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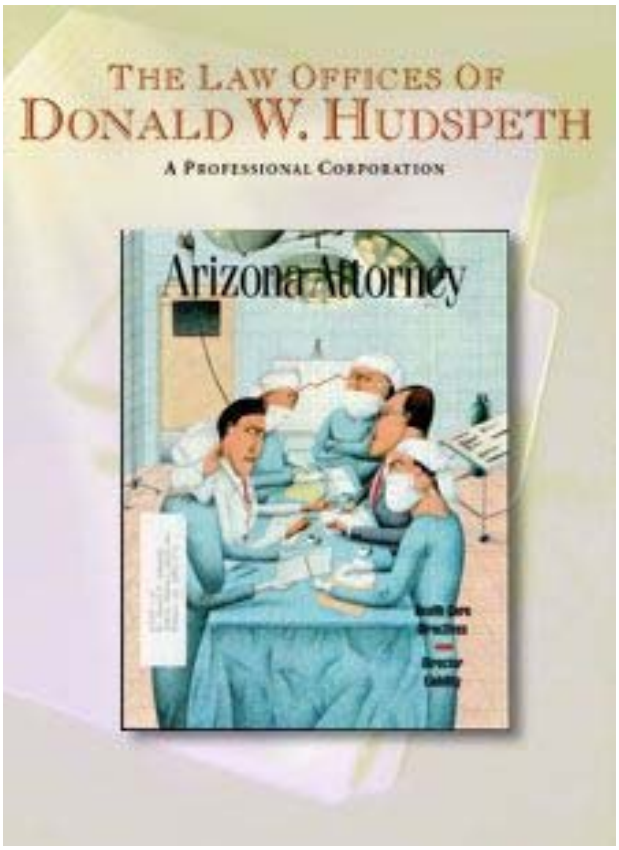

Getting Past Thompson v. Harris:
A New Standard of Constructive Eviction in Arizona

by Don Hudspeth

In 1969 the Arizona Court of Appeals decided *Thompson v Harris.1 Thompson* the famous (or infamous) welding shop case, dramatically illustrates the traditional rule that a landlord has no duty to one tenant to correct the nuisance activities of another. Put more legalistically the case holds that a "landlord's obligation under a covenant of quiet enjoyment ... does not extend to acts of other tenants or third parties unless such acts are performed on behalf of the landlord or by one claiming paramount title."2

The facts of *Thompson* are roughly as follows: In 1962, Thompson leased space for the Longbranch Bar, 1937 E. Indian School Rd., Phoenix, Arizona, from Harris, the landlord. Sometime thereafter, Harris rented adjacent space to an unidentified second tenant for a welding shop. Thompson's bar and the welding shop shared a common wall. Because the welding shop had no toilet facilities, some of its occupants used the common wall as a urinal. Soon, the wall developed an offensive odor and began to leak.

Thompson complained to Harris, who spoke to the welding shop proprietor about the problem, but neither Harris nor the welding shop took any action to correct the problem. Thompson then deducted money from the rent check to pay for mopping and deodorants. Harris returned the check with a Notice of Termination.

At trial Thompson argued that his failure to pay the rent in full did not breach the lease because Harris had breached the lease by, among other reasons, not acting to cure the problem. Both the trial court and the court of appeals rejected this argument, holding that "the landlord had no duty to prevent the improper use of the wall by another tenant."3

The Evolving Rule of Landlord Duty and Liability

The New Test: Landlord's Power to Act

In *Klimkowski v De La Torre*,4 the Arizona Court of Appeals held that the landlord has a duty to remedy a dangerous nuisance where it has opportunity to correct the problem due to the expiration and renewal of a month-to-month lease. In *Klimkowsk*i the dangerous situation consisted of children playing with cigarette lighters in the vicinity of a storage shed containing large amounts of paint, thinner and tar paper. Automobiles were being dismantled near the shed, and an automobile gas tank was stored half inside and half outside the shed.

On several occasions plaintiff Klimkowski observed the children's behavior and alerted the De La Torre to the situation. However, in spite of this knowledge, Mr. De La Torre continued to rent the property to the tenants on a

month-to-month basis without requiring any kind of corrective action. Later, the property caught fire, and several explosions occurred, which spewed burning materials onto the plaintiff and his property.5

The key fact in *Klimkowski* is that the lease was a month-to-month lease. The significance of that fact is the landlord's right and opportunity to control the nuisance tenant by terminating or not renewing the lease.7 However, any right of termination should provide the landlord with the same right and opportunity to compel the tenant to fix the nuisance or face eviction.

The landlord's opportunity to take corrective action should be deemed to arise not only from his ability to terminate a month-to-month lease, but from any event or situation where the landlord has the right to terminate the lease. Such events would include any default allowing the landlord to terminate the lease. Examples of default would include not only the non-payment of rent, but any material breach, particularly of a provision requiring the tenant to obey all applicable law and refrain from disturbing other tenants. Another situation might be where the nuisance activity occurred before the formal commencement date of the lease.

Naturally, what is noxious or illegal would be defined on a case-by-case basis. Examples of a "noxious" nuisance would be excessive noise, smoke, odor and other forms of noise and air pollution. An "illegal" nuisance would be defined in terms of any applicable law, including municipal ordinances.

Arizona should extend the holding of *Klimkowski* to cover not only a dangerous nuisance, but also any noxious and illegal nuisance, where the landlord has notice of the problem.8 Arizona should now expressly adopt section 6.1 of the Restatement (Second) of Property (the "Restatement at __ "). The Restatement at 6.1 provides, in relevant part, that, absent some contrary agreement, "there is a breach of the landlord's obligations if, during the period the tenant is entitled to possession of the leased property, the landlord, or *someone whose conduct is attributable to him*, interferes with a permissible use of the leased property by the tenant."9

Although it was discussing section 837 of the Restatement (Second) of Torts at the time, the Arizona Court of Appeals appears to have implicitly adopted this test in *Klimkowski* by stating that "[t]he landlord's liability in such cases arises not from any action or inaction on the part of the landlord but rather from the landlord's own failure to eliminate a dangerous condition of which he has knowledge when the leased property comes under his control."10 The Maryland Court of Appeals wrestled with this nuisance tenant issue in *Bocchini v. Gorn Management Co.* There, the residential landlord, Gorn Management, refused to take any action to stop "unbearable noise" created by an upstairs tenant. The lease contained a clause against excessive noise. The affected tenants, Carol Bocchini and her young daughter, argued that the landlord's lack of action *ratified or encouraged* the offensive behavior. The management company argued that a landlord cannot be held to have breached a covenant of quiet enjoyment or to have constructively exacted a tenant because of conditions created by another tenant.

In considering this argument, the Maryland court observed that the law in this area "seems to be in a state of flux and disarray."12 On the one hand the court acknowledged a1980 hornbook and a 1955 ALR 2d Annotation in support of the old rule.13 On the other hand, the court observed that a later ALR 4th Annotation and the Restatement (Second) of Property had adopted a different view.14

The Maryland court noted that under comment (d) to section 6.1 of the Restatement, conduct performed on the property by a third party is attributable to the landlord where the *"conduct could legally be controlled by him..."*15 The Court also cited illustration 11 to comment (d) of section 6.1. Illustration 11 describes a situation where the landlord has the right to terminate the lease for persistent noise, but has refused to do so even after a request by the affected tenant? In that case, under the Restatement, the landlord has breached the covenant of quiet enjoyment and constructively evicted the tenant.17 The material fact, here, is the landlord's "measure of control over the offending tenant."18

Intent or Wilfulness Not Required

Under the traditional rule, a finding of the landlord's intent or wilfulness to evict was required to find a breach of duty by the landlord or constructive eviction.19 However, the Colorado Court of Appeals in *Eskanos and Supperstein v. Irwin,* this modified, then eliminated this requirement.20

In *Eskanos,* Irwin, a shopping center tenant, vacated due to excessive noise created by surrounding tenants.21 The leases contained provisions against noise heard outside the demised premises.22 The Colorado Court of Appeals held that, in such situations, the test for constructive eviction should not be whether less or intended to cause the eviction, but whether the landlord intended "to perform the acts of commission or omission which resulted in a deprivation of use."23 The court stated:

> Therefore, we hold that to establish a constructive eviction a lessee need not prove his landlord's intent to work an *eviction*; rather he need only prove that the *acts* which deprive him of all or a substantial portion of his leasehold were intentional on the part of the landlord, be they acts of commission or of omission.24

The Supreme Judicial Court of Massachusetts came to a similar conclusion in the consolidated actions of *Blackett v. Olanoff.*25 There, the landlords, Arthur B. Blackett and others, had introduced a noisy commercial lounge into a pre-existing residential setting.26 Its lease required the lounge to conduct entertainment so that it could not be heard outside the building and would not disturb the apartment residents.

The court found that the landlords had the right "as a matter of law" to control the objectionable noise and that the trial judge was warranted in finding "as a fact that the landlords could control the objectionable conditions."27 The court held that the landlord had constructively evicted the affected tenants because it had created the situation and had the right to control the objectionable conditions.28 The court reasoned that, due to the landlords' actions and omissions, "a clash of tenants' rights was inevitable, if each pressed those rights."29

The court concluded that, because "the disturbing condition was the natural and probable consequence" of the landlords' acts and "because the landlord could control the actions at the lounge," the landlord should not be allowed to collect rent and that the tenants "should not be left only with a claim against the proprietors of the noisomelounge."30

We may conclude, then, that a landlord has the duty to remedy the actions of a nuisance tenant where it has notice of the problem and the right under the lease or otherwise to control the offending tenant. For purposes of determining whether a nuisance has caused constructive eviction, the material acts or omissions in question *are those of the landlord, not the offending tenant.*

A Traditional Waiver Clause May Not Be Effective

The Landlord's Actions, Not the Tenant's, Are in Question

Most commercial leases contain a "waiver clause" similar to the following: "Landlord shall not be liable for any damages arising from any act or neglect of any other tenant, if any, of the building in which Premises are located." On its face, this clause bars the affected tenant's claim against the landlord for nuisances caused by offending tenants.

However, the clause misses the point. Under the evolving standard, once the landlord has notice of the nuisance and the right to terminate the offending tenant's lease, then the acts or omissions in question are not those of the nuisance tenant but those of the landlord.31

As discussed above, the landlord's right to terminate the nuisance tenant's lease would arise from the breach of any lease covenant. For example, if the lease contained an "anti-nuisance" clause, then under the default and remedies sections of standard leases, the landlord would, or should, have the right to terminate. In *Klimkowski*, the Arizona Court of Appeals held that a landlord is liable to a third party for a dangerous nuisance where it has the opportunity to correct a tenant nuisance due to the expiration of a month-to-month lease.32 In making this determination, the court looked to the actions of the landlord, not the offensive tenant. The opinion states:

> The landlord's liability in such cases arises not from any action or inaction on the part of the tenant but rather from the landlord's own failure to eliminate a dangerous condition of which he has knowledge when the leased property comes under his control.33

Thus, after notice and opportunity to cure, the landlord's acts or omissions are material.

Similarly, a court should find that constructive eviction of a tenant has occurred where the landlord fails to correct another tenant's nuisance after notice and opportunity to cure. This result is consistent with common expectation. A victimized tenant does not expect to sue his neighbor. He calls his landlord.

The landlord is both financially and operationally, in the best position to remedy the situation because it may use the power of the lease to deal with the offensive tenant. Moreover, through common area charges, the landlord may distribute the costs of litigation, if necessary, over a group of tenants for the good of all. This is more practical and fair than expecting one or a few tenants to bear the burden of confrontation and litigation.

The Waiver Clause May Bar Only Claims, Not Defenses

In *Barton v. Mitchell Co*., the Florida Court of Appeals upheld the defense of constructive eviction even though the lease contained a waiver clause.34 Barton, the affected tenant, operated a retail store selling patio furniture.35 After she was in place for about two years, her landlord, The Mitchell Company, leased the adjacent premises to an exercise studio, Body Electric. Barton's lease entitled her to "peacefully and quietly enjoy the Demised Premises."36

The exercise studio's lease prohibited audible noise outside its premises.37 Nevertheless, "[l]loud music, screams, shouts and yells" accompanied this operation causing "the walls to vibrate, and a painting to fall off the wall."38

Barton repeatedly complained to the landlord that the noise made it difficult to conduct her business.39 Eventually, after months of continuing promises but no action, Barton vacated the property.

The Mitchell Company sued for the unpaid rent due under the lease. Barton defended on the theory of constructive eviction. In response, the landlord argued that Ms. Barton had waived her right to hold the landlord responsible for the noise and vibration caused by the adjacent exercise studio. The pertinent lease provision read as follows:

> Landlord shall not be liable to Tenant or any other person for any damage or injury caused to any person or property by reason of the failure of Landlord to perform any of its covenants or agreements hereunder,...or for any damage arising from acts or negligence of other tenants or occupants of the Shopping Center....40

The Florida District Court of Appeals rejected the landlord's waiver argument and found that constructive eviction had occurred. The court held that the waiver clause applied only to *claims, not defenses,* and found that "here no one is seeking to sue or impose liability or collect damages from the landlord."41

This decision may reveal a common problem. Many leases contain a standard waiver clause similar to the one in *Barton;* that is, "landlord shall not be liable for any damages arising from any act or neglect of any other tenant, ...' As such clauses say nothing about the waiver of defenses, they may not bar the affected tenant's defense of constructive eviction²42

To remedy this problem, Arizona landlords may want to revise their leases to state, in substance, the following: "Tenant hereby waives all defenses arising from, and Landlord shall not be liable for any damages arising from, any act or neglect of any other tenant, or from landlord's acts or omissions in enforcing any provision of this lease against another tenant, whether or not the landlord has notice of the offending tenant's disturbing or unlawful act or the opportunity to cure the disturbance by invoking its powers under the lease."

Conclusion

The traditional rule of landlord non-liability for tenant nuisances appears to be under fire, particularly where the problem involves a potentially dangerous nuisance and the landlord can fix the problem by invoking its powers

under the lease. This is the lesson of *Klimkowski*. However, *Klimkowski* should be extended to cover all forms of tenant-created nuisance, including environmental hazards such as air or noise pollution.

This extension would be good news for tenants, because it would make the law consistent with their expectation in tenant nuisance cases, i.e., of first calling the landlord instead of their lawyer. As a result, landlords would be held to a higher standard.

However, there may be some good news for the landlord here also. Under the traditional rule, the landlord not only had no duty to act, it had no *right* to act. This limitation of the landlord's rights followed from the centuries-old conception of a lease as a "conveyance" and the tenant as an "owner."43 Once the landlord's duty is established, there can be no question of its right to police tenants.

Waiver clauses, to be effective, should waive defenses as well as claims and bar claims against the landlord, not only for the acts of third parties or other tenants, but for the acts or omissions of the landlord itself.

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ENDNOTES:

1. 9Ariz. App. 341,452 P.2d 122 (1969).
2. Id. at 345, 452 P.2d at 126. See also Annot., Breach of covenant for a quiet enjoyment in lease, 41 A.L.R.2d 1414 § 22 at 1441) (1955).
3. Id. at 345, 452 P.2d at 126.
4. 175 Ariz. 340, 857 P.2d 392 (App. 1993).
5. Id. at 341, 857 P.2d at 393.
6. Id. at 341, 857 P.2d at 393.
7. See Restatement (Second) of Property, §6.1, comment d, illustration 11 (1977).
8. Indeed, Thompson v. Harris, 9 Ariz. App. 341,452 P.2d 122 (1969) is now 25 years old. Its decision pre-dates many of our modern health and safety laws and the public policy underlying those regulations. Were the case to arise today, with arguments presenting the health and safety issues, the courts might decide the case differently, particularly if the landlord had reason to know of the nuisance before entering the lease or had the opportunity under the lease to correct the problem. However, because Thompson is silent on the issue of landlord's right to act under the lease, extending Klimkowski would not necessarily overrule Thompson.
9. Restatement (Second) of Property @ 6.1, (1977).
10. Klimkowski, 175 Ariz. at 342, 857 P.2d at 394 (citing Bischofhausen v. D. V. Jacquays Mining and Equipment Contractors Co., 145 Ariz. 204, 210, 700 P.2d 902,908 (App. 1985).
11. 515 A.2d 1179 (Md. App. 1986).
12. Id. at 1184.
13. Id.
14. Annotation, Landlord-Tenant: Constructive Eviction by Another Tenant's Conduct, 1 A.L.R.4th 849,859-62 (1980) and Restatement (Second) of Properly § 6.1 (1977).
15. 515 A.2d 1179, 1184 (Md. App. 1986) (emphasis by the court).
16. Illustration 11 reads: "L leases an apartment to T. L leases another apartment of the same building to A. Under the terms of each lease, L reserves the right to terminate the lease if a tenant persists in making noises disturbing to other tenants after being requested to stop the disturbing noises. T complains to L about disturbing noises of A and L refuses to do anything. The noises of A are attributable to L for the purposes of applying the role of this section."
17. Id.
18. Id.
19. See Eskanos and Supperstein v Irwin, 637 P.2d 403, 405-406 (Colo. App. 1981).
20. Id.
21. Id. at 404.
22. Id.
23. Id. at 406.
24. Id. (emphasis added).
25. 358 NE.2d 817, 819-20 (Mass., 1977) (citing Thompson v. Harris for the traditional rule).
26. Id. at 818.
27. Id. at 819.
28. Id. at 819-820.
29. Id. at 820.
30. Id. See also Cohen v. Werner, 378 N.Y.S.2d 868 (App. Div. 1975) (upholding finding of constructive eviction where

landlord had ample notice of existing conditions caused by upstairs tenant but did little to abate nuisance).
31. Bocchini, 515 A.2d at 1884; Restatement (second) of Property § 6.1, comment d, illustration 11 (1977); Annotation, 1 A.L.R. 4th 849 (1992); Eskanos, 637 P.2d at 406; Blackett, 358 N.E. 2d at 819-820; Cohen, 85 378 N.Y.S.2d at 868.
32. 175 Ariz. at 340, 857 P.2d at 392. (In Klimkowski, plaintiff was a third party, not a tenant).
33. Id. (cite omitted).
34. 507 So.2d 148 (Fla. App. 4 Dist. 1987).
35. Id.
36. Id. at 149.
37. Id.
38. Id. at 148-49.
39. Id. at 149.
40. Id. at 149 (emphasis added.)
41. Id.
42. In a recent unpublished Decision Order on an accelerated appeal brought by the author under Rule 29, ARCAP, the Arizona Court of Appeals reversed the trial court to find that questions of both law and fact existed under the theory of constructive eviction where the affected tenant alleged noxious and illegal lacquer spraying by an adjoining tenant and the lease required the tenants to obey all applicable law and to avoid disturbing other tenants.
43. 49 AmJur.2d, Landlord and Tenant § 2 (1970).