State of New Hampshire Supreme Court

NO. 2004-0111

2004 TERM

JUNE SESSION

AMY BABCHYCK & JAMES DORR

v.

JEAN DRAKE

BRIEF OF DEFENDANT/APPELLANT JEAN DRAKE

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . *ii*

QUESTIONS PRESENTED *1*

STATEMENT OF FACTS AND STATEMENT OF THE CASE *2*

SUMMARY OF ARGUMENT *4*

ARGUMENT *5*

- I. Ms. Drake Did Not Willfully Interrupt her Tenants' Water, Sewage, or Heat *5*
  - A. Ms. Drake Did Not Willfully Interrupt the Tenants' Water Service *6*
    - 1. Notice of Water Problems Came Late, and With No Supporting Information *6*
    - 2. Ms. Drake Took Prompt and Responsible Action *7*
    - 3. The Chlorination Process: Misunderstandings Between Landlord and Tenants *8*
  - B. Ms. Drake Did Not Willfully Interrupt the Tenants' Septic Service *10*
  - C. Ms. Drake Did Not Willfully Interrupt the Tenants' Heat *11*
  - D. Ms. Drake's Actions Did Not Violate The Statute Barring Landlords from Willfully Interrupting Tenants' Utility Services *12*
- II. Lease Committed Tenants to Make Repairs *13*
  - A. Construction of Lease Terms Generally *13*
  - B. Construction of Covenant to Repair *14*
  - C. Ms. Drake Took Prompt and Responsible Action to Remedy Tenant's Habitability Complaints *16*

CONCLUSION *19*

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION *19*

APPENDIX *20*

TABLE OF AUTHORITIES

NEW HAMPSHIRE CASES

Audley v. Melton,
138 N.H. 416 (1994) *15*

Black v. Fiandaca,
98 N.H. 33 (1953) *18*

Carter v. Lachance,
146 N.H. 11 (2001) *3, 5*

Charlton v. Brunelle,
81 N.H. 13 (1923) *7*

Crowley v. Frazier,
147 N.H. 387 (2001) *12*, *18*

Dow Associates, Inc. v. Gulf Oil Corp.,
114 N.H. 381 (1974) *16*

In re Estate of Hollett,
150 N.H. 39 (2003) *15*

Flanders v. New Hampshire Savings Bank,
90 N.H. 285 (1939) *10*

Gibson v. LaClair,
135 N.H. 129 (1991) *14*

Guay v. Kehoe,
70 N.H. 151 (1900) *14*

Hill v. Boutel,
3 N.H. 502 (1826) *15*

Hill v. Dobrowolski,
125 N.H. 572 (1984) *18*

Hunkins v. Amoskeag,
86 N.H. 356 (1933) *7*

Hutchins v. Peabody,
__ N.H. __ (decided May 25, 2004) *7*

Kline v. Burns,
111 N.H. 87 (1971) *14*, *15*

Manchester Amusement Co. v. Conn,
80 N.H. 455 (1922) *14*

N.A.P.P. Realty Trust v. CC Enterprises,
147 N.H. 137 (2001) *13*, *14*

Rood v. Moore,
148 N.H. 378 (2002) *5*, *12*

Town of Ossipee v. Whittier Lifts Trust,
149 N.H. 679 (2003) *13*

NEW HAMPSHIRE STATUTES

RSA 358-A:10 .... *3*

RSA 48-A:14 .... *3*

RSA 540-A *12*

RSA 540-A:2 .... *3*

RSA 540-A:3, I *3*, 5

RSA 540-A:3, IV *5*

RSA 540-A:4, IX *3*

SECONDARY SOURCE

Schoshinski, AMERICAN LAW OF LANDLORD AND TENANT (1980) *14*

QUESTIONS PRESENTED

1. Did the court err in finding that Jean Drake willfully interrupted her tenants utility services?

2. Did the court err in finding that the lease between the parties did not commit the tenants to make necessary repairs?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Jean Drake has one significant asset, her house, which she retained after a divorce several years ago. Located in Alexandria, New Hampshire, it is "out in the middle of nowhere." 1/20/04 *Trn*. at 38. It was Ms. Drake's home for 23 years, having raised her children there. 1/20/04 *Trn.* at 22.

During the last several years, Ms. Drake has been repeatedly hospitalized with a series of debilitating diseases. As a result, she moved to her father's home in Massachusetts so he can take care of her daily needs. 1/20/04 *Trn.* at 20, 22-23. Ms. Drake has been too weak to work, and has thus had no income. 1/20/04 *Trn.* at 25.

Ms. Drake's best-friend, however, knew her house needed watching and tending. The best-friend had a daughter with a boyfriend and young family, who had little money and needed a place to live. On behalf of her daughter, the best-friend suggested to Ms. Drake that the couple take care of the house in exchange for below-market rent, promising that "they'd take care of the house for me, if there were any problems, they'd take care of it, 'cause she knew I was sick." 1/20/04 *Trn.* at 23.

The best-friend's daughter and boyfriend, Amy Babchyck and James Dorr, the plaintiff's here, thus became Ms. Drake's tenants.

> I rented to them in the good faith that they were gonna take care of the problems. . . . [T]he amount of money I charge them, I charge them less than the rent they were paying at the other place before they moved to my house so that they would do the stuff for me.

1/20/04 *Trn.* at 25. To memorialize this bargain, Mr. Dorr drafted a one-year lease. 1/20/04 *Trn.* at 20, 35, *Appx. to Br.* at 21. It included a covenant for repair; the parties now dispute whether the provision bound them to make various repairs.

In December 2003 Ms. Babchyck and Mr. Dorr brought two Landlord/Tenant actions against Ms. Drake. The first (Ply. Dist. Ct. No. 03-LT-120, *filed* Dec. 1, 2003) alleged that Ms. Drake wilfully terminated her tenants' water utility in violation of RSA 540-A:3, I, and the second (Ply. Dist. Ct. No. 03-LT-128, *filed* Dec. 23, 2003) alleged a variety of habitability issues pursuant to RSA 540-A:2 and RSA 48-A:14, and wilful termination of the heat and sewerage utilities under RSA 540-A:3, I

In the first case, the tenants alleged that Ms. Drake wilfully cut off water service after it was discovered that the well was contaminated. Although Ms. Drake took a variety of remedial actions, after hearings the court found them inadequate and ordered her to restore potable water and to schedule and pay for follow-up tests, FINAL ORDER (Dec. 23, 2003), *Appx. to Br.* at 23; 12/23/03 *Trn.* at 16, and allowed the tenants to use withheld rent money to fix the problem. ORDER (Jan. 6, 2004), *Appx. to Br.* at 25. After a third hearing, the court awarded damages of $1,000 per day for a total of $27,000 pursuant to the landlord/tenant and consumer protection acts. RSA 540-A:4, IX; RSA 358-A:10; *Carter v. Lachance*, 146 N.H. 11 (2001); ORDER (Jan. 21, 2004), *Appx. to Br.* at 27-28.

The tenants' second action alleged that the house had a variety of problems. Ms. Drake again took remedial actions, and also cited the lease agreement which she believed committed the tenants to make the repairs. After a hearing, the court found that "the lease does not exonerate [Ms. Drake] form failing to properly remedy the problems" alleged by the tenants, and ordered her to make repairs forthwith. ORDER (Jan. 21, 2004), *Appx. to Br.* at 30.

This appeal followed. A motion to stay the civil penalties pending appeal was granted by the District Court.

SUMMARY OF ARGUMENT

Jean Drake first notes that "willfully," as used in the landlord/tenant statute, means the tenants must prove the landlord acted with some measure of bad faith. She points out that the tenants probably caused the habitability problems about which they complained, that she took prompt and responsible action upon learning of the problems, and that whatever neglect occurred was the product of misunderstandings and not of bad faith.

Ms. Drake then points to the language of the lease between she and her tenants. Ms. Drake reviews the law of lease construction generally, and also the law concerning covenants to repair. She notes that despite the tenants having undertaken to make repairs, she took prompt and responsible action as to each of the items which were allegedly neglected.

ARGUMENT

I. Ms. Drake Did Not Willfully Interrupt her Tenants' Water, Sewage, or Heat

Ms. Babchyck and Mr. Dorr alleged that Ms. Drake willfully cut off their water, septic and heat utilities. In two separate order, the court agreed.

The New Hampshire landlord/tenant statute provides that:

> No landlord shall willfully cause, directly or indirectly, the interruption or termination of any utility service being supplied to the tenant including . . . water, heat, [or] sewerage . . . except for such temporary interruption as may be necessary while actual repairs are in process or during temporary emergencies.

RSA 540-A:3, I.

The meaning of "willfully" was recently addressed. The same statute at issue here also prohibits landlords from "willfully enter[ing] into the premises of the tenant." RSA 540-A:3, IV. In *Rood v. Moore*, 148 N.H. 378 (2002), the landlord, in order to measure for carpet, entered the leased premises under the mistaken belief that he had the tenant's permission. This Court wrote that the tenants:

> would have us construe the prohibited practice at issue to be that the landlord voluntarily and intentionally entered the premises, without, in fact, having consent to do so, regardless of the landlord's knowledge or state of mind on the issue of consent. We reject this interpretation.

Rood, 148 N.H. at 379. The landlord argued that "willfully" means "with a bad purpose or motive or with actually knowledge of violation of the law." *Id.* In finding the landlord's action blameless, this court held that the word, at the least, does not include "an act committed under a mistaken belief of the operative facts." *Id*; *c.f.*, *Carter v. Lachance*, 146 N.H. 11 (2001) (construction of "willfully" presented, but not addressed by court). Because there does not seem to be much of a middle ground between the positions argued by the landlord and tenant in *Rood*,

it thus appears that to act "willfully," the landlord must act with some measure of bad faith.

A. Ms. Drake Did Not Willfully Interrupt the Tenants' Water Service

At some point in their tenancy Ms. Babchyck and Mr. Dorr noticed the well water was brown, and upon having it tested, learned it was contaminated. They blame it on Ms. Drake. The only explanation offered for the problem, however, was that the well-head cover had been removed, thereby providing an easy pathway for pollution to enter the well. *See* Max Burns, COTTAGE WATER SYSTEMS 24-25 (2002) (inadequate well sealing often responsible for pathogen contamination).

Ms. Drake testified that she had knowledge that she had left the well appropriately capped, but that when the well company visited the cover was off. Because the tenants controlled the premises, she alleged they were probably responsible for the problem. 12/23/03 *Trn*. at 6; 1/20/04 *Trn*. at 41, 44; 1/6/04 *Trn*. at 6. Her testimony was undisputed, and in the absence of any other explanation, it is a probable cause of the contamination. Thus, the only evidence was that the tenants themselves caused the problem, or that it was simply an act of nature. Ms. Drake did nothing to willfully cut off clean water.

1. Notice of Water Problems Came Late, and With No Supporting Information

Regardless of how the pollution got into the well, however, once Ms. Drake learned of it, she acted responsibly.

As she was living in Massachusetts at her father's home, and the tenants apparently corresponded with her at her recently abandoned addressed in New Hampshire, and her mail had to be forwarded, it was not expeditiously received. Ms. Drake testified she first learned of the

water contamination problem on December 11, 12/23/03 *Trn*. at 6, about a week-and-a-half before the hearing on the matter. 12/23/03 *Trn.* at 4, 13.

Ms. Drake received little information. She got a context-less "certificate of analysis," 1/20/04 *Trn.* at 28; 12/23/03 *Trn.* at 4, which didn't describe the problem, or what to do about it. 12/23/03 *Trn.* at 6, 13. The tenants' pre-printed Petition contains only a check-off box stating "My landlord willfully caused my utility service to be shut off," with the "water" box checked. In the "other" line, the tenants wrote only: "Water is not potable." PETITION UNDER RSA 540-A:4, *Appx. to Br.* at 22.

Moreover, without the supporting documents, the allegation is on its face ridiculous – Ms. Drake was recovering from having been hospitalized, 1/20/04 *Trn.* at 25, at her father's home in Massachusetts too many miles away to have stolen to Alexandria, New Hampshire to turn a valve on her tenant's water supply.

Landlords are not liable for defects about which they have no knowledge. *Charlton v. Brunelle*, 81 N.H. 13 (1923); *see Hunkins v. Amoskeag*, 86 N.H. 356, 358 (1933) (landlord liable "ought to have known of the unsafe condition"); *see also Hutchins v. Peabody*, __ N.H. __ (decided May 25, 2004) (landlord has two-week grace period after written notice to make repairs). As it is undisputed that Ms. Drake didn't learn about any problem with water until some time after it occurred, she can hardly have willfully caused it.

2. Ms. Drake Took Prompt and Responsible Action

Once she learned about the problem, Ms. Drake took prompt and responsible action. Despite her weakness and poor health, she immediately contacted a well company, scheduled a visit by a professional, and got the repair done.

On December 12, 13, 14, and 15, Ms. Drake called the lab that conducted the tenant's water test, and left messages on voice mails, 1/20/04 *Trn.* at 28, seeking information about the meaning of the test. "On Tuesday [December] 16th, I finally got ahold of the lab and they sent me the next two sheets that Amy [Babchyck] had received but didn't send to me which was the explanation sheet of what the test results meant and the directions on how to fix it." 1/20/04 *Trn.* at 28; 12/23/03 *Trn.* at 13. She received this information on December 16 or 17. *Id.*

The following day, Ms. Drake contacted four or five well companies seeking someone to fix the problem. 1/20/04 *Trn.* at 28. After a number of calls, she found a company who might be able to do the work. As the person responsible for scheduling was out, she was told he would call back the next day, which he did. *Id.* The Guilford Well Company then committed to looking at her well on Friday, December 19, and on that day it was treated with chlorine as recommended by the well company. 1/20/04 *Trn.* at 29; 12/23/03 *Trn.* at 3-4, 14.

The tenants do not dispute these events, and acknowledge that the well was chlorinated on December 19. 12/23/03 *Trn.* at 4, 10, 11.

3. The Chlorination Process: Misunderstandings Between Landlord and Tenants

The standard way to decontaminate a private drinking water well is to inject it with chlorine. After a certain period of time for the chemicals to disinfect, the well must be flushed. *See* New Hampshire Department of Environmental Services, *Environmental Fact Sheet WD-SWEB-4-3*, DISINFECTING PUBLIC WATER SYSTEMS (1998) <http://www.des.state.nh.us/factsheets/ws/ws-4-3.htm>. This, Ms. Drake had learned, is accomplished by running water constantly until one smells chlorine at the tap. 1/20/04 *Trn.* at 29. The tenants understood this

process. 1/6/04 *Trn.* at 7.

Thus, Ms. Drake asked a friend, Frank Companion, to follow up on the chlorination by flushing the well. But because the tenants do not like Mr. Companion, they did not let him in. 1/6/04 *Trn.* at 4, 7; 1/20/04 *Trn.* at 37, 44. Mr. Companion thus posted an official notice – which the well company provided – of the chlorination on the tenants door. 1/6/04 *Trn.* at 6; 1/20/04 *Trn.* at 29. The tenants acknowledged they received the posted notice on the evening of Thursday December 18. 1/20/04 *Trn.* at 30.

Consequently, Ms. Drake spoke to the tenants, who informed her that they would not be home on Friday during the well company's visit. The tenants told her that they didn't want Mr. Companion or Ms. Drake at their home, so they, the tenants, would take care of the rest of the process themselves. Drake: 1/20/04 *Trn.* at 29. "So as far as we were concerned, once Guilford Well Company was done, it was in [tenants] hands." *Id.*

> The Court: They told you that they would take care of doing what?
> Ms. Drake: The rest of the steps, which was . . . bringing the chlorine up through all the pipes to clean out the pipes, then you're supposed to let it sit for 24 hours, and then you flush, basically flush the well out until the chlorine's gone.

Drake: 1/20/04 *Trn.* at 29-30

The tenants, however, apparently understood differently who was responsible for the flushing. Mr. Dorr testified that on Friday morning he

> "spoke to the well person that morning when he showed up . . . and he indicated that if there was an outside spigot, he could use that to circulate the water until they got a chlorine smell, so we did not have to be home."

1/20/04 *Trn.* at 30. What happened next is unclear, but it appears that the well was not flushed. The well company did not do it because they either did not consider it their job or believed that

either Ms. Drake or the tenants would do it. Ms. Drake did not do it because after the tenants rejected her agent, Mr. Companion, she believed they had taken responsibility. And the tenants did not do it because they thought it was the well company's job. Had the tenants not rejected Mr. Companion, he would have taken seen to the flushing, and the subsequent problems would not have occurred. *See Flanders v. New Hampshire Sav. Bank*, 90 N.H. 285 (1939) (when landlord has duty to repair, landlord may enter to prevent waste). In any event, the follow-up fell between the cracks of a misunderstanding, and the correct procedures were not followed.

This lead to a motion for contempt with an allegation by the tenants that Ms. Drake had violated the court's order to decontaminate the well in that she "made no attempt to follow up on the chlorination process that was done on December 19th." MOTION FOR CONTEMPT (undated), *Appx. to Br.* at 24. That became the subject of the January 6, 2004 hearing, and lead to the court's finding of a wilful violation and the $27,000 damage award.

B. Ms. Drake Did Not Willfully Interrupt the Tenants' Septic Service

When the tenants realized the well had not been flushed, they did it themselves. Rather than opening an outside spigot as the well company had suggested, they opened the faucets inside the house and ran the water continuously until they smelled chlorine. This action naturally overloaded the septic system, as they are generally not designed to handle more than the normal volume of household waste water. COTTAGE WATER SYSTEMS at 78-79.

None of this is disputed. In their motion for contempt the tenants wrote:

> "We followed the directions given to us by the well company and as a direct result of running all of the faucets in the house, our septic is now backing up into the basement. Now we are unable to use our water at all."

MOTION FOR CONTEMPT (undated), *Appx. to Br.* at 24; 1/6/04 *Trn.* at 3. The overflow caused a

variety of sewage leaks and prevented the tenants from using portions of the house. 1/20/04 *Trn.* at 8-12. Moreover, because the leaks began before the smell of chlorine was present, the tenants could not be sure that the well was fixed. 12/23/03 *Trn.* at 5. The constant running of water also overtaxed the water well pump which as a result ceased operating, 12/20/03 *Trn.* at 32, and which was later replaced.

Upon learning of the sewage issues, Ms. Drake contacted a septic company and made arrangements to have the problem diagnosed and fixed. 1/20/04 *Trn.* at 31-32.

Nonetheless, the tenants blamed these events on Ms. Drake, and the court found that she willfully cut of the tenants' septic utility in violation of the housing statutes. Ms. Drake, however, acted reasonably in all her actions, and did not "willfully" terminate her tenants septic service.

C. Ms. Drake Did Not Willfully Interrupt the Tenants' Heat

The tenants alleged that the heating system does not make some rooms warm enough, and the court found that Ms. Drake willfully terminated their heating service.

Ms. Drake's house has a wood furnace and a back-up propane furnace. 1/20/04 *Trn.* at 34, 43. Both use the same duct system to distribute heat. The system apparently has idiosyncracies involving adjustments to the blower system, 1/20/04 *Trn.* at 35, 51, 52, but when she lived there Ms. Drake managed to keep the house livably warm. 1/20/04 *Trn.* at 35, 42-43.

Before they moved in, the parties discussed the heating system. Although Ms. Drake understood that her insurance company did not want tenants using the wood furnace, 1/20/04 *Trn.* at 34, Ms. Babchyck and Mr. Dorr made clear that they didn't have enough money to purchase propane and intended to heat with wood. 1/20/04 *Trn.* at 36. Because there was an understanding that the tenants intended to use propane at most only as a backup, just as Ms.

Drake did when she occupied the house, their allegation that the propane furnace alone was not sufficient to heat the house is not surprising. The tenants did not claim that the heating *system*, when used as designed, was inadequate to heat the house.

Ms. Drake was diligent in taking care of her heating system; the routine every-two-years service was done on the propane furnace shortly before the tenants moved in. 1/20/04 *Trn.* at 33-34, 42.

Moreover, the hearing on this matter took place on January 20, 2004. Although difficult to recall at this writing in June, it should be remembered that New Hampshire had a few weeks of very cold weather in January. 1/20/04 *Trn.* at 35. Ms. Drake should not be held responsible for unusually cold weather experienced collectively by everyone in New Hampshire.

D. Ms. Drake's Actions Did Not Violate The Statute Barring Landlords from Willfully Interrupting Tenants' Utility Services

In enacting RSA 540-A and providing for civil penalties, the Legislature hoped to relegate to housing history the meanest of landlord actions – disconnecting utilities when tenants are behind on the rent. *See* Margot Saunders, Roger Colton, Nancy Brockway, TENANTS' RIGHTS TO UTILITY SERVICE 90 (1994). In using the word "willfully," it did not intend, however, to penalize upstanding landlords for their diligent responses and honest misunderstandings. *Rood v. Moore*, 148 N.H. 378, 379 (2002).

Ms. Drake's conduct here does not measure up to even the lenient standard of willfulness this court rejected in *Rood*, and clearly does not involve the bad faith *Rood* requires. Thus, the district court was in error in holding Ms. Drake liable for willfully interrupting her tenants' utility services. Accordingly this court should reverse that finding and lift the imposition of civil penalties. *See Crowley v. Frazier*, 147 N.H. 387 (2001).

II. Lease Committed Tenants to Make Repairs

A. Construction of Lease Terms Generally

The lease the tenants drafted and Ms. Drake accepted included a covenant to repair. It provides:

> Tenants agree to help keep the property in good condition. James and Amy agree to do work (or contract to have work done) after consulting Landlord, and Tenants also agree to do the work as a favor to Landlord, less the cost of materials, if they do the work themselves. The Landlord must agree to work before any work is performed, and the cost of the materials will be deducted from the rent.

LEASE AGREEMENT , *Appx. to Br.* at 21. The parties now dispute whether the covenant bound them to make the various repairs which are the subject of this suit.

> Mr. Dorr: In the lease we did agree to keep the property in good condition. We did not agree to be the caretakers of the property in this lease.
>
> Ms. Drake: Yes, you did.

1/20/04 *Trn.* at 41; *see also* 1/6/04 *Trn*. at 5-6.

Rental leases are interpreted according to standard principles of contract law. *Town of Ossipee v. Whittier Lifts Trust*, 149 N.H. 679 (2003). A lease is ambiguous when the parties "could reasonably disagree as to the meaning of [the] language." *N.A.P.P. Realty Trust v. CC Enterprises*, 147 N.H. 137, 139 (2001) (quotations omitted). Disputed terms are construed objectively.

> In determining the parties' intentions under these [objective] standards, the court must give the disputed term the meaning which the party using the words should reasonably have apprehended that they would be understood by the other party, and the meaning which the recipient of the communication might reasonably have given to it. In other words, the court must determine what the parties, as reasonable people, mutually understood the ambiguous term to mean.
>
> In applying this objective standard, the court should consider the parties' intent by examining the contract as a whole, the circumstances surrounding execution and the object intended by the agreement, keeping in mind [the court's] goal of giving effect to the intention of the parties."

N.A.P.P Realty Trust, 147 N.H. at 140-41 (quotations and citations omitted).

B. Construction of Covenant to Repair

Generally landlords do not have to pay for repairs voluntarily made by the tenant. *Guay v. Kehoe*, 70 N.H. 151 (1900). Here, Ms. Drake bargained away a portion of this immunity (she agreed to pay for materials) in exchange for a commitment by the tenants to "help keep the property in good condition" and "to do work."

Even if a tenant agrees to a "put in repair" covenant, the tenant is not expected to "repair a building that has become unusable for its purpose, and which has inherent structural vices." *Gibson v. LaClair*, 135 N.H. 129, 133 (1991) (quotations omitted). But when a tenant signs a standard "keep in repair" covenant, as Ms. Babchyck and Ms. Dorr did here, the tenant must "keep the premises in such a state of repair as the ordinary man, owning and operating such a [property] would keep them." *Manchester Amusement Co. v. Conn*, 80 N.H. 455, 460 (1922). *See* Schoshinski, AMERICAN LAW OF LANDLORD AND TENANT § 5:20 at 278, 279 (1980)

When construing a lease, "the age and condition of the leased premises must be taken into account." *Gibson v. LaClair*, 135 N.H. 129, 133 (1991). Other factors can be the "nature of the deficiency, its effect on habitability, the length of time for which it persisted, the age of the structure, the amount of the rent, the area in which the premises are located, whether the tenant waived the defects, whether the defects resulted from malicious, abnormal, or unusual use by the tenant." *See Kline v. Burns*, 111 N.H. 87, 93 (1971) (establishing implied warrant of habitability and defining factors to determine its breach); AMERICAN LAW OF LANDLORD AND TENANT § 5:20 at 277.

In adopting an implied warrant of habitability and thereby making the landlord rather than the tenant generally responsible for habitability issues, this Court explained that:

> In today's housing market, the landlord is usually in a much better bargaining position than the tenant which results in rental of poor housing in violation of public policy.

Kline v. Burns, 111 N.H. at 92.

But Ms. Drake's case isn't the usual situation. The *tenants*, not Ms. Drake, wrote the lease. They proposed renting the house. The tenants were seeking cheap rent and, being aware of her medical difficulties, knew Ms. Drake faced a choice of needing a caretaker or leaving the house vacant, exposed to vandalism and weather. They knew its condition and rural location. The house, as noted, was Ms. Drake's only asset and her sickness prevented her from earning an income. Moreover, Amy Babchyck was Ms. Drake's best-friend's daughter.

In short, Ms. Drake did not set out with the intention of becoming a landlord, but rather found herself in that position as a result of unfortunate circumstances and a chance to do a good friend a good turn. *See Hill v. Boutel*, 3 N.H. 502 (1826) (relation of landlord and tenant implied by payment of rent).

In this case, the landlord, rather than the tenant, had the poorer bargaining position. In line with the principle that contract terms among parties with a disparity in bargaining power should be construed against the maker, *see*, *e.g.*, *In re Estate of Hollett*, 150 N.H. 39, 44 (2003) (prenuptial agreements); *Audley v. Melton*, 138 N.H. 416, 418 (1994) (exclusion contracts), the covenant to repair here must be taken in the light most favorable to Ms. Drake.

The covenant to repair contained in Ms. Drake's lease with Ms. Babchyck's and Mr. Dorr provides: "Tenants agree to help keep the property in good condition. Regardless of the

standard of contract construction, "help keep the property in good condition" means fixing things that break. Things broke here, but the tenant seeks to place the blame – willful blame – on Ms. Drake.

C. Ms. Drake Took Prompt and Responsible Action to Remedy Tenant's Habitability Complaints

Whatever the precise measure of each party's duties pursuant to the lease, Ms. Drake acted promptly and responsibly as to each item the tenants alleged she shirked.

As noted, when Ms. Drake learned of dirty water, she sought more information, contacted a well company, and arranged for its decontamination. When she learned of septic problems, she found a septic company, and arranged for its inspection and repair. Ms. Drake had performed routine two-year maintenance to the propane heater just a few months before the tenants moved in.

Regarding the rest of the tenants' allegations, the repairs were within their realm of responsibility, and Ms. Drake adequately fulfilled her share of the duties.

Ms. Drake is clearly responsible for the well pump, as it is utility infrastructure within the house. *See Dow Associates, Inc. v. Gulf Oil Corp.*, 114 N.H. 381 (1974). When the pump stopped working, the tenants alleged it affected habitability. The well pump was just eight years old, and its failure was coincident with the tenants' having run the water which backed-up the sewage system. After the tenants installed a new pump it also didn't work, 1/20/04 *Trn*. at 32-33, suggesting nothing was probably wrong with the *old* pump, but rather something else was wrong and Mr. Dorr simply made an incorrect plumbing diagnosis. Nonetheless, Ms. Drake ended up paying for a new pump.

The tenants claimed that due to the backed-up sewage, there was a mark on the wall, which they alleged indicated that water might be getting into an electrical outlet. 1/20/04 *Trn*. at 9. While this is a potentially serious issue, the tenants provided no evidence of an electrical problem, and alleged no continuing problem after the septic problems had been addressed. The matter was either resolved, or was not of the import they initially thought.

The tenants reported that some ceiling tiles needed replacing. This is a minor issue and easy to repair. 1/20/04 *Trn*. at 37. Moreover, it is part of maintaining the house, for which the tenants are responsible under the lease.

The tenants have been concerned about mice. 1/20/04 *Trn*. at 49. Ms. Drake noted that when she lived at the house, she had a cat, which killed any mouse she was aware of within a day or two. 1/20/04 *Trn*. at 38. Noting that rural living generally involves some mice, and having no reason to believe the tenants' mouse problem was different than she had experienced, Ms. Drake nonetheless bought some mousetraps for her tenants, explaining that "mousetraps and peanut butter . . . is the standard way if your cat doesn't catch mice." *Id.* Moreover, during the tenancy Ms. Drake approved the tenants' superfluous request to get a cat, as the lease specifically allows pets so long as they are clean.

The tenants complained about a leaky roof. 1/20/04 *Trn*. at 10-11. In response, Ms. Drake hired a laborer who patched portions of it, 1/20/04 *Trn*. at 38-39, and the tenants acknowledged the repair. 1/20/04 *Trn*. at 50. During the January 20 hearing the tenants reported additional leaks, but it was the first Ms. Drake had heard of them. *Id.*

Finally, the tenants complained about a broken porch railing. First, the porch in question is associated with the pool which, because of the cost of insurance, was indisputably not

demised. 1/20/04 *Trn*. at 40; *Hill v. Dobrowolski*, 125 N.H. 572 (1984) (housing code does not apply to places outside leasehold); *Black v. Fiandaca*, 98 N.H. 33 (1953) (no duty for landlord to repair places outside leasehold). Because of that, and because Ms. Drake knew Ms. Babchyck and Mr. Dorr had small children, she had a gate placed across the porch access before they moved in. *Id.* Second, fixing a simple railing is the tenants responsibility under the lease. 1/20/04 *Trn*. at 39, 43-44. Third, Ms. Drake nonetheless hired a laborer who made the repairs. 1/20/04 *Trn*. at 39.

Even though Ms. Drake took prompt and responsible action when confronted with each of the tenants various complaints, Ms. Drake was found in violation of the housing code. Accordingly, the lower court's order should be reversed. *See Crowley v. Frazier*, 147 N.H. 387 (2001).

CONCLUSION

Based on the foregoing, Ms. Drake requests this honorable Court to reverse the finding that she willfully interrupted her tenants utility services, lift the associated imposition of civil penalties, and reverse the finding of housing code violations.

Respectfully submitted,

Jean Drake,
By her Attorney,

Law Office of Joshua L. Gordon

Dated: June 18, 2004

____

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Jean Drake requests that her counsel, Joshua L. Gordon, be allowed 15 minutes for oral argument.

I hereby certify that on June 18, 2004, copies of the foregoing will be forwarded to Amy Babchyck and James Dorr.

Dated: June 18, 2004

____

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

APPENDIX

1. DEFENDANT'S EXHIBIT A, *Lease Agreement* (April 7, 2003) *21*

Plymouth District Court Docket 03-LT-120

2. PETITION UNDER RSA 540-A:4 (Dec. 1, 2003) *22*
3. FINAL ORDER (Dec. 23, 2003) *23*
4. MOTION FOR CONTEMPT (undated) *24*
5. ORDER (Jan. 6, 2004) *25*
6. ORDER (Jan. 21, 2004) *27*

Plymouth District Court Docket 03-LT-128

7. PETITION UNDER RSA 540-A:4 (Dec. 23, 2003) *29*
8. ORDER (Jan. 21, 2004) *30*