

A FAULTY PRESUMPTION: HOW *PHILADELPHIA INDEMNITY INSURANCE COMPANY V. WHITE* DIMINISHES TENANTS' RIGHTS UNDER THE TEXAS PROPERTY CODE, CHAPTER 92

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INTRODUCTION

In 2016, a greater percentage of Americans were renting than at any point in the last fifty years.<sup>1</sup> From 2006 to 2016, the number of households owning homes remained relatively stagnant, while the total number of households in America rose by 7.6 million in that same time frame.<sup>2</sup> What's even more striking: over half of Americans without a high-school education are renting, and that percentage continues to rise.<sup>3</sup> Therefore, some of the most vulnerable Americans are renters who may be at risk for exploitation by sophisticated landlords. Protection for these renters is primarily found in the provisions of the various state property codes.<sup>4</sup>

Although there are thousands of landlord "horror stories" every year, one collection of stories in Texas highlights the necessity for tenant protections that the Texas Legislature provided in Chapter 92 of the Texas Property Code. In the aftermath of Hurricane Harvey, many Texans faced demands to pay rent on apartments that were uninhabitable and were told that they must pay for repairs caused by the hurricane.<sup>5</sup> During the three weeks following Hurricane Harvey, the Texas Attorney General's Office

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<sup>1</sup>Anthony Cilluffo et al., *More U.S. households are renting than at any point in 50 years*, PEW RESEARCH CTR. (Jul. 19, 2017), <http://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years>.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>*See generally* TEX. PROP. CODE ANN. §§ 92.001, .006, .052 (West 2014).

<sup>5</sup>Ben Popken, *First They Fought the Storm; Now, They Fight Their Landlord*, NBC NEWS (Sep. 9, 2017, 10:01 AM ET), <https://www.nbcnews.com/storyline/hurricane-harvey/first-they-fought-storm-now-they-fight-their-landlord-n799206>.

received twenty-three complaints about residential landlords.<sup>6</sup> As a result of these seemingly unconscionable demands, many of these tenants were forced to move out of their rental homes.<sup>7</sup> After the floodwaters receded, the sidewalks of entire subdivisions of Houston and its suburbs were replete with “water-soaked wooden dressers, sofa recliners, paperwork, and children’s clothes.”<sup>8</sup> “In front of every home . . . [sat] the soggy discard pile of the American Dream, waiting for the garbage truck.”<sup>9</sup> Stories of unreasonable landlords, such as those following Hurricane Harvey, highlight the necessity for statutory protections of residential tenants in general.

This Note addresses a common issue that arises in landlord-tenant relationships: who must repair material conditions on leased premises—the landlord or the tenant? The following hypothetical exemplifies this issue: a landlord and a tenant enter into a residential lease which requires the tenant to repair all conditions on the property that are created while the tenant is in possession of the premises, regardless of fault or causation. Without statutory protections, Texas’s freedom to contract would prevail, and the tenant would remain liable for all of those repairs.<sup>10</sup> The Texas Property Code provides the protection that shields tenants from landlords who would otherwise take advantage of them.

This Note analyzes how *Philadelphia Indemnity Insurance Company v. White* affects Texas Property Code Chapter 92 which, *inter alia*, outlines when a landlord has a duty to repair damage to premises under a tenant’s control, when that duty shifts to the tenant, and when the landlord no longer has that duty. In *White*, the Texas Supreme Court delivered one of its most in-depth opinions on the landlord’s duty to repair.<sup>11</sup> *White* is a follow-up opinion to *Churchill Forge, Inc. v. Brown*, a case with a similar fact pattern and issue to *White*.<sup>12</sup> This Note will answer the following questions in light of the court’s opinion in *White*: (1) whether the “caused by” language in Texas Property Code Section 92.052(b) is a fault-based standard and

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<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016) (“In the residential-leasing context, privilege of contract is circumscribed by statute . . .”).

<sup>11</sup>*See generally id.*

<sup>12</sup>*See generally id.*; *Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 372 (Tex. 2001).

(2) whether courts should recognize a presumption of causation for damage to property that occurred in tenant-controlled areas.

Answering these questions necessitates the following discussion: Part One will address the evolution of the relationship between landlord and tenant, culminating in the current law found in Chapter 92 of the Texas Property Code. Part Two will introduce the pertinent facts and legal discussion from the Note case, *Philadelphia Indemnity Insurance Company v. White*, and will address one of *White's* secondary issues: how courts should determine whether a contractual provision is void as to public policy. Part Three will argue that the Texas Legislature did not intend for Texas Property Code Section 92.052(b) to employ a strict liability standard; rather, it intended for “caused by” to operate as a fault-based inquiry. Part Four will address the presumption of causation that the Texas Supreme Court recognized in *White* and explain why it is dangerous to tenants’ rights. Part Five will address the questions that remain unanswered after *White*. Part Six will conclude.

This Note will conclude that, contrary to the *White* holding, Texas Property Code Section 92.052 prohibits a landlord from employing a contractual provision that places a duty on the tenant to repair all conditions not caused by the landlord unless an exception in Section 92.006 applies. A landlord does not have a duty to repair unless and until Section 92.052(a) applies. After that, a landlord has an un-waivable duty to repair unless Section 92.052(b) or a provision in section 92.006 applies.

#### I. EVOLUTION FROM COMMON LAW TO MODERN LANDLORD AND TENANT RELATIONSHIPS AND THE EXISTENCE OF STATUTORY LANDLORD DUTIES.

In order to understand modern landlord-tenant relationships and statutory protections of tenants, it is essential to understand their origins and various evolutions. As America progressed, legal professionals consistently called for a redefinition of real property leases to keep up with and reflect current societal needs.<sup>13</sup> In its judicial molding of the common law, the courts’ recognition of public policy is the primary source of these changes in leasehold law.<sup>14</sup> The Texas Legislature also took note of imbalances in landlord-tenant relationships and more recently created statutory protections

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<sup>13</sup> See John Forrester Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 446 (1972).

<sup>14</sup> *Id.*

for tenants which deny enforcement of certain contractual provisions where the tenant bears liability for all loss suffered.<sup>15</sup>

This Part outlines the rules of landlord and tenant liability for repairs at common law, how the common law evolved, and how the legislature responded to these common-law rules.

#### A. Common Law Rules.

At common law, landlords had nearly unlimited freedom to contract however they saw fit.<sup>16</sup> The law governing the relationship between landlord and tenant finds its roots in the common law of England.<sup>17</sup> Based on the tenant's insufficient relationship with the land, a tenant's rights were solely contractual in nature.<sup>18</sup> As part of a historically agrarian society, the relationship between a landlord and tenant was, at its most basic level, a tenant's promise to pay in exchange for the bare right to possess the property.<sup>19</sup> The rights available to freehold estate owners were not available to lessees.<sup>20</sup> These leases were viewed as a contract right rather than a property right. Because this was a contract right, Texas's strong preference for freedom to contract meant that landlords could contract however they pleased.<sup>21</sup>

Historically, *caveat emptor* controlled landlord-tenant relationships, ensuring that no warranty of habitability was implied upon leasing of the premises.<sup>22</sup> Without an implied warranty of habitability or specific lease

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<sup>15</sup> See *infra* note 35.

<sup>16</sup> Thomas E. Lipscomb, *Effect of Repair Requirements of Housing Laws Upon the Common Law Liability of Landlords*, 9 INS. COUNSEL J. 17, 17 (1942).

<sup>17</sup> Ian Davis, *Better Late Than Never: Texas Landlords Owe a Duty to Mitigate Damages When a Tenant Abandons Leased Property*, 28 TEX. TECH L. REV. 1281, 1282 (1997).

<sup>18</sup> Hicks, *supra* note 13, at 449.

<sup>19</sup> Kamarath v. Bennett, 568 S.W.2d 658, 660 (Tex. 1978), *superseded by statute*, Act of May 28, 1979, 66th Leg., R.S. ch. 780, §§ 1–18, 1979 Tex. Gen. Laws 1978, *as recognized in* Daitch v. Mid-Am. Apartment Cmtys., Inc., 250 S.W.3d 191, 195 (Tex. App.—Dallas 2008, no pet.).

<sup>20</sup> *Id.*

<sup>21</sup> Wood Motor Co. v. Nebel, 238 S.W.2d 181, 185 (Tex. 1951) (citing Printing & Numerical Registering Co. v. Sampson, 19 L.R., Equity 462, 465) (“ . . . if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting . . . you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.”).

<sup>22</sup> 5 THOMPSON ON REAL PROPERTY § 41.04(a)(1), at 169–70 (David A. Thomas & N. Gregory Smith eds., 2d Thomas ed. 1998); Yarbrough v. Booher, 174 S.W.2d 47, 48 (Tex. 1943).

language to the contrary, a landlord had no obligation during the term of the lease to maintain or repair the premises.<sup>23</sup> Once the tenant took possession of the premises, he or she was generally liable for all repairs to the premises and the landlord was not liable for any damages sustained by the tenant or the tenant's guests on those tenant-controlled premises.<sup>24</sup>

This shift of liability to the tenant occurring with the shift of possessory rights was likewise recognized early in Texas common law: "A landlord is not liable for acts of tenants originating on that portion of the premises under lease."<sup>25</sup> Therefore, the general rule was that once the lessor relinquished possession of the premises, he or she was no longer liable for repairs to the premises.

Though not addressed in *White*, premises liability is another significant aspect of landlord-tenant relationships and is integral to understanding this evolution. Premises liability is consonant with the common-law duty to repair: "[a] lessor generally owes no duty to a tenant or its invitees for dangerous conditions on the leased premises."<sup>26</sup> Texas courts recognize several exceptions to this general rule; one exception is particularly relevant to this issue: the retained-control exception.<sup>27</sup> This exception requires the landlord to maintain common areas for the use and benefit of multiple tenants or the public, or to areas where the landlord retained some control over, as opposed to retaining no control and thus owing no duty.<sup>28</sup> The landlord is liable for injuries suffered as a result of a condition in those areas in which the landlord retains control.<sup>29</sup> The Texas Supreme Court summarized this duty: "a lessor generally has no duty to tenants or their invitees for dangerous conditions on the leased properties."<sup>30</sup> Courts

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<sup>23</sup> 5 THOMPSON ON REAL PROPERTY § 41.04(b), at 172.

<sup>24</sup> *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 478 (Tex. 2016).

<sup>25</sup> *Ward v. Wallace*, 175 S.W.2d 611, 613 (Tex. Civ. App.—Dallas 1943, writ ref'd w.o.m.).

<sup>26</sup> *Jensen v. Sw. Rodeo, L.P.*, 350 S.W.3d 755, 757 (Tex. App.—Dallas 2011, no pet.).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Johnson Cty. Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 285 (Tex. 1996); *see also* *Brownsville Navigation Dist. v. Izaguirre*, 829 S.W.2d 159, 160 (Tex. 1992) (noting general rule is that lessor of land is not liable to lessee or to others on land for physical harm caused by any dangerous condition existing when lessee took possession); *Morton v. Burton-Lingo Co.*, 150 S.W.2d 239, 240–41 (Tex. 1941) (holding that where there is no agreement by landlord to repair premises and he is not guilty of any fraud or concealment, tenant takes risk of his safety and the landlord is not liable to him or any person entering under his title or by his invitation for injury

recognized this rule because a lessor typically relinquishes possession of the premises to the lessee.<sup>31</sup> Therefore, at common law, a landlord was not liable for repairs to the property or for injuries sustained on the property by the tenant or the tenant's guests.

The courts, not the legislature, originally recognized tenant protections.<sup>32</sup> The Texas Supreme Court overruled Texas common law by recognizing an implied warranty of habitability in residential leaseholds in *Kamarath v. Bennett*.<sup>33</sup> The court never addressed the tenant's exact remedy for a landlord's breach of this warranty; the only precedent comes from *Morris v. Kaylor Engineering Company*, where the Fourteenth District Court of Appeals held that this warranty does not apply in a suit for personal injury, but only for repairs.<sup>34</sup> Ultimately, it is unclear what the remedy for this implied warranty was, but the legislature soon acted and rendered that question moot.<sup>35</sup>

In conclusion, at common law, it was apparent that the landlord was the ultimate authority on the leased premises. Unless the landlord contracted to maintain the duty to repair, that duty shifted exclusively to the tenant once the tenant took possession. In Texas, shortly after *Kamarath*, the legislature created statutory tenant protections.

### B. Statutory Protections.

The Texas Legislature responded to the recognition of the common law warranty of habitability in *Kamarath* by enacting article 5236f, which created a landlord's statutory duty to repair and abrogated the *Kamarath*

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caused by reason of their unsafe condition); *Palermo v. Bolivar Yacht Basin, Inc.*, 84 S.W.3d 746, 748 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

<sup>31</sup>*Endsley*, 926 S.W.2d at 285.

<sup>32</sup>*Kamarath v. Bennett*, 568 S.W.2d 658, 660–61 (Tex. 1978), *superseded by statute*, Act of May 28, 1979, 66th Leg., R.S. ch. 780, §§ 1–18, 1979 Tex. Gen. Laws 1978, *as recognized in* *Daitch v. Mid-Am. Apartment Cmty., Inc.*, 250 S.W.3d 191, 195 (Tex. App.—Dallas 2008, no pet.).

<sup>33</sup>*Id.* (“In our opinion, the above considerations demonstrate that in a rental of a dwelling unit . . . there is an implied warranty of habitability by the landlord that the apartment is habitable and fit for living.”).

<sup>34</sup>Rebecca Hurley, *Recent Statutory Developments in Texas Landlord-Tenant Law: A Sword without a Shield*, 35 SW. L.J. 645, 656 n.100 (1981); *Morris v. Kaylor Eng'g Co.*, 565 S.W.2d 334, 334 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

<sup>35</sup>See Angus S. McSwain, Jr. & David L. Butler, *The Landlord's Statutory Duty to Repair—Article 5236f: The Legislative Response to Kamarath v. Bennett*, 32 BAYLOR L. REV. 1, 5–6 (1980).

implied warranty.<sup>36</sup> This duty was narrower than the warranty in *Kamarath*. For example, while a deterioration of the interior of a residential dwelling may make it uninhabitable under *Kamarath's* warranty of habitability, it likely does not materially affect the physical health or safety of an ordinary tenant; therefore, the landlord would have no duty to repair.<sup>37</sup> This article was incorporated in Chapter 92 of the Texas Property Code, which contains the current statutory protections for tenants and is only applicable to residential rental properties.<sup>38</sup> The legislature further discriminates between commercial and non-commercial landlords.<sup>39</sup> In Chapter 92, when the legislature refers to commercial landlords, it describes landlords who own more than one rental dwelling, not those landlords who lease commercial properties.<sup>40</sup> It also limited the situations in which a landlord and tenant could contract to shift the duty to repair in Section 92.006, entitled “Waiver or Expansion of Duties and Remedies.”<sup>41</sup> This Section will outline the specifics of the landlord’s duty to repair.

### 1. Existence of the Duty to Repair.

As a starting point, the Texas Supreme Court recognizes that the existence of a legal duty under a given set of facts and circumstances is a question of law.<sup>42</sup> Section 92.052(a) provides that a landlord has a duty to repair when “the tenant specifies the condition in a notice to the person to whom or to the place where rent is normally paid; the tenant is not delinquent in the payment of rent at the time notice is given; and the condition: materially affects the physical health or safety of an ordinary tenant . . . .”<sup>43</sup>

Section 92.052(a) does not mandate that the notice must be in writing; rather, it must only be in writing if the lease itself is in writing and the lease requires the notice to be in writing.<sup>44</sup> In *Ortega v. Murrah*, the First District Court of Appeals upheld a contractual provision that required all notices to

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<sup>36</sup> McSwain & Butler, *supra* note 35, at 1.

<sup>37</sup> *Id.* at 6.

<sup>38</sup> TEX. PROP. CODE ANN. § 92.002 (West 2014).

<sup>39</sup> Churchill Forge, Inc. v. Brown, 61 S.W.3d 368, 373 (Tex. 2001).

<sup>40</sup> See Phila. Indem. Ins. Co. v. White, 490 S.W.3d 468, 482 (Tex. 2016).

<sup>41</sup> *Brown*, 61 S.W.3d at 370.

<sup>42</sup> Greater Hous. Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990).

<sup>43</sup> TEX. PROP. CODE ANN. § 92.052(a).

<sup>44</sup> *Id.* § 92.052(d); see *infra* Part V for an extended discussion on the validity of notice.

be in writing.<sup>45</sup> The court held that because Ortega's husband gave oral notice to the landlord, instead of written notice, the landlord's duties were not triggered under Section 92.052(a). The Texas Supreme Court denied the petition for review.<sup>46</sup> Landlords can, therefore, require written notice under Section 92.052(a), (d).<sup>47</sup>

Section 92.052(a) also does not place a duty on the landlord to repair conditions that do not materially affect the health and safety of an ordinary tenant.<sup>48</sup> Unless the landlord voluntarily retains a duty to repair non-material conditions, the tenant remains responsible to repair these conditions.<sup>49</sup> Unfortunately, no clear line exists between material and non-material conditions.<sup>50</sup>

The legislature demonstrated its willingness to allow modification of certain provisions in Chapter 92. For example, Section 92.054(c) states: "A landlord and tenant may agree otherwise in a written lease."<sup>51</sup> This provision applies only to Section 92.054.<sup>52</sup> Subsection (c) demonstrates that the legislature contemplated modifications, but did not allow parties to "agree otherwise" in Section 92.052 because it did not include an express recognition of that right.<sup>53</sup> Therefore, under Chapter 92, modifications of these provisions is only acceptable where modification is expressly

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<sup>45</sup>The provision was titled "Entire Agreement/Amendment" and provided: "This Lease Agreement contains the entire agreement of the parties and there are no other promises or conditions in any other agreement whether oral or written. *This Lease may be modified or amended in writing, if the writing is signed by the party obligated under the amendment.*" No. 01-14-00651-CV, 2016 Tex. App. LEXIS 12363, at \*8-9 n.2 (Tex. App.—Houston [1st Dist.] Nov. 17, 2016, pet. denied) (emphasis added) (mem. op., not designated for publication).

<sup>46</sup>*Ortega v. Murrah*, No. 17-0163, 2017 LEXIS 544, at \*1 (Tex. June 9, 2017).

<sup>47</sup>*Id.*

<sup>48</sup>*See* TEX. PROP. CODE ANN. § 92.052(a).

<sup>49</sup>*Supra* note 41.

<sup>50</sup>There exists no consensus amongst Texas courts what conditions materially affect health and safety. *Compare* *Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 376 (Tex. 2001) ("... when a fire destroys an entire complex, it obviously affects physical health and safety."), *with* *Raia v. Crockett*, No. 03-16-00562-CV, 2017 Tex. App. LEXIS 4190, at \*29 (Tex. App.—Austin May 10, 2017, pet. denied) (mem. op., not designated for publication) ("Evidence... of ticks on the property... does not translate into evidence that ticks were present in the house or on the property at the time of closing in such numbers that they materially affected human health or safety...").

<sup>51</sup>TEX. PROP. CODE ANN. § 92.054.

<sup>52</sup>*See id.*

<sup>53</sup>*Id.* § 92.052.



provided by the legislature; an agreement modifying the provisions of Section 92.052 abrogates statutory protections for the tenant.

Construed in context, Section 92.052 defines the landlord's duty by both positive and negative references and imposes a repair obligation only if all of its elements are satisfied.<sup>54</sup> Such a construction properly places the burden of proof on the party claiming the existence of a duty.<sup>55</sup> Section 92.052(a) can be read as "[a] landlord [has a duty to] make a diligent effort to repair or remedy a condition . . ."<sup>56</sup> Although the word "duty" is not used in Section 92.052, this "duty" is reinforced by Section 92.006 which refers to the "landlord's duty under [Section 92.052] to repair . . ."<sup>57</sup> Therefore, when a tenant claims that the landlord had a duty to repair as an affirmative defense, he or she has the burden to prove the existence of that duty.<sup>58</sup>

## 2. Exceptions to the Duty to Repair.

Even when the tenant has met his or her burden under Section 92.052(a) and proven that the landlord has a duty to repair, there are certain exceptions that eliminate that duty. The first set of exceptions is listed in Section 92.006, which describes the exclusive situations in which a landlord and tenant can contract for the tenant to maintain the responsibility to repair, regardless of whether the tenant complies with Section 92.052(a).<sup>59</sup> "The legislatively imposed restriction on freedom of contract provided in section 92.006(c) is triggered only when the landlord has a duty under section 92.052. . . . When section 92.006(c)'s general prohibition is 'activated,' the statutory exceptions to the prohibition come into play."<sup>60</sup> The exclusive exceptions from Section 92.006 are:

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<sup>54</sup> *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d, 468, 486 (Tex. 2016).

<sup>55</sup> *See Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 182 (Tex. 2004) (holding that when one claims a duty owed by another, the party claiming the duty generally bears the burden of establishing it).

<sup>56</sup> TEX. PROP. CODE ANN. § 92.052(a).

<sup>57</sup> *See id.* § 92.006.

<sup>58</sup> *White*, 490 S.W.3d at 486.

<sup>59</sup> TEX. PROP. CODE ANN. § 92.006(c) ("A landlord's duties and the tenant's remedies under Subchapter B, which covers conditions materially affecting the physical health or safety of the ordinary tenant, may not be waived except as provided in Subsections (d), (e), and (f) of this section.").

<sup>60</sup> *White*, 490 S.W.3d at 480.

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(d) A landlord and a tenant may agree for the tenant to repair or remedy, at the landlord's expense, any condition covered by Subchapter B.

(e) A landlord and a tenant may agree for the tenant to repair or remedy, at the tenant's expense, any condition covered by Subchapter B if all of the following conditions are met: (1) at the beginning of the lease term the landlord owns only one rental dwelling; (2) at the beginning of the lease term the dwelling is free from any condition which would materially affect the physical health or safety of an ordinary tenant; (3) at the beginning of the lease term the landlord has no reason to believe that any condition described in Subdivision (2) of this subsection is likely to occur or recur during the tenant's lease term or during a renewal or extension; and (4) (A) the lease is in writing; (B) the agreement for repairs by the tenant is either underlined or printed in boldface in the lease or in a separate written addendum; (C) the agreement is specific and clear; and (D) the agreement is made knowingly, voluntarily, and for consideration.

(f) A landlord and tenant may agree that, except for those conditions caused by the negligence of the landlord, the tenant has the duty to pay for repair of the following conditions that may occur during the lease term or a renewal or extension: (1) damage from wastewater stoppages caused by foreign or improper objects in lines that exclusively serve the tenant's dwelling; (2) damage to doors, windows, or screens; and (3) damage from windows or doors left open.<sup>61</sup>

In summary, Subsection (d) provides that the tenant shall complete the repair but at the landlord's expense. Therefore, a landlord and tenant can only contract for the tenant to be financially liable for repairs without a finding of causation under Texas Property Code Section 92.006(e), (f).

The second exception to this duty to repair is found in Section 92.052(b): unless the condition was caused by normal wear and tear, if the tenant, a lawful occupant in the tenant's dwelling, a member of the tenant's

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<sup>61</sup>TEX. PROP. CODE ANN. § 92.006.

family, or a guest or invitee of the tenant causes the material condition, the landlord does not have a duty to repair.<sup>62</sup> The Texas Supreme Court made clear that a landlord can require reimbursement for tenant-caused damages to tenant-controlled premises under Section 92.052(b): “Public policy does not restrict a landlord and tenant from agreeing that the tenant will be responsible for damages the tenant or cotenant causes.”<sup>63</sup>

Unless the landlord can prove the tenant caused the condition under Section 92.052(b) or one of the exceptions from Section 92.006, the landlord has a duty to repair under Section 92.052(a) and he or she cannot contractually avoid a repair obligation.<sup>64</sup> Therefore, Section 92.052(a) provides for the circumstances where the landlord has a duty. Sections 92.052(b) and 92.006 provide the circumstances where the landlord no longer has a duty, even when the requirements of (a) have been met. In conclusion, where the tenant has met his or her burden under Section 92.052(a), a landlord can only escape liability for repairs if Sections 92.052(b) or 92.006(d), (e), or (f) apply.

It is important to remark that tenants have several statutory remedies for a landlord’s failure to repair a material condition that are outside the scope of this Note.<sup>65</sup> As demonstrated in the next Part, the landlord in *White* contracted for the tenant to bear greater liability than is allowed under Chapter 92.

## II. FACTS OF PHILADELPHIA INDEMNITY INSURANCE COMPANY V. WHITE.

*White* does not present a particularly unique fact pattern and therefore has the potential to significantly affect any number of the millions of landlord-tenant relationships in Texas.<sup>66</sup> This Part outlines the key facts of *White* and summarizes the court’s discussion of the issues.

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<sup>62</sup>*Id.* § 92.052(b).

<sup>63</sup>*Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 373 (Tex. 2001). Part III, *infra*, will explain why this causation is a fault-based inquiry.

<sup>64</sup>*See White*, 490 S.W.3d at 479–80, 482.

<sup>65</sup>*See* TEX. PROP. CODE ANN. §§ 92.056, .0561, -.0563 for a list of available tenant remedies.

<sup>66</sup>In 2016, there were an estimated 9,535,612 households in Texas. Of those, 3,710,141 were “Renter-occupied housing units.” 2016 American Community Survey 1-Year Estimates, U.S. Census Bureau (2017). Thirty-nine percent of all households in Texas are occupied by renters. *Id.* Therefore, any change to landlord-tenant law affects millions of Texans.

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A. *Facts.*

Carmen White and her landlord, the Sienna Ridge Apartments, entered into a Texas Apartment Association (TAA) form lease.<sup>67</sup> That lease required White to reimburse Sierra Ridge for all property losses not resulting from the landlord's negligence or fault.<sup>68</sup> The reimbursement provision provided, in pertinent part:

**DAMAGES AND REIMBURSEMENT.** You must promptly pay or reimburse us for loss, damage, consequential damages, government fines or charges, or cost of repairs or service in the apartment community due to: a violation of the Lease Contract or rules; improper use; negligence; *other conduct by you or your invitees, guests or occupants; or any other cause not due to [the landlord's] negligence or fault.* You will indemnify and hold us harmless from all liability arising from the conduct of you, your invitees, guests, or occupants, or our representatives who perform at your request services not contemplated in this Lease Contract. **Unless the damage or wastewater stoppage is due to our negligence, we're not liable for—and you must pay for—repairs, replacements and damage to the following if occurring during the Lease Contract term or renewal period: (1) damage to doors, windows, or screens; (2) damage from windows or doors left open; and (3) damage from wastewater stoppages caused by improper objects in lines exclusively serving your apartment.**<sup>69</sup>

When White moved into her apartment, her parents gifted her a new washer and dryer.<sup>70</sup> White successfully connected the washer but abandoned her efforts to install the dryer because the cord sparked and the circuit breaker tripped when she attempted to plug the dryer into the wall.<sup>71</sup> One week later, upon White's request, a Sienna Ridge Apartment employee

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<sup>67</sup> *Phila. Indem. Ins. Co. v. White*, 421 S.W.3d 252, 254 (Tex. App.—San Antonio 2013, pet. granted).

<sup>68</sup> *White*, 490 S.W.3d at 472.

<sup>69</sup> *Id.* (emphasis in original).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

successfully connected the dryer using the cord that White provided. Shortly thereafter, a fire severely damaged White's apartment and several adjoining units.<sup>72</sup> The fire originated in her apartment and started in her dryer drum.<sup>73</sup> The total loss exceeded \$83,000.<sup>74</sup>

Sienna Ridge Apartments filed a damages claim with its insurance provider, Philadelphia Indemnity Insurance Company.<sup>75</sup> Philadelphia paid the claim, then subsequently demanded payment from White.<sup>76</sup> When White refused to pay, Philadelphia sued her for negligence and breach of contract for non-compliance with the reimbursement provision.<sup>77</sup>

At trial, the judge asked the jury two pertinent questions. First, "Did the negligence, if any, of [White] proximately cause damages to the Sienna Ridge Apartments[?]"<sup>78</sup> The jury answered no.<sup>79</sup> Second, "Did [White] violate the terms of the Apartment Lease Contract[?]"<sup>80</sup> The jury answered yes: its response was based on White not paying for the damage in accordance with the reimbursement provision.<sup>81</sup> The trial court rendered a take-nothing judgment in favor of the tenant.<sup>82</sup> The San Antonio Court of Appeals affirmed and declared the reimbursement provision void because it plainly "makes a tenant liable for damage to the entire apartment complex for accidental losses, acts of God, criminal acts of another, or any other act of someone or something unassociated with the tenant or [landlord]."<sup>83</sup> The Texas Supreme Court granted the petition for review.

### B. Discussion.

*White* addressed three issues: "(1) whether section 12 of White's lease agreement unambiguously imposes liability for the disputed damages;

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Phila. Indem. Ins. Co. v. White*, 421 S.W.3d 252, 254 (Tex. App.—San Antonio 2013, pet. granted).

<sup>76</sup> *Id.* at 254–55.

<sup>77</sup> *White*, 490 S.W.3d at 472.

<sup>78</sup> *Id.* at 473.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (quoting *Phila. Indem. Ins. Co. v. White*, 421 S.W.3d 252, 256 (Tex. App.—San Antonio 2013, pet. granted)).

(2) . . . whether the agreement runs afoul of public policy embodied in the Property Code; and (3) whether the jury’s failure to find that White’s negligence proximately caused the property damage affects the disposition.”<sup>84</sup> In response to these questions, the court held that (1) the reimbursement provision is unambiguous;<sup>85</sup> (2) where an agreement can be performed without violating public policy it is not void as a matter of law;<sup>86</sup> (3) and that there exists a presumption that property damage to tenant-controlled areas was caused by the tenant.<sup>87</sup> Most notably, the court held that “caused by” in Section 92.052(b) is not fault-based, which makes the tenant strictly liable for repairs if he or she is a but-for cause of the condition.<sup>88</sup>

The majority of courts that cite to *White* do so to reinforce Texas’s penchant for allowing parties to contract as they wish.<sup>89</sup> This is understandable: the *White* majority opinion’s first sentence reinforces Texas’s strong public policy favoring freedom of contract: “Absent compelling reasons, courts must respect and enforce the terms of a contract the parties have freely and voluntarily entered.”<sup>90</sup> Freedom of contract is a long-held position of the court; however, the effect of contracts on landlord-tenant relationships is at the core of this opinion.<sup>91</sup>

*White* next stands for the proposition that if a contract provision *can* be carried out without violating public policy, then it is not unenforceable per

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<sup>84</sup> *Id.* at 476 (footnotes omitted).

<sup>85</sup> *Id.* at 477.

<sup>86</sup> *Id.* at 475.

<sup>87</sup> *Id.* at 487.

<sup>88</sup> See *infra* Part III for a discussion on strict vs. fault-based standards.

<sup>89</sup> *First Bank v. Brumitt*, 519 S.W.3d 95, 99 (Tex. 2017) (“As a general rule, parties in Texas may contract as they wish.” (citing *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 475 (Tex. 2016)); *Freeman v. Harleton Oil & Gas, Inc.*, 528 S.W.3d 708, 740 (Tex. App.—Texarkana 2017, pet. filed) (“Texas’s strong public policy favoring freedom of contract is firmly embedded in our jurisprudence.” (citing *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016)); *Vance v. Popkowski*, 534 S.W.3d 474, 478 (Tex. App.—Houston [1st Dist.] 2017, pet. filed) (“strong public policy favoring freedom of contract,” (citing *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016)); *Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co.*, 516 S.W.3d 89, 95 (Tex. App.—Tyler 2017, pet. filed) (“Texas’s strong public policy favoring freedom of contract is firmly embedded in our jurisdiction” (citing *White*, 490 S.W.3d at 471)).

<sup>90</sup> *White*, 490 S.W.3d at 471.

<sup>91</sup> *Wood Motor Co. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951); see *White*, 490 S.W.3d at 471.

se.<sup>92</sup> In construing the contract, the court first noted that redundancies do not necessarily render an interpretation of a contract erroneous or invalid.<sup>93</sup> It recognized the catch-all reimbursement provision “is *susceptible* of an application in contravention of” Chapter 92 of the Texas Property Code.<sup>94</sup> However, such agreements between tenants and landlords are not in violation of Chapter 92 if they are based upon “tenant-caused” damages.<sup>95</sup>

The majority noted that “[t]he [reimbursement] provision [in *White*] would be unenforceable per se only if it could not be performed without violating the Property Code.”<sup>96</sup> The court named a circumstance in which the Sienna Ridge Apartments could seek reimbursement for a condition materially affecting habitability; thus, the contract did not contravene the statute.<sup>97</sup> This effectively means that a contract provision must entirely contravene the statute or contravene the statute in all circumstances for it to be unenforceable per se.<sup>98</sup>

For comparison, the lease in *Churchill Forge* was considerably narrower than the lease in *White*.<sup>99</sup> The *Churchill Forge* lease limited the tenant’s liability to tenant-caused damage to the property, consistent with Texas Property Code Section 92.052(b).<sup>100</sup> The court upheld the validity of the

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<sup>92</sup> *White*, 490 S.W.3d at 483 (“A contract to do a thing which cannot be performed without violation of the law violates public policy and is void.”) (internal quotations omitted) (citation omitted).

<sup>93</sup> *See id.* at 477 (citing *Kenneth D. Eichner, P.C. v. Dominguez*, No. 14-16-00192-CV, 2017 Tex. App. LEXIS 5334, at \*19 (Tex. App.—Houston [14th Dist.] June 13, 2017, no pet.) (not designated for publication)) (“Though we strive to construe contracts in a manner that avoids rendering any language superfluous, redundancies may be used for clarity, emphasis, or both.”).

<sup>94</sup> *See id.* (emphasis added).

<sup>95</sup> *Id.* at 491.

<sup>96</sup> *Id.* at 483.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.*

<sup>99</sup> *Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 370 (Tex. 2001) (“REIMBURSEMENT. You must promptly reimburse us for loss, damage, or cost of repairs or service caused anywhere in the apartment community by your or any guest’s or occupant’s improper use or negligence. Unless the damage or stoppage is due to our negligence, we’re not liable for - and you must pay for - repairs, replacement costs and damage to the following if occurring during the Lease Contract term or renewal period: (1) damage to doors, windows, or screens; (2) damage from windows or doors left open; and (3) damages from wastewater stoppages caused by improper objects in lines exclusively serving your apartment. We may require payment at any time, including advance payment of repairs for which you’re liable. Any delay in our demanding sums you owe is not a waiver.”).

<sup>100</sup> *Id.* at 371–72.

*Churchill Forge* lease by stating that “nothing in the Property Code restricts the parties’ freedom to negotiate over who will pay for repair of damages negligently or intentionally caused by the tenant, the tenant’s occupant, or guest.”<sup>101</sup> This statement is a common-law recognition of Texas Property Code Section 92.052(b). However, the *White* reimbursement provision extends far beyond the *Churchill Forge* lease by placing liability on the tenant for all damage not caused by the landlord.

The next Part argues that Section 92.052(b) requires a finding of fault before relieving the landlord of his or her duty to repair under Section 92.052(a).<sup>102</sup>

### III. THE TEXAS LEGISLATURE DID NOT INTEND FOR STRICT TENANT LIABILITY IN TEXAS PROPERTY CODE SECTION 92.052(B).

The *White* majority “conclude[d] that . . . ‘caused by’ is not a fault-based standard . . .”<sup>103</sup> In civil cases, Texas departs from requiring a finding of the fault in limited circumstances. This Part will argue that the legislature did not intend for strict causation in Section 92.052(b) for two reasons: first, that Texas only employs strict liability in limited circumstances and that an exception to a landlord’s duty to repair does not meet the rationale for these circumstances; and second, statutory construction and legislative history suggest a finding of fault is required for tenant liability.

#### A. *Strict Liability and Negligence Per Se in Texas.*

Strict liability and negligence per se are two of the limited circumstances where Texas does not require a particularized finding of fault.<sup>104</sup> Strict Liability is defined as liability that does not depend on proof of negligence or intent to do harm but that is based instead on a duty to compensate the harms proximately caused by the activity or behavior subject to the liability rule.<sup>105</sup> Essentially, liability exists where there is a finding of causation between conduct and damages, even without a finding of fault. Likewise, negligence per se requires only a finding of a violation of

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<sup>101</sup> *Id.* at 373.

<sup>102</sup> TEX. PROP. CODE ANN. § 92.052 (West 2014).

<sup>103</sup> *White*, 490 S.W.3d at 488.

<sup>104</sup> *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985); Robert Fugate, *Survey of Texas Animal Torts*, 48 S. TEX. L. REV. 427, 429 (2006) (listing the elements of strict liability).

<sup>105</sup> *Strict Liability*, BLACK’S LAW DICTIONARY (10th ed. 2014).



a statute; if that violation causes damages, liability is established.<sup>106</sup> Finally, for comparison, in the criminal context, strict liability prohibits a certain *actus reus* regardless of the accused's *mens rea*.<sup>107</sup>

Under Texas civil law, strict liability is imposed only in limited circumstances: products liability cases involving dangerously defective products and cases involving a dangerous domesticated animal.<sup>108</sup> Local ordinances related to strict liability arise out of the city's police power because they are designed to maintain public safety, health, and welfare.<sup>109</sup> Texas does not recognize a cause of action of strict liability for "ultrahazardous" or "abnormally dangerous" activities.<sup>110</sup>

Texas imposes strict civil liability in these limited circumstances because the legislature recognizes that animals and products are generally beneficial to society, but that because of the inherent dangers, the owners of animals and proponents of products must "pay their way" when damage is caused.<sup>111</sup> Conversely, there are not inherent risks associated with leasehold estates. Rather, a residence is necessary to a basic quality of life; animals and products are not. Therefore, the state's reasoning for strict civil liability does not apply in the landlord-tenant context.

Negligence *per se* punishes the violation of a statute: state legislatures proscribe specific behavior, which if committed, constitutes a breach.<sup>112</sup> A finding of negligence *per se* only subjects the defendant to possible liability by establishing breach; it does not establish liability.<sup>113</sup> The elements of negligence *per se* are an *actus reus* of the proscribed behavior and proximate cause.<sup>114</sup> The typical duty and breach elements from a regular

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<sup>106</sup>*Negligence Per Se*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Trujillo v. Carrasco*, 318 S.W.3d 455, 458 (Tex. App.—El Paso 2010, no pet.).

<sup>107</sup>*Fleming v. State*, 455 S.W.3d 577, 581 (Tex. Crim. App. 2014).

<sup>108</sup>*Fugate*, *supra* note 104, at 429.

<sup>109</sup>*Id.* at 432.

<sup>110</sup>*Prather v. Brandt*, 981 S.W.2d 801, 804 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

<sup>111</sup>*See Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996); *see also Cities Serv. Co. v. Florida*, 312 So.2d 799, 803 (Fla. Dist. Ct. App. 1975). Texas has adopted section 402A of the Restatement (Second) of Torts. *Barajas*, 927 S.W.2d at 613. Comment A to section 402A states "The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product." RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

<sup>112</sup>*Fugate*, *supra* note 104, at 432.

<sup>113</sup>*Id.* (internal quotations omitted).

<sup>114</sup>*Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985).

cause of action are contemplated in a statute that prohibits behavior.<sup>115</sup> Proximate cause requires a finding of two elements: cause-in-fact and foreseeability.<sup>116</sup> Where the legislature has deemed all conduct of a certain type to constitute negligent behavior; it has conducted a fault analysis.<sup>117</sup> Section 92.052 does not proscribe any specific tenant behavior. The legislature has not deemed any tenant behavior as inherently negligent and therefore has not conducted its own fault analysis which would subject the tenant to strict liability under Section 92.052(b).

The rationale for liability without an express finding of fault does not extend from strict liability and negligence per se to the duty to repair under Section 92.052.

### *B. Statutory Construction and Legislative History Support a Fault-Based Causation Standard.*

#### 1. Statutory Construction.

Interpreting Section 92.052(b) as not requiring a finding of fault is contrary to the remainder of Chapter 92 of the Texas Property Code. A simple hypothetical helps demonstrate the effect of this interpretation: it is improbable that the legislature intended that a healthy twenty-seven-year-old, who suffers an entirely unforeseen and unpredictable heart attack and who falls through a window, to be financially liable for the repair costs for the window because, in the strictest fashion, he or she caused the damage. This Section will show that when the legislature used “caused by” in Section 92.052, it intended the causation analysis to operate on a fault-based standard.

Statutory construction begins with determining what rules guide the analysis.<sup>118</sup> Texas Property Code Section 1.002 makes the Code Construction Act applicable to the construction of each provision in the Texas Property Code.<sup>119</sup> A basic tenet of statutory construction: when the

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<sup>115</sup>Lucas v. Tex. Indus., Inc., 696 S.W.2d 372, 376 (Tex. 1984).

<sup>116</sup>Nixon, 690 S.W.2d at 549.

<sup>117</sup>Barbara Kritchevsky, *Tort Law is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Litigation*, 60 AM. U.L. REV. 71, 76 (2010) (“Courts have long found that a person who violates a clear legal duty is per se negligent.”).

<sup>118</sup>Ronald Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 343 (2012).

<sup>119</sup>TEX. PROP. CODE ANN. § 1.002 (West 2014).

legislature uses a word, it is presumed the legislature intended the plain meaning of the word.<sup>120</sup> If the legislature does not provide a meaning for a word, courts should use the plain and ordinary meaning unless there is an accepted legal definition, and should further refrain from substituting its own judgment for that of the legislature.<sup>121</sup> These words and phrases must be read in context.<sup>122</sup>

If a word has a legally accepted meaning that is distinct from the common or ordinary meaning, it is presumed that the legislature intended to use the legal meaning.<sup>123</sup> Similarly to the ordinary meaning canon, this presumption only exists by reading the word or phrase in context.<sup>124</sup>

The legislature did not define “caused by” in the Texas Property Code.<sup>125</sup> The ordinary meaning of “caused by” implies fault. Take, for example, a typical car accident in a four-way intersection. Two cars enter the intersection at the same time: the blue car enters the intersection through a green light; the brown car enters the intersection through a red light. The cars collide in the intersection, resulting in considerable damage to the vehicles and personal injury. If you were to ask any of the witnesses: “who caused the accident?” each of them would likely respond with “the brown car,” because the brown car’s driver was at-fault. Although technically both drivers are but-for causes of the accident, an implicit fault-based analysis occurs in answering this causation question.

If the legislature had used the phrases “but-for causation” or “proximately caused,” phrases whose legal definitions are accepted as not querying fault, that interpretation would control. However, because there is no generally accepted legal definition of “caused by;”, the ordinary meaning of the phrase should control the interpretation of Section 92.052(b).

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<sup>120</sup>Beal, *supra* note 118, at 378 (citing TEX. GOV’T CODE ANN. § 311.011 (West 1985)).

<sup>121</sup>*Id.* at 378–79, 383.

<sup>122</sup>*Id.* at 378.

<sup>123</sup>*Id.* at 386–87.

<sup>124</sup>*Id.* at 378.

<sup>125</sup>TEX. PROP. CODE ANN. § 92.001 (West 2014).

## 2. Legislative History.

The legislative history of Section 92.052 also suggests the conclusion that “caused by” is a fault-based standard.<sup>126</sup> S.B. 1607 amended the language in Section 92.052(b) from: “The landlord does not have a duty to repair or remedy a condition caused during the term of the lease, including a renewal or extension, by the tenant, a member of the tenant’s family, or a guest of the tenant, unless the condition was caused by normal wear and tear,” to “Unless the condition was caused by normal wear and tear, the landlord does not have a duty during the lease term or a renewal or extension to repair or remedy a condition caused by (1) the tenant . . . .”<sup>127</sup> This amendment highlights this “normal wear and tear” clause.

Even when a condition is “caused by” (regardless of fault) the tenant, if the condition (that materially affects habitability) is due to normal wear and tear, the landlord remains liable for the repairs.<sup>128</sup> Normal wear and tear encompasses non-negligent conduct; it is defined as the:

deterioration that results from the intended use of a dwelling, including, for the purposes of subchapters B and D, breakage or malfunction due to age or deteriorated condition, but the term does not include deterioration that results from negligence, carelessness, accident, or abuse of the premises, equipment, or chattels by the tenant, by a member of the tenant’s household, or by a guest or invitee of the tenant.<sup>129</sup>

Negligence, carelessness, or abuse constitute negligent conduct and a fault-based standard would still place liability on the tenant. “Accident” requires a more extended analysis. Because “accident” is not defined by the Property Code, the court should use the plain and ordinary meaning of the word.<sup>130</sup> Webster’s dictionary defines “accident” as an unforeseen and unplanned event or circumstance and a lack of intention or necessity.<sup>131</sup> A conflict exists between an accident that the jury believes occurred within

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<sup>126</sup>Act of 1989, 71st Leg., R.S., ch. 650, § 3, 1989 Tex. Gen. Laws 2142, 2144 (current version at TEX. PROP. CODE § 92.052).

<sup>127</sup>*Id.*

<sup>128</sup>*Supra* Part III.

<sup>129</sup>TEX. PROP. CODE ANN. § 92.001(4).

<sup>130</sup>Beal, *supra* note 118, at 378.

<sup>131</sup>*Accident*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1998).

the intended use of the premises and an accident that occurred outside of the intended use of the premises. The former relieves the tenant of any liability; the latter imposes liability on the tenant. An accident that occurs outside of the intended use of the premises constitutes negligent conduct. Therefore, the phrase “normal wear and tear” contemplates non-negligent behavior because it expressly excludes negligent behavior. “Caused by,” when construed in context with the phrase, “unless caused by normal wear and tear,” means that the tenant must be at-fault for the landlord to escape liability.

In this case, the jury was asked whether White’s negligence caused the damage to the premises.<sup>132</sup> Because the legislature intended “caused by” to operate as a fault-based inquiry, the jury’s negative response to whether White was negligent should have concluded the Section 92.052 inquiry; the only remaining questions should have been whether an exception from Section 92.006 applied.<sup>133</sup> If not, the Sienna Ridge Apartments should have remained liable for the repairs. Instead, the court did not require a finding of fault under Section 92.052(b) and further recognized a presumption of causation for tenant-controlled areas.<sup>134</sup> The court held that White was liable for the repairs to the apartment.<sup>135</sup> The next Part will explain why this presumption is a dangerous reduction of tenant protections that results from not requiring a finding of fault under Section 92.052(b).

#### IV. THE PRESUMPTION OF CAUSATION THAT THE COURT RECOGNIZED IN *WHITE* IS INCONSISTENT WITH SECTION 92.052.

Because the court did not interpret Section 92.052(b) as a fault-based inquiry, the question of who caused the fire remained. The court then went on to hold that when property damage is sustained on a leased area exclusively under a tenant’s control, it is presumed to be caused by the tenant: “Taken together, Sections 92.052 and 92.053 create a presumption that damage to premises under the tenant’s control was caused by the tenant and the tenant must prove otherwise.”<sup>136</sup> Justice Boyd points out in dissent

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<sup>132</sup>Phila. Indem. Ins. Co. v. White, 490 S.W.3d 468, 473 (Tex. 2016).

<sup>133</sup>Note 79 and accompanying text.

<sup>134</sup>White, 490 S.W.3d at 487.

<sup>135</sup>Id. at 491.

<sup>136</sup>Id. at 487, 484–85 (“White’s failure to submit a causation question to the jury is the lynchpin for concluding she has failed to prove her affirmative defense.”).

that this is a complete reversal from the court's position fifteen years earlier in *Churchill Forge, Inc. v. Brown*.<sup>137</sup>

This Part will show *White* significantly infringes on tenant's rights by creating this presumption and will demonstrate why this presumption is one of the primary dangers of not interpreting Texas Property Code Section 92.052(b) to require a fault-based standard. It will outline why an actual finding of causation is required, rather than recognizing a presumption which shifts the burden to the tenant and will provide examples of how this presumption affects landlord-tenant relationships.<sup>138</sup>

#### A. A Finding of Causation is Required.

The Texas Supreme Court first addressed the question of tenant-caused damages in *Churchill Forge, Inc. v. Brown*.<sup>139</sup> The court stated the general rule: "Without *showing* that the [property] damage was caused by the tenant, the landlord would otherwise have a duty to bear the cost of repair under [Section 92.052]."<sup>140</sup> And under Section 92.006(c), that duty cannot be waived except for the limited circumstances in Subsections (d), (e), and (f).<sup>141</sup> These rules, taken together, mean that where the tenant has provided notice and is not delinquent on rent payments, the landlord has a duty, and unless Section 92.006 (d), (e), or (f) applies, then the landlord must have a finding of causation under Section 92.052(b) for the landlord to escape liability.

To understand this "duty shifting," a few rules must be understood. First, "[t]he burden of proving a statutory exception rests on the party seeking the benefit from the exception, not on the party seeking to avoid that benefit."<sup>142</sup> The tenant meets his or her initial burden by proving the existence of the landlord's duty under Section 92.052(a). Therefore, it is actually the landlord, not the tenant, that is seeking the benefit from the exception, namely the exception that the landlord is not liable to repair

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<sup>137</sup>*Id.* at 494–95 (Boyd, J., dissenting) ("I see no reason, however, why our reading of the statute should be different today. Dicta is not wrong just because it is dicta.").

<sup>138</sup>*See supra* Part II.

<sup>139</sup>*Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 369 (Tex. 2001).

<sup>140</sup>*Id.* at 372 (emphasis added) (explaining that unless Section 92.006 is at play, a finding of causation is required).

<sup>141</sup>*Id.* at 371.

<sup>142</sup>*City of Hous. v. Jones*, 679 S.W.2d 557, 559 (Tex. App.—Houston [14th Dist.] 1984, no writ.)

tenant-caused damage to the premises under Section 92.052(b). Therefore, it is the landlord who should properly carry the burden of proving causation under Section 92.052(b).<sup>143</sup>

Nevertheless, the court departed from the rule that it recognized just fifteen years prior.<sup>144</sup> It held that the burden remains on the tenant because the tenant is “the party who controls the leased premises and is, therefore, in the best position to (1) avoid damage to the premises and (2) prove that another party is responsible for the damage.”<sup>145</sup> It also stated that any other construction of Sections 92.052 and 92.053 would “place[] the landlord at a distinct disadvantage in attempting to prove the cause of the damage to premises under the tenant’s control, creating potentially insurmountable proof problems.”<sup>146</sup> The dissent notes that this claim of insurmountable proof problems is exaggerated: “I conclude that the difficulty the landlord faces in proving that White caused the fire damage pales in comparison to the difficulty White would face proving that she did *not* cause the damage.”<sup>147</sup>

The *White* holding thus requires tenants to prove a negative: that he or she did not cause the condition. Where the tenant cannot do that, the presumption of causation prevails in the landlord’s favor.<sup>148</sup> This presumption clashes with other similar civil rules, such as Texas Rule of Civil Procedure 92, which allows defendants to file general denials to pleadings rather than carrying a burden of proof to disprove an allegation of fact.<sup>149</sup>

The court also relied on Section 92.053 as reinforcing its holding that the tenant carries the burden of proving he or she did not cause the

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<sup>143</sup> *Id.*

<sup>144</sup> *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 468 (Tex. 2016) (*Churchill Forge* was decided in 2001 and *White* was decided in 2016).

<sup>145</sup> *Id.* at 486.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 495 (Boyd, J., dissenting). In an analogous situation, the Texas Supreme Court considered the relative likelihood of an event occurring in determining where to allocate the burden of proof. *20801, Inc. v. Parker*, 249 S.W.3d 392, 397 (Tex. 2008). There, the court held that because there exist “potentially limitless” acts or omissions that could constitute encouragement to violate the statutory prohibition against over-serving a visibility intoxicated person, the plaintiff bears the burden to prove that the bar *did* encourage over-service, rather than the bar bearing the burden to negate all possible acts or omissions of encouragement. *Id.* The court recognized the inherent challenge in proving a negative. *See id.*

<sup>148</sup> *White*, 490 S.W.3d at 494 (Boyd, J., dissenting).

<sup>149</sup> Tex. R. Civ. P. 92.

condition.<sup>150</sup> However, Section 92.053 relates exclusively to judicial rights as a plaintiff, not to who has the burden of proof to show the existence of a duty.<sup>151</sup> In *Wynn v. Silver Oaks Apts., Ltd.*, the Fourth District Court of Appeals cites to the burden of proof from Section 92.053 as applying to Section 92.056, which discusses landlord liability to the tenant, rather than the existence of the duty to repair material conditions, and which is a separate claim from Section 92.052(a).<sup>152</sup> Therefore, Section 92.053 does not reinforce any presumption of causation under Section 92.052(b).

To summarize, this presumption is contrary to the weight of Sections 92.052 and 92.006. Section 92.052(b) states: “[the] landlord . . . does not have a duty during the lease term or a renewal or extension to repair or remedy a condition caused by the tenant . . . .”<sup>153</sup> By presuming that conditions on premises controlled by the tenant were caused by the tenant, repairs that are necessary due to acts of God or criminal activity are the responsibility of the tenant unless he or she can prove that he or she did not cause the damage.

This presumption is a step back for tenant’s rights. The purpose of Chapter 92 is to protect tenants; it prescribes neither a presumption of causation nor a burden on the tenant.<sup>154</sup> The legislature enacted Section 92.006 after it enacted Section 92.052.<sup>155</sup> Although Section 92.052 is a narrower codification of the *Kamarath* implied warranty, Section 92.006 expressly limits the landlord’s ability to waive this duty.<sup>156</sup> The past fifty years of development in landlord-tenant relationships has been fueled by the inherent imbalance in these relationships.<sup>157</sup> This imbalance in bargaining power is acceptable only because of the protections in Chapter 92. If the court reduces the protections, the balance between landlords and tenants will deteriorate.

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<sup>150</sup> *White*, 490 S.W.3d at 487 (“section 92.053(a) necessarily allocates the burden of proof under section 92.052 to the tenant. In doing so, section 92.053 makes no distinctions among section 92.052’s various subsections.”).

<sup>151</sup> TEX. PROP. CODE ANN. § 92.053 (West 2014).

<sup>152</sup> No. 04-12-00727-CV, 2014 Tex. App. LEXIS 129, at \*6 (Tex. App.—San Antonio Jan. 8, 2014, no pet.) (mem. op., not designated for publication).

<sup>153</sup> TEX. PROP. CODE ANN. § 92.052(b).

<sup>154</sup> *White*, 490 S.W.3d at 497 (Devine, J., dissenting).

<sup>155</sup> This order of enactment demonstrates a narrowing of possibilities for a landlord to avoid his or her duty to repair.

<sup>156</sup> See *supra* Part II.

<sup>157</sup> See *Hicks*, *supra* note 13, at 451–52.



The dissent summarized how this presumption of causation prevented the correct result in *White*: “[b]ecause the landlord did not get a jury finding that the tenant caused the fire . . . the Code prohibits the landlord from enforcing the provision that requires the tenant to repair the damage.”<sup>158</sup>

*B. Effect on Landlord-Tenant Relationships.*

Presuming causation places the landlord one step ahead in any litigation involving a reimbursement provision under Chapter 92. Ultimately, the *White* holding will result in greater tenant liability for damage to the premises, regardless of whether it was actually caused by the tenant or whether he or she was at-fault.

First, the majority of landlord-tenant contracts are adhesion contracts.<sup>159</sup> *White* addressed, and largely based its holding on, Texas favoring freedom to contract; however, if one party is inherently advantaged and one is inherently disadvantaged, does that constitute freedom?<sup>160</sup> Even if there was freedom to negotiate, consumers are usually inadequately informed about the meaning or consequence of most contractual provisions, especially a complicated provision such as a reimbursement provision.<sup>161</sup> The result, in light of *White*, is that a tenant will not understand the predicament that he or she is in until it is too late and they are forced to pay for a repair unless they can prove that they did not cause the condition. In *White*'s case, this loss exceeded \$83,000.<sup>162</sup>

Second, this presumption forces tenants into litigation. Because the court recognized a presumption of causation, landlords will be more willing to initiate lawsuits because they start ahead of their tenants. For many tenants, hiring an experienced defense team will cause great financial hardship. Even worse, this presumption could result in a greater number of tenants filing for bankruptcy because of an inability to pay a claim or to pay for a defense team.

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<sup>158</sup> *White*, 490 S.W.3d at 492 (Boyd, J., dissenting).

<sup>159</sup> Audrey Goldstein Flessig, Note, *Unconscionability: A New Helping Hand to Residential Tenants*, 1979 WASH. U.L.Q. 993, 993 (1979).

<sup>160</sup> *Supra* Part II.

<sup>161</sup> Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 829 (2006); e.g., *supra* note 67 (The reimbursement provision in *White* is a typical TAA residential real estate lease).

<sup>162</sup> *White*, 490 S.W.3d at 472.

Finally, this two-step analysis is condensed into a one-step recognition: the court does not require a finding of fault and then further presumes causation. Regardless of whether the tenant was at fault or whether the tenant's actions caused the damages to property, the tenant now must carry the burden to prove that he or she did not cause the damage to avoid liability for the repairs.

Therefore, combining a tenant's general lack of understanding of residential rental contracts and a landlord's increased motivation to file a lawsuit for damage to the premises with *White's* removal of two tenant safeguards will result in a major departure from the trend of recognizing additional tenant's rights.

#### V. UNADDRESSED ISSUES UNDER SECTION 92.052.

The discussion in *White* highlights two unaddressed landlord-tenant issues. First, as discussed, *supra*, notice is required under Section 92.052(a).<sup>163</sup> Because it was not at issue in *White*, the Texas Supreme Court did not address what constitutes valid notice under Texas Property Code Section 92.052(a). The question is: how much, and what kind of notice, is required? Several Texas Courts of Appeals have addressed parts of this question, with varying results. The First District Court of Appeals considered whether a contractual requirement of written notice meets the requirements under Section 92.052(d).<sup>164</sup> The Eighth District Court of Appeals addressed not providing notice as precluding the possibility of a landlord's duty under Section 92.052(a).<sup>165</sup> The Third District Court of Appeals held that even when indulging all inferences in favor of the tenant, an oral notification that is later written down by a representative of the landlord is not proper written notice under the Property Code.<sup>166</sup> The Fourth District Court of Appeals confirmed that without such prior notice, the landlord cannot be held liable.<sup>167</sup> Therefore, because of the apparent lack of

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<sup>163</sup> *Supra* note 43 and accompanying text.

<sup>164</sup> *E.g.*, Ortega v. Murrah, No. 01-14-00651-CV, 2016 Tex. App. LEXIS 12363, at \*8–12 (Tex. App.—Houston [1st Dist.] Nov. 17, 2016, pet. denied) (mem. op., not designated for publication).

<sup>165</sup> *See, e.g.*, Hernandez v. Gallardo, No. 08-12-00178-CV, 2014 Tex. App. LEXIS 11878, at \*8 (Tex. App.—El Paso Oct. 29, 2014, pet. denied) (mem. op., not designated for publication).

<sup>166</sup> Woods v. Taylor Hous. Auth., No. 03-98-00249-CV, 1999 Tex. App. LEXIS 3599, at \*6 (Tex. App.—Austin May 13, 1999, no pet.) (mem. op., not designated for publication).

<sup>167</sup> Garza-Vale v. Kwiecien, 796 S.W.2d 500, 504 (Tex. App.—San Antonio 1990, writ denied).

consensus amongst Texas appellate courts, the question of whether notice is valid will continue to be a fact-heavy inquiry by each court.

Second, certain fact patterns will continue to challenge courts in determining whether valid notice was given.<sup>168</sup> In the event of damage to property that is not tenant caused, such as a lightning strike or other acts of God, and the tenant is contractually required to provide notice in writing, will the landlord not have a duty to repair until he or she receives adequate written notice? Or, because the condition is readily apparent, will the landlord have constructive notice? Moreover, when written notice is not required under Section 92.052(d), is the correct inquiry whether the tenant him or herself provided notice to trigger the duty in Section 92.052(a)? Or, is the proper inquiry whether the landlord has received notice, even if it was not the tenant who provided that notice? This provision may require actual knowledge from the tenant, a third party, or independent discovery, or may be as simple as constructive knowledge from the perspective of a reasonable landlord. Texas Property Code Section 92.056(c) states: “a landlord is considered to have received the tenant’s notice when the landlord or the landlord’s agent or employee has actually received the notice or when the United States Postal Service has attempted to deliver the notice to the landlord.”<sup>169</sup> However, Section 92.056(c) only applies to Section 92.056(b), which discusses when the landlord is liable to a tenant and what remedies the tenant may pursue, not whether the landlord has a duty under Section 92.052(a).<sup>170</sup>

Despite the *White* court thoroughly discussing nearly every aspect of a landlord’s duty to repair material conditions on the leased property, some of these questions remain unanswered. Regardless, after *White*, courts may turn the tables on tenants by requiring them to prove that they did not cause the damage to the property and not requiring a finding of fault before shifting liability back to the tenant under Section 92.052(b).

## VI. CONCLUSION.

The Texas Supreme Court delivered an in-depth opinion on landlord-tenant relationships in *Philadelphia Indemnity Insurance Company v. White*. It stacked the deck against tenants by interpreting Texas Property

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<sup>168</sup>See *supra* Part IV for a discussion of the presumption of causation recognized by the *White* majority.

<sup>169</sup>TEX. PROP. CODE ANN. § 92.056(c) (West 2014).

<sup>170</sup>*Id.* § 92.056.

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## A FAULTY PRESUMPTION

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Code Section 92.052(b) as a strict causation standard, rather than a fault-based standard, which is the standard that a statutory construction analysis and the legislative history support.<sup>171</sup> It further recognized a presumption that conditions on tenant-controlled premises were caused by the tenant; this presumption is contrary to the remainder of Chapter 92.<sup>172</sup>

Two solutions to this issue exist. The first option is for the Texas Supreme Court could overrule its holding in *White* in a subsequent case, hold that Section 92.052(b) requires a finding of fault, and reinstate the rule originally announced in *Churchill Forge, Inc. v. Brown*. The second option is for the legislature could amend the language in Section 92.052(b) to include explicit fault-based language to clarify this causation requirement; the legislature demonstrated its willingness to intervene for tenants' rights when it acted in an analogous situation by abrogating the common law developed in *Kamarath* with article 5236f.<sup>173</sup> Requiring fault under Section 92.052(b) will restore the balance between landlords and tenants.

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<sup>171</sup> See *supra* Part III.

<sup>172</sup> *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 495 (Tex. 2016) (Boyd, J., dissenting).

<sup>173</sup> *Supra* notes 32 & 34 and accompanying text.