Mercer Law Review

Volume 32
Number 1 *Annual Survey of Georgia Law*

Article 24

12-1980

Country Club Apartments v. Scott: Exculpatory Clauses in Leases Declared Void

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Country Club Apartments v. Scott: Exculpatory Clauses in Leases Declared Void

In *Country Club Apartments, Inc. v. Scott*,[1] the Georgia Supreme Court held that exculpatory provisions in leases are void as against public policy.[2] The Georgia Supreme Court affirmed the judgment of the court of appeals upholding the denial of the defendant's motion for judgment on the pleadings.[3]

The facts of the case illustrate the potential harshness of the result when the landlord is allowed to exculpate himself. Plaintiff entered into a lease agreement with defendant whereby plaintiff was to occupy defendant's apartment complex for a period of six months.[4] Plaintiff occupied the premises on November 26, 1978, and awoke the following morning with a severe headache. Her condition improved during the day but the following morning she awoke with a headache accompanied by nausea. Plaintiff's illness continued throughout the week as her condition grew progressively worse until she was hospitalized the following Sunday and underwent a series of tests.[5] She was discharged three days later and stayed with her parents four days before returning to the apartment. She awoke again with a severe headache and nausea and fainted four times before she was able to leave the apartment. She was hospitalized for further tests[6] and was discharged three days later. She returned to her apartment accompanied by her mother and her sister who spent the night with her. All three became slightly ill that evening and awoke the following morning violently ill. A blood test revealed that all three persons had

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1. Country Club Apts., Inc. v. Scott, No. 36346 (Ga. Sup. Ct., Oct. 1, 1980).

2. *Id.*, slip op. at 4.

3. *Id.* The court acknowledged that this type ruling did not ordinarily receive a grant of certiorari under GA. SUP. CT. R. 29(2). However, noting the importance of the issue and the confusion of law in this area, the supreme court determined a grant of certiorari was warranted. *Id.*, slip op. at 1.

4. 154 Ga. App. 217, 218, 267 S.E.2d 811, 812 (1980). All facts are taken from the opinion of the court of appeals. The case came before the court of appeals by way of interlocutory appeal to review the trial court's denial of defendant's motion for a judgment on the pleadings. Accordingly, plaintiff's allegations were assumed to be true.

5. Plaintiff underwent an angiogram procedure, spinal tap, EEG and other tests. *Id.* at 218, 267 S.E.2d at 812.

6. *Id.* Plaintiff underwent another EEG, a glucose tolerance, bloodcount and heart test.

extremely high levels of carbon monoxide.

An inspection of the heating unit by the gas company revealed that a pipe connected to a vent to remove carbon monoxide from the heater and the apartment was loose, thus permitting carbon monoxide to escape into the apartment. Plaintiff alleged that the rented premises contained a latent defect of fatal capabilities which defendant, exercising ordinary care, could have discovered and which was unknown to plaintiff.[7]

Plaintiff alleged that under the terms of the lease defendant had retained supervision and control of the rented premises.[8] Defendant, in his motion for a judgment on the pleadings, asserted that he was not liable for any damage to plaintiff, relying on an exculpatory provision in the lease.[9] The trial court found that the exculpatory clause was ambiguous and therefore ineffective to relieve the landlord of liability.[10] On this basis, the trial court denied defendant's motion for a judgment on the pleadings and defendant appealed.

Like the issue addressed in *Scott*, the focus of this article is, assuming that the landlord is deemed liable,[11] what is the effect of an exculpatory

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7. *Id.*

8. *Id.* at 219, 267 S.E.2d at 813. The lease was drawn and furnished by defendant. Plaintiff's allegations of control and supervision were based on defendant's (1) retaining a resident agent to collect rents, (2) employing full-time maintenance and repair personnel, (3) promulgating rules and regulations by which tenants were bound, and (4) requiring tenants to permit defendant's agents to enter premises to inspect and to maintain premises.

9. *Id.* The exculpatory clause provided: "Tenant hereby releases Landlord and Landlord's agents from any and all damages to both person and property and will hold them harmless from all such damages during the term of this rental agreement, whether due to negligence of Landlord, Landlord's agents or other tenants or anyone else."

10. *Id.* The trial court concluded that the clause failed to address negligence occurring prior to the inception of the lease agreement nor did it address negligence in turning over the premises in a defective condition.

11. Under common law, a lease was treated as a conveyance and the lessor enjoyed the immunity afforded by the doctrine of caveat emptor. *See* Love, *Landlord Liability for Defective Premises: Caveat Lessee, Negligence or Strict Liability*, 1975 WIS. L. REV. 19, 21. A number of jurisdictions hold that a landlord is not under a duty to exercise ordinary care at the time of leasing to discover latent defects reasonably discoverable by the tenant. However, if the landlord is aware of the defects, or from the facts ought to know of defects, and he has reason to know they are dangerous and are unlikely to be discovered by the tenant, he may be held liable. *See* 49 AM. JUR. 2d *Landlord and Tenant* § 789 (1970). Other courts hold that a landlord is under an affirmative duty to exercise reasonable care to discover and inform the tenant of any latent defects which render the premises unsafe. These courts impose liability upon the landlord if he fails to exercise reasonable care and the tenant is injured without negligence on his part. *See* 49 AM. JUR. 2d *Landlord and Tenant* § 790 (1970). Some courts hold that absent a covenant by the landlord to repair, unless there is actual fraud or concealment, the tenant takes the premises as they are and assumes all risks from defects in the premises. *See* 49 AM. JUR. 2d *Landlord and Tenant* § 850 (1970). Some states, including Georgia, have statutes imposing a duty of repair upon the landlord, which may impose liability for breach of this duty. *See* 49 AM. JUR. 2d *Landlord and Tenant* § 772

clause purporting to relieve the landlord of liability for injuries to the tenant's person or property?

The exculpatory clause is an excellent example of the adage that necessity breeds ingenuity. Faced with increasing potential liability as additional duties were imposed upon him by legislative enactment[12] or through judicial fiat,[13] the landlord turned to the legal draftsman for relief. In response, the draftsman created the exculpatory clause whereby the lessee agreed to release or exempt the landlord from liability arising out of the lease agreement.[14]

The exculpatory clause frequently places the courts in the precarious position of choosing between two fundamental concepts of our legal system. The courts must choose between freedom of contract and the imposition of tort liability for the failure to meet a duty of ordinary care to avoid injury to another.[15] Early courts generally found these clauses to be

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(1970).

12. One of the first legislatively imposed duties was a duty to repair. Georgia had such a statute in its first complete code of law. GA. CODE § 2266 (1863) (current version at GA. CODE ANN. § 61-111 (1979)). While the Georgia statute did not expressly authorize a shifting of this duty by agreement between the parties, an early California statute, CALIF. CIVIL CODE § 1941 (1872), did, and it was widely adopted by other states. It should be noted that Georgia case law authorized the shifting of the duty to repair between the parties, although the statute did not. *See* Heriot v. Connerat, 12 Ga. App. 203, 76 S.E. 1066 (1912); Rehberg, *Exculpatory Clauses in Leases*, 15 GA. B.J. 389 (1953).

13. *See* Love, *supra* note 11, at 49-68 for an excellent discussion of six judicially created exceptions to the doctrine of caveat lessee. The landlord may be held liable on the basis of fraud or negligence for failure to disclose latent defects. RESTATEMENT (SECOND) OF TORTS § 358 (1965) would impose liability upon the landlord if the lessee did not know or have reason to know of the condition or risk involved while the lessor knows or has reason to know of the condition and the risk involved. A second exception applies to premises leased for admission of the public and is set forth in RESTATEMENT (SECOND) OF TORTS § 359 (1965). The third exception is an implied warranty of habitability or merchantability in furnished dwellings. Few courts have adopted this theory, which is based upon breach of contractual obligation, and those states which have adopted it have sharply limited its use. *See* Love, *supra* note 11, at 55 & nn.179-81. A fourth exception is found in RESTATEMENT (SECOND) OF TORTS § 357 (1965) and imposes tort liability for breach of a covenant to repair. A fifth exception provides for liability for negligent repairs, which differs from the prior exception since the latter is based upon misfeasance while the former may be imposed for nonfeasance. *See* 40 L. FRUMER & M. FRIEDMAN, PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 1.05 [3] at 428. Finally, the courts have imposed liability for injuries arising from premises in common use. *See* RESTATEMENT (SECOND) OF TORTS § § 360-61 (1965). Liability is based upon the theory that the landlord retains control over these areas and is therefore bound to exercise reasonable care in keeping them safe.

14. *See* Rehberg, *supra* note 12.

15. *See* Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941); Wessman v. Boston & M. R.R., 84 N.H. 475, 152 A. 476 (1930); Conn v. Manchester Amusement Co., 79 N.H. 450, 111 A. 339 (1920); McCutcheon v. United Home Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971). Some courts avoid the difficult choice by finding that traditional contract principles are inapplicable to the standard form lease increasingly used by landlords. These courts find

a valid exercise of freedom of contract, unaffected by public interest.[16] However, the courts almost unanimously agreed that these clauses were to be strictly construed.[17] The majority of courts continue to uphold such clauses as valid in the abstract.[18] However, the increasing urbanization of American society and the resulting need for and use of multi-family dwellings has resulted in an increasing number of courts evidencing a willingness to employ various means to avoid enforcement of these clauses if given sufficient grounds.[19] Unfortunately for both landlord and tenant, what constitutes "sufficient grounds" is a varied and elusive factor.

A majority of courts follow the *Restatement*[20] rule that allows the landlord to contract away liability for his own future negligence, but not for willful or wanton misconduct. In other words, the clause generally will be upheld as valid unless the consequences of the negligent act fall greatly below the standard established by law.[21] As previously stated, while a

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that the absence of negotiation and the subsequent failure to embody the mutual intent of the parties prevents analysis under traditional contract principles. *See* Galligan v. Arovitch, 421 Pa. 301, 219 A.2d 463 (1966).

16. Inglis v. Garland, 19 Cal. App. 2d Supp. 767, 64 P.2d 501 (1936); Queen Ins. Co. of America v. Kaiser, 27 Wis. 2d 571, 135 N.W.2d 247 (1965). *Accord* Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929); Kirshenbaum v. General Outdoor Adv. Co., 258 N.Y. 489, 180 N.E. 245 (1932); Manius v. Housing Auth., 350 Pa. 512, 39 A.2d 614 (1944); *See generally* Annot., 49 A.L.R. 3d 321 (1973).

17. *See, e.g.*, Kay v. Cain, 154 F.2d 305 (D.C. Cir. 1946); Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (1955); Worthington v. Parker, 11 Daly 545 (N.Y.C.P. 1885); Love, *supra* note 11, at 82; Rehberg, *supra* note 12, at 391.

18. Note, 28 U. PITT. L. REV. 85 (1966).

19. *See* Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (1955); McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971). Courts are becoming increasingly susceptible to arguments based upon the unequal bargaining position between landlord and tenant as housing becomes increasingly scarce. *See* Kay v. Cain, 154 F.2d 305 (D.C. Cir. 1946); Strauch v. Charles Apt. Co., 1 Ill. App. 3d 57, 273 N.E.2d 19 (1971). At least one author has advocated that the courts face the problem directly by declaring such clauses in standard form leases unconscionable and void as against public policy rather than employing strict construction and judicial interpretation to avoid enforcing the provisions. *See* Note, 28 U. PITT. L. REV. 85, 96-97 (1966).

20. *See* Love *supra* n.11 at 83 & n.331; Note, 25 U. PITT. L. REV. 85, 86 & n.6 (1966); RESTATEMENT OF CONTRACTS §§ 572, 574 (1932); RESTATEMENT (SECOND) OF TORTS § 496B, Comment d (1965).

21. RESTATEMENT OF CONTRACTS § 574 (1932). *Accord*, McCutcheon v. United Homes Corp., 79 Wash. 2d 443, ____, 486 P.2d 1093, 1096 (1971) in which the court stated:

> [w]hen a lessor is no longer liable for the failure to observe standards of affirmative conduct, or for *any* conduct amounting to negligence, by virtue of an exculpatory clause in a lease, *the standard ceases to exist.* In short, such a clause destroys the concept of negligence in the landlord-tenant relationship. Neither the standard nor negligence can exist in abstraction.

Id. at ___, 486 P.2d at 1096 (emphasis in original).

number of courts hold such clauses valid, these courts employ various means to avoid enforcing them in order to avoid extremely harsh results.

One method of avoiding enforcement is to strictly construe the clause to find that the parties entering the lease did not contemplate the type negligence before the court,[22] or that the specific time of the occurrence was not covered by the clause.[23] Some courts have found the clause to be overbroad, thus attempting to exempt the landlord from all liability, which is deemed contrary to public policy.[24] Pennsylvania, however, has evidenced a willingness to enforce broadly phrased exculpatory clauses so long as they cover the factual situation before the court.[25] A number of courts concur in holding that one may not relieve himself from liability resulting from a breach of a statutory duty by use of an exculpatory clause.[26]

The courts in at least one jurisdiction hold that any attempt to contract against liability for negligence is contrary to public policy.[27] A few

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22. Some courts distinguish between active and passive negligence. While the latter may be covered by an exculpatory clause, most courts agree that the former may not. This approach has been criticized because of the dubious distinction between the two and the inconsistent decisions it creates. *See* Note, 28 U. PITT. L. REV. 85, 87 (1966); Annot., 40 A.L.R.3d 795 (1971); Annot., 49 A.L.R.3d 321 (1973). California courts have gone so far as to declare that exculpatory clauses may be applied to active negligence, however; the clause must be strictly construed and the intent to extend the clause to active negligence must be clearly expressed. *See* Fields v. City of Oakland, 137 Cal. App. 2d 602, 291 P.2d 145 (Ct. App. 1955) and cases cited therein. California recently passed a statute declaring exculpatory clauses in residential leases executed after January 1, 1976 invalid. *See* CAL. CIV. CODE § 1953 (West Supp. 1980).

23. *See e.g.*, Saewitz v. Levittown Shopping Center, Inc., 13 Bucks L. Rptr. 49 (C.P. Bucks County, Pa. 1963). The court found that the clause failed to release the landlord from liability due to pre-existing conditions. Plaintiff suffered property damage when frozen pipes burst due to faulty installation prior to the tenancy.

24. *See, e.g.*, Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425, 432 (1955) (dictum). The court acknowledged that given the unequal bargaining position of the landlords and tenants in housing accommodations in parts of the state an exculpatory clause purporting to immunize the landlord from all liability would be contrary to public policy.

25. *See* Gorel v. Cimensky, 58 Pa. D. & C. 374 (1946); *compare* Darrow v. Keystone 5, 10, 25, & $1.00 Stores, Inc., 365 Pa. 123, 74 A.2d 176 (1950); Rehberg, *supra* note 12, at 402.

26. *See, e.g.*, Feldman v. Stein Bldg. & Lumber Co., 6 Mich. App. 180, 148 N.W.2d 544 (1967) (statutory duty to keep premises clean includes removal of ice and snow; therefore, plaintiff may recover despite exculpatory clause when injury is the result of a fall in a common area); Boyd v. Smith, 372 Pa. 306, 94 A.2d 44 (1953) (landlord's failure to provide a proper fire escape in contravention of statute rendered exculpatory clause ineffective to bar recovery). Annot., 49 A.L.R.3d 321 (1973).

27. Papakalos v. Shaka, 91 N.H. 265, 268, 18 A.2d 377, 379 (1941). An increasing number of courts have come to realize that a lease is no longer strictly a matter of private concern and may be affected with public interest. *See* Henrioulle v. Marin Ventures, Inc., 20 Cal. 3d 512, 573 P.2d 465, 143 Cal. Rptr. 247 (1978); Rehberg, *supra* note 12, at 402-04; Love, *supra* note 11, at 85.

courts distinguish between commercial and residential leases, and hold that exculpatory clauses in the latter are void as against public policy.[28] Finally, some states have enacted legislation expressly voiding exculpatory clauses as contrary to public policy.[29]

Thus it appears that while exculpatory clauses in leases have generally been found valid, they are viewed with disfavor. For this reason various means have been employed by the courts to soften the impact of such clauses.[30] Unfortunately, this effort by the courts has resulted in a number of illogical and inconsistent decisions in this area of the law.

Prior to the court's decision in *Scott*, Georgia law followed the *Restatement*[31] rule concerning the validity of exculpatory clauses. While Georgia courts had allowed the landlord to contract against liability for his future negligence,[32] he was not permitted to relieve himself of liability for willful or wanton misconduct.[33]

In *King v. Smith*,[34] plaintiff sought recovery for damages to furniture and household goods caused by steam, heat, and moisture escaping into his room from a defective steam pipe. Plaintiff alleged that the landlord

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28. *See* Tenants Council of Tiber Island-Carrollsburg Square v. DeFranceaux, 305 F. Supp. 560 (D.D.C. 1969); Rishty v. R. & S. Properties, Inc., 101 A.2d 254 (D.C. 1953); McCutcheon v. United Homes Corp., 79 Wash. 443, 486 P.2d 1093 (1971). Some courts find such distinctions "artificial and arbitrary." *See* College Mobile Home Park & Sales, Inc. v. Hoffman, 72 Wis. 2d 514, 241 N.W.2d 174 (1976).

29. In some states the statutes apply to the entire leased premises. ILL. ANN. STAT. ch. 80, § 91 (Smith-Hurd Supp. 1980); MASS. GEN. LAWS ANN. ch. 186, § 15 (West Supp. 1980); N.Y. GEN. OBLIG. § 5-321 (McKinney 1978). Other states restrict their application only to those portions of the premises under the landlord's control. MD. ANN. CODE art. 21, § 8-105 (1974).

30. *See* Love, *supra* note 11, at 82 & n.328.

31. RESTATEMENT OF CONTRACTS §§ 572, 574, 575 (1932).

32. Capital Wall Paper Co. v. Callan Court Co., 38 Ga. App. 428, 144 S.E.135 (1928). The case concerned the question of whether a printed provision and a written provision of a lease contract were to be construed in *pari materia*. The printed provision absolved the lessor of any liability for damages to person or property however occurring. The written provision stipulated that the lessor would furnish steam heat. Finding no irreconcilable conflict, the court determined they were to be construed in *pari materia*. The court found that the printed portion did not relieve the lessor from liability for breach of a covenant to provide heat; however, it did relieve the lessor from liability for damage to property resulting from such a breach. The only injury alleged was damage to property which was expressly covered by the exculpatory provision; therefore, the court found that the lower court properly granted nonsuit. While often cited for the proposition that one may contract against liability for future negligence, it is arguable that the case addressed only liability for breach of a covenant and negligence was not an issue. *But see* Plaza Hotel Co. v. Fine Prod. Corp., 87 Ga. App. 460, 74 S.E.2d 372 (1953) in which the court upheld a similar exculpatory clause.

33. Brady v. Glosson, 87 Ga. App. 476, 74 S.E.2d 253 (1953); Sinclair Ref. Co. v. Reid, 60 Ga. App. 119, 3 S.E.2d 121 (1939); King v. Smith, 47 Ga. App. 360, 170 S.E. 546 (1933).

34. 47 Ga. App. 360, 170 S.E. 546 (1933).

and his agent, the janitor, although aware of the observable defect, "negligently, carelessly, wantonly, willfully, and intentionally"[35] used the furnace and "negligently, carelessly, wantonly, willfully, and intentionally" failed to enter his room and shut off the heat to preserve his property.[36] The lease contained an exculpatory clause which relieved the lessor of any liability for damage to person or property "arising from the bursting or leaking of water or steam pipes."[37] The court stated: "*Except in cases prohibited by statute,* . . . a party may by a valid contract relieve himself from liability to the other party for particular injuries or damages and for ordinary negligence; and such an agreement is not void as against public policy."[38] The court analogized such an agreement to that of a person receiving a gratuitous pass from a railroad company and thereby agreeing to relieve the company from injuries to his person or property, and who is bound to the exemption except for damage inflicted willfully and wantonly.[39] The court found that the evidence was insufficient to establish willfulness or wantonness by the defendant.[40] The court added that while the lease gave the landlord the right to enter upon the premises to make repairs to the steam pipes, it did not impose a duty upon the landlord to enter the premises to inspect and repair a defective valve.[41] The court determined, therefore, that the exculpatory clause covered defendant's failure to enter plaintiff's premises to prevent damages due to the escaping steam.[42]

The court in *Covington v. Brewer*[43] stated that while similar exculpatory leases have been held unambiguous and not contrary to public pol-

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35. *Id.* at 361, 170 S.E. at 546.

36. *Id.*

37. *Id.*

38. *Id.* at 364, 170 S.E. at 548 (emphasis added), *citing* Dowman-Dozier Mfg. Co. v. Central of Ga. Ry., 29 Ga. App. 187, 114 S.E. 815 (1922); Hearn v. Central of Ga. Ry., 22 Ga. App. 1, 3-7, 95 S.E. 368, 369-70 (1918).

39. 147 Ga. App. at 364, 170 S.E. at 548.

40. *Id.* at 366, 170 S.E. at 549. The court said that to establish that an act was done willfully or wantonly, one must allege and prove specific facts. *See* Dowman-Dozier Mfg. Co. v. Central of Ga. Ry., 29 Ga. App. 187, 114 S.E. 815 (1922). Defendant's conduct must be "such as to evidence a willful intention to inflict the injury, or else so reckless or so charged with indifference to the consequences . . . as to justify the jury in finding a wantonness equivalent in spirit to actual intent." 47 Ga. App. at 366, 170 S.E. at 549, *citing* Central of Ga. Ry. v. Moore, 5 Ga. App. 562, 565, 63 S.E. 642, 644 (1909).

41. It should be noted that the court found that the defective valve was a patent defect, and under Georgia precedent, a landlord is not liable for injuries to his tenant arising from a patent defect existing at the time of the leasing. 47 Ga. App. at 365, 170 S.E. at 548. *See* McGee v. Hardacre, 27 Ga. App. 106, 107 S.E. 563 (1921).

42. 47 Ga. App. at 366, 170 S.E. at 548-49.

43. 101 Ga. App. 724, 115 S.E.2d 368 (1960).

icy,[44] they are generally strictly construed.[45] The court held that the exculpatory clause was ineffective to relieve defendant of liability for plaintiff's injuries incurred in a two-story plunge in an elevator installed subsequent to defendant's signing of the lease.[46]

The court of appeals acknowledged in *Jadronja v. Bricker*[47] that the landlord was under a statutory duty to repair[48] but noted that case law allowed the tenant to waive this duty.[49] The court found that since the tenant had accepted the premises as they were and had agreed to make all necessary repairs, he was bound by this agreement. In addition, the tenant had released the landlord from liability for damage "of any character" due to the condition of the premises. The court, citing *Buchanan v. Tesler*,[50] said that under these circumstances the tenant could not recover for damages to property caused by a defect in the premises; however, the landlord could be liable for negligent repairs voluntarily undertaken despite the exculpatory provision.[51]

Several recent Georgia cases addressing exculpatory provisions in leases contain little or no discussion concerning their validity. Instead, the court has referred to the earlier cases and summarily denied plaintiff's recovery.[52] An example is *Camp v. Roswell Wieuca Court Apartments*,[53] in

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44. *Id.*, *citing* Capital Wall Paper Co. v. Callan Court Co., 38 Ga. App. 428, 114 S.E. 135 (1928); *See also* Hitchcock v. Mayfield, 133 Ga. App. 546, 211 S.E.2d 612 (1974).

45. Annot., 26 A.L.R.2d 1044 (1952); Annot., 175 A.L.R. 8 (1948). These have been superseded in part by Annot., 49 A.L.R.3d 321 (1973). *See also* Insurance Co. of N. America v. Gulf Oil Corp., 106 Ga. App. 382, 127 S.E.2d 43 (1962) where the court found that the exculpatory clause contemplated causes of action arising out of the lease relationship but did not encompass negligence in other legal duties that would exist in the absence of the lease. The court declined to decide the effect that such a broadly worded clause would have upon a personal injury claim. *See also* Carlton v. Hoskins, 134 Ga. App. 558, 215 S.E.2d 321 (1978).

46. The court reasoned that the clause applied only to the demised premises or portions thereof. Since the elevator was not in existence or contemplated at the time the lease was excecuted, the exculpatory clause was inapplicable.

47. 49 Ga. App. 37, 174 S.E. 251 (1934).

48. GA. CIVIL CODE § 3699 (1910).

49. Heriot v. Connerat, 12 Ga. App. 203, 76 S.E. 1066 (1912).

50. 39 Ga. App. 799, 148 S.E. 614 (1929).

51. 49 Ga. App. at 38-39, 174 S.E. at 252. The court found that the petition alleged a modification of the original lease and was sufficient to withstand a general demurrer.

52. *See* Tek-Aid, Inc. v. Eisenberg, 137 Ga. App. 99, 223 S.E.2d 29 (1975) (action for water damage to plaintiff's equipment was specifically addressed in an exculpatory clause; however, evidence was in conflict whether defendant's construction of the penthouse resulted in violation of a statute and might amount to willful and wanton conduct beyond the scope of the clause); Smith v. General Apt. Co., 133 Ga. App. 927, 213 S.E.2d 74 (1975) (landlord's failure to warn plaintiff or take protective measure constituted deliberate act of omission not covered by exculpatory clause when landlord had knowledge of other rapes in which intruder gained entrance by use of a pass key. This might be considered willful and wanton conduct by landlord); Sport Shop, Inc. v. Churchwell, 131 Ga. App. 718, 206 S.E.2d

which plaintiffs sought recovery for damages to person and property resulting from a fire allegedly caused by a defective heater in one of the apartments.[54] Plaintiffs alleged that defendant negligently failed to repair the heater and that the negligent construction of the buildings allowed the fire to spread. The court of appeals found that an exculpatory provision in the lease releasing the landlord and his agent from "any and all damage or injury to person or property"[55] was binding on all signatories to the lease. On this basis the court affirmed the trial court's grant of defendant's motion for summary judgment in those cases brought by signatories to the leases.[56]

In *Country Club Apartments, Inc. v. Scott*,[57] the Supreme Court of Georgia found that the General Assembly had declared new public policy regarding exculpatory provisions in leases.[58] The court stated that this new policy was first set forth in Georgia Code Ann. section 20-504.[59] However, after the courts continued to hold exculpatory clauses valid contrary to the implicit message in section 20-504, the legislature further clarified its position in a 1976 amendment to Georgia Code Ann. section 61-102.[60] On this basis, the Supreme Court of Georgia affirmed the court of appeals decision upholding the denial of defendant's motion for judgment on the pleadings and overruled all cases[61] in conflict with the public policy set

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715 (1974) (clause released defendant of liability for property damage in commercial lease); Akin v. Hardeman-Long Corp., 129 Ga. App. 303, 199 S.E.2d 621 (1973) (exculpatory clause effective to bar recovery for damage to property arising from simple negligence but not gross negligence).

53. 127 Ga. App. 67, 192 S.E.2d 499 (1972).

54. *Id.* Six cases were before the court on joint appeal.

55. *Id.*

56. *Id.* However, the court found that the release did not apply to nonsignatories, *citing* Ragland v. Rooker, 124 Ga. App. 361, 183 S.E.2d 579 (1971). *See* Levy v. Logan, 99 Ga. App. 253, 108 S.E.2d 307 (1959); Leonard v. Fulton Nat. Bank, 86 Ga. App. 635, 72 S.E.2d 93 (1952); Greene v. Birdsey, 47 Ga. App. 424, 170 S.E. 681 (1933).

57. Country Club Apts. v. Scott, No. 36346 (Ga. Sup. Ct. Oct. 1, 1980).

58. *Id.*, slip op. at 2.

59. GA. CODE ANN. 20-504 (1977). The court noted that in Frazer v. City of Albany, 245 Ga. 399, 265 S.E.2d 581 (1980), it was determined that section 20-504 was applicable to exculpatory clauses in lease contracts. In *Frazer*, plaintiff sought to enjoin certain actions contemplated by the city. One of these actions was the execution of a lease agreement under which the city would be obligated to rent a civic center from the Albany-Dougherty Inner-City Authority for up to fifty years. Plaintiff argued that certain provisions purporting to relieve the Authority from liability for damage to person or property violated section 20-504. The court agreed and held that these provisions were void as contrary to the public policy of section 20-504. The court found these provisions were severable parts of the lease, however, and denied the injunction. 245 Ga. at 401-02, 265 S.E.2d at 583.

60. GA. CODE ANN. § 61-102 (1979).

61. Country Club Apts. v. Scott, slip op. at 4. The court noted that the four judge plurality *purportedly* overruled a line of cases holding that a landlord can exculpate himself from

forth in sections 20-504 and 61-102.[62] The rationale underlying the Georgia Supreme Court's ruling was more clearly set forth by the plurality in the earlier court of appeals decision.[63] While the Supreme Court of Georgia somewhat summarily recognized a legislative declaration of new public policy, the plurality gave a much more detailed analysis of the relevant case law and the effect of the recent legislation upon this case law.

Although the four justice plurality in the court of appeals disagreed with the trial court's finding that the exculpatory clause at issue was ambiguous,[64] they affirmed the denial of the appellant's motion for judgment on the pleadings. Judge Smith, author of the plurality opinion, acknowledged the general rule upholding such clauses[65] but noted Georgia authority establishing a landlord's implied warranty against latent defects.[66] He indicated that the implied warranty exists by operation of law and is in the interest of safety.[67] Judge Smith then stated that the warranty could not be defeated by an exculpatory clause and that cases holding to the contrary were overruled.[68] The plurality opinion referred to section 20-504 which provides in part:

> A contract which is against the policy of the law cannot be enforced

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damages occurring to the person or property of a tenant during the period of the lease as a result of ordinary negligence of the landlord. However, since the special concurrence needed to give the plurality a true majority refused to overrule those cases, they were not overruled by the court of appeals. *Id.*, slip op. at 1-2. In addition to overruling those cases listed by the plurality, the court overruled Jaffe v. Davis, 134 Ga. App. 651, 215 S.E.2d 583 (1975) and F. P. Plaza, Inc. v. Sugrue, 144 Ga. App. 543, 241 S.E.2d 644 (1978).

62. The court pointed out that while the legislature had declared a change in public policy in 1970, the courts had failed to give effect to this new policy. Country Club Apts. v. Scott, slip op. at 4.

63. 154 Ga. App. at 217, 219-21, 267 S.E.2d at 811, 813-14.

64. 154 Ga. App. at 220, 267 S.E.2d at 813.

65. *Id.* at 219, 267 S.E.2d at 813, *citing* Tek-Aid, Inc. v. Eisenberg, 137 Ga. App. 99, 223 S.E.2d 29 (1975); Smith v. General Apt. Co., 133 Ga. App. 927, 213 S.E.2d 74 (1975); Sport Shop, Inc. v. Churchwell, 131 Ga. App. 718, 206 S.E.2d 715 (1974); Akin v. Hardeman-Long Corp., 129 Ga. App. 303, 199 S.E.2d 621 (1973); Camp v. Roswell Wieuca Court Apts., 127 Ga. App. 67, 192 S.E.2d 499 (1972).

66. *See* Elijah A. Brown Co. v. Wilson, 191 Ga. 750, 13 S.E.2d 779 (1941); Ross v. Jackson, 123 Ga. 657, 51 S.E. 578 (1905). In *Wilson*, the Supreme Court of Georgia acknowledged that while a landlord is under a duty to repair latent defects in the premises prior to leasing, that duty is not absolute but is dependent upon the landlord's knowledge of the defect and the consequent need for repair. The court stated that the test was whether the landlord ought to have known of the defect through the exercise of ordinary care in the performance of his obligation to keep the premises in repair; if so, he would be liable. 191 Ga. at 751, 13 S.E.2d at 780. *Wilson* has been construed to require that the landlord must have some reason to think an inspection is necessary before an affirmative duty to inspect will arise. *See* Spires v. Fitzsimmons, 106 Ga. App. 22, 126 S.E.2d 244 (1962).

67. 154 Ga. App. at 220, 267 S.E.2d at 813.

68. *Id.* at 220, 267 S.E.2d at 813-14. *See* cases cited in note 59 *supra*.

> . . . . A covenant, promise, agreement, or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances and appliances . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee, is against public policy and is void and unenforceable . . . .[69]

The plurality found that "[a] landlord's implied warranty concerning latent defects existing at the inception of the lease is sufficiently analogous to a contract for maintenance or repair that an exculpatory provision purporting to nullify the effect of the implied warranty is void and unenforceable under Code § 20-504."[70]

In addition, the plurality referred to an amendment to section 61-102 which provides:

> A landlord or tenant may not waive, assign, transfer or otherwise avoid in any contract, lease, license agreement, or similar agreement, oral or written, for the use or rental of real property as a dwelling-place any of the rights, duties, or remedies contained in the following provisions of law, as now or hereafter amended: (1) Section 61-111, relating to duties of a landlord as to repairs and improvements.[71]

Judge Smith stated that "it would be incongruous to hold that a residential landlord's duty to 'keep the premises in repair' cannot be waived and yet maintain the position that a residential landlord can contractually relieve himself from liability for failure to satisfy that duty where liability would otherwise attach."[72]

In declaring exculpatory clauses void as against public policy, Georgia joins a number of jurisdictions which have done so.[73] The majority of these states have done so on the basis of explicit legislation expressly ap-

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69. GA. CODE ANN. § 20-504 (1977).

70. 154 Ga. App. at 220, 267 S.E.2d at 814.

71. GA. CODE ANN. § 61-102(b) (1979).

72. 154 Ga. App. at 221, 267 S.E.2d at 814. GA. CODE ANN. § 61-111 (1979) provides: "The landlord must keep the premises in repair, and shall be liable for all substantial improvements placed upon them by his consent." GA. CODE ANN. § 61-112 (1979) provides: "The landlord having fully parted with possession and right of possession, is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; but he is responsible to others for damages arising from defective construction or for damages from failure to keep the premises in repair." It is stated in the editorial note to section 61-112 that sections 61-111 and 61-112 overlap and the courts in construing them have failed to distinguish when either is applicable.

73. For example, California, Illinois, Massachusetts, Maryland and New York. *See* Love, *supra* note 11, at 83; Henrioulle v. Marin Ventures, Inc., 20 Cal. 3d 513, ___, 573 P.2d 465, 469-70, 143 Cal. Rptr. 247, 251-52 (1978).

plicable to exculpatory clauses in leases.[74] The decision in *Scott* clarifies an area of law previously plagued with uncertainty. The Georgia Supreme Court is to be commended for recognizing a reversal in public policy declared by the legislature,[75] although it has taken them some time. In addition, the Georgia Supreme Court has clarified some uncertainties raised by the court of appeals decision.[76]

There is, however, one area of confusion resulting from the rationale of the decisions in *Scott:* that is; neither the court of appeals nor the supreme court established whether the holding in *Scott* was limited to residential leases. The plurality's reasoning under section 20-504 would apply to both commercial and residential leases since Georgia case law imposes the implied warranty against latent defects in both.[77] Section 61-102, however, is expressly limited to the "rental of real property as a dwelling place."[78] The plurality's interpretation of this statute as applicable to residential leases only is reasonable under its express terms; however, it does add an element of confusion to the decision. The Georgia Supreme Court did nothing to clarify this ambiguity. The supreme court merely noted that by amending section 61-102, the legislature "re-enforced" its earlier pronouncement of public policy in section 20-504, and clarified the legis-

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74. *See* Love, *supra* note 11, at 83 & n.333; 1972 WIS. L. REV. 520, 525. New Hampshire has declared that any attempt to contract against liability is void as against public policy without reference to a specific statute.

75. It should be pointed out, however, that the legislative enactments and the court's intepretation and application of the new public policy necessarily infringes upon principles of freedom of contract. *See* 1972 WIS. L. REV. 520 in which the author presents a convincing argument for the application of the doctrine of unconscionability to exculpatory provisions in standard form leases. The author asserts that such an approach provides the courts with flexibility not available under statutes declaring all exculpatory provisions void, but yet avoids the inconsistencies present under the traditional approaches. Under this theory, when it is established that the exculpatory provision was a negotiated term between parties with equal bargaining power it will be enforced; but upon proof of unequal bargaining power, the court may declare the term unconscionable and therefore unenforceable. This approach keeps intact the traditional contract principles; however, it requires litigation in each case to establish the relative bargaining power of the parties and to determine whether the exculpatory clause was in fact a negotiated term.

76. The primary criticism of the court of appeals decision was the resulting uncertainty in this area of the law. The decision was of limited precedential value since the special concurrence by Judge McMurray was needed to affirm the trial court's ruling. Judge McMurray refuted the reasonng of the plurality and declined to join in overuling the line of recent cases upholding the validity of exculpatory clauses in leases. 154 Ga. App. at 221, 267 S.E.2d at 814.

77. *See, e.g.*, Grimes v. Gano, 111 Ga. App. 544, 142 S.E.2d 413 (1965); Cox v. Walter M. Lowney Co., 35 Ga. App. 51, 132 S.E. 257 (1925).

78. *See* text accompanying n. 71. Dwelling-place is defined as "some permanent abode or residence, in which one has the intention of remaining . . . ." BLACK'S LAW DICTIONARY 596 (rev. 4th ed. 1968).

lature's intention that section 20-504 apply specifically to the landlord-tenant relationship. If the court is relying solely upon section 20-504, then the holding in *Scott* is not limited to residential leases. Under this theory, the supreme court's reference to section 61-102 is merely to support a finding that the legislature intended section 20-504 to apply to exculpatory provisions in leases. However, if section 61-102 is relied upon not only as evidence of the legislature's earlier declaration of new public policy but as essential to holding exculpatory provisions invalid, then *Scott* is necessarily limited to residential leases. If the latter is ultimately determined to be what the supreme court intended, then *Scott* is subject to the criticism that a distinction between commercial and residential leases is "artificial and arbitrary."[79]

In conclusion, the *Scott* decision answers a number of questions previously existing in this area. Unfortunately, the full effect of the holding in *Scott* is unclear. Hopefully, subsequent decisions will quickly clarify the intended scope of the decision so that the landlord-tenant relationship will be afforded the certainty that is essential to this relationship.

MITCHELL O. MOORE

79. *See* College Mobile Home Park & Sales, Inc. v. Hoffman, 72 Wis.2d 514, ___, 241 N.W.2d 174, 177 (1976).