IN THE SUPREME COURT OF OHIO

AKRON METROPOLITAN HOUSING AUTHORITY, et al.,	)	On Appeal from the Summit County Court of Appeals, Ninth Appellate District
Appellants,	)	
v.	)	Court of Appeals Consolidated Case Nos. 23056 and 23060
OHIO CIVIL RIGHTS COMMISSION, et al.,	)	
Appellees.	)	

MEMORANDUM IN SUPPORT OF JURISDICTION

Michele Morris (0032688)
1 South Main Street
The United Building, Suite 301
Akron, Ohio 44308
(330) 253-7100
(330) 253-2500 (Fax)

Richard A. Green (0021732)
100 West Cedar Street
Akron, Ohio 44307
(330) 376- 7880
(330) 253-1192 (Fax)

Counsel for Appellants, AMHA and June Davidson

David A. Oppenheimer (0063193)
Associate Assistant Attorney General
Civil Rights Section
615 West Superior Avenue, 11th Floor
Cleveland, Ohio 44113-1899
(216) 787-4154
(216) 787-3480 (Fax)

Counsel for Appellee, OCRC

Andrew L. Margolius (0003402)
55 Public Square, Suite 1100
Cleveland, Ohio 44113
(216) 621-2034
(216) 621-1908 (Fax)

Counsel for Appellees, Fair Housing Advocates Assoc., Inc. and Fontella Harper

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUIONAL QUESTION

This case presents two critical issues for the future of landlords and tenants in Ohio: (1) whether an Ohio landlord is now legally required to regulate the living environment amongst its tenants to ensure that the environment is free of discrimination analogous to the legal duty of an employer to maintain a work environment free of discrimination; and (2) whether the imposition of such a law necessarily violates the constitutional rights of public housing tenants.

In this case, the court of appeals expanded the Ohio fair housing laws when it ruled "that a cause of action based upon a hostile living environment is actionable in Ohio and that Harper established an issue of material fact that the elements of such action were present in this matter." *Appellate Court Decision and Journal Entry* at page 11. As a case of first impression, the majority determined that a hostile living environment claim was a logical extension to those claims based upon various types of harassment already recognized by federal courts, in particular, hostile working environment in the employment context. *Id.* As such, the majority manufactured the following test to establish a *prima facie* case of a hostile living environment:

> 1) [P]laintiffs are members of a protected class, 2) the harassment was unwelcome, 3) the harassment was based on the race of plaintiffs, 4) it was sufficiently severe or pervasive to alter the plaintiffs' living conditions and create an abusive environment and 5) that either (a) the harassment was committed by a landlord, or (b) the landlord, through its agents or supervisory personnel, knew or should have known about the harassment and failed to take immediate and appropriate corrective action.

Id. at 8 – 9.

The dissent strongly criticized the majority's expansion of the law, warning that "[t]he majority's decision opens the door to judicially legislate against 'bad neighbors' within the context of public housing." *Id.* at 13. This expansion of court dockets is unnecessary, as there exist alternative remedies to address such situations. The dissent also took issue with the

analogy between the present cause of action and a cause of action for hostile working environment.

> Private employers exercise immediate control over their employees, so that it is reasonable to hold them accountable for the known and tolerated hostile acts of their employees in the workplace. I believe that it is unreasonable to hold lessors in housing situations to the same level of accountability given the impracticability of both the exercise of such control over rents and the burden of policing 'bad neighbors.'

Id. at 13.

The implications of the decision of the court of appeals affect every landlord in the State of Ohio. The public's interest in placing such an onerous and overreaching burden on landlords in Ohio is profound. Landlords do not and cannot exercise control over tenants tantamount to that of an employer over its employees. Moreover, with respect to public housing, the court of appeals decision requires eviction proceedings against one tenant even when both tenants admit participating in wrongdoing. The key phrase with regard to civil rights is equal rights. Here, both tenants engaged in wrongdoing and AMHA resolved the matter without evicting either tenant. This was proper and in compliance with law.

Still further, in a public housing environment the court of appeals decision raises an additional constitutional concern inasmuch as in the public housing context evictions often leave an evicted tenant homeless. Thus the standard for eviction is high (as it should be), as the public has an interest in keeping its citizens housed. Thus, in accordance with our constitution, AMHA tenants facing eviction are entitled to a pre-deprivation hearing. The standard for eviction in this case was not met. The court of appeals' inappropriately compels a landlord to evict which impedes on the constitutional rights of all public housing tenants.

In sum, this case transforms Ohio landlords into quasi-peace officers. It places an unrealistic and oppressive responsibility on Ohio landlords to regulate the conduct of its tenants.

Moreover, it alters the constitutional standard to which a public housing authority is required to adhere in an eviction proceeding, which is designed to keep our citizens housed. This Court must grant jurisdiction to hear this case and review the erroneous and oppressive decision of the court of appeals.

STATEMENT OF THE FACTS AND CASE

The Appellee, Fontella Harper ("Harper"), an African-American woman, has lived in public housing with her two sons, Demitrios Tayon and Samarr Lopp, for approximately twenty years. Specifically, the Harpers reside at an Appellant, Akron Metropolitan Housing Association ("AMHA"), housing development known as Van Buren Homes located in Barberton, Ohio and have lived in that development during the entire period of Harper's public housing tenancy.

During August of 2001 Beverly Kaisk and her two children, Kimberly Lewis and Keith Kaisk (the "Kaisks") moved into the apartment at 252 Illinois Place, neighboring the Harpers. Kimberly Lewis[1], a minor residing in that apartment, suffered from a mental health disorder. To understate their relationship, the Harpers and Kaisks families did not get along. According to Ms. Harper and the Appellee, Ohio Civil Rights Commission ("OCRC"), Ms. Harper and her two sons were passive, innocent neighbors victimized by the Kaisk family. However, the evidence demonstrates that both families actively participated in and perpetuated a nasty neighborhood feud. A threatening and explosive incident occurred between the families on September 29 and 30, 2001. Ms. Harper testified that at the time of this incident, she called Appellant, June Davidson ("Davidson"), the AMHA property manager for Van Buren. According to Ms. Harper, Ms. Davidson told her to call the police and to submit her complaint to AMHA in writing. Ms. Harper complied with Ms. Davidson's directive: to wit, she called the

[1] Kimberly Lewis is at times referred to in the record below as Kimberly Kaisk. In this brief, she will be referred to as Kimberly Lewis.

police, and she submitted her complaint to AMHA in writing. Ms. Harper's written description dated October 1, 2001, the day following the incident, is a three-and-a-half page document wherein Ms. Harper describes the incident in detail. There is no mention of any racial animus in her report. The Barberton Police Department's record of its contemporaneous investigation of the incident likewise does not document evidence of race hostility toward the Ms. Harper or her family; it corroborates Ms. Harper's self-depiction of the incident.

Thereafter, the families continued to spar. Ms. Harper admits that she was actively engaged in the argument with her neighbors. She opines that she called the police several times with complaints about her neighbors and she admits that the police responded each and every time. In addition to Ms. Harper's calls to security, the evidence demonstrates that Kaisks likewise made complaints against the Harpers. Nothing in the documentation generated by Harper herself or by security reflects that the dispute was motivated by racial animus although Ms. Harper maintains that she filed several racial harassment complaints, which she claims have all disappeared and of which she maintained no copies. In any event, it is undisputed that there is no documentation to support Ms. Harper's contention that the feud between her family and the Kaisks was racially based. Moreover, no criminal charges resulted from the numerous police reports that were lodged by these two families against one another, and thus no basis for eviction proceedings existed.

On August 27, 2002, the Kaisks requested a hardship transfer out of Van Buren and into other AMHA housing. As a basis for this request, the Kaisks stated that Ms. Harper threatened their lives. The Kaisks' request for a hardship transfer was granted on September 13, 2002. Consequently, the Kaisks relocated to a different AMHA development on November 4, 2002.

Ms. Harper admits that unlike the Kaisks she did not request that AMHA relocate her family. She also admits that the relocation of the Kaisks ended the feud.

Appellee Harper initiated this case in February of 2003 when she contacted Appellee Fair Housing Advocates Associates, Inc. ("FHAA") and both submitted a charge affidavit with the Appellee OCRC. The charge affidavit asserts that the Appellant AMHA and one of its property managers, Appellant Davidson, violated Harper's fair housing rights by tolerating tenant-on-tenant racial harassment in Harper's housing complex and that AMHA failed to take adequate, effective steps to end the harassment. After conducting an investigation, the Akron Regional Office of the OCRC made a finding of no probable cause. Harper and FHAA timely requested reconsideration and on January 29, 2004, the Commissioners of the OCRC reversed the decision of the Akron Regional Office and found that it was probable that AMHA and Ms. Davidson violated the fair housing act. Ms. Harper and FHAA elected to pursue the matter further in common pleas court.

On June 17, 2004, the OCRC filed its Complaint asserting the following claims against AMHA and Ms. Davidson: (1) Discrimination in the terms or conditions, of renting or leasing any housing accommodations based on race in violation of Ohio Rev. Code § 4112.02(H)(4); and, (2) Failure to provide an environment free from racial hostility. Thereafter, with leave of the trial court, on August 9, 2004, FHAA and Ms. Harper filed their Complaint as Interveners asserting the following claims against AMHA and Ms. Davidson: (1) Failure to provide an environment free from racial hostility; and (2) Conspiracy to deprive a person of rights, privileges and immunities in violation of 42 U.S.C. §1985.

AMHA and Ms. Davidson timely answered. Extensive discovery was conducted. On September 21, 2005, Appellees filed a Motion for Summary Judgment essentially arguing that

Ohio does not recognize a cause of action for a hostile housing environment under Ohio Rev. Code § 4112. FHAA and Ms. Harper filed Motions for Summary Judgment as well. The trial court denied Appellees' motion for summary judgment and granted Appellants' Motion for Summary Judgment, concluding that Ohio does not recognize a hostile housing environment cause of action under Ohio's Fair Housing Act. The trial court further concluded that even if such an action were recognized, Ms. Harper did not present sufficient evidence to support such a claim in this case. Appellees timely appealed.

The Ninth District Court of Appeals consolidated the appeals for the purpose of filing the record, briefs, and presenting oral argument. The appeal was fully briefed and argued by the parties. On December 29, 2006, the court of appeals, in a split decision, reversed and remanded the judgment of the trial court. *See, Appellate Court Decision and Journal Entry* at page 12.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. 1:

OHIO DOES NOT, AND SHOULD NOT, RECOGNIZE A HOSTILE HOUSING ENVIRONMENT CLAIM UNDER ITS FAIR HOUSING LAW.

1. Fair housing laws were neither intended to be a vehicle for the resolution of neighborhood disputes nor to attach liability to landlords for such disputes.

The purpose of the Fair Housing Act is to provide, within constitutional limits, for fair housing throughout the United States. *See, 42 U.S.C. § 3601.* Congress and the state legislatures did not intend the statute to serve as a means by which neighbors of different races may bring neighborhood feuds into court when such feuds have little or no actual relation to housing discrimination. *Lawrence v. Courtyards at Deerwood Assoc.* (S.D. Florida 2004), 318 F.Supp.2d 1133, 1142. Nothing in the language, the legislative history, or the case law interpreting the Fair Housing Act indicates Congress intended the Act to operate in such a manner. *U.S. v. Weisz*

(S.D.N.Y. 1996), 914 F.Supp. 1050, 1054; *see also, Walton v. Claybridge Homeowners Association* (S.D.Ind. 2004), 2004 WL 192106 7.

It is well settled that a "landlord... is not the keeper of its tenants." *Bradley v. Carydale Enterprises* (E.D. Virginia 1989), 730 F.Supp. 709, 720. It is further understood that a proprietor is not liable to a tenant for the negligence of another tenant on the premises, so long as the latter acted without the proprietor's consent or authority. *Darnell v. Columbus Show Case Co.* (Ga. 1907), 58 S.E. 631, 632. Appellants had neither a duty to control the conduct of the Kaisk family nor a duty to protect the Harper family. *Siino v. Reices* (1995), 628 N.Y.S.2d 757, 758. Nonetheless, AMHA maintains security for its residents and, here, security appropriately responded to Harper's complaints.

Further, the alleged use of racial slurs by the Kaisks against the Harpers cannot be imputed to AMHA so as to give rise to Harper's claim of a violation of the Fair Housing Act. *Louisiana ACORN Fair Housing v. Preferred Equities* (E.D. La., Jan. 23, 2002), 2001 U.S. Dist. LEXIS 845. The Appellants did not create the allegedly hostile environment. The environment was created by the conduct of Appellant Harper, her family, and a third party, the Kaisks. The Fair Housing Act and related Ohio statutes were not created to serve as "some all purpose civil code regulating conduct between neighbors." *Lawrence*, 318 F.Supp.2d at 1142; *quoting, Gourlay v. Forest Lake Estates Civil Ass'n of Port Richey* (M.D.Florida, 2003), 276 F.Supp.2d 1222, 1232. The court of appeals ruling imposes an inappropriate liability on Ohio landlords.

2. <u>An analogy between the present cause of action and that of hostile working environment is misplaced.</u>

Equally misplaced is the court of appeal's conclusion that, "tenant versus tenant harassment is analogous to co-worker harassment in the workplace." *See Appellate Court Decision and Journal Entry* at page 7. The relationship between an employer's duty and the

ability to control employees through discipline or termination and that of a public housing provider's is too tenuous and abstract to justify basing a housing law on existing employment law. The *Lawrence* Court said:

> [T]he policy considerations for allowing an employer to regulate the conduct of its employees and the work environment are not the same as those that come to mind in determining whether a homeowner association or property manager should be held accountable for the conduct of private homeowners within a community. Accordingly, the court is not persuaded by the employment cases.

318 F.Supp.2d at 1149. In the case at bar, the dissent properly recognized that "it is unreasonable to hold lessors in housing situations to the same level of accountability [as employers have toward employees] given the impracticability of both the exercise of such control over renters and the burden of policing 'bad neighbors. This is especially unreasonable given that such a claim is viable only for renters as against other renters of the same housing authority or landlord and not for private homeowners. 'Bad neighbors' are not exclusive to a rental housing environment." *See Appellate Court Decision and Journal Entry* at page 13.

3. <u>The appellate court's holding raises serious ethical and constitutional concerns.</u>

The final element of the appellate court's hostile housing environment test is "the landlord, through its agents or supervisory personnel, knew or should have known about the harassment and failed to take immediate and appropriate corrective action." *Appellate Court Decision and Journal Entry* at page 9. "[I]mmediate and appropriate corrective action", in the absence of a truce between the feuding tenants, translates into either a relocation or eviction of one or both of the feuding tenants.[2] However, neither option is practical.

[2] Indeed, the appellate court emphasizes the availability of eviction as an appropriate resolution to tenant feuds. "AMHA has control over who is allowed to be a tenant in their facilities and has the authority to evict anyone who does not comply with the terms of the lease they enter into with AMHA." (Appellate Court Decision and Journal Entry at page 8).

Relocation is not a viable solution given the current shortage of low-income housing. *See* Ronald R. Volkmer, *Low-Income Housing and the Charitable Exemption*, 34 CREIGHTON L. REV. 47, 69 (December, 2000). It may be several months before a unit becomes available at an AMHA location. This is certainly not the "immediate" resolution contemplated by the appellate court. In addition, it would be unreasonable and, arguably, an unnecessary burden to force content tenants to swap residences with a discontent tenant. Finally, and perhaps most compelling, many low-income housing operators only own and operate a single location. Absent additional locations, relocation of feuding tenants is virtually impossible.

Eviction presents even more problems, both constitutional and ethical in nature. With wait lists for public housing at an incredible length, *see* Symposium, *Housing Out the Poor*, 19 St. Louis U. Pub. L. Rev. 309, 310-12 (2000), there is reason to suspect that the appellate court's recognition of a hostile housing environment cause of action would be susceptible to abuse. Landlords would now have the means to evict less desirable tenants under the guise of compliance with the new test so as to fill their housing with more desirable tenants. This risk is too great given the potential harm that befalls an evicted public housing tenant: forced homelessness, diminished quality of life and availability of other resources, mental suffering. Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 Cardozo Pub. L. Pol'y & Ethics J. 699, 707-08 (Jan. 2006).

Still further, a tenant in federally subsidized housing has a constitutionally protected property interest in that housing. *Gorsuch Homes, Inc. v. Wooten* (2nd Dist. 1992), 73 Ohio App.3d 426, 432. An AMHA eviction qualifies as state action[3], and, therefore, the fourteenth

[3] AMHA receives federal funding for the operation of its low-incoming housing: "The participation of the federal government in such housing projects is conditioned upon state approval. The state is thus involved for there would otherwise be no federal direct funding through rent subsidies and indirect funding through mortgage benefits... [T]hese factors coupled with utilization of state eviction procedure have 'so far insinuated [the state] into a position

amendment is triggered and due process compliance. *Joy v. Daniels* (4th Cir. 1973), 479 F.2d 1236, 1239; *McQueen v. Druker* (1st Cir. 1971), 438 F.2d 781, 784-85; *Gorsuch*, 73 Ohio App.3d at 432. "When a plaintiff has a protected property interest, a pre-deprivation hearing of some sort is generally required to satisfy the dictates of due process." *Leary v. Daeschner* (6th Cir. 2000), 228 F.3d 729, 742. Just what type of due process is due is dependent upon a balancing of the competing interests at stake. *Cleveland Bd. of Educ. v. Loudermill* (1985), 470 U.S. 532, 543. Eviction of a low-housing tenant is equivalent to declaring that tenant and his family homeless. *Turner v. Chicago Housing Authority* (N.D. Ill. 1991), 760 F.Supp. 1299, 1301; *United States v. Leasehold Interest in 121 Nostrand Avenue* (E.D.N.Y. 1991), 760 F.Supp. 1015, 1032. Accordingly, the interest of the tenant severely outweighs those of the landlord. As such, a pre-eviction hearing of the highest level must be afforded to every tenant prior to eviction. This is undoubtedly too severe a cost to impose upon landlords and taxpayers for the purpose of resolving a feud between two tenants.

The Fourth Amendment to the United States Constitution[4] provides, in relevant part, that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . ." Accordingly, the Fourth Amendment protects against two distinct expectations (1) unreasonable searches of property and (2) unreasonable seizures of property. *Soldal v. Cook County, Ill.* (1992), 506 U.S. 56, 63. A seizure of property is the "meaningful interference with an individual's possessory interests in that property." *Id., quoting, U.S. v. Jacobsen* (1984), 466 U.S. 109, 113. Accordingly, the

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of interdependence' with [AMHA] that [eviction of a low-income housing tenant] 'cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.'" *Joy v. Daniels* (4th Cir. 1973), 479 F.2d 1236, 1239 (*quoting, Burton v. Wilmington Parking Auth.*, (1961), 365 U.S. 715, 725).

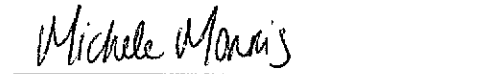
[4] The Fourth Amendment was made applicable to the states by the Fourteenth Amendment. *Ker v. State of California* (1963), 374 U.S. 23, 30-31.

eviction of a tenant from public housing must comply with Fourth Amendment concepts of reasonableness. Reasonableness involves a balancing of the governmental and private interests. *New Jersey v. T.L.O.* (1985), 469 U.S. 325, 341. In cases similar to the present, the private interest is squarely set on sustained housing and an avoidance of homelessness. According to the appellate court, the government has an interest in a tenant's peaceful enjoyment of their accommodations. *See Appellate Court Decision and Journal Entry* at page 3. While the government interest is important it fails to rise to the level of the private interest at stake. Homelessness is a severe and debilitating consequence that cannot be taken lightly. As such, the appellate court's recognition of a hostile housing environment claim and its promulgated test are squarely set against the Fourth Amendment to the United States Constitution.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



Michele Morris (0032688)
1 South Main Street
The United Building, Suite 301
Akron, Ohio 44308
(330) 253-7100
(330) 253-2500 (Fax)

Richard A. Green (by M. Morris)

Richard A. Green (0021732)
100 West Cedar Street
Akron, Ohio 44307
(330) 376- 7880
(330) 253-1192 (Fax)
Counsel for Appellants

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction has been sent by regular, U.S. mail this 8th day of February, 2007, to:

David A. Oppenheimer
Associate Assistant Attorney General
Civil Rights Section
615 West Superior Avenue, 11th Floor
Cleveland, Ohio 44113-1899

Andrew L. Margolius
55 Public Square, Suite 1100
Cleveland, Ohio 44113

Michele Morris

Michele Morris
Counsel for Appellants

STATE OF OHIO COUNTY OF SUMMIT	))ss:)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
OHIO CIVIL RIGHTS COMMISSION, et al. Appellants v. AKRON METROPOLITAN HOUSING AUTHORITY, et al. Appellees		C. A. Nos. 23056 & 23060 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 04 06 3416

DECISION AND JOURNAL ENTRY

Dated: December 29, 2006

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

{¶1} Appellants, the Ohio Civil Rights Commission ("OCRC"), Fontella Harper, and Fair Housing Advocates Associates, Inc. ("FHAA"), appeal the decision of the Summit County Court of Common Pleas, which awarded summary judgment in favor of appellees, Akron Metropolitan Housing Authority ("AMHA") and June Davidson. This Court reverses.

I.

{¶2} This appeal is a result of AMHA's allegedly discriminatory handling of a bitter dispute between appellant Harper and her white neighbors at Van Buren

Homes. Harper, a black woman, and her two sons moved into the Van Buren Homes rental housing development in 1991. Van Buren Homes is owned and operated by AMHA. Appellee June Davidson is the property manager at Van Buren Homes.

{¶3} In 1998, the Harper family moved to 254 Illinois Place, which is also located at Van Buren Homes. In 1991, the Kaisk family moved next door to the Harpers. Shortly after the Kaisks became the Harpers' neighbors, the two families began to engage in heated confrontations. Appellant Harper alleges that the Kaisk family would swear at members of her family and guests to her home, using racial epithets. Harper maintains that the name calling, swearing and shouting escalated to overt threats of violence towards her family.

{¶4} The origin of this dispute is traceable to October 2001. On October 1, 2001, Harper submitted a Resident Complaint Form ("RCF") to AMHA, in which she alleged certain facts that led to the filing of the complaint in this matter. Harper alleged that a series of incidents occurred on September 29, 2001, and September 30, 2001, involving Harper, the Kaisks, Harper's cousin and the cousin's daughter. Van Buren Homes' standard procedure was to refer all RCF's to the security department which had a contract with both the Summit County and Barberton Sheriff's Departments.

{¶5} Moreover, the lease terms specifically provided:

> "The OWNER may terminate or refuse to renew the lease only for serious or repeated violations of material terms of the lease, including but not limited to failure to make payments due under the lease or to fulfill the TENANT obligations set forth in Section VII ***.[1]"

Despite this policy, Harper alleged that Van Buren Homes' management neither investigated nor resolved Harper's complaint regarding her neighbors' racial remarks and other harassing conduct. According to Harper, the harassment continued through January of 2003. Harper alleged that her black guests were also victims. Harper testified through deposition that she filed numerous racial harassment complaints verbally and in writing and gave them to June Davidson, but they have just disappeared.

{¶6} In late 2002, the Kaisks applied for a hardship transfer out of Van Buren Homes on the basis that Harper and her relatives had threatened their lives. The requested transfer was granted, and the Kaisks moved out of Van Buren Homes.

{¶7} In February 2003, Harper contacted FHAA. Subsequently, both Harper and the FHAA submitted a charge affidavit with the OCRC. The charge affidavit asserted that the AMHA and one of its property managers, June Davidson, violated Harper's fair housing rights by tolerating tenant-on-tenant

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[1] Section VII requires the tenant to conduct himself or herself in a manner "which will not disturb their neighbors' peaceful enjoyment of their accommodations."

racial harassment in the Van Buren Homes complex and that AMHA failed to take adequate, effective steps to end the harassment. The OCRC found probable cause of discrimination and filed suit. Harper and the FHAA intervened. Claims were asserted under the entirety of both the federal and Ohio Fair Housing Acts.

{¶8} The appellants and the appellees filed cross motions for summary judgment and response briefs. The trial court awarded summary judgment in favor of appellees. The OCRC and appellants Harper and the FHAA filed notices of appeal. This Court consolidated the appeals.

{¶9} The OCRC filed an appellate brief asserting three assignments of error. Harper and the FHAA also filed a brief setting forth three assignments of error. The assignments of error have been rearranged and some have been combined to facilitate review.

II.

HARPER AND FHAA'S SECOND ASSIGNMENT OF ERROR

"A HOSTILE ENVIRONMENT CLAIM MAY BE PREMISED ON THE FAIR HOUSING ACT'S INTERFERENCE CLAUSE, THE TERMS AND CONDITIONS CLAUSE, OR THE CLAUSE REQUIRING HOUSING TO BE AVAILABLE TO ALL PROTECTED CLASSIFICATIONS[.]"

{¶10} All six of appellants' assignments of error challenge the trial court's award of summary judgment in favor of AMHA. To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material

fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the nonmoving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶11} This Court finds that appellants' Harper and FHAA's second assignment of error is dispositive of the appeal. Therefore, we will discuss it first.

{¶12} In Harper and FHAA's second assignment or error, appellants argue that the trial court erred in not recognizing a cause of action for a hostile housing environment in Ohio. This Court agrees.

{¶13} Appellees argue that the underlying action is nothing more than a dispute between tenants and that this type of dispute is not actionable under state or federal anti-discrimination laws. However, appellees fail to understand the point of appellants' claim. Appellees' argument focuses on the Kaisks' racist acts rather than AMHA's apparent toleration of those acts. Such toleration by AMHA arguably interfered with Harper's right to enjoy her lease.

{¶14} Both the federal and Ohio fair housing acts guarantee equal terms and conditions for protected classes such as race. Section 3617, Title 42 U.S. Code and R.C. 4112.02. Ohio's Fair Housing Act provides, in pertinent part:

> "It shall be an unlawful discriminatory practice:
>
> "For any person to ***
>
> "Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located[.]" R.C. 4112.02(H)(4).

Furthermore, R.C. 4112.08 provides that fair housing protections in Ohio are to be construed and interpreted liberally.

{¶15} Although the issue of a hostile living environment claim is a matter of first impression in Ohio, federal courts have recognized such a cause of action based upon various types of harassment. See *DiCenso v. Cisneros* (C.A.7, 1996), 96 F.3d 1004, 1008 (hostile living environment based upon gender); *Honce v. Vigil* (C.A.10, 1993), 1 F.3d 1086, 1088 (hostile living environment based upon gender); *Smith v. Mission Assoc. Ltd. Partnership* (D.Kan. 2002), 225 F.Supp.2d 1293 (hostile living environment based upon racial harassment); *Neudecker v. Boisclar Corp.* (C.A.8, 2003), 351 F.3d 361, 364 (hostile living environment based upon disability); *Halprin v. Prairie Single Family Homes of Dearborn Park Assn.*

(C.A.7, 2004), 388 F.3d 327, 330 (hostile living environment based upon religion); *Bradley v. Carydale Ents.* (E.D.Va. 1989), 707 F.Supp 217, 223 (racial harassment in housing).

{¶16} Appellants argue and this Court agrees that tenant versus tenant harassment is analogous to co-worker harassment in the workplace. In *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, the Supreme Court of Ohio set forth the requirements for establishing a claim of hostile environment in the workplace due to sexual harassment:

> "In order to establish a claim of hostile-environment sexual harassment, the plaintiff must show (1) that the harassment was unwelcome, (2) that the harassment was based on sex, (3) that the harassing conduct was sufficiently severe or pervasive to affect the 'terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment,' and (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action." Id., paragraph two of syllabus.

While noting that most courts also require the plaintiff to show that he or she belongs to a protected class, the Court in *Hampel* found it unnecessary due to the fact that there are only two sexes and both of them are entitled to protection under R.C. 4112.02(A). Id. at 733, Fn. 2.

{¶17} In addressing the issue of a hostile living environment, the court in *Smith* stated:

> "The elements necessary for a prima facie case of hostile housing environment are 1) plaintiffs are members of a protected class, 2) the conduct was unwelcome, 3) the conduct was based on the race of

> plaintiffs, 4) it was sufficiently severe or pervasive to alter the plaintiffs' living conditions and create an abusive environment and 5) defendant knew or should have known about the harassment." 225 F.Supp.2d 1293 at 1298-1299, citing *Reeves v. Carrollsburg Condominium Unit Owners Assn.* (D.D.C. Dec. 18, 1997), No. CIV.A. 96-2495RMU.

{¶18} After reviewing the record, federal case law, and Ohio case law regarding discrimination in the workplace, this Court finds that the trial court erred in not recognizing a cause of action for a hostile living environment in this case. This is not a case of harassment of a neighbor by a neighbor where each neighbor owns his or her own property. The property at issue in this case is a public housing development owned and operated by AMHA. AMHA has control over who is allowed to be a tenant in their facilities and has the authority to evict anyone who does not comply with the terms of the lease they enter into with AMHA. In this case, the lease provided, in relevant part:

> "VII. TENANT OBLIGATIONS
>
> "The TENANT agrees:
>
> "***
>
> "R. To conduct himself/herself and cause other persons who are on the premises with the TENANT'S consent to conduct themselves in a manner which will not disturb the neighbors' peaceful enjoyment of their accommodations; or to engage in illegal or other activity which impairs the physical or social environment of the development."

{¶19} Based upon the Supreme Court of Ohio's decision in *Hampel*, this Court finds that the elements necessary to establish a prima facie case of hostile living environment under the facts in this case are 1) plaintiffs are members of a

protected class, 2) the harassment was unwelcome, 3) the harassment was based on the race of plaintiffs, 4) it was sufficiently severe or pervasive to alter the plaintiffs' living conditions and create an abusive environment and 5) that either (a) the harassment was committed by a landlord, or (b) the landlord, through its agents or supervisory personnel, knew or should have known about the harassment and failed to take immediate and appropriate corrective action.

{¶20} After finding that Ohio does not recognize a cause of action under Ohio's Fair Housing Act for a hostile living environment, the trial court concluded that even if such an action were recognized in Ohio, Harper did not present sufficient evidence to establish that the alleged harassment was sufficiently severe or pervasive as to alter her living environment, or that AMHA had sufficient notice of the alleged harassment. This Court disagrees.

{¶21} Initially, this Court notes that the trial court improperly weighed the credibility of Harper's allegations and enforced its own factual conclusion regarding the evidence. This is not permissible on summary judgment. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 249. The trial court characterized the situation between the Harpers and the Kaisks as "an unfortunate ongoing skirmish between neighbors that may have been tinged with discriminatory overtones or occasional discriminatory comments." Viewing the facts in the light most favorable to the nonmoving party, however, this Court finds that Harper presented evidence of the existence of a genuine issue of material fact that the elements of a

hostile living environment existed in this case. Harper alleged that the Kaisk family would swear at members of her family and guests to her home, using racial epithets. Harper maintained that the name calling, swearing, and shouting escalated to overt threats of violence towards her family. Harper stated that the harassment was continuous from September 2001 through January of 2003. Harper further alleged that she filed numerous racial harassment complaints both verbally and in writing with the management of Van Buren Homes, but that her complaints were neither investigated nor resolved.[2]

{¶22} Appellants Harper and FHAA's second assignment of error is sustained.

OCRC'S FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT IMPROPERLY REQUIRED PLAINTIFFS TO DEMONSTRATE VIOLENT OR EXTREME CONDUCT IN ORDER TO ESTABLISH A HOSTILE LIVING ENVIRONMENT CLAIM."

OCRC'S SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT IMPROPERLY DETERMINED THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE HARPER FAMILY WAS SUBJECTED TO SEVERE OR PERVASIVE HARASSMENT BASED ON THEIR RACE."

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[2] While June Davidson stated in her deposition testimony that she had been aware of an ongoing controversy between the Kaisk family and the Harper family for over a year, she concluded that the controversy was not racially based. Ms. Davidson based her conclusion upon a belief that harassment based upon race no longer exists in today's society.

OCRC'S THIRD ASSIGNMENT OF ERROR

"THE TRIAL COURT IMPROPERLY DETERMINED THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE LANDLORD WAS PUT ON NOTICE OF THE RACIALLY HOSTILE ENVIRONMENT."

HARPER AND FHAA'S FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED WHEN IT HELD THAT EVEN IF OHIO ADOPTED THE DOCTRINE OF HOSTILE ENVIRONMENT IN HOUSING, INSUFFICIENT FACTS SHOWED A HOSTILE ENVIRONMENT HERE."

HARPER AND FHAA'S THIRD ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED WHEN IT ARTICULATED FACTS THAT SHOWED NOTICE OF THE HARASSMENT AND AN ESCALATING PATTERN OF HARASSMENT YET CONCLUDED NO NOTICE AND NOT SEVERE OR PERVASIVE MISCONDUCT."

{¶23} OCRC's first, second, and third assignments of error are rendered moot by this Court's resolution of Harper and FHAA's second assignment of error. Harper and FHAA's first and third assignments of error are rendered moot as well. Therefore, we decline to address appellants' remaining assignments of error. See App.R. 12(A)(1)(c).

III.

{¶24} In sum, this Court finds that a cause of action based upon a hostile living environment is actionable in Ohio and that Harper established an issue of material fact that the elements of such action were present in this matter. Having found that the trial court improperly awarded summary judgment in favor of

AMHA, the judgment of the Summit County Court of Common Pleas is reversed, and the cause remanded to the trial court for proceedings consistent with this opinion.

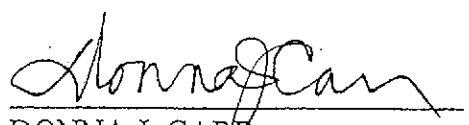
Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellees.



DONNA J. CARR
FOR THE COURT

MOORE, J.
CONCURS

SLABY, P. J.
DISSENTS, SAYING:

{¶25} I respectfully dissent.

{¶26} I would not recognize a cause of action for hostile housing environment. The majority's decision opens the door to judicially legislate against "bad neighbors" within the context of public housing. I believe that it is then inevitable that feuding tenants in private housing would seek similar remedies. In fact, other remedies such as nuisance actions, police intervention and defamation actions are already available to address such situations.

{¶27} I further disagree with the analogy between a cause of action for hostile working environment and hostile housing environment. Private employers exercise immediate control over their employees, so that it is reasonable to hold them accountable for the known and tolerated hostile acts of their employees in the workplace. I believe that it is unreasonable to hold lessors in housing situations to the same level of accountability given the impracticability of both the exercise of such control over renters and the burden of policing "bad neighbors." This is especially unreasonable given that such a claim is viable only for renters as against other renters of the same housing authority or landlord and not for private homeowners. "Bad neighbors" are not exclusive to a rental housing environment. Given the existence of other remedial measures to address neighbors who

perpetuate an intolerable or dangerous living environment, I find no reason to expand the law and create a cause of action to subject lessors to greater liability. I would affirm the trial court's finding that no such cause of action for hostile living environment exists in Ohio.

APPEARANCES:

JIM PETRO, Attorney General, DAVID A. OPPENHEIMER, and SHARON D. TASSIE, Assistant Attorney Generals, for appellants.

ANDREW L. MARGOLIUS, Attorney at Law, for appellants.

MICHELE MORRIS, Attorney at Law, for appellees.

RICHARD A. GREEN, Attorney at Law, for appellees.