bathroom, broken water pipes in the yard and termites in the basement. No objection was made to the introduction of this testimony. The testimony of the defendant also indicates that he painted the interior and made repairs upon the premises, but ceased making repairs when he learned of a municipal court action being initiated against the plaintiff as a result of numerous housing **163 code

violations within the house. In addition, the record reveals that the landlord was informed of the defects and was prosecuted successfully for violations of the Seattle housing code.

During the trial the defendant attempted to introduce the testimony of two housing inspectors as to the housing code violations which existed on the premises. The trial court sustained the plaintiff's objections to this testimony upon the theory that the condition of the premises was not relevant to the issue before the court. We disagree with the reasoning of the trial court in refusing to accept the evidence as to the condition of the premises, although it should be stated that this issue has not been heretofore specifically addressed in this jurisdiction in relation to our unlawful detainer statutes.

Throughout the United States, the old rule of caveat emptor in the leasing of premises has been undergoing judicial scrutiny.

In *Pines v. Perssion*, 14 Wis.2d 590, 596, 111 N.W.2d 409, 412 (1961), the court stated:

To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, Caveat emptor. Permitting landlords to rent 'tumbledown' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.

See *26 *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970);

Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Javins v. First Nat'l Realty Corp., 138 U.S.App.D.C. 369, 428 F.2d 1071 (1970), cert. denied, 400 U.S. 925, 91 S.Ct. 186, 27 L.Ed.2d 185 (1970), and Jack Spring, Inc. v. Little, 50 Ill.2d 351, 280 N.E.2d 208 (1972).

In Lemle v. Breeden, Supra, the court reviewed the rule of caveat emptor and the current trend toward finding an implied warranty of habitability in leases, and stated on page 433, [462 P.2d 474](#):

The application of an implied warranty of habitability in leases gives recognition to the changes in leasing transactions today. It affirms the fact that a lease, is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship. From that contractual relationship an implied warranty of habitability and fitness for the purposes intended is a just and necessary implication. It is a doctrine which has its counterparts in the law of sales and torts and one which when candidly countenanced is impelled by the nature of the transaction and contemporary housing realities. Legal fictions and artificial exceptions to wooden rules of property law aside, we hold that in the lease of a dwelling house, such as in this case, there is an implied warranty of habitability and fitness for the use intended.

(Footnote omitted.)

In Javins v. First Nat'l Realty Corp., Supra, the court analyzed the various exceptions to the common law rule that the lessor has no duty to repair and stated on page 1078:

These as well as other similar cases demonstrate that some courts began some time ago to question the common law's assumptions that the land was the most important feature of a leasehold and that the

tenant could feasibly make any necessary repairs himself. Where those assumptions no longer reflect contemporary housing patterns, the courts have created exceptions to the general rule that landlords have no duty to keep their premises in repair.

It is overdue for courts to admit that these assumptions are no longer true with regard to all urban housing. *27 Today's **164 urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in 'a house suitable for occupation.' Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the 'jack-of-all-trades' farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property.

We find the reasoning of these cases extremely persuasive. Any realistic analysis of the lessor-lessee or landlord-tenant situation leads to the conclusion that the tenant's promise to pay rent is in exchange for the landlord's promise to provide a livable dwelling. As Judge Skelly Wright stated in the Javins case on page 1074:

When American city dwellers, both rich and

poor, seek 'shelter' today, they seek a well known package of goods and services--a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

(Footnote omitted.) [Javins v. First Nat'l Realty Corp., 138 U.S.App.D.C. 369, 428 F.2d 1071 \(1970\)](#), cert. denied, [400 U.S. 925, 91 S.Ct. 186, 27 L.Ed.2d 185 \(1970\)](#). The value of the lease today then, whether it is oral or written, is that it gives the tenant a place to live, and he expects not just space but a dwelling that protects him from the elements of the environment without subjecting him to health hazards.

[2] In [House v. Thornton, 76 Wash.2d 428, 457 P.2d 199 \(1969\)](#), *28 we rejected the doctrine of caveat emptor as it applied to the sale of a new residence and found an implied warranty that the structure is fit for the buyer's intended purpose. In doing so, we noted that the old rule of caveat emptor has little relevance to the sale of a brand-new house by a vendor-builder to a first buyer for the purposes of occupancy. By analogy, the old rule of caveat emptor has little relevance to the renting of premises in our society. There can be little justification for following a rule that was developed for an agrarian society and has failed to keep pace with modern day realities. We therefore hold that in all contracts for the renting of premises, oral or written, there is an implied warranty of habitability and breach of this warranty constitutes a defense in an unlawful detainer action. See [Javins v. First Nat'l Realty Corp., Supra; Lund v. MacArthur, 51 Haw. 473, 462 P.2d 482 \(1969\)](#); [Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 \(1970\)](#), and [Jack Spring, Inc. v. Little, 50 Ill.2d 351, 280 N.E.2d 208 \(1972\)](#).

[3] It can be argued, however, that the defendant should not be entitled to the protection of an implied warranty of habitability since he knew of a substantial number of defects when he rented the premises and the rent was reduced from \$87 per month to \$50 per month. We believe this type of bargaining by the landlord with the tenant is contrary to public policy and the purpose of the doctrine of implied warranty of habitability. A disadvantaged tenant should not be placed in a position of agreeing to live in an uninhabitable premises. Housing conditions, such as the record indicates exist in the instant case, are a health hazard, not only to the individual tenant, but to the community which is exposed to said individual. As the court recognized in [Pines v. Persson, Supra](#), such housing conditions are at least a contributing cause of such problems as urban blight, **165 juvenile delinquency and high property taxes for the conscientious landowners.

Our belief that public policy demands such a result is reinforced by our review of Laws of 1973, 1st Ex.Sess., ch. 207, which became effective July 16, 1973. The legislature *29 in passing this bill and the Governor in signing it have recognized that public policy demands this result. Laws of 1973, 1st Ex.Sess., ch. 207, provides in part:

Sec. 6. The landlord will at all times during the tenancy keeps the premises fit for human habitation, and shall in particular:

(1) Maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented;

(2) Maintain the roofs, floors, walls, chimneys, fireplaces, foundations, and all

other structural components in reasonably good repair so as to be usable and capable of resisting any and all normal forces and loads to which they may be subjected;

* * *

(5) Except where the condition is attributable to normal wear and tear, make repairs and arrangements necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the commencement of the tenancy;

* * *

(7) Maintain all electrical, plumbing, heating, and other facilities and appliances supplied by him in reasonably good working order;

(8) Maintain the dwelling unit in reasonably weathertight condition;

* * *

(10) Except where the building is not equipped for the purpose, provide facilities adequate to supply heat and water and hot water as reasonably required by the tenant;

* * *

Sec. 8. The tenant shall be current in the payment of rent before exercising any of the remedies accorded him under the provisions of this chapter: Provided, That this section shall not be construed as limiting the tenant's civil remedies for negligent or intentional damages: Provided further, That this section shall not be construed as limiting the tenant's right in an unlawful detainer proceeding *30 to raise the defense that there is no rent due and owing.

* * *

Sec. 10. . . .

* * *

(6) Nothing in this section shall prevent the tenant from agreeing with the landlord to undertake the repairs himself in return for cash payment or a reasonable reduction in rent, the agreement thereof to be agreed upon between the parties, and such agreement does not alter the landlord's obligations under this chapter.

It may also be argued that the defendant should not be afforded the protection of the doctrine of implied warranty of habitability since the defendant signed a lease which contained an option to purchase. However, as heretofore stated, the trial court failed to recognize the validity of the lease. There is no cross-appeal from this determination and we are therefore bound by the trial court's decision.

The plaintiff argues that the trial court was correct in disregarding the Seattle housing code as it was improperly pleaded and no properly authenticated copy of the housing code was offered. These issues were not before the court when it rejected the testimony of the housing inspectors. It was not until after the court had rejected the testimony of the housing inspectors on the basis of their testimony being irrelevant that the housing code was offered into evidence. Had the court rejected the housing code on the grounds suggested by **166 the plaintiff, the defendant would have been in a position to move to amend his pleadings. The argument as to the housing code not being properly authenticated, we believe, is without merit in view of [RCW 5.44.080](#) which states:

When the ordinances of any city or town are printed by authority of such municipal

corporation, the printed copies thereof shall be received as prima facie evidence that such ordinances as printed and published were duly passed.

[4] The copy of the housing code that was offered into evidence by the defendant is printed by authority of the city *31 of Seattle and is therefore prima facie evidence that the ordinances as printed and published were duly passed.

[5][6][7] The testimony relating to the housing code violations should have been admitted into evidence, and the trial court erred in ruling that the condition of the premises was not relevant to the issue of rent due and owing. While the housing code violations in and of themselves do not establish a prima facie case that the premises are uninhabitable, they are evidence which aids in establishing that the premises are uninhabitable. [FN1]

[FN1]. Evidence of one or two minor infractions of a housing code which do not affect habitability are inconsequential and would not entitle the tenant to a reduction in rent. Also, the tenant's defense does not depend on official inspection or official finding of violations of a city housing code. Javins v. First Nat'l Realty Corp., 138 U.S.App.D.C. 369, 428 F.2d 1071 (1970), cert. denied, 400 U.S. 925, 91 S.Ct. 186, 27 L.Ed.2d 185 (1970), and Diamond Housing Corp. v. Robinson, 257 A.2d 492 (D.C.App.1969).

[8] The plaintiff argues, in effect, however, that the unlawful detainer statutes are not designed for defenses such as breach of

implied warranty of habitability due to the nature of the action. In light of our previous discussion, we believe this to be without merit.

One of the basic issues in an unlawful detainer action of this nature is whether or not there is any rent due. RCW 59.12.170, which governs the entry of judgment and execution in an unlawful detainer action, states that upon a finding of default in the payment of rent, 'the judgment shall also declare the forfeiture of the lease, agreement or tenancy.' RCW 59.12.030 provides:

A tenant of real property for a term less than life is guilty of unlawful detainer either:

* * *

(3) When he continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises . . .

[9] Since the affirmative defense of breach of implied warranty of habitability goes directly to the issue of rent due *32 and owing, which is one of the basic issues in an unlawful detainer action as the above statutes indicate, we now hold said defense is available in an unlawful detainer action of this nature. See *Jack Spring, Inc. v. Little, supra*.

[10] The defendant also contends that the trial court erred in rendering judgment in the instant case, since the amount demanded in the 3-day notice was more than the trial court found was actually due and owing. We disagree.

In *Provident Mutual Life Ins. Co. v. Thrower*, 155 Wash. 613, 617, 285 P. 654, 655 (1930), we stated:

As to the form and contents of the notice or demand, a substantial compliance with the statute is sufficient.

See [Sowers v. Lewis](#), 49 Wash.2d 891, 307 P.2d 1064 (1957). See also [Erz v. Reese](#), 157 Wash. 32, 288 P. 255 (1930) (wherein we stated on page 35 that 'we have never adopted the strictest rule of construction as to the form or contents of such notices under our unlawful detainer statutes, chiefly for the reason, doubtless, that the statutes prescribe no form.') In the *Provident Mutual* case the notice was defective in three respects: (1) It contained the signature ****167** of the agent rather than the owner; (2) it overstated the amount of rent due by \$165 as found by the trial court; and (3) it defectively described the premises. Although we did not specifically address the issue of the overstatement of the amount of rent due, we did hold the notice substantially complied with the requirements of Rem.Comp.Stat., s 812 (now [RCW 59.12.030](#)).

In the instant case, the 3-day notice to pay rent or vacate the premises that was served upon the defendant called for the payment of \$205, the balance due under the lease, plus \$75 per month for July and August. There was no dispute as to the monthly rental payment under the terms of the purported lease; however, there was a conflict as to the amount of the monthly rental due for the months of July and August. The plaintiff testified the rent for those months was to be \$75 per month, and the defendant testified that it ***33** was to be \$50 per month. It appears that the plaintiff's demand for rental in the notice was in conformity with his good faith determination as to the amount of rental due, and that the defendant was not

prejudiced as he could have tendered to the plaintiff the amount of rental due according to his understanding of the agreement. See *C.J. Peck, Landlord and Tenant Notices*, 31 Wash.L.Rev. 51, 61 (1956). In tendering the amount due to the plaintiff, of course, he would deduct that amount due which he believed he was relieved from paying due to the landlord's breach of his implied warranty of habitability.

We believe that under the above facts, the plaintiff's demand for rental was in substantial compliance with the statute and the fact that there was a dispute as to the amount of rent due, which was later determined contrary to the plaintiff, should not invalidate the unlawful detainer proceeding.

The defendant also contends that the portion of [RCW 59.12.170](#), which authorizes the doubling of damages, is unconstitutional as it is in violation of the due process and equal protection clauses of the fourteenth amendment to the United States Constitution.

We need not reach this issue in light of the passage of the 'Residential Landlord-Tenant Act of 1973' (Laws of 1973, 1st Ex.Sess., ch. 207), which eliminated the mandatory double damage provision from the law.

[11] Where substantial legislative or decisional changes in the applicable statutory provisions have been made thereby precluding the imposition of the challenged provision, the constitutional issue need not be resolved. [Grays Harbor Paper Co. v. Grays Harbor County](#), 74 Wash.2d 70, 442 P.2d 967 (1968); [State School Directors Ass'n v. Department of Labor & Indus.](#), 82 Wash.2d 367, 510 P.2d 818 (1973). See also

[State v. Vidal, 82 Wash.2d 74, 508 P.2d 158 \(1973\)](#), and [State v. Baker, 81 Wash.2d 281, 501 P.2d 284 \(1972\)](#).

As we stated in *Sorenson v. Bellingham*, 80 Wash.2d 547, 558, 496 P.2d 512, 518 (1972):

It is a general rule that, where only moot questions or *34 abstract propositions are involved, or where the substantial questions involved in the trial court no longer exist, the appeal, or writ of error, should be dismissed. There is an exception to the above stated proposition. The Supreme Court may, in its discretion, retain and decide an appeal which has otherwise become moot when it can be said that matters of continuing and substantial public interest are involved. . . . This exception to the general rule obtains only where the real merits of the controversy are unsettled and a continuing question of great public importance exists.

(Citations omitted.)

Given the passage of the new landlord-tenant act and the absence of any actual trial court imposition of double damages in the instant case, the exception to the above rule is not in force and we therefore need not comment further upon this issue.

For the guidance of the trial court at the new trial to which the defendant is entitled, **168 the finder of fact must make two findings where the defendant claims the landlord has breached his implied warranty of habitability: (1) Whether the evidence indicates that the premises were totally or partially uninhabitable during the period of habitation and, if so, (2) what portion, if any or all, of the defendant's obligation to pay rent is relieved by the landlord's total or partial breach of his implied warranty of

habitability. If the finder of fact determines that the entire rental obligation is extinguished by the landlord's total breach, then the action for unlawful detainer based on nonpayment of rent must fail. If, on the other hand, the court determines that the premises are partially habitable, and the tenant failed to tender to the plaintiff a sufficient amount to pay rent due for the partially habitable premises, then judgment shall be entered in accordance with [RCW 59.12.170](#).

The judgment of the trial court is reversed and the case is remanded for a new trial consistent with this opinion.

HALE, C.J., and ROSELLINI,
HAMILTON, STAFFORD and UTTER, JJ.,
concur.

*35 BRACHTENBACH, Associate Justice
(dissenting).

Ignoring the defendant's own testimony, the majority cast this dispute into a traditional landlord-tenant battle and from that relationship creates an implied warranty of habitability. That creation might well be a desirable change in Washington law, but this simply is not the case in which it should be implemented.

The majority's application of such a warranty to the defects presented in this case and even its characterization of the defendant as a mere 'tenant' are unsound in light of the defendant's testimony, elicited

by his own counsel:

Q. And what was the agreement between you and the Foiseys relating to the purchase of that house? A. The agreement was that I was to pay \$50 a month to buy the house . . .

Q. So, it was your understanding that the agreement was that you were to buy the house for \$50 a month? A. That was my understanding . . . Q. At the time you moved in, were there defects on the premises? A.

All kinds but I tried my best to bring them up to some remedy of standard . . . Q. What was your understanding as to what you had to do to exercise the option? A. My

understanding was to clean the house up and fix it up to some degree. Q. So, in other words, you thought that--A. Take care of it like a regular home owner. I figure it was

mine and I was going to try to do the best I could but I run into all kinds of difficulty with the permit . . . Q. So, it was your

understanding that you were purchasing the house and that is your only obligation to pay \$50 a month? A. That was the whole

understanding at the conception of the deal because her mother told me (objection). Q. So, the only time prior to March you were on the premises was to just look at it? A.

Right. I told them I would buy and they said fine. They put me in it for \$50 a month. Q. Had you done any work cleaning up the

house or anything around the premises before you moved in on March? A. Oh, yes, I had to. Q. Before you moved in? A. Right,

I had to. In the basement there was termites and there was things. Q. When were you doing those things? A. In February . . . Q. At that time did you have any agreement

with the Foiseys as to whether or not you were going to purchase it? A. I had the agreement before I walked in *36 that

house. That is when they told me you can have it for \$50 a month. They wanted \$87 a month. I said it is not worth it because it is sitting still and the windows are out. (Interruption). Q. That understanding was that you were going to pay \$50 per month?

A. Correct. That is the only way I would walk in that house because I wasn't in the proper position to bargain. They bargained to me because I **169 saw a deal and I grabbed it . . . Q. As far as you were concerned, you never received any word that you were anything but a purchaser, is that right? A. To my knowledge, that was the only way I would have gone into that house as a purchaser. What would I want to rent it for I had a house of my own.

From that testimony it is perfectly clear that the defendant was fully aware of the defects and deficiencies in the premises. Those defects and deficiencies were the very reason he was willing and able to negotiate lower payments.

It requires no authority to sustain the proposition that a person who takes possession of premises with known defects, intends to repair those defects, bargains for reduced monthly payments and characterizes the transaction as a 'deal' which he 'grabbed,' neither deserves nor needs the protection of an implied warranty of habitability.

The fact of the matter, apparent from the record, is that the defendant encountered difficulties with his continued, anticipated repairs when the housing code violations pending against the plaintiffs came to light. That situation might give rise to other remedies, but they are not asserted here.

But apart from the foregoing, and even if the defendant is to be characterized as a tenant in the strict legal sense of that word, the majority fails to recognized that the Seattle housing code was not properly before the trial court.

In his answer, affirmative defense and counterclaim, the defendant alleged violations of the provisions of the housing, building, fire, health and sanitation codes of the city of Seattle. Such shotgun pleading is a clear violation of [CR 9\(i\)](#). At the time of trial, absolutely no proof of the housing code was provided, except to offer an unauthenticated, unidentified booklet entitled 'Housing Code, City of Seattle.' *37 The trial court, on that ground alone, correctly rejected testimony about violations of a city ordinance which had not been properly pleaded, properly authenticated or properly identified.

The trial court should be affirmed.

WRIGHT, J., concurs in the dissent.

RYAN, Judge pro tem. (concurring in the result of the dissent).

However desirable the majority' endorsement of the doctrine of implied warranty of habitability may be, this is not a proper case for its application.

I would, therefore, concur in the result of the dissent.

515 P.2d 160, 83 Wash.2d 22

END OF DOCUMENT