Implied Warranties of Suitability in Commercial Real Property Leases: Physical vs. Non-Physical Defects

by Richard L. Clark, Jr.

Introduction

Although not readily apparent, the subject of implied warranties in commercial real estate lease agreements is important to everyone in society and substantially impacts the national economy. It is a waste of a commercial tenant's financial resources to lease commercial property for a specific commercial purpose only to discover after commencement of the lease that the subject property is not suited for its intended commercial purpose due to a latent defect in the property that the landlord knew or should have known about. Such waste may have the effect of driving smaller commercial tenants out of business, including many start up companies and family-owned businesses, thus suppressing economic entrepreneurship, which has an adverse effect on the nation's economy as a whole. Money spent on unusable lease space could have been used to expand business or to donate to charity. The businesses that are not forced to shut down may have to increase prices to cover for their losses due to wasted lease space. Such price increases will of course have an adverse effect on all consumers and their pocketbook. However, all of this economic waste could be avoided if only the landlord had a duty to inform the prospective tenant of any latent defect in the leased premises which would restrict the tenant's stated intended use of the premises.

In 1988, the Texas Supreme Court in *Davidow v. Inwood North Professional Group— Phase I*[1] recognized for the first time the existence of a landlord's implied warranty of suitability for a particular commercial purpose,[2] making Texas one of only two states to recognize an implied

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warranty of suitability for a particular commercial purpose.[3] The Texas Supreme Court's ruling was broad, and did not limit such implied warranties to apply only to non-physical defects in the leased premises. Such non-physical defects may include: inappropriate zoning;[4] parking ordinances and regulations;[5] restrictions on the sale of liquor;[6] and other miscellaneous factors which hinder or restrict the intended use of lease space.[7]

However, in the wake of *Davidow*, the Dallas Court of Appeals, in *Coleman v. Rotana, Inc.*,[8] interpreted *Davidow* to rule that an implied warranty of suitability for a particular purpose applies only to physical latent defects in the premises and does not cover non-physical latent defects in the premises.[9]

This manuscript contends that in Texas, under the Texas Supreme Court's ruling in *Davidow*, the implied warranty of suitability for a particular purpose covers *all* latent defects in the property that the landlord knows about or should know about, including non-physical defects as well as physical defects. In other words, without an agreement to the contrary by the contracting parties, a commercial landlord implicitly warrants that the premises are suitable for their intended commercial purpose.

Parts I and II of this manuscript will trace the history of implied warranties in real property leases, from its origins up to the current status of the law, including changes in the law and reasoning for the changes. Part III analyzes the Dallas Court of Appeals' holding in *Coleman v. Rotana, Inc.*, that implied warranties of suitability for intended commercial purposes cover only latent physical defects in leased premises and do not cover latent non-physical defects.[10] Lastly, Part IV advances policy reasons why implied warranties of suitability should cover non-physical latent defects in the premises as well as physical latent defects.

I. IMPLIED WARRANTIES IN REAL PROPERTY LEASES

A. Implied Warranties in Residential Leases

The common law has assumed that a lease of real property primarily conveys to the tenant an interest in land.[11] The law has historically seen the landlord-tenant relationship as governed by the tenets of property law.[12] The value of the lease was the land itself,[13] and the structures of the land were not the focus of the lease.[14] The lease was seen as a conveyance of an estate in land for a limited term, and was based upon the parties' mutual promises.[15] Possession of the land was key to the common law concept of a leasehold,[16] and the tenant's promise to pay rent was exchanged only for the bare right of possession.[17] Thus, the landlord was under no duty to deliver the premises in any particular condition,[18] and the rule of caveat emptor, or "let the buyer beware," governed all real property lease transactions.[19]

This concept of the landlord-tenant relationship may have been reasonable in a rural society, but is not as applicable in today's urban society.[20] The agrarian concept of landlord-tenant law has become outdated, and is no longer representative of the relationship existing between the modern lessor and lessee.[21] Today's tenant is more concerned with suitable facilities and tenant services than the possibility of the landlord's interference with his possession.[22] The primary importance of the lease today is not to create a tenurial relationship between the parties, but to arrange the leasing of space appropriate for its intended use.[23] Furthermore, the landlord, and not the prospective tenant, usually has superior knowledge of the existence of defects in the leased premises which may render the property uninhabitable.[24] In light of these changes in the landlord-tenant relationship, many jurisdictions, including Texas,[25] have recognized this transformation of the landlord-tenant relationship and have either judicially or statutorily adopted an implied warranty of habitability in residential leases.[26]

In 1978, the Texas Supreme Court, in *Kamarath v. Bennett*,[27] recognized, for the first time, the existence of an implied warranty of habitability by the landlord that the leased premises are habitable and fit for living in a residential apartment lease.[28] In this case, Kamarath leased an apartment from Bennett pursuant to an oral, month-to-month lease agreement.[29] Kamarath examined the leased premises before moving in.[30] However, shortly after commencement of the lease, Kamarath became aware of defects in the premises, including broken pipes, faulty electrical wiring, and physical defects, rendering the premises uninhabitable and unfit for living.[31] City building inspectors supported Kamarath's testimony that the defects were undiscoverable at the time Kamarath moved in to the apartment,[32] and Kamarath subsequently ceased rental payments.[33]

The trial court found that Bennett did not breach the lease contract with Kamarath, or violate any duty owed to Kamarath concerning the state of repair of the premises.[34] On appeal, the Waco Court

of Civil Appeals affirmed and applied the common law rule that absent fraud, there is no implied warranty on the part of the landlord that the leased premises are habitable and fit for living.[35]

However, the Texas Supreme Court reversed the appeals court, holding that in the rental of residential real property, there is an implied warranty of habitability by the landlord that the leased premises are habitable and fit for living.[36] In other words, at the commencement of the lease, the landlord warrants that there are no latent defects in the facilities that are crucial to the use of the premises for residential purposes and that the facilities will remain in a condition which makes the premises habitable.[37]

B. Implied Warranties of Suitability for a Particular Purpose in Commercial Leases

In contrast to the widespread recognition of implied warranties in residential real property leases, most jurisdictions, including Texas, have been slow to adopt an implied warranty of suitability in a commercial real property lease context. The old common law rule of caveat emptor remains prevalent in most jurisdictions for the commercial tenant.[38] However, in 1988, the Texas Supreme Court in *Davidow* recognized the similarities between residential and commercial tenants and determined that residential lease warranties should apply to commercial lease property.[39] Specifically, the court held that there is an implied warranty of suitability by a commercial landlord that the premises are suitable for their intended commercial purpose.[40] The particular commercial purpose must either be known by the landlord or specified in the lease itself.[41] Such a warranty guarantees to the tenant that at the inception of the lease, there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose.[42]

In *Davidow*, a doctor, Dr. Joseph Davidow, was sued by his landlord, Inwood North Professional Group—Phase I, for unpaid rent.[43] Shortly after moving into the medical office space, Davidow began having problems with the facilities.[44] The roof leaked when it rained, causing the carpet to rot and to mildew.[45] Rodents and other pests infested the office,[46] and the air conditioning in the building was out of order, often causing the temperature inside the office to rise above 85 degrees.[47] The landlord neglected to replace burned out hallway lights, resulting in hallways remaining dark for several months at a time.[48] Contrary to the lease agreement, cleaning, hot water, and maintenance were not provided,[49] and the parking lot was constantly filled with trash.[50] On one occasion, Davidow went without electricity for several days after the landlord failed to pay the electric bill.[51] Davidow finally moved out of the office space and ceased rent payments over a year before the lease expiration date.[52]

It is a waste of a commercial tenant's financial resources to lease commercial property for a specific commercial purpose only to discover after commencement of the lease that the subject property is not suited for its intended commercial purpose due to a latent defect in the property that the landlord knew or should have known about. Such waste may have the effect of driving smaller commercial tenants out of business, which has an adverse effect on the nation's economy as a whole.

After the landlord initiated suit for unpaid rent against Davidow, Davidow counter-sued for breach of an implied warranty that the premises were suitable for use as medical offices.[53] The jury found that the landlord knew of Davidow's intended use of the premises as medical offices, that the landlord warranted to Davidow that the office lease space was suitable as a medical office, and that the office lease space was not suitable as a medical office.[54] The trial court subsequently rendered judgment that Davidow recover $9,300 in damages and that the landlord take nothing in its suit.[55]

On appeal, the court of appeals refused to extend the implied warranty of habitability to commercial leases.[56] Holding that there is no implied warranty of suitability in commercial real property leases, the court of appeals reversed the judgment of the trial court and rendered judgment in favor of the landlord for Davidow's unpaid rent.[57]

However, the Supreme Court of Texas reversed the judgment of the court of appeals, holding that there is an implied warranty of suitability by a commercial landlord that the premises are suitable for their intended commercial purpose.[58] In other words, at the inception of a commercial lease, a landlord impliedly warrants that the premises are

suitable for their intended commercial purpose and that there are no latent defects that would prevent the use of the premises for its known intended commercial purpose.[59] The court recognized the similarities between commercial and residential tenants, and therefore expanded residential warranties to cover commercial leases as well.[60] "It cannot be assumed that a commercial tenant is more knowledgeable about the quality of the structure than a residential tenant."[61] A businessman should not be expected to have the requisite expertise to assure the suitability of the premises, and many commercial tenants do not have the financial ability to hire professionals to assess the suitability of the premises for their intended commercial purpose.[62] Therefore, commercial tenants must rely on the landlord's greater ability to discover any latent defects that would hinder the tenant's intended use of the property.

The court goes on to state that the existence of a breach of the implied warranty of suitability in commercial real property leases is a fact question to be determined from the circumstances of each case.[63] Among the factors to be considered when determining whether a breach of such a warranty has occurred are: the nature of the defect; the length of time the defect persisted; the rental amount; the age of the premise's structure; the effect of the defect on the tenant's use of the premises; the area in which the premises are located; whether the defect was a result of any abnormal or unusual use by the tenant; and whether the tenant waived the defects.[64]

Only one other state court of last resort besides the Texas Supreme Court has expressly recognized an implied warranty of suitability in commercial real property leases: the New Jersey Supreme Court in *Reste Realty Corp. v. Cooper*.[65] Both courts' rulings are broad in that at the inception of a commercial lease, a landlord impliedly warrants that the premises are suitable for their intended commercial purpose and that there are no latent defects that would prevent the use of the premises for their intended commercial purpose.[66] There is nothing in either case to suggest that the implied warranty of suitability for a particular purpose does not apply in cases where the latent defect is non-physical in nature, such a particular use being forbidden by a zoning ordinance, restrictive covenant, or other municipal ordinance.[67] Furthermore, neither court listed the requirement that the defect be physical in nature among the factors to be considered in determining the existence of a breach of the implied warranty of suitability in commercial leases.[68]

II. *COLEMAN V. ROTANA, INC.*[69]

In the wake of the Texas Supreme Court's landmark decision in *Davidow*, the Dallas Court of Appeals heard the case of *Coleman v. Rotana, Inc.*,[70] only one year after the *Davidow* decision was handed down. In the *Coleman* case, a group of investors, J. Hamilton Coleman, Dean Flowers, John Ward, and Curtis Whitehead, leased commercial retail property from Rotana, Inc., the owner of the a retail strip center on Greenville Avenue in Dallas for the specified use as a restaurant and bar to be operated under the trade name of Catalina Cafe.[71] Included in the lease was a provision for the non-exclusive use of the parking area for patrons and employees of the restaurant.[72]

The City of Dallas parking ordinances required 23 spaces for use by a restaurant the size of the Catalina Cafe, and the strip center in total only had 29 spaces.[73] Before the lease was signed, Rotana's agent had represented to Coleman and the other restaurant owners that the Catalina Cafe would have access to 23 of the 29 parking spaces available for the exclusive use of the restaurant.[74] However, the two other tenants in the center required and used more than three spaces each.[75] Thus, any restaurant in the space was going to be in violation of the city's parking ordinances.

After opening, the Catalina Cafe experienced constant parking problems.[76] Coleman testified that on weekend nights, the Catalina Cafe never had more than 50 percent of the 29 spaces in the strip center available to its customers.[77] The Catalina Cafe tried numerous tactics in an attempt to solve the parking issue, including hiring a valet service, but nothing solved the problem.[78] Subsequently, the restaurant received numerous warnings from the City of Dallas for parking violations.[79]

Business at the Catalina Cafe began to falter and the restaurant eventually closed its doors.[80] Coleman and the rest of the restaurant's owners subsequently sold their interest in the restaurant to Robert Miller and Thomas Fleeger, and the restaurant re-opened as a Mexican food restaurant under the new ownership.[81] However, the original owners of the Catalina Cafe remained obligated to Rotana for the restaurant's lease, due to the personal guarantees each individual owner had signed at the commencement of the lease.[82]

The Mexican restaurant closed after only a few months.[83] After the restaurant closed the second time, Coleman and the other original owners

attempted to secure the landlord's permission to sublease to other investors.[84] Rotana rejected the restaurant owners' proposal, and Rotana sued Coleman and other the original owners of the restaurant for unpaid rent individually on their personal guaranties of the payment and performance of the obligations and liabilities of the tenant under a commercial lease.[85] Coleman and the original restaurant owners counterclaimed for constructive eviction, fraudulent inducement, and breach of an implied warranty of suitability for a particular commercial purpose, all arising from Rotana's failure to provide adequate parking to the tenants for their restaurant.[86]

The suit was originally filed in the 101st District Court in Dallas County.[87] The trial court refused to submit Coleman's and the other defendants' counterclaims to the jury, except for the fraud claim, for which the jury answered in favor of the landlord, Rotana.[88] The trial court subsequently entered judgment on a jury verdict in favor of Rotana, and Coleman and the original restaurant owners appealed.[89] The Dallas Court of Appeals affirmed the trial court's judgment,[90] and writ of error to the Texas Supreme Court was denied.

In affirming the holding of the trial court, the Dallas Court of Appeals held that an implied warranty of suitability for a particular commercial purpose covers only latent defects in the nature of a "physical or structural defect" which the landlord has a duty to repair.[91] The court of appeals claimed that this holding was based on the Texas Supreme Court's holding in *Davidow*.[92] The court reasoned that inadequate parking which violates city parking ordinances is not a physical defect vital to the use of the premises for their intended commercial purpose of the type specified by the *Davidow* court.[93]

In support of its holding, the court quoted the *Davidow* opinion:

> It cannot be assumed that a commercial tenant is more knowledgeable about the quality of a *structure* than a residential tenant. A businessman cannot be expected to possess the expertise necessary to adequately inspect and repair the premises, and many commercial tenants lack the financial resources to hire inspectors and repairmen to assure the suitability of the premises.[94]

From this quote, the court ascertained that the *Davidow* court intended the implied warranty of suitability to encompass only physical or structural defects in the premises and not non-structural or non-physical defects such as inadequate parking facilities.[95] Therefore, the court concluded that although Coleman could not utilize the leased premises for their specified purpose as a restaurant due to inadequate parking facilities, the landlord was not to be held accountable, for inadequate parking facilities is not a physical or structural defect in the leased premises.[96]

Money spent on unusable lease space could have been used to expand business or to donate to charity. The businesses that are not forced to shut down may have to increase prices to cover for their losses due to wasted lease space. Such price increases will of course have an adverse effect on all consumers and their pocketbook. However, all of this economic waste could be avoided if only the landlord had a duty to inform the prospective tenant of any latent defect in the leased premises which would restrict the tenant's stated intended use of the premises.

III. MISAPPLICATION OF *DAVIDOW*

A. The Texas Supreme Court's Ruling in Davidow

The Supreme Court of Texas ruled in *Davidow* that there is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose.[97] This means that at the inception of the lease, there are no latent defects in the facilities that are vital to the use of the premises for its intended commercial purpose.[98] However, the *Davidow* ruling is broad, and as stated previously, at no point in that opinion does the court impliedly or expressly rule that an implied warranty of suitability for a particular commercial purpose does not cover non-physical defects in the leased premises.[99] Such a requirement was not listed by the Texas Supreme Court in *Davidow* among the factors to be considered when determining the existence of a breach of an implied warranty of suitability in commercial real property leases.[100]

Nevertheless, the Dallas Court of Appeals in *Coleman* read the *Davidow* decision too narrowly and ruled that parking facilities that violate city parking requirements are not the type of defects that are covered by the implied warranty of suitability for a particular commercial purpose as defined by the Supreme Court in *Davidow*.[101] The court in *Davidow* stated, "This warranty means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition."[102] The word "facilities" in no way can be seen as limiting implied warranties of suitability for a particular commercial purpose to those defects of a physical or structural nature. Yet, the word "facilities" may have misled the Dallas Court of Appeals into reading that such warranties are limited to structural or physical defects in the facilities.

In addition, the statement in *Davidow* that the essential facilities "remain in suitable condition"[103] on its face could imply that the implied warranty of suitability covers physical or structural defects only, thus misleading the Dallas Court of Appeals to hold that adequate parking is not a defect covered by the implied warranty of suitability. However, in *Coleman*, at the inception of the lease, there were an adequate number of parking spaces in the shopping center for use by the restaurant due to the fact that only one of the other two lease spaces in the center were occupied.[104] Only after the lease began did the restaurant fail to have an adequate number of parking spaces available to it in order to satisfy city parking ordinances.[105] Thus, the parking facilities did not "remain in suitable condition" throughout the term of the lease. Therefore, the *Davidow* court's use of the term "remains in suitable condition" does not necessarily intimate that the implied warranty of suitability applies only to structural or physical defects, and the *Coleman* court should not have been led astray by the phrase.

Furthermore, the Texas Supreme Court in *Davidow* did not expressly limit implied warranties of suitability to cover only latent defects in the structure of the premises.[106] As stated earlier, the court said that the nature of the defect was only one of several factors to be considered when determining whether there has been a breach of such a warranty.[107] In addition to the nature of the defect, a court should also consider: the defect's effect on the tenant's use of the premises; the length of time the defect persisted; the structure's age; the area in which the premises are located; the amount of rent; whether the tenant waived the defects; and whether the defect resulted from any unusual or abnormal use by the tenant.[108] However, the court gave little guidance on how much weight to give each factor.

Thus, according to the Texas Supreme Court's wording in *Davidow*, the *effect* of the defect on the tenant's use of the premises carries equal weight to the *nature* of the defect. This is due to the fact that the *Davidow* court did not indicate which factor should receive the greater weight. Therefore, affording one factor more weight than the other is reading more into *Davidow* than the court expressly or implicitly said. Accordingly, determining whether a breach of an implied warranty of suitability in commercial real estate leases hinges on more than whether the defect was physical or non-physical in nature.

Therefore, the Dallas Court of Appeals in *Coleman* misinterpreted the *Davidow* opinion, and the court should not have hinged its entire decision on the physical or non-physical nature of the defect without consideration of the other factors outlined in *Davidow*. By basing its entire decision on the nature of the defect without consideration of the other factors, the court of appeals has inappropriately limited implied warranties of suitability for a particular commercial purpose as defined by the Texas Supreme Court in *Davidow*. Furthermore, the court of appeals ignored the majority of factors to be considered when determining the existence of a breach of an implied warranty of suitability for a particular commercial purpose that the Texas Supreme Court spelled out in *Davidow*.[109] While the factor of the age of the structure applies only to physical defects, the remainder of the factors can apply to both physical and non-physical defects in the facilities of leased premises. Although the Dallas Court of Appeals in *Coleman* did consider the nature of the defect, the other *Davidow* factors were ignored altogether, and the resultant decision was error.

B. The Results of the Misapplication of Davidow

If based on physical defects only, many tenants will be stuck with lease payments for property which is useless for the lease's intended commercial purpose. For instance, in *Coleman*, the tenants to a retail restaurant lease were held to be responsible for lease payments for a lease which was essentially not usable for its intended commercial purpose.[110] The tenants leased the space for the purpose of operating a restaurant.[111] However, the strip mall in which the space was located had inadequate parking to satisfy city parking ordinances.[112] Thus, the

space was in effect not usable for the purpose of operating a restaurant.

As a result of *Davidow*, Coleman and other owners of the restaurant should not be held responsible for the unpaid rent. The landlord, Rotana, implicitly warranted to Coleman and the other owners that the leased premises were suitable for use as a restaurant and bar under the rule set forth in *Davidow*, which states that at the inception of the lease, the landlord implicitly warrants that the premises are suitable for their intended commercial purpose.[113] It was known by Rotana that Coleman and the other owners were leasing the premises for use as a restaurant and bar.[114] Thus, just as Dr. Davidow was not liable for unpaid rent to his landlord, Inwood North, after Inwood North breached its implied warranty of suitability to Dr. Davidow, Coleman and the other original owners of the Catalina Cafe should not have been liable to Rotana, its landlord, after Rotana breached its implied warranty of suitability to Coleman and the other original owners of the restaurant.

However, the Dallas Court of Appeals misapplied the *Davidow* rule and held the tenants responsible for lease payments throughout the term of the lease.[115] The *Coleman* court held that an implied warranty of suitability for a particular commercial purpose covers only latent defects in the nature of a physical or structural defect.[116] Therefore, the court of appeals allowed Rotana to lease space to tenants for the expressed purpose of operating a restaurant in the leased premises, even though the premises were not usable as restaurant space due to Dallas city parking requirements.[117] Such a result is clearly contrary to the spirit of *Davidow* and the reasoning behind the supreme court's decision to recognize the existence of implied warranties of suitability for a particular commercial purpose in commercial real property leases.[118]

Moveover, holding that implied warranties of suitability for a particular commercial purpose are not applicable to commercial leases that have non-physical defects in the premises would have inequitable results far beyond the mere waste of tenants' resources. For instance, consider a situation where a landlord leases commercial property to a psychiatrist that the landlord knows specializes in treating known pedophiles, and later leases space immediately next door to the psychiatrist's office to a day care center, whose owner was unaware of the nature of the psychiatrist's practice when he signed the lease agreement. The landlord would thus have

Over the last few years, there has been a gradual trend towards expanding the protection the law affords to both residential and commercial tenants. Most jurisdictions have adopted an implied warranty of habitability in residential real property leases. However, Texas is one of the first jurisdictions to recognize the similarities between the residential tenant and the commercial tenant and apply the implied warranty of habitability in the commercial context, in the form of the implied warranty of suitability for the property's intended commercial use.

superior knowledge of a defect in the premises which would hinder the tenant's intended use as a day care center, yet failing to disclose such information to the prospective tenant. At worst, children who attend such a day care center would be put at risk of molestation due to the proximity of pedophiles to the day care center, and at best, parents would take their children out of the day care center, leaving the center with no customers and thus no means of paying rent. Therefore, it would be outrageous to suggest that the day care's lease space would remain "fit" for use as a day care center in such a situation where the landlord has superior knowledge of a defect that would endanger the lives of numerous preschool children. The day care center would be well-advised to move out upon such an occurrence in order to protect the health and safety of the children. The law should not force day care businesses to choose between protecting innocent children and remaining in business. Certainly the Dallas Court of Appeals did not intend to condone such an unjust result in its ruling in *Coleman*.

However, according to the court of appeals' interpretation of *Davidow*, the day care center would remain responsible for all unpaid rental payments from the time the day care center moved out of the lease space until the termination of their lease. The landlord would be absolved of any wrongdoing, despite the fact that the landlord had knowledge of the nature of the psychiatrist's practice at the time the landlord leased the space to the day care center. Therefore, because the defect in this example is not

physical or structural in nature, the implied warranty of suitability for a particular commercial purpose would not apply to the day care center's landlord. The landlord would be allowed to collect rent for unusable lease space at the expense of the day care center, which would have little means of paying such rent due to a lack of children attending the center. Such an inequitable result would have the effect of forcing most day care centers in a similar situation to remain in such a lease despite the presence of those who are a danger to the children who attend day care at the center; for most day care center operators would not have the financial ability to move if forced to pay rent both at the former lease space and at a new lease space. Surely the Dallas Court of Appeals had not taken such a possibility into consideration at the time that it decided *Coleman*.

As both *Davidow* and *Kamarath* tell us, modern landlords are not at liberty to lease real property to a tenant when the landlord has knowledge that the premises are not suitable for the tenant's intended use of the premises.[119] Moreover, it is generally recognized that a landlord has a duty to inform prospective tenants of any qualities of the premises which might reasonably be undesirable from the tenant's perspective.[120] The landlord must sufficiently inform the prospective tenant on the prospective lease space to the extent that the tenant has enough information to properly assess the premise's suitability for its intended purpose.[121] Thus, the landlord in the day care center situation has a duty to inform the day care center of any qualities of the lease space that might hinder the tenant's intended use of the premises. Surely an office full of pedophiles next door to a day care center could reasonably be found to hinder the use of the day care center's space as a day care center! The days of the caveat lessee are over.[122] As the day care center example demonstrates, such a change in the law, where an implied warranty of suitability is imposed on the lessor of commercial real estate should be welcomed due to the likelihood of such unjust and potentially dangerous repercussions.

Furthermore, the court of appeals' decision in *Coleman* may have the unfortunate effect of misleading other courts in their interpretation of *Davidow* to hold that implied warranties of suitability for a particular commercial purpose cover only latent defects of a physical nature. As a result, numerous other tenants may be forced to remain in unsuitable lease space or be held liable for rental payments for commercial lease space that is unfit for its intended use if they decide to move.

IV. POLICY REASONS WHY THE *DAVIDOW* TEST SHOULD BE READ TO APPLY TO NON-PHYSICAL DEFECTS AS WELL AS DEFECTS THAT ARE PHYSICAL IN NATURE

A. The Economic Ability of Tenants to Assess the Suitability of Premises for Their Intended Commercial Purpose

As stated in *Davidow*, a typical businessperson cannot be expected to possess the necessary expertise to adequately assess the suitability of the premises for their intended commercial purpose, and "many commercial tenants lack the financial resources" to hire professionals who are able to assess the suitability of the premises for a particular purpose.[123] Furthermore, the landlord, as permanent owner of the property, usually has superior knowledge of any defects in the premises that may render them unsuitable for a known purpose.[124] As a consequence, commercial tenants, with the exception of large corporations with substantial financial resources, usually rely on their prospective landlord's greater ability to assess the suitability of the premises for their intended commercial purpose.[125]

Therefore, no fundamental difference exists between a physical or structural defect in a leased commercial property which precludes the use of the property for its intended commercial purpose and a non-physical defect which has a similar preclusive effect on the use of the property for its intended commercial purpose. It takes a comparable amount of financial resources, if not greater resources, to determine the existence of a latent non-physical defect in a property which would limit a tenant's use of the property as it would to determine the existence of a latent physical defect which also would limit a tenant's use of the property.

Moreover, there is little essential difference between the tenant in *Davidow*, Dr. Davidow, who could not use the space he leased for use as a medical office due to numerous problems with the premises,[126] and the tenant in *Coleman*, the owners of the Catalina Cafe, who could not use the space they leased for use as a restaurant due to inadequate parking facilities which violate city parking ordinances.[127] Both tenants leased space which is unfit for use as its intended commercial purpose. Therefore, just as the landlord in *Davidow* was not allowed to collect unpaid rent from the doctor who

had leased space that was unfit for its intended commercial purpose for use as a medical office, the landlord in *Coleman* should not have been allowed to collect unpaid rent from the restaurant space tenants who had leased space that was unfit for use as a restaurant.

However, the results of *Davidow* and *Coleman* are diametrically opposed from one another. The consequences of the defects to the leased premises in both *Davidow* and *Coleman* have a similar prohibitive effect on the tenants in each case, yet the court of appeals in *Coleman* allowed the landlord to collect unpaid rent from the affected tenants,[128] due to a perceived difference on the part of the court between physical and non-physical defects. As previously stated, such a difference was never recognized by the Texas Supreme Court in *Davidow*,[129] and should not have been recognized in *Coleman*.[130]

B. The Landlord's Knowledge of the Premises

Because of his familiarity with the property, the landlord should have superior knowledge of any defects in the premises that will render them unsuitable for a specified use.[131] Additionally, the landlord, as owner of the property, should bear the cost of curing any defect in the premises.[132] Furthermore, "[a] tenant, even one who inspects the premises prior to leasing them, is under no obligation to discover each latent defect that would render the premises unsuitable for his purposes . . . ."[133] Therefore, due to the fact that most commercial tenants lack the capacity to accurately assess the existence of any possible latent defect in a property that will render it unsuitable for a particular commercial purpose;[134] the fact that most property owners should have knowledge of any defects in the premises which will render the property unsuitable for its intended commercial purpose;[135] and the fact that tenants do not have a duty to uncover latent defects that would render the property unsuitable,[136] it would be highly inequitable to hold a tenant responsible for lease payments when the property is not suited for its intended commercial purpose. The landlord has the responsibility and the duty to inform the tenant of any possible defects that would interfere with the tenant's specified use for the premises.[137]

As stated earlier, there is little difference between the effect a physical defect has on the tenant's use of the premises and the effect a non-physical defect has on the tenant's use of the premises.[138] Furthermore, as stated in *Davidow*, a landlord should have knowledge of *any* defects which will render the premises unfit for a particular use.[139] In *Davidow*, the landlord was held to have knowledge that the space leased to Dr. Davidow was unfit for use as medical offices, due to numerous physical and non-physical defects in the premises.[140] Following such logic, the landlord in *Coleman* should have had knowledge that the space leased by the owners of the Catalina Cafe was defective in that the space was unfit for use as a restaurant due to an inadequate number of available parking spaces according to city parking requirements and the use of such space as a restaurant would be in violation of such parking requirements. Therefore, the landlord in *Coleman* should have been charged with knowledge of the latent defect in the premises it leased to the owners of the restaurant, thus establishing a breach of the implied warranty of suitability.

In light of the Texas Supreme Court's opinion in* Davidow, *such an implied warranty of suitability clearly covers all latent defects in leased commercial real property in Texas. Furthermore, considering the inequitable results of restricting implied warranties of suitability to situations where the defect is physical and not applying implied warranties of suitability where the defect in the premises is not physical, the Texas Supreme Court surely did not mean what the* Coleman *court said it meant.

However, the court of appeals disregarded the guidance given by the *Davidow* court, holding that regardless of the landlord's knowledge of any defects in the premises which would make the premises unfit for their intended commercial purpose, the landlord does not impliedly warrant to the tenant that the premises are fit for their intended commercial purpose if the defect is non-physical in nature.[141]

If the court of appeals read the *Davidow* opinion correctly, the court would have realized that the landlord is usually in a better position to have knowledge of a defect which would affect a tenant's commercial use of a property. It makes no difference that the defect in *Coleman* was non-physical in nature. The landlord, as owner of the property, has superior knowledge of the property and *any* defects it may have as to a particular use. Therefore, the

landlord has the duty to notify the tenant of any latent defects which might limit the tenant's intended use of the premises. If the landlord fails to notify the tenant of such a defect, the landlord impliedly warrants to the tenant that the premises are suitable for the tenant's known intended use of the premises.

CONCLUSION

Over the last few years, there has been a gradual trend towards expanding the protection the law affords to both residential and commercial tenants. Most jurisdictions have adopted an implied warranty of habitability in residential real property leases. However, Texas is one of the first jurisdictions to recognize the similarities between the residential tenant and the commercial tenant and apply the implied warranty of habitability in the commercial context, in the form of the implied warranty of suitability for the property's intended commercial use.

As previously stated, the Texas Supreme Court's ruling in *Davidow v. Inwood North Professional Group—Phase I* was broad. The court held that in a commercial lease, there is an implied warranty of suitability by the landlord that the premises are suitable for their intended purpose and that at the inception of the lease, there are no latent defects in the facilities that are vital to the intended use of the premises. Under the Texas Supreme Court's ruling in *Davidow*, the implied warranty of suitability for a particular commercial purpose covers *all* latent defects in the property that the landlord knows about or should know about. Furthermore, in *Davidow*, the court listed numerous factors to be considered when determining whether there has been a breach of such a warranty. The court did not include among the factors to be considered a requirement that such defects be physical in nature to be covered by the newly-recognized implied warranty of suitability for a particular commercial purpose.

However, the Dallas Court of Appeals in *Coleman v. Rotana, Inc.* misapplied *Davidow* and held that such an implied warranty of suitability as defined by the Texas Supreme Court in *Davidow* covers only latent *physical* defects in the premises that the landlord knows about or should know about and not latent defects which are not physical in nature, even though there was no requirement in *Davidow* that the defect be physical in nature. Moreover, such non-physical defects may have the same prohibitive effect on the tenant's use of the premises, but according to *Coleman*, no implied warranty of suitability would be applied in such a situation.

In addition, the result in *Coleman* that the tenant was held responsible for all unpaid lease payments until the termination date of the lease for lease space that was unsuitable for its intended commercial purpose was clearly inequitable and may lead to further unjust results if other courts rely on *Coleman* in interpreting the *Davidow* opinion as it relates to implied warranties of suitability for a particular commercial purpose. In light of the Texas Supreme Court's opinion in *Davidow*, such an implied warranty of suitability clearly covers all latent defects in leased commercial real property in Texas. Furthermore, considering the inequitable results of restricting implied warranties of suitability to situations where the defect is physical and not applying implied warranties of suitability where the defect in the premises is not physical, the Texas Supreme Court surely did not mean what the *Coleman* court said it meant.

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NOTES

1. 747 S.W.2d 373 (Tex. 1988).
2. *See id.*
3. The New Jersey Supreme Court in Reste Realty Corp. v. Cooper, 251 A.2d 268 (N.J. 1969), recognized for the first time the existence of an implied warranty of suitability for a particular purpose in a commercial lease.
4. *See, e.g.*, Service Oil Co., Inc. v. John T. Arnold Associates, Inc., 542 P.2d 652 (Kan. 1975).
5. *See, e.g.*, Coleman v. Rotana, Inc., 778 S.W.2d 867 (Tex. App.—Dallas, 1989, writ denied).
6. *See, e.g.*, Truetried Serv. Co. v. Hager, No. 70163, 1997 WL 25517 (Ohio Ct. App. 1997).
7. *See, e.g.*, Vermes v. American Dist. Tel. Co., 251 N.W.2d 101 (Minn. 1977).
8. 778 S.W.2d 867 (Tex. App.—Dallas, 1989, writ denied).
9. *See id.* at 871.
10. *See id.*
11. *See* Kamarath v. Bennett, 568 S.W.2d 658, 660 (Tex. 1970). *See also* Javins v. First Nat. Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970), cert. denied, 400 U.S. 925 (1970).
12. *See Kamarath*, 568 S.W.2d at 659-60.
13. *See id.* at 660.
14. *See id. See also* Paula Murray, *The Evolution of Implied Warranties in Commercial Real Estate Leases*, 28 U. Rich. L. Rev. 145, 148 (1994).
15. *See id.*
16. *See Kamarath*, 568 S.W.2d at 660.
17. *See id.*
18. *See id.*
19. *See* Anthony J. Vlatas, *An Economic Analysis of Implied Warranties of Fitness In Commercial Leases*, 94 Colum. L. Rev. 658, 661 (1994).
20. *See Kamarath*, 568 S.W.2d at 660. *See also Javins*, 428 F.2d at 1074.
21. *See Kamarath*, 568 S.W.2d at 660.
22. *See id.*
23. *See id.*
24. *See* Davidow v. Inwood N. Prof'l Group—Phase I, 747 S.W.2d 373, 375-76 (Tex. 1988).
25. *See Kamarath*, 568 S.W.2d at 661.
26. *See, e.g.*, Green v. Superior Court, 517 P.2d 1168 (Cal. 1974); Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass.

1973); *Javins*, 428 F.2d at 370-71; Kline v. Burns, 265 A.2d 526 (N.H. 1970). Only Alabama, Arkansas, Colorado, Mississippi, South Carolina, Utah and Wyoming have declined to recognize an implied warranty of habitability in residential leases.

27. 568 S.W.2d 658 (Tex. 1978).
28. *See id.* at 661.
29. *See id.* at 659.
30. *See id.*
31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.* at 660-61.
37. *See id.* at 661.
38. *See* Vlatas, *supra* note 17, at 664.
39. *See* Davidow v. Inwood N. Prof'l Group—Phase I, 747 S.W.2d 373, 375-76 (Tex. 1988).
40. *See id.* at 377.
41. *See id.*
42. *See id.* at 377.
43. *See id.* at 374.
44. *See id.*
45. *See id.*
46. *See id.* at 375.
47. *See id.* at 374.
48. *See id.* at 375.
49. *See id.*
50. *See id.*
51. *See id.*
52. *See id.*
53. *See id.*
54. *See id.* at 377.
55. *See id.* at 375.
56. *See id.*
57. *See id.*
58. *See id.* at 377.
59. *See id.*
60. *See id.* at 376.
61. *Id.*
62. *See id.*
63. *See id.* at 377.
64. *See id.*
65. 251 A.2d 268 (N.J. 1969).
66. *See Davidow*, 747 S.W.2d at 377; *Reste Realty Corp.*, 251 A.2d at 272-73.
67. *See Davidow*, 747 S.W.2d at 377; *Reste Realty Corp.*, 251 A.2d at 272-73.
68. *See Davidow*, 747 S.W.2d at 377; *Reste Realty Corp.*, 251 A.2d at 272-73.
69. 778 S.W.2d 867 (Tex. App.—Dallas, 1989, writ denied).
70. *See id.*
71. *See id.* at 869.
72. *See id.*
73. *See id.*
74. *See id.*
75. *See id.*
76. *See id.*
77. *See id.*
78. *See id.*
79. *See id.* at 870.
80. *See id.*
81. *See id.*
82. *See id.* at 868.
83. *See id.* at 870.
84. *See id.*
85. *See id.* at 868.
86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.* at 874.
91. *See id.* at 871.
92. *See id.*
93. *See id.*
94. *Id.* (quoting Davidow v. Inwood North Professional Group—Phase I, 747 S.W.2d 373, 376 (Tex. 1988)) (emphasis added).
95. *See id.*
96. *See id.*
97. *See Davidow*, 747 S.W.2d at 377.
98. *See id.*
99. *See Davidow*, 747 S.W.2d 373.
100. *See supra* Part II.B. *See also Davidow*, 747 S.W.2d at 377.
101. *See* Coleman v. Rotana, Inc., 778 S.W.2d 867 (Tex. App.—Dallas, 1989, writ denied).
102. *Id.* at 377.
103. *Id.*
104. *See Coleman*, 778 S.W.2d at 869.
105. *See id.*
106. *See id.*
107. *See supra* Part II.B..
108. *See id.*
109. *See id.*
110. *See Coleman*, 778 S.W.2d at 868.
111. *See id.*
112. *See id.* at 869.
113. *See Davidow*, 747 S.W.2d at 377.
114. *See id.*
115. *See id.* at 868.
116. *See id.* at 871.
117. *See id.* at 869.
118. *See supra* Part III.A.
119. *See* Davidow v. Inwood N. Prof'l Group—Phase I, 747 S.W.2d 373, 375-76 (Tex. 1988); Kamarath v. Bennett, 568 S.W.2d 658, 660-61 (Tex. 1978).
120. *See* Vermes v. American Dist. Tele. Co., 251 N.W.2d 101, 105 (Minn. 1975).
121. *See id.*
122. *See Davidow*, 747 S.W.2d at 375-76.
123. *See id.* at 376. *See also* Kerrville HRH, Inc. v. City of Kerrville, 803 S.W.2d 377, 385 (Tex. App.—San Antonio, 1990, writ denied).
124. *See id. See also Vermes*, 251 N.W.2d at 105.
125. *See id. See also Kerrville HRH, Inc.*, 803 S.W.2d at 385.
126. *See id.* at 375.
127. *See Coleman*, 778 S.W.2d at 869.
128. *See id.*
129. *See supra* Part II.B.
130. *See Coleman*, 778 S.W.2d at 871.
131. *See Davidow*, 747 S.W.2d at 376; Kamarath v. Bennett, 568 S.W.2d 658, 660 (Tex. 1978); *Kerrville HRH, Inc.*, 803 S.W.2d at 385; Reste Realty Corp. v. Cooper, 251 A.2d 268 (N.J. 1969).
132. *See Davidow*, 747 S.W.2d at 376.
133. *Kerrville HRH, Inc.*, 803 S.W.2d at 386.
134. *See supra* Part IV.A.
135. *See Davidow*, 747 S.W.2d at 376; Kamarath v. Bennett, 568 S.W.2d 658, 660 (Tex. 1978); *Kerrville HRH, Inc.*, 803 S.W.2d at 385; Reste Realty Corp. v. Cooper, 251 A.2d 268 (N.J. 1969).
136. *See Kerrville HRH, Inc.*, 803 S.W.2d at 386.
137. *See* Vermes v. American Dist. Tele. Co., 251 N.W.2d 101, 105 (Minn. 1975).
138. *See supra* Part IV.A.
139. *See Davidow*, 747 S.W.2d at 376.
140. *See id.* at 377.
141. See *Coleman*, 778 S.W.2d at 871.