ORIGINAL

IN THE SUPREME COURT OF OHIO

Lauren J. Mann, Plaintiff-Appellee, v. Northgate Investors LLC, Defendant-Appellant.	Case No. 2012-1600 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

BRIEF OF *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEE LAUREN J. MANN

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CERTIFIED QUESTION

Whether landlord owes the statutory duties of R.C. 5321.04(A)(3) to a tenant's guest properly on the premises but on the common area stairs at the time of injury?

INTEREST OF *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE

U.S. Census data for 2011 reflect that housing units that are part of buildings consisting of three or more units number 970,774 in Ohio – 19 percent of Ohio's housing units.[1] Taking into account the number of guests to these multi-unit buildings, it is apparent that the safety of a substantial percentage of Ohioans depends at one time or another upon residential landlords' adherence to the safety-promoting duties the General Assembly imposed upon them via R.C. 5321.04(A). This case presents the question of whether those duties apply equally to tenants and guests with respect to common areas.

The Ohio Association for Justice is Ohio's largest victims-rights advocacy association, comprised of 1,500 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The OAJ is devoted to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable.

[1] Source: http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?fpt=table

STATEMENT OF THE CASE AND FACTS

The Ohio Association for Justice accepts the Statement of the Case and the Statement of Facts in the brief of Plaintiff-Appellee Lauren Mann.

ARGUMENT

I. Standard of review.

This case presents a certified question of law, which this Court reviews *de novo*.

II. A landlord owes the duty of R.C. 5321.04(A)(3) to a tenant's guest properly in a common area.

A. Introduction.

In 1974, the General Assembly enacted R.C. Chap. 5321 (S. 103, 135 Laws of Ohio 36), which governs leases of residential premises. R.C. 5321.01(C) defines "residential premises" as including common areas:

> As used in this chapter [5321]: . . . (C) "Residential premises" means a dwelling unit for residential use and occupancy and the structure of which it is a part, the facilities and appurtenances in it, and ***the grounds, areas, and facilities for the use of tenants generally*** or the use of which is promised the tenant. . . . .

R.C. 5321.01(C) (emphasis added).

R.C. 5321.04(A) imposes duties upon landlords, including the following:

> A landlord who is a party to a rental agreement shall do all of the following:
>
> (1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety;
>
> (2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;
>
> ***(3) Keep all common areas of the premises in a safe and sanitary condition;***

(4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by the landlord;

(5) When the landlord is a party to any rental agreements that cover four or more dwelling units in the same structure, provide and maintain appropriate receptacles for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of a dwelling unit, and arrange for their removal;

(6) Supply running water, reasonable amounts of hot water, and reasonable heat at all times, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.

R.C. 5321.04(A) (H. 490, Baldwin's Ohio Legislative Service Ann. L-2963, Vol. 4 (2012) (eff. Sept. 28, 2012)) (emphasis added).[2]

Defendant concedes, correctly,

- that landlords' R.C. 5321.04(A) duties extend to tenants in common areas;
- that landlords' R.C. 5321.04(A) duties extend to guests in tenants' units, *Shump v. First Continental-Robinwood Assocs.*, 71 Ohio St.3d 414, 420 1994-Ohio-427; and
- that landlords' R.C. 5321.04(A)(1) and (2) duties extend to guests in common areas, *Sikora v. Wenzel*, 88 Ohio St.3d 493, 2000-Ohio-406, syllabus; *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 23.

But Defendant contends that landlords' R.C. 5321.04(A)(3) duty does not extend to guests. (Defendant's Brief 8-13.)

[2] R.C. 5321.04(A)(3) has never been amended since its 1974 enactment. The General Assembly added Paragraphs 9 and 10 to R.C. 5321.04(A), in 1990 and 2012, respectively, but otherwise has made only technical, non-substantive amendments to Division A. *See* S. 258, 143 Laws of Ohio 1526 (eff. Aug. 22, 1990); H. 490, *supra* (eff. Sept. 28, 2012).

There is no good reason for singling R.C. 5321.04(A)(3) out of R.C. 5321.04(A) for disparate treatment. Defendant's proposed construction of R.C. 5321.04(A)(3) is

- inconsistent with the rest of R.C. Chap. 5321,
- inconsistent with *Shump v. First Continental-Robinwood Assocs.*, 71 Ohio St.3d 414, 1994-Ohio-427;
- inconsistent with the common law's equal treatment of tenants and their guests with respect to landlords' tort duties;
- contrary to sound public policy, and
- contrary to the best-reasoned opinions of Ohio's courts of appeals.

B. The "*in pari materia*" rule of construction indicates that landlords' R.C. 5321.04(A)(3) duty is owed to guests.

Where the text of a statute is ambiguous, the text must be construed using the "*in pari materia*" rule of construction:

> All statutes relating to the same general subject matter must be read in pari materia, and in construing these statutes in pari materia, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes.

State ex rel. Herman v. Klopfleisch, 72 Ohio St.3d 581, 585 (1995).

1. R.C. 5321.12 provides: "In any action under Chapter 5321. of the Revised Code, ***any party may recover damages*** for the breach of contract or a breach of any duty that is imposed by law." (Emphasis added.) "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." R.C. 1.42. "Any party" means "any party" – not "tenants, and guests inside the tenants' units but not guests in common areas." If the General Assembly had intended to distinguish guests in common areas from guests in tenants' units, the General Assembly would not have used the term "any party." And if the General Assembly had intended to distinguish R.C. 5321.04(A)(3) with disparate treatment under R.C. 5321.12, it would have said so.

2. R.C. Chap. 5321 defines "residential premises" as including common areas:

> "Residential premises" means a dwelling unit for residential use and occupancy and the structure of which it is a part, the facilities and appurtenances in it, and ***the grounds, areas, and facilities for the use of tenants generally*** or the use of which is promised the tenant. . . . .

R.C. 5321.01(C) (emphasis added). Thus, when the General Assembly created R.C. 5321.04(A)(3) as a rule dedicated to common areas, the General Assembly was not creating a rule distinct in nature from the other rules of R.C. 5321.04(A) but rather one of a unified set of related, often overlapping rules to be treated the same under R.C. 5321.12.

3. "It is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences." *State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St.3d 382, 384 (1985). *Accord State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St.3d 39, 42, 2000-Ohio-8 (quoting *Wells*). A hypothetical example demonstrates the unreasonable consequences of the Defendant's construction of R.C. 5321.04(A): Two sets of stairs are identical, except that one set is inside a tenant's unit and the other is inside a common-area party room. The stairs have identical defects, and the landlord was notified[3] of the defects at the same time. One guest is injured by the defective stairs in the tenant's unit. Another guest is likewise injured by the defective stairs in the common-area party room. Under Defendant's construction, the guest in the tenant's unit has a claim under R.C. 5321.04(A), even if she had been aware of the defect, and the guest in the common area does not, even if she had been unaware of the defect. Avoiding such unreasonable results requires construing R.C. 5321.04(A)(3) as applying to both guests and tenants alike.

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[3] Landlords are liable under R.C. 5321.04(A) only if they "knew or should have known of the factual circumstances that caused the violation." *Sikora v. Wenzel*, 88 Ohio St.3d 493, 2000-Ohio-406, syllabus.

4. Landlords' R.C. 5321.04(A)(1) and (2) duties extend to guests in common areas, *Sikora v. Wenzel*, 88 Ohio St.3d 493, 2000-Ohio-406, syllabus; *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 23. It would be bizarre to construe the statute pertaining to common areas, R.C. 5321.04(A)(3), as not extending to guests.

Defendant's proposed construction of R.C. 5321.04(A)(3) depends primarily upon the proposition that this Court's use of the term "leased premises" in *Shump* implies that R.C. 5321.04(A)(3) cannot protect guests because, Defendant argues, the term "leased premises" excludes common areas. (Defendant's Brief 9-13.)

There are four flaws in Defendant's argument.

1. Construction of R.C. 5321.04(A)(3) does not require any reference to *Shump*. As demonstrated above, application of the rules of statutory construction renders the conclusion that landlords' R.C. 5321.04(A)(3) duty is owed to guests and tenants alike.

2. Defendant's argument reads far too much into *Shump*. In *Shump* an accidental fire killed a guest in a tenant's unit. *Shump* is not a "common area" case. The Court in *Shump* had no reason to consider – and did not consider – whether landlords' statutory duties to guests varied based upon whether the guest was in a common area or a unit. Moreover, the *Shump* opinion states rather clearly that both under the common law and under R.C. 5321.04, landlords owe the same duties to tenants and guests alike. (More on that in Part II-C below.)

3. The Court in *Shump* used the terms "leased premises" and "rental property" seemingly interchangeably. The interchangeable use of these terms suggests that the Court did not intend its use of "leased premises" to necessarily convey any meaning different from the R.C. 5321.01(C) definition of "residential premises," which includes common areas.

4. The Court in *Shump* expressly rejected two court-of-appeals decisions in which the courts held that landlords' R.C. 5321.04(A) duties are not owed to guests:

> [W]e hold that a landlord owes the same duties to persons lawfully upon the leased premises as the landlord owes to the tenant. . . . . We, therefore, reject the reasoning of *Rose v. Cardinal Industries, Inc.* (1990), 68 Ohio App.3d 406, and *Seiger v. Yeager* (1988), 44 Ohio Misc.2d 40. [¶] We do not believe that the Landlords and Tenants Act of 1974, R.C. Chapter 5321, alters this well-settled common-law principle.

Shump, 71 Ohio St.3d at 419-20 (parallel citations omitted). The plaintiff in *Rose* relied specifically upon R.C. 5321.04(A)(3). The express rejection of *Rose* and *Seiger* signifies that what this Court meant in *Shump* is that ***all*** of landlords' R.C. 5321.04(A) duties are owed to guests, including R.C. 5321.04(A)(3).

C. *Shump v. First Continental-Robinwood Assocs.* stands for the proposition that landlords owe the R.C. 5321.04(A)(3) duty to both tenants and guests.

In *Shump v. First Continental-Robinwood Assocs.*, 71 Ohio St.3d 414, 1994-Ohio-427, an accidental fire killed a guest in a tenant's unit, and a wrongful death action was brought against the landlord. This Court began its analysis by stating that "a landlord's liability to a tenant is determined by a landlord's common-law immunity from liability and any exceptions to that immunity that a court or a legislative body has created." *Id.* at 418. The Court commented that exceptions nearly have swallowed the common-law rule of landlord immunity. The list of exceptions includes – pertinent to this case – exceptions for areas under the landlord's control and for violations of statutory duties:

> In point of fact, the exceptions nearly have swallowed up the general rule of landlord immunity. Some of the commonly accepted exceptions that give rise to landlord liability include the following: concealment or failure to disclose known, nonobvious latent defects; defective premises held open for public use; ***defective areas under the landlord's control***; failure to perform a covenant to repair; ***breach of a statutory duty***; and ***negligent performance of*** a contractual or ***statutory duty to repair***.

Id. at 418 (emphasis added) (footnote omitted). Apartment-building common areas generally are "areas under the landlord's control." R.C. 5321.04(A)(3) imposes a statutory duty.

The Court in *Shump* then held, as a matter of common law, that landlords owe the same tort duties to tenants and guests alike:

> We do not distinguish between the duties a landlord owes to a tenant and the duties a landlord owes to other persons lawfully upon the leased premises. [¶] The proposition that a landlord owes the same duties to persons lawfully upon the rental property as the landlord owes to the tenant is not unique to Ohio. [¶] For the foregoing reasons, we hold that a landlord owes the same duties to persons lawfully upon the leased premises as the landlord owes to the tenant.

Id. at 419. The Court then stated that this same equality pertains under R.C. Chap. 5321:

> We do not believe that the Landlords and Tenants Act of 1974, R.C. Chapter 5321, alters this well-settled common-law principle. . . . . Thus, ***the obligations imposed upon a landlord under R.C. 5321.04 would appear to extend*** to tenants and ***to other persons lawfully upon the leased premises***.

Id. at 420 (emphasis added).

Given *Shump*'s statements (1) that under the common law landlords are liable for "defective areas under the landlord's control" and "breach of a statutory duty," and (2) that under both the common law and R.C. 5321.04 landlords owe the same duties to tenants and guests alike, *Shump* necessarily means that all of the R.C. 5321.04(A) duties, including R.C. 5321.04(A)(3), are owed to both tenants and guests.[4]

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[4] The remedies provided by R.C. Chap. 5321 are cumulative to those of the common law. *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20, 25 (1981). Thus, landlords owe guests in common areas of leased residential premises two duties:

- a common-law duty of reasonable care because common areas are "under the landlord's control," and
- statutory duties, including the duty imposed by R.C. 5321.04(A)(3).

In this case, Defendant concedes that as a general matter landlords owe guests in common areas a common-law duty of reasonable care. But Defendant argues that landlords owe no duty with respect to darkened stairs because darkened stairs are "open and obvious" (Defendant's Brief 7-8) – an argument addressed in Part III below.

D. R.C. 5321.04(A)(3) should be construed as consistent with the common law.

Statutes are to be construed in the light of and with reference to the common law. In *Shump* this Court stated that because under the common law landlords owe the same tort duty to both tenants and guests alike, the duties imposed by R.C. Chap. 5321 upon landlords likewise should be construed as being owed to both tenants and guests alike:

> [W]e hold [as a matter of common law] that a landlord owes the same duties to persons lawfully upon the leased premises as the landlord owes to the tenant. .... [¶] We do not believe that the Landlords and Tenants Act of 1974, R.C. Chapter 5321, alters this well-settled common-law principle. "Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention." Thus, the obligations imposed upon a landlord under R.C. 5321.04 would appear to extend to tenants and to other persons lawfully upon the leased premises.

Id. at 420 (citations omitted) (emphasis added). R.C. 5321.04(A)(3) of course applies to tenants. Following the model of the common law, it should be construed as applying to guests.

E. Sound public policy recommends construing landlords' R.C. 5321.04(A)(3) duty as owed to guests and tenants alike.

Sound public policy calls for construing R.C. 5321.04(A) duties as applying to guests both in common areas and in tenants' units (to the extent they are by their nature applicable to guests). The purpose of R.C. 5321.04(A) is to protect all people who use rented residential premises:

> R.C. 5321.04 imposes duties on the landlord to make repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition. Furthermore, the purpose of the statute is to protect persons using rented residential premises from injuries.

Shroades v. Rental Homes, Inc., 68 Ohio St.2d 20, 25 (1981). R.C. 5321.04(A) thus encourages landlords – ***requires*** landlords – to maintain safe residential premises, which R.C. 5321.01(C)

defines as including common areas. That purpose is blind as to whether potential victims – tenants and guests alike – are in tenants' units or in common areas. If anything, the purpose of the statute is advanced by a greater scope of responsibility under the statute – the more motivation for landlords to diligently adhere to the statute.

Defendant's suggestion that the common law adequately addresses disputes over residential landlords' maintenance of common areas (Defendant's Brief 13) is doubtful. The General Assembly enacted R.C. 5321.04(A) in part to modernize the law governing leaseholds, which developed during a time when most leased properties were farms and there were few "common areas." As this case demonstrates, the common law does not provide a clear answer (or, if Defendant's position is correct, a satisfying answer) to tort injuries in modern, residential rental premises. The goal of R.C. 5321.04(A) is the safety of all persons using residential rental premises, both in common areas and individual units.

Indeed, in the context of modern residential leases, Defendant's argument is illogical. Defendant concedes that landlords owe the R.C. 5321.04(A) duties to guests while the guests are in a tenant's unit – the part of the premises that landlords rarely see and over which landlords exercise little control on a day-to-day basis. Defendant argues that those duties evaporate the moment a guest leaves the unit and enters the common area – the part of the premises that landlords monitor and maintain on a daily basis. It does not make sense that landlords should owe less of a tort duty to guests when the guests are in common areas than when guests are in individual units.

F. The best-reasoned opinions of Ohio's courts of appeals hold that landlords' R.C. 5321.04(A)(3) duty is owed to guests.

Decisions from the 3rd, 6th, 7th, 8th, 9th, and 10th District Courts of Appeals have held that landlords' R.C. 5321.04(A) duties are owed to guests in common areas:

- ***Bierl v. BGZ Associates II, LLC***, 3rd Dist. No. 9-12-42, 2013-Ohio-648, ¶¶ 31-42. In a case brought under R.C. 5321.04(A)(3) by a guest injured in a common area, the court stated that "the Landlord-Tenant Act . . . allows social guests of tenants to maintain actions against landlords for the injuries that the guests sustain in the common areas of residential properties they are visiting." *Id.* at ¶ 42.

- ***Smith v. Finn***, 6th Dist. No. L-04-1244, 2005-Ohio-1547, ¶¶ 13-14. In a case brought under R.C. 5321.04(A)(1) and (2) in which the plaintiff was a guest injured, apparently, on a common-area stair, the court held that "[a] landlord owes the same duty to persons lawfully on the leased premises as he or she owes to a tenant." *Id.* at ¶ 13.

- ***Mowery v. Shoaf***, 148 Ohio App.3d 403, 2002-Ohio-3006, ¶¶ 24-29 (7th Dist.). In a case brought under R.C. 5321.04(A)(3) by a guest injured in a common area, the court stated that "[u]nder R.C. § 5321.04(A)(3), . . . landlords do owe a duty to maintain common areas in a safe condition for tenants and social visitors alike." *Id.* at ¶¶ 24-25.[5]

- ***Hodges v. Gates Mills Towers Apt. Co.***, 8th Dist. No. 77278, 2000 Ohio App. LEXIS 4477, *8 (Sept. 28, 2000). In a case brought under R.C. 5321.04(A)(4) by a guest injured in a common-area elevator, the court quoted *Shump* for the proposition that "the obligations imposed upon a landlord under R.C. 5321.04 would appear to extend to tenants ***and to other persons lawfully upon the leased premises***.'" *Id.* (emphasis in original).

- ***Harris-Coker v. Abraham***, 9th Dist. No. 26053, 2012-Ohio-4135, ¶¶ 3-7. In a case brought under R.C. 5321.04(A)(2) and (3) by a guest injured on a common-area stair, the court summarily reversed the landlord's summary judgment because the trial court had "failed to analyze the issue of negligence per se." *Id.* at ¶ 7.

- ***Mann v. Northgate Investors*, LLC**, 10th Dist. No. 11AP-684, 2012-Ohio-2871 (this case).

In addition, the Ohio Jury Instructions do not discriminate with respect to guests under R.C. 5321.04(A). Civil Instruction 617.19(2)(B) reads: "An act or failure to act in accordance with any of these duties [listed in R.C. 5321.04(A)] is negligence as a matter of law."

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[5] The court in *Mowery* went on to rule that R.C. 5321.04(A)(3) did not require the landlord to provide additional lighting in an outdoor, common-area, parking lot. *Id.* at ¶¶ 32-60. That ruling does not apply in this case, because R.C. 5321.04(A)(3) – if not also R.C. 5321.04(A)(4) – requires landlords to light interior, common-area stairs.

In contrast to the well-reasoned opinions by the Tenth District Court of Appeals in this case, by the Third District in *Bierl*, by the Seventh District in *Mowery*, and the other decisions cited above, the authority supporting Defendant's position is weak.

Defendant relies primary upon four cases from the Ninth District Court of Appeals. The first of the four, *Sanders*, misinterpreted *Shump*, and the other three followed *Sanders* without any reflection upon that misinterpretation. Moreover, the most recent decision from the Ninth District – *Harris-Coker v. Abraham*, *supra* – has effectively abandoned those decisions.

The first of the four Ninth District cases upon which Defendant relies is *Sanders v. Bellevue Manor Apartments*, 9th Dist. No. 95CA006067, 1996 Ohio App. LEXIS 3, *6 (Jan. 3, 1996). In *Sanders*, a tenant's guest in the parking lot tripped over a concrete, parking-space wheel-stop. The court correctly determined that regardless of the standard of care, the landlord had no duty to warn anyone about wheel-stops in parking spaces. *Id.* at *9, 11. But in *dicta* the court mistakenly opined that "*Shump* had no impact on the duty owed plaintiff in this case." *Id.* at *6-7.

Sanders consists of a series of anomalies and erroneous conclusions.

First, the plaintiff apparently never invoked R.C. 5321.04. The *Sanders* opinion does not contain a single reference to R.C. Chap. 5321. Thus, the court in *Sanders* was not even asked to apply R.C. 5321.04(A).

The plaintiff invoked the wrong common-law duty. In the trial court, the plaintiff erroneously agreed that she was a mere licensee, to whom the landlord owed no duty other than to refrain from willful or wanton misconduct. *Id.* at *4. The trial court granted the defendant's motion to dismiss on the ground that the defendant did not commit any act of willful or wanton misconduct. *Id.* at *5. It was only after the plaintiff had made this erroneous admission that this Court announced its decision in *Shump*.

In the court of appeals, the plaintiff invoked *Shump* for the proposition that the landlord owed her a common-law duty of ordinary care. The plaintiff again, apparently, failed to invoke R.C. 5321.04(A).

As even the Defendant in this case concedes (Defendant's Brief 1-2, 7) landlords' common-law duty to guests in common areas is the duty of ordinary care, not (as Ms. Sanders erroneously conceded) the duty merely to refrain from willful and wanton misconduct. *Shump*, 71 Ohio St.3d at 418, n. 3. But the court of appeals in *Sanders* (either confused or holding plaintiff to her erroneous admission)

> affirm[ed] the judgment of the trial court because: (1) it applied the correct standard to determine defendant's duty to plaintiff [no duty other than to refrain from willful and wanton misconduct]; (2) defendant was entitled to judgment as a matter of law; and (3) plaintiff failed to submit evidence that would have been sufficient to permit a jury to find that defendant had willfully or wantonly caused her injuries.

Sanders, 1996 Ohio App. LEXIS 3, at *2.

In explaining why the willful-and-wanton standard should apply to the common-law negligence claims of guests in common areas, the court quoted a passage from *Shump*. But the quoted passage concerns only the duties landlords and tenants respectively owe guests ***on the property the tenant controls***, *see id.* at 6 (quoting *Shump*, 74 Ohio St.3d at 417) – in the case of a residential apartment building, the tenant's unit. This quoted passage from *Shump* says nothing about the duties landlords owe guests in common areas. But the subsequent Ninth District cases construed *Sanders*' interpretation of *Shump* as being that landlords' standard of care with respect to common areas must be different – and lower – for guests compared to tenants. That is not so. *Shump* states that both under the common law and under R.C. Chap. 5321, landlords owe their tort duties to guests and tenants alike.

The *Sanders* court stated that because the plaintiff Ms. Sanders was injured in a common area, "*Shump* had no impact on the duty owed plaintiff." *Id.* at *6-7. It is true that the passage from *Shump* that the *Sanders* court quoted had no impact on the duty owed plaintiff. But the *Sanders* court (1) ignored *Shump*'s rejection of *Rose*; (2) ignored *Shump*'s reference to the common-area and statutory-duty exceptions to the very common-law rule of landlord immunity upon which the *Sanders* court was relying; and (3) ignored *Shump*'s statement that landlords' R.C. Chap. 5321 duties, like landlords' common-law duties, are owed equally to tenants and guests.

Thus, although *Sanders* correctly determined that regardless of the standard of care, absent extraordinary circumstances, a landlord has no duty to warn anyone about wheel-stops in parking spaces, *Sanders' dicta* about landlords' duty with respect to common areas was ill-reasoned and incorrect.

The Ninth District perfunctorily adhered to *Sanders'* misinterpretation of *Shump* in three other cases upon which Defendant relies:

- In *Westbrook v. Elden Properties*, 9th Dist. No. 98CA007257, 2000 Ohio App. LEXIS 1486, *8 (Apr. 5, 2000), the court said that "this court has declined to extend the *Shump* holding to cases involving injuries suffered from a mishap occurring in a common area.

- The Ninth District perfunctorily adhered to *Sanders* again, albeit in *dicta*, in *Owens v. French Village Co.*, 9th Dist. No. 99CA0058, 2000 Ohio App. LEXIS 3345, *14 (July 26, 2000).

  Also: *Owens* is distinguishable from this case because the hazard at issue in *Owens* was a natural accumulation of snow and ice, which R.C. 5321.04(A) does not require landlords to ameliorate, *see LaCourse v. Fleitz*, 28 Ohio St.3d 209, syllabus (1986). The *Owens* court acknowledged that the nature of the landlord's duty generally was irrelevant because "[e]ven if *Shump* extended to the guest all the statutory duties owed to the tenant by the landlord[,] the Supreme Court of Ohio has held that R.C. 5321.04(A)(3) does not impose a duty on the landlord to keep common areas of leased premises free form natural accumulations of snow and ice. *Owens*, *14, n. 3 (citing *LaCourse*).

- The Ninth District perfunctorily adhered to *Sanders* again in *Shumaker v. Park Lane Manor of Akron, Inc.*, 9th Dist. No. 25212, 2011-Ohio-1052, ¶¶ 9-12 (*per curiam*).

Most recently, however, the Ninth District Court of Appeals *sub silentio* abandoned the *Sanders* line of cases. In *Harris-Coker v. Abraham*, 9th Dist. No. 26053, 2012-Ohio-4135, ¶¶ 3-7, a tenant's guest was injured on a common-area stair, and the trial court granted the landlord summary judgment. The Ninth District summarily reversed because the trial court "failed to analyze the issue of negligence per se" under R.C. 5321.04(A)(2) and (3). *Id.* at ¶ 7.

Defendant also relies upon *Sheline v. Denman*, 5th Dist. No. CT2009-0033, 2010-Ohio-2041, in which the court applied the common law to a claim by a guest injured in a common-area parking lot. *Sheline* does not even mention R.C. Chap. 5321. And it has never been cited by any other appellate opinion.

Defendant also relies upon *Briskey v. Gary Crim Rentals*, 7th Dist. No. 04 MA 7, 2004-Ohio-6508. But Briskey did not involve a common area. *Id.* at ¶¶ 2, 14. And *Briskey* does not even mention R.C. Chap. 5321. (The plaintiff apparently never invoked the statute. *See id.* at ¶ 11.) And *Briskey* has never been cited by any other appellate opinion. The more compelling precedent from the Seventh District is *Mowery*, *supra*, which was decided by the same three-judge panel as *Briskey*.

Defendant also relies upon *Carrozza v. Olympia Mgmt. Ltd.*, 12th Dist. No. CA96-11-228, 1997 Ohio App. LEXIS 3896 (Sept. 2 1997). *Carrozza* has no application here. The premises in *Carrozza* was not a residence but a commercial parking lot. Moreover, the hazard was a natural accumulation of ice, which R.C. 5321.04(A) does not require residential landlords to ameliorate, *LaCourse*, *supra*.

III. Defendant is not entitled to summary judgment based upon the "open and obvious" defense.

A. The applicability of the "open and obvious" defense is not before this Court.

The Court of Appeals ruled that there was at least a genuine issue of material fact regarding whether the hazard in this case was "open and obvious." 2012-Ohio-2871, at ¶¶ 21-25. Defendant did not seek this Court's review of that issue. Defendant only filed a Notice of Certified Conflict on the question of "[w]hether landlord owes the statutory duties of R.C. 5321.04(A)(3) to a tenant's guest properly on the premises but on the common area stairs at the time of injury." Questions concerning the applicability of the "open and obvious" defense are not before this Court.

B. The "open and obvious" defense is not viable against an R.C. 5321.12 cause of action.

R.C. 5321.12 creates a statutory cause of action for violation of R.C. 5321.04(A). *See Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20, 25 (1981). This cause of action is cumulative to, or in addition to, common-law causes of action. *Id.*

That a hazard was "open and obvious" is a common-law defense to common-law negligence. The theory of the "open and obvious" defense is that the open and obvious nature of the hazard itself warns potential victims of its danger, thereby obviating the landowner's common-law duty to warn. *Simmers v. Bentley Construction Co.*, 64 Ohio St.3d 642, 644 (1992).

It is axiomatic that common law must yield to legislation. A common-law defense cannot supersede a statutory cause of action. Thus, Defendant's "open and obvious" defense is not viable against Plaintiff's R.C. 5321.12 cause of action for breach of R.C. 5321.04(A)(3).

C. On the merits, Defendant is not entitled to summary judgment based upon the "open and obvious" defense.

1. The "open and obvious" defense is not available, because violation of R.C. 5321.04(A)(3) constitutes negligence *per se*.

Negligence *per se* is a common-law doctrine whereby courts borrow a legislatively-created standard as the standard of care for a common-law negligence claim:

> In situations where a statutory violation constitutes negligence *per se*, the plaintiff will be considered to have conclusively established that the defendant breached the duty that he or she owed to the plaintiff. In such instances, the statute serves as a legislative declaration of the standard of care of a reasonably prudent person applicable in negligence actions. Thus the reasonable person standard is supplanted by a standard of care established by the legislature.

Sikora v. Wenzel, 88 Ohio St.3d 493, 497, 2000-Ohio-406 (quotation marks and citations omitted).

In *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20 (1981), this Court held that violation of R.C. 5321.04 constitutes negligence *per se*:

> R.C. 5321.04 imposes duties on the landlord to make repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition. . . . . A violation of a statute which sets forth specific duties constitutes negligence per se. . . . . [¶] . . . . We conclude that a violation of this statute [R.C. 5321.04] is negligence per se.

Id. at 25-26. *Shroades* refers to R.C. 5321.04 as a whole and does not exclude any of the enumerated paragraphs of R.C. 5321.04. Thus, violation of R.C. 5321.04(A)(3) constitutes negligence *per se.*

The "open and obvious" defense is not available when there is negligence *per se*. In *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 25, the Court ruled that if the landlord was negligent *per se* based upon R.C. 5321.04(A)(2), then the "open and obvious" nature of the hazard is not a defense. The Court reversed and remanded because there was a genuine issue of material fact regarding whether the landlord was negligent *per se*. *Id.* at ¶ 24.

Here, too, there is at least a genuine issue of material fact regarding whether Defendant is negligent *per se* under R.C. 5321.04(A). Therefore, at this point in the case, neither this Court nor the lower courts may consider the "open and obvious" defense.

Defendant contends that the doctrine of negligence *per se* does not apply to R.C. 5321.04(A)(3). (Defendant's Brief 13-17.)

Defendant is wrong for six reasons.

First: *Shroades* established that negligence *per se* applies to R.C. 5321.04(A) as a whole. *Shroades*, 68 Ohio St.2d at 25-26.

Second: R.C. 5321.04(A) consists of multiple, enumerated standards. It is unlikely that the General Assembly intended the courts to enforce only an undesignated few of those standards rather than all of them.

Third: Neither this Court nor, apparently, any Ohio court has ever suggested that violation of R.C. 5321.04(A)(3) does not constitute negligence *per se*.

Fourth: Defendant's sole contention – that R.C. 5321.04(A)(3) is too vague to give rise to negligence *per se* – is inconsistent with the fact that the similar, adjacent standards give rise to negligence *per se*:

- R.C. 5321.04(A)(2) requires finders of fact to decide what is "***reasonably*** necessary" to put and keep premises in fit and habitable condition (emphasis added).
- R.C. 5321.04(A)(4) requires finders of fact to decide what is "***good and safe***" with respect to appliances and utilities (emphasis added).
- R.C. 5321.04(A)(5) requires finders of fact to decide what is "***appropriate***" with respect to trash receptacles (emphasis added).

R.C. 5321.04(A)(3) requires finders of fact to decide what is "safe and sanitary condition" for common areas – a standard no more vague than the others.

Fifth: Defendant wrongly contends that "R.C. § 5321.04(A)(3) does not supplant the reasonable person standard of care and, as such, does not constitute the creation of a different standard of care by the legislature." (Defendant's Brief 14.) Defendant's contention might be an apt criticism of R.C. 5321.04(A)(**2**), which requires finders of fact to decide what is "***reasonably*** necessary" (emphasis added) to put and keep premises in fit and habitable condition. But Defendant concedes that violation of R.C. 5321.04(A)(2) is negligence *per se*. (*See* Defendant's Brief 15-16.) R.C. 5321.04(A)(**3**), in contrast, contains no "reasonableness" element. R.C. 5321.04(A)(3) requires landlords to "[k]eep all common areas of the premises in a safe and sanitary condition," regardless of whether achieving that standard requires reasonable effort or extraordinary effort. For example, a poor building design, poor construction, or dangerous terrain might require a landlord to exert extraordinary effort to achieve a "safe and sanitary condition."

Sixth: Defendant's reliance upon *LaCourse* is misplaced, for two reasons. First, *LaCourse* does not even fit logically into Defendant's argument. In *LaCourse* this Court held that "keep[ing] all common areas ... in a safe and sanitary condition" as R.C. 5321.04(A)(3) requires does not include keeping common areas free of natural accumulations of ice and snow. In *LaCourse*, in other words, there was no violation of the statute. In this appeal, however, Defendant concedes that Defendant violated the statute (or at least that there remains a genuine issue of material fact about the issue). The lone question – the certified question – is whether guests can sue for that violation. Second, the natural, outdoor accumulations of ice and snow is not analogous to a pane of glass at the bottom of a darkened, interior, common-area staircase.

2. If the "open and obvious" defense obviates any duty on the part of residential landlords toward guests to keep common areas illuminated, then the "open and obvious" defense should be deemed merged into Ohio's comparative negligence scheme.

The staircase upon which Plaintiff fell was the only path to the tenant she was visiting. 2012-Ohio-2871 at ¶ 2. Plaintiff arrived at noon, while it was still daylight, and was departing after 10 p.m., when it was dark outside. *Id.* The common area outside the unit, including the stairs, was unlit. *Id.* The darkness Plaintiff faced was essentially unavoidable. Plaintiff proceeded down the stair with caution. (*See* Plaintiff's Brief 4.) The "open and obvious darkness" cases upon which Defendant relies (Defendant's Brief 8) are weak precedents for deciding this case. None of those cases involved residential premises, much less rental premises or the common areas of residential premises

Defendant contends that the "open and obvious" defense obviates any duty on the part of residential landlords toward guests to keep common areas illuminated – even a common-area staircase with a pane of glass at the bottom. If that is so, then it is indeed time to adopt the Restatement of Torts position and deem the "open and obvious" defense merged into the comparative negligence scheme. *See Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, ¶¶ 26-31 (Lanzinger, J., and O'Connor, J., concurring in judgment only), ¶¶ 32-36 (Pfeifer, J., dissenting).

D. A hazard's being "open and obvious" does not excuse negligence *per se*.

Some instances of negligence *per se* are excused. The Second Restatement of Torts includes this non-exclusive list of situations in which negligence *per se* is excused:

(a) the violation is reasonable because of the actor's incapacity;

(b) he neither knows nor should know of the occasion for compliance;

(c) he is unable after reasonable diligence or care to comply;

(d) he is confronted by an emergency not due to his own misconduct;

(e) compliance would involve a greater risk of harm to the actor or to others.

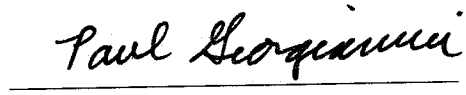
2 Restatement of the Law 2d, Torts 32-33, Section 288A (1965). *Accord Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 37 (1987) (ruling that statutory violation was excused because compliance was impossible under the circumstances); *Zehe v. Falkner*, 26 Ohio St.2d 258, 262 (1971) (same); *Sikora v. Wenzel*, 88 Ohio St.3d 493, 2000-Ohio-406, syllabus (holding that although "[a] landlord's violation of the duties imposed by R.C. 5321.04(A)(1) or 5321.04(A)(2) constitutes negligence *per se*, . . . a landlord will be excused from liability under either section if he neither knew nor should have known of the factual circumstances that caused the violation").

Defendant contends that negligence *per se* should be excused when the statutory violation is "open and obvious." (Defendant's Brief 17.) A statutory violation being "open and obvious" is not an excuse recognized by the Restatement or any Ohio court or, apparently, any court anywhere. Indeed, Defendant's suggestion that the "open and obvious" nature of a violation excuses negligence *per se* is precisely the opposite of the law: Where there is negligence *per se*, the "open and obvious" defense, as a matter of law, does not apply. *See Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 25.

CONCLUSION

This Court should answer the certified question in the affirmative and affirm the judgment of the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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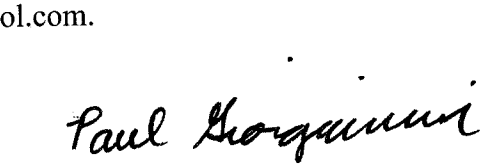

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