

IN THE SUPREME COURT OF OHIO

13-0586

CARLOS SIVIT, et al.)
)
 Appellees)
)
 v.)
)
 VILLAGE GREEN OF BEACHWOOD,)
 L.P., et al.)
)
 Appellants)

No. _____
 On Appeal from Cuyahoga County
 Court of Appeals, Eighth
 Appellate District
 Court of Appeals
 Case No. 98401

**MEMORANDUM IN SUPPORT OF JURISDICTION
 OF APPELLANTS VILLAGE GREEN OF BEACHWOOD, L.P.
 AND FOREST CITY RESIDENTIAL MANAGEMENT, INC.**

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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC
OR GREAT GENERAL INTEREST**

When, in 2005, it amended R.C. 2321.05 (as part of what is sometimes referred to as “Tort Reform III”), the General Assembly attempted to “reform * * * the punitive damages law in Ohio” in order to “restore balance, fairness and predictability to the civil justice system.” See *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012 Ohio 552, ¶ 30, and *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 2009 Ohio 6481 (10th Dist.), ¶ 25, quoting from 2004 Am. Sub. S.B. 80, Section 3, 150 Ohio Laws, Part V, at 8025. The General Assembly therefore included in that amended statute two significant provisions. One -- paragraph (D)(2)(a) -- provided that “[i]n a tort action,” a trial court must impose a “cap” on the amount of punitive damages so that such damages shall not be “in excess of two times the amount of the compensatory damages awarded to the plaintiff from the defendant.” The other -- paragraph (B) -- required the bifurcation of claims for punitive damages from claims for compensatory damages in such “tort actions.” Subsequently, this Court held that both the “cap” provision and the bifurcation provision are constitutional. See *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468 (2007), ¶ 111, and *Havel* at ¶ 35. In addition, this Court held that the “cap” limitation on punitive damages bears “a ‘real and substantial relation’ to the general welfare of the public.” *Arbino*, ¶ 102.

Notwithstanding this Court’s recognition of the importance of these provisions to “the general welfare of the public,” the decision of the Eighth District Court of Appeals in the instant case drastically restricts the cases in which these restraints on punitive damages can be imposed. For the Eighth District has now held that the “cap” provision of amended R.C. 2315.21 (and, necessarily, the bifurcation provision as well) does not apply to **any** claim of tortious conduct giving rise to punitive damages where the duty allegedly breached by the defendant

arose from the fact that the defendant had a contractual relationship with the plaintiff. In the instant case that contractual relationship was that of landlord and tenant, and the principal thrust of the plaintiffs' claim was that a landlord (Village Green of Beachwood) had failed to exercise due care in maintaining an apartment building in violation of the Ohio Landlord-Tenant Act (R.C. 5321.04). The plaintiffs, who were tenants in that apartment building ("Building 8"), alleged that the landlord's negligence had caused a fire that destroyed their property. In the ensuing trial, the jury awarded the tenants, first, \$582,326 in compensatory damages and then \$2,000,000 in punitive damages, which was more than three-and-a-half times the amount of the compensatory damages. Defendant Village Green immediately moved the trial court to reduce the punitive damages award in accordance with the "cap" provision of amended R.C. 2315.21, but the trial judge refused, holding that R.C. 2315.21 did not apply to this case. On appeal, the Eighth District agreed, holding that a claim for "negligent maintenance" in violation of R.C. 5321.04 is **not** a "tort action" within the meaning of R.C. 2315.21(A), but rather a "civil action for damages for a breach of contract or another agreement between the parties" (which actions, according to R.C. 2315.21(A), are not included in the definition of "tort action"). The Eighth District based its conclusion that this was an "action for damages for breach of contract" on the fact that "the only relationship between Village Green and the individual plaintiffs is that borne out in [their] rental agreement" (Opinion, ¶ 60). The Eighth District then reasoned that the provisions of R.C. 5321.04 became implied terms of that rental agreement. Accordingly, when the jury concluded that Village Green had "negligently maintain[ed] Building 8" (¶ 62), the jury must have concluded that Village Green "breached the [implied terms of the] rental agreement." (¶¶ 60 and 62).

Expanding on that reasoning, the Eighth District went on to hold that in cases where a defendant's conduct constituted **both** a breach of contract and "a tort for which punitive damages are recoverable" (§ 62), the action against the defendant will be deemed to be a "civil action for damages for breach of contract" rather than a "tort action," insofar as R.C. 2315.21 is concerned. The plaintiff in such a case will therefore be allowed to recover punitive damages from the defendant in an **unlimited amount**, even though punitive damages are normally not recoverable at all in a breach of contract action.

These holdings by the Eighth District, if allowed to remain in effect, will dramatically restrict future usage of R.C. 2315.21 and will severely undercut the public policy that the General Assembly sought to accomplish with the 2005 amendments. Hence, a major element of "Tort Reform III" will be eviscerated. For under the Eighth District's interpretation of the amended statute, all manner of cases that have long been deemed to be "tort actions" -- and which clearly meet the definition of "tort actions" set forth in R.C. 2315.21(A), to wit, "a civil action for damages for injury or loss to person or property" -- will be exempted from the "cap" and bifurcation provisions, simply because "the only relationship between" the plaintiff and the defendant was contractual. Such exempted claims will include, for example, punitive damage claims in actions for retaliatory discharge, sexual harassment, age discrimination and sex discrimination brought by employees against employers, all of which involve breaches of duties that arise from the fact that the parties had a contractual (i.e., employer-employee) relationship. Also exempted will be punitive damage claims in actions for legal malpractice, which actions can only be brought where there has been a contractual relationship between the parties, and bad faith-punitive damages claims against insurance companies, which can only be brought where the defendant has breached an insurance contract. At a minimum, the Eighth District's holdings

will create confusion and uncertainty as to the type of cases to which R.C. 2315.21 must be applied. The public interest in having this Court eliminate that confusion and uncertainty -- and in negating the substantial limitations that the Eighth District has imposed upon that statute and "Tort Reform III" -- should be apparent.

The Eighth District's decision also raises **another issue** of public or great general interest that relates to the proof of punitive damages in general. In *Malone v. Courtyard by Marriott, L.P.*, 74 Ohio St.3d 440, 659 N.E.2d 1292 (1996), this Court held that, in order to recover punitive damages on the ground that a defendant had been guilty of "actual malice" because the defendant had "consciously disregarded the safety" of a plaintiff, the plaintiff must show that the defendant had "actual knowledge" of the danger posed to the plaintiff. In this case the alleged "danger" that, according to plaintiffs' expert, caused the fire in Building 8 was the wearing away of the insulation of one of the wires that were located in a 16-inch interstitial space above the ceiling of Apartment 210 (see Court of Appeals Opinion, ¶¶ 26 and 36). In the opinion of plaintiffs' expert, that wearing away of insulation was probably caused by one of the staples that was holding the wire to a ceiling joist, which staple may have been negligently installed during the original construction of the building thirteen years earlier. However, there was no evidence that either defendant Village Green or defendant Forest City Residential Management (the property manager since September 1, 2006) ever had any knowledge that such a wearing away of insulation was occurring, either above the ceiling of Apartment 210 or anywhere else in Building 8, for that matter. Nevertheless, the Eighth District panel held that the "conscious disregard" requirement was satisfied in the instant case by evidence that the defendants had "fail[ed] to address the electrical and water infiltration issues that were brought to their attention through tenants' complaints, previous employees, the city inspector, and the 2004

fire in [another] building.” (§ 55) No evidence, however, was presented at trial that any of those “complaints” suggested to anyone -- the landlord, the city inspectors, the owner-landlord or the property manager -- that the insulation of an interior wire was being worn away somewhere in the three-story apartment building. To the contrary, the complaints of disrepair by city building inspectors related to the **exterior** of the building, i.e., “deteriorated siding,” “missing brick veneer” and “missing gutters.” If, then, the Eighth District’s decision is allowed to stand, a plaintiff can henceforth impose punitive damages on a landlord simply by presenting evidence that the landlord failed to make repairs of **some kind**, even though that failure had nothing whatever to do with the incident that damaged the plaintiff and even though the particular condition that did cause the incident was not known to, or even reasonably discoverable by, the landlord.

A **further issue** of public or great general interest raised by the Eighth District’s decision is that it transforms R.C. 5321.04 into a strict liability statute. Up until now, Ohio courts have followed the holdings of this Court that, in order for a tenant to recover under R.C. 5321.04, the tenant has to prove (a) the existence of a defective condition of which the landlord had actual or constructive knowledge and (b) a causal relationship between that defective condition and the incident that caused injury or damage to the tenant. The thrust of the Eighth District’s decision, however, is that **any dereliction** by a landlord in the maintenance of the leased property is sufficient to impose liability on the landlord, even though that negligent maintenance had no connection whatever with the particular condition that caused injury to the tenant (in this case, the wearing away of the insulation of a wire that was hidden above a ceiling) and even though the landlord had no actual knowledge of, or any ability to discover, that

condition. This holding, if allowed to stand, is therefore of enormous consequence to Ohio landlords and, hence, another reason why this case is of public and great general interest.

STATEMENT OF THE CASE AND FACTS

This case consists of five consolidated lawsuits arising from a fire that occurred in October, 2007, in Building 8 of an eleven-building apartment complex located in Beachwood, Ohio. The plaintiffs -- who were tenants (or subrogated insurers of tenants) in that building -- sought damages for their personal property that was destroyed in the fire. All five lawsuits alleged that the fire had resulted from "negligent construction" (i.e., negligent installation of electrical wiring) and subsequent "negligent maintenance" of the electrical wiring in violation of the Ohio Landlord-Tenant Act (R.C. 5321.04). The named defendants were the owner of the complex, Village Green of Beachwood L.P. and the company that had been managing the complex since September 1, 2006, Forest City Residential Management, Inc. By agreement of the parties, the plaintiffs' claims for punitive damages were bifurcated at trial from their claims for compensatory damages, in accordance with R.C. 2315.21(B).

In December, 2011, a common pleas court jury found that both defendants had been negligent and awarded compensatory damages to the individual plaintiffs in an amount that ultimately totaled \$582,326. In the second stage of the bifurcated trial, the same jury awarded punitive damages against **the owner-landlord**, defendant Village Green, in the amount of \$2,000,000, which amount was more than three and a half times the total compensatory damages. Village Green then moved the trial court to reduce the punitive damages award to the amount prescribed by the "cap" provision of amended R.C. 2315.21(D)(2)(a). The trial judge, however, refused to do so.

On January 17, 2013, the Eighth District Court of Appeals affirmed the trial court's judgments in all respects.

On January 28, 2013, defendants filed, pursuant to App. R. 26(A)(2), an application for *en banc* consideration, pointing out that two of the panel's holdings conflicted with previous Eighth District decisions. On March 5, 2013, the Court denied that application. Defendants have now filed a Notice of Appeal in accordance with S.Ct. Prac. R. 7.01(A)(6).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition Of Law No. 1: An action to recover damages for injury to person or property caused by negligence or other tortious conduct is a "tort action" within the meaning of R.C. 2315.21(A), even though the plaintiff's claim arose from a breach of duty arising from a contractual relationship and even though defendant's conduct constituted both tortious conduct and a breach of contract.

When does a cause of action for a negligent or tortious breach of duty that has resulted in damage to person or property become an action for "a breach of contract or another agreement between persons," rather than a "tort action" within the meaning of amended R.C. 2315.21,¹ and therefore exempt from the punitive damages "cap" (and the bifurcation requirement) imposed by that statute?

According to the Eighth District, such an exemption occurs when "the only relationship" between the plaintiff and defendant is "contractual" and the defendant "breached the contractual agreement by negligently" or tortiously failing to comply with his contractual obligations (Opinion, ¶¶ 60-62). Thus, in the instant case, even though the plaintiffs' pleadings (and the instructions given to the jury) repeatedly alleged that the defendants had "negligently maintained" Building 8 in violation of their obligations under R.C. 5321.04, the Eighth District reasoned that the critical fact was that "the only relationship between Village Green and the

¹ R.C. 2315.21(A) states that, as used in that statute, "a 'tort action' means a civil action for damages for injury or loss to person or property* * *but does not include a civil action for damages for a breach of contract or another agreement between persons."

individual plaintiffs is that borne out in the rental agreement.” (*Id.*, ¶ 60) Therefore, concluded the Eighth District, the provisions of R.C. 5321.04 should be deemed to constitute **implied terms** of the rental agreement, and plaintiffs’ claims for breach of R.C. 5321.04 should be viewed as claims for “breach of contract” that are not subject to the “cap” set forth in R.C. 2315.21. (*Id.*, ¶¶ 60-62). The Eighth District reached that conclusion even though, as noted above, plaintiffs’ pleadings **repeatedly** alleged that the defendants had acted negligently and even though no claim for breach of contract was ever submitted to the jury.

The Eighth District did acknowledge that “punitive damages are generally not recoverable in a breach of contract action.” (*Id.*, ¶ 62). Nevertheless, punitive damages are recoverable in “a civil action alleging breach of contract where the conduct constituting the breach **is also a tort.**” (*Ibid.*). The Eighth District then concluded that, in such an action, the breach of contract “trumps” the tort claim insofar as R.C. 2315.21 is concerned, and the “cap” and bifurcation provisions of that statute are therefore **inapplicable** to such a case.

The consequences of these interpretations of R.C. 2315.21 by the Eighth District, and the extent to which they will restrict utilization of that statute and the fulfillment of the public policy embodied therein, cannot be overstated. After all, there are a large number of tort claims that, in the words of this Court in *Motorists Mutual Ins. Co. v. Said*, 63 Ohio St.3d 690, 694, 590 N.E.2d 1228 (1992), “[a]rise[] as a consequence of a breach of duty established by a particular contractual relationship.” Such claims include claims for retaliatory discharge, sexual harassment, age discrimination and sex discrimination brought by employees against employers; claims for legal malpractice by persons who entered into oral or written contracts with lawyers; and claims for bad faith by insureds against an insurance company that allegedly violated its contractual obligations under an insurance policy. All of such claims have long been deemed to

be “tort actions.” Yet, under the narrow (and erroneous) approach taken by the Eighth District, all of such claims will henceforth be exempted from the “cap” and bifurcation provisions of R.C. 2315.21, thereby seriously undercutting the important public policy, which public policy was expressly noted by this Court in the *Havel* and *Arbino* cases (see page 1 above), that the General Assembly sought to implement.

It should further be noted that the Eighth District’s interpretation of R.C. 2315.21 is directly in conflict with the recent decision of the Eleventh District in *Stewart v. Sicilano*, 2012 WL 6727271, 2012 Ohio 6123 (11th Dist.). In *Stewart* (which was decided only three weeks before the issuance of the Eighth District’s decision in the instant case), an insured under an automobile policy sued the insurer (Progressive) for breach of the insurance contract and for bad faith. In arguing that the insured’s punitive damages claim was not subject to the mandatory bifurcation provision of R.C. 2315.21(B), the insured made the same argument that was subsequently adopted by the Eighth District in this case with respect to negligent maintenance claims under R.C. 5321.04, namely, that plaintiff’s claim was actually a claim for breach of contract because it “arises as a consequence of a breach of duty established by a particular contractual relationship;” therefore, “the entire case is outside the contemplation of R.C. 2315.21(B)(1)” (*Stewart* at ¶ 30). The Eleventh District, however, rejected that argument and held that an insured’s bad faith claim for punitive damages against an insurance company is subject to R.C. 2315.21 because it “**sounds in tort**” and is therefore a “tort action” within the meaning of R.C. 2315.21(A), rather than a “civil action for damages for a breach of contract.” (¶ 36)

To the same effect is *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 276, 452 N.E.2d 1315 (1983), where this Court held that a claim against a property insurance company for

bad faith refusal to settle a claim “imposes liability **sounding in tort**” even though “the liability arises from the breach of the positive legal duty imposed by law due to the relationship of the parties.”

This same approach should be taken with respect to cases in which tenants seek punitive damages from landlords for a violation of R.C. 5321.04. See, in this regard, *Sherman v. Pearson*, 110 Ohio App.3d 70, 74-75, 673 N.E.2d 643 (1st Dist. 1996), where the First District held that a “negligence action brought against a landlord [under R.C. 5321.04] for defective rental premises” is an action “**sounding in tort**”, even though such an action “relies heavily upon evidence of the landlord’s noncompliance with the Landlord and Tenant Act and the **duties that arise from the rental agreement**”, which duties the Landlord and Tenant Act “attaches to the rental agreement.”

On the other hand, if the Eighth District’s approach is allowed to stand, there will, at a minimum, be confusion and uncertainty as to the cases to which the “cap” and bifurcation provisions of amended R.C. 2315.21 actually apply. Trial courts will have to decide which way to go: should they follow the Eleventh District’s approach, or should they follow the Eighth District’s approach? That confusion will be compounded by the fact that the only case cited by the Eighth District in support of its restrictive interpretation of R.C. 2315.21 is *Kramer Consulting, Inc. v. McCarthy*, 2006 U.S. Dist. LEXIS 12857, 2006 WL 581244 (D.C. Ohio), where a federal district judge held that a suit against a corporate director and officer for breach of fiduciary duty was “not within the purview of R.C. 2315.21.” (See Opinion, ¶ 64.) Yet, in *Luri v. Republic Services, Inc.*, 193 Ohio App.3d 682 (8th Dist. 2011), a different Eighth District panel concluded, in ¶ 14, that the *Kramer* holding was contrary to the decision of this Court in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468 (2007).

This Court should therefore accept jurisdiction of this case in order to make it clear that the phrase “civil action for damages for breach of contract,” as used in R.C. 2315.21(A), refers only to actions that are purely and simply claims for breach of contract -- in other words, claims for which punitive damages have never been recoverable. See *Digital & Design Corp. v. North Supply Co.*, 44 Ohio St.3d 36, 45-46, 540 N.E.2d 1358 (1989). This statutory phrase should **not** be interpreted as encompassing a claim that is **both** (a) a breach of contract claim and (b) a tort claim for which punitive damages **are** recoverable. There is no reason to conclude that the General Assembly intended to exempt such claims from the “cap” and bifurcation provisions of R.C. 2315.21, especially when punitive damages are recoverable in such cases only because of the fact that the defendant engaged in tortious conduct.

Proposition Of Law No. 2: In order to recover punitive damages on the ground that a landlord consciously disregarded the rights and safety of a plaintiff, the plaintiff must prove that the specific danger that caused plaintiff’s injury was a danger of which the landlord had subjective knowledge. The fact that the landlord had knowledge of another danger on the premises is irrelevant if that other danger had no causal connection to plaintiff’s injury.

Under settled Ohio law, in order to obtain punitive damages in any amount, plaintiffs herein were required to prove, by clear and convincing evidence, that defendant Village Green acted with “actual malice,” which means “a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.” *Preston v. Murty*, 32 Ohio St.3d 334 (1987). Indeed, the trial court so instructed the jury. (Tr. 2229).

This Court, however, has held that in order to establish a prima facie case of “conscious disregard,” a plaintiff must show that the defendant had “**actually known**” of the danger posed to plaintiff by defendant’s conduct. See *Malone v. Courtyard by Marriott, L.P.*, 74 Ohio St.3d 440, 446, 639 N.E.2d 1242 (1996), where this Court held that, “[a]bsent such proof of a defendant’s **subjective knowledge** of the danger posed to another, a punitive damages claim

against that defendant premised on the ‘conscious disregard’ theory of malice is not warranted” and “a charge to the jury on punitive damages would have been unjustified.”

The latter rule has direct application to the instant case. According to plaintiffs’ expert, the “dangerous condition” that allegedly caused the October, 2007 fire involved one of three wires that were located in the 16-inch interstitial space above the ceiling of Apartment 210. (Court of Appeals Opinion, ¶¶ 26 and 36). Plaintiffs’ expert opined that the fire occurred after the insulation on one of those wires had been worn away by one of the staples that had been holding the wire to a ceiling joist since 1994. (Tr. 1019-1024) There was, however, no evidence whatever that either of the defendants had any **knowledge** that such a wearing away of insulation was occurring. The trial court therefore clearly erred in allowing the issue of punitive damages to go to the jury.

On appeal, however, the Eighth District ignored the *Courtyard by Marriott* case and held that a “decision whether to award punitive damages is within the trial court’s discretion.” (Opinion, ¶ 49). (That statement by the Eighth District, of course, begs the question. A plaintiff still has an obligation to prove the elements of punitive damages, including actual malice, set forth by this Court in *Preston v. Murty*.) The panel then stated that “the testimony presented at trial established that Village Green consciously ignored the severe state of disrepair of Building 8” and that such “inaction was sufficient to support a finding of malice.” (*Id.*, ¶¶ 51 and 52). The principal flaw in this reasoning was that the only evidence presented at trial with respect to the “severe state of disrepair in Building No. 8” related entirely to the **exterior of the building** (i.e., “deteriorated siding,” “missing brick veneer,” and “missing gutters,” according to a letter from the Beachwood Building Department). There was **no evidence** of any disrepair of any **electrical wiring** inside the building. Indeed, the only testimony of “disrepair” presented at

trial with respect to “potential electrical problems” related to “water leaks in the basement of the building” near the main electrical panel (Tr. 422-423), which area was more than two floors away from where the fire started. And although plaintiffs did present testimony from several tenants that they had observed occasional “loss of power” (Tr. 1342 and 1433), “water leaks” (Tr. 1316, 1367, 1368), false fire alarms (Tr. 1317), and “brown-outs” (Tr. 1405), there was absolutely no testimony from any witness that any of those incidents constituted “notice” to the defendants that there was a defect in any of the internal wires that were located behind the apartment walls or above the numerous ceilings of Building 8.

Accordingly, to allow this decision to stand would mean that, henceforth, every Ohio landlord is subject to punitive damages whenever that landlord fails to repair **any** defective condition of which it had notice, even though that defective condition had no causal connection with the injury or damage sustained by the plaintiff and for which the landlord is being sued, and even though the landlord had no actual knowledge of the particular defect that **did** cause the injury. The rule announced by this Court in *Courtyard by Marriott* will then become a “dead letter” in the landlord-tenant situation.

This Court should therefore accept jurisdiction of this case in order to make it clear that, in order to impose punitive damages on a landlord, evidence must be presented that the landlord had “subjective knowledge” of the particular condition that actually caused the tenant’s injury.

Proposition of Law No. 3: A landlord cannot be held liable under R.C. 5321.04 for failure to correct defects occurring in electrical wiring of which it was unaware and which were concealed behind walls or above ceilings.

Recognizing the considerable public interest that exists with respect to the duties and obligations imposed on landlords by R.C. 5321.04, this Court has, on several occasions, accepted jurisdiction of cases dealing with the interpretation and application of that statute. See,

for example, *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20 (1981), *Sikora v. Wenzel*, 88 Ohio St.3d 493 (2000), and *Robinson v. Bates*, 112 Ohio St.3d 17 (2006). In those cases this Court held that R.C. 5321.04 does **not** impose strict liability and that a landlord **cannot** be held liable for a tenant's damages if the landlord has exercised reasonable diligence. See, for example, *Robinson* at ¶ 23 and *Sikora* at 498.

Consequently, up to now Ohio appellate courts have consistently held that, in order to recover **compensatory** damages under R.C. 5321.04, a tenant must prove that the landlord had actual or constructive knowledge of the particular defective condition that was a proximate cause of the occurrence. See, for example, *Mounts v. Ravotti*, 2008 WL 4415819 (7th Dist.), ¶ 30, citing *Shroades*, 68 Ohio St.2d 20. In the instant case, however, the Eighth District held that **any** dereliction by a landlord in the maintenance of the property, regardless of its nature, is sufficient to impose liability on the landlord, even though that particular dereliction had no connection whatever with the defective condition that actually caused damage to the tenant and even though the landlord had no actual knowledge of -- and, indeed, no reason to discover -- that defective condition. For, as pointed out above, the cause of the October, 2007 fire, according to plaintiffs' expert, was that a metal staple had worn through the insulation of one of three internal wires that were located in the 16-inch interstitial space above the ceiling of Apartment 210. Those wires were at all times concealed from the view of -- and, hence, from reasonable inspection by -- the landlord or the landlord's property manager. Yet the Eighth District held that the landlord (Village Green) and the 2006-2007 property manager (Forest City Residential Management) could be held liable for the fire.

The Eighth District's decision is therefore in direct conflict with the holding of the Sixth District in *Abbott v. Haight Properties, Inc.*, 2000 WL 491731, that a landlord cannot

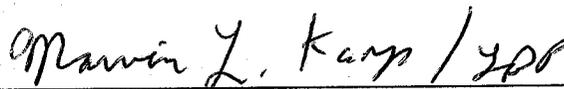
be held liable for fires that result from defects that have occurred in electrical wiring **behind ceilings and walls** and of which the landlord had no knowledge. In *Abbott*, the same thing happened as allegedly occurred in this case: a fire started behind an apartment wall when one of the staples that attached an electric wire to an internal wooden stud wore through the insulation. In holding that the landlord could not be held liable for something that was occurring in an area not “readily available for inspection by the landlord,” the Sixth District pointed out that “in order to inspect the electrical wiring in this case, the [landlord] would have to tear up the wall and the sound board, a requirement that we find nonsensical in both this and similar cases.”

The Sixth District’s approach is clearly the logical one, since there is no reasonable justification for imposing financial liability on a landlord for loss and damage that arose from a hidden condition of which the landlord had no knowledge and which was not discoverable except by taking such extreme steps as cutting holes in ceilings and walls.

CONCLUSION

For all of the reasons set forth above, appellants request this Court to accept jurisdiction so that the above-described issues of public and great general interest can be reviewed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellants Village Green of Beachwood, L.P. and Forest City Residential Management, Inc. has been served by regular U.S. Mail, this 10th of April, 2013, upon the following:

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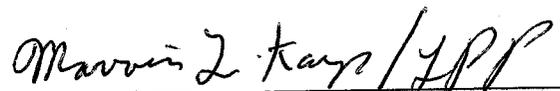
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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98401

CARLOS SIVIT, ET AL.

PLAINTIFFS-APPELLEES

vs.

VILLAGE GREEN OF BEACHWOOD, L.P., ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-671776, CV-674795, CV-701195,
CV-706333, and CV-707545

BEFORE: Blackmon, P.J., Celebrezze, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: January 17, 2013

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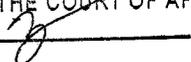
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FILED AND JOURNALIZED
PER APP.R. 22(C)

JAN 17 2013

CUYAHOGA COUNTY CLERK
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PATRICIA ANN BLACKMON, P.J.:

{¶1} Appellants, Village Green of Beachwood, L.P. (“Village Green”) and Forest City Residential Management, Inc. (“FCRM”), appeal the trial court’s denial of their motion for directed verdict and assign 11 errors for our review.¹ Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

{¶2} In the early morning of October 23, 2007, a fire erupted and quickly engulfed Building 8 of the Verdant at Village Green apartment complex, located at 26800 Amhearst Circle in Beachwood, Ohio. After several hours, the Beachwood Fire Department, with mutual aid from surrounding communities, extinguished the fire. All the residents escaped unharmed, but there was considerable property damage, and Building 8 was ultimately demolished.

{¶3} Immediately following the fire, the Beachwood Fire and Police Departments, the State Fire Marshall’s office, as well as professional fire investigators began investigating the cause of the fire. Collectively, they evaluated the scene, took photographs, and spoke to witnesses and residents to ascertain the cause of the fire.

{¶4} The occupants of Suite 310 indicated that they smelled a camp-like odor around 1:00 p.m. the day before and notified the maintenance department of the smell of smoke. Around 9:00 p.m., Beachwood fire and police responded to

¹See appendix.

Suite 310, but could not locate the source of the odor. The occupant of Suite 210 indicated that she smelled a barbeque or campfire odor around 8:30 p.m. the night before the fire. The occupant of Suite 110 indicated that her lights were flickering on and off around 10:30 p.m. the night before the fire and at approximately 11:15 p.m., she smelled the odor of burning tar. Most of the other residents of Building 8 reported unresolved electrical and maintenance issues with the building.

{¶5} As part of the investigation, the Beachwood Fire Department retained Ralph Dolence (“Dolence”), a fire investigator and electrical expert, to assist in their investigation. Dolence, who had previously been retained to investigate a fire in 2004 that destroyed Building 3 of the same apartment complex, ruled out arson or accelerants as causes of the fire, which was supported by the other investigators.

{¶6} Following his investigation, Dolence determined that the fire originated in the interstitial space between the floor and ceiling space of Units 210 and 310, and that there was no fire internally in Units 110, 210, and 310. Dolence concluded that the fire was caused by faulty electrical wiring contaminated by water leaks within the building. Dolence’s conclusion was in keeping with that of the Beachwood Fire Department.

{¶7} On September 26, 2008, Carlos Sivit (“Sivit”), along with ten other residents who lost most of their personal belongings and were displaced when

Building 8 was demolished, filed a complaint against several entities including Village Green and FCRM, the managers of the developers and owners of the apartment complex, alleging that negligence or gross negligent construction and maintenance of the building caused the fire.

{¶8} Sivit also brought a cause of action for breach of lease alleging that Village Green had failed to maintain Building 8 and the mechanical devices therein in a clean, safe, and working condition. Sivit further alleged that throughout the course of the lease, Village Green and FCRM failed to perform building repairs within a reasonable time that were of an emergency in nature, including electrical faults and other fire hazards.

{¶9} On December 16, 2011, after a two-week trial, the jury rendered a verdict in favor of Sivit and awarded compensatory damages of \$582,328. The jury also awarded punitive damages in the amount of \$2,000,000. In addition, the trial court awarded attorney fees in the amount of \$1,040,000 to Sivit's attorneys. Village Green and FCRM now appeal.

**Directed Verdict, Negligent Maintenance, and
Negligent Construction**

{¶10} We will address assigned errors 1 and 5 together because they both contend the trial court erred when it denied the motion for directed verdict on Sivit's claims of negligent maintenance and construction.

{¶11} The standard of appellate review on a motion for directed verdict is de novo. *Loreta v. Allstate Ins. Co.*, 8th Dist. No. 97921, 2012-Ohio-3375, citing *Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 90, 509 N.E.2d 399 (1987). This court is to construe the evidence presented most strongly in favor of the nonmoving party and, after so doing, determine whether reasonable minds could only reach a conclusion that is against the nonmoving party. *Titanium Indus. v. S.E.A. Inc.*, 118 Ohio App.3d 39, 691 N.E.2d 1087 (7th Dist.1997), citing *Byrley v. Nationwide Ins. Co.*, 94 Ohio App.3d 1, 640 N.E.2d 187 (6th Dist.1993), *appeal not accepted*, 70 Ohio St.3d 1441, 638 N.E.2d 1044 (1994).

{¶12} An appellate court does not weigh the evidence or test the credibility of the witnesses. *Id.* In considering the motion, this court assumes the truth of the evidence supporting the facts essential to the claim of the party against whom the motion is directed, and gives to that party the benefit of all reasonable inferences from that evidence. *Becker v. Lake Cty. Mem. Hosp. W.*, 53 Ohio St.3d 202, 206, 560 N.E.2d 165 (1990), citing *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 68, 430 N.E.2d 935 (1982).

{¶13} To prevail in a negligence action, the plaintiff must show (1) the existence of a duty, (2) a breach of that duty, and (3) an injury proximately resulting from the breach. *Mann v. Northgate Investors L.L.C.*, 10th Dist. No. 11AP-684, 2012-Ohio-2871, citing *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 21. At common law, a landlord was charged with

a general duty to exercise reasonable care to keep the premises retained in his control for the common use of his tenants in a reasonably safe condition. *Mullins v. Grosz*, 10th Dist. No. 10AP-23, 2010-Ohio-3844, ¶ 23.

{¶14} In 1974, the Ohio General Assembly modified the common law regarding landlords and tenants when it “enacted R.C. 5321.01 et seq., the Landlord-Tenant Act, in an attempt to clarify and broaden tenants’ rights as derived from common law.” *Mullins* at ¶ 23.

{¶15} In *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20, 427 N.E.2d 774 (1981), the Supreme Court of Ohio held that a landlord is liable for injuries sustained on leased premises that are proximately caused by the landlord’s failure to fulfill the duties imposed by R.C. 5321.04(A), which provides, in pertinent part:

(A) 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;

*** * ***

(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 him[.]

{¶16} A landlord's violation of the duties imposed by Ohio's Landlord-Tenant Act constitutes negligence per se. *Allstate Ins. Co. v. Henry*, 12th Dist. No. CA2006-07-168, 2007-Ohio-2556, ¶ 9, citing *Sikora v. Wenzel*, 88 Ohio St.3d 493, 2000-Ohio-406, 727 N.E.2d 1277, syllabus. With negligence per se, proof of a landlord's violation of the statute dispenses with the plaintiff's burden to establish the existence of a duty and the breach of that duty. *Henry* at ¶10; *Chambers v. St. Mary's School*, 82 Ohio St.3d at 563.

{¶17} However, negligence per se does not equate to liability per se, as it does not dispense with the plaintiff's obligation to prove the landlord's breach was the proximate cause of the injury complained of, nor does it obviate the plaintiff's obligation to prove the landlord received actual or constructive notice of the condition causing the statutory violation. *Packman v. Barton*, 12th Dist. No. CA2009-03-009, 2009-Ohio-5282, citing *Turner v. Tiemeyer*, 12th Dist. No. CA95-08-053, 1996 Ohio App. LEXIS 428, *3 (Feb. 12, 1996); *Henry* at ¶ 11. In turn, landlords will be excused from liability where they "neither knew nor should have known of the factual circumstances that caused the violation." *Mounts v. Ravotti*, 7th Dist. No. 07 MA 182, 2008-Ohio-5045, ¶ 30, quoting *Sikora*, 88 Ohio St.3d at 498.

{¶18} In the instant case, the record reveals that Village Green and FCRM's collective violation of the duties imposed by Ohio's Landlord-Tenant Act proximately caused the fire. As it relates to the claim of negligent maintenance,

numerous tenants gave statements regarding various maintenance issues with Building 8 to the on-scene investigators at the time of the fire. Several of these tenants testified at trial, but in the interest of brevity, the recurrent element can be summed up in the testimony of Detective Don Breckenridge of the Beachwood Police Department. Detective Breckenridge investigated the 2004 fire in Building 3 as well as the 2007 Fire in Building 8. Detective Breckenridge testified in pertinent part about the 2004 and 2007 fires, as follows:

Q. Without repeating exactly what those tenants and witnesses said to you, was there a consensus or general theme behind the complaints or statements that you received?

A. Yes. It seemed to be a consensus of opinion that most problems with electrical surges; lights flashing off and on, lights dimming. There were reports of people who could hear water running between the walls, mildew, light bulbs flashing real bright then dim, and then finally going out; numerous fire alarms, false fire alarms.

Q. Okay. Detective, did you then have an opportunity, in 2007, to investigate the fire that took place in the same location but a different building?

A. Yes.

Q. The general responses or theme was what, Detective?

A. Power surges, lights dimming, lights flashing off and on, light bulbs blowing out, mildew, water in the walls, elevator not working.

Q. Okay. And how did that compare with those that you had investigated and found out in your investigation in the 2004 fire?

A. They seemed very much the same to me. Tr. 1305-1307.

{¶19} In addition to the tenants' maintenance concerns, as illuminated in Detective Breckenridge's testimony above, Michael Farlow, Village Green's former maintenance supervisor, who moved out of Building 8 shortly before the fire, testified in conformity with the tenants, as follows:

Q. * * * Okay. At some time after you moved out, did the police ever contact you about the fire in the building?

A. Yes, they did.

Q. Okay. What was the purpose of their contacting you?

A. They wanted to know if I knew any information prior — or about the building since I was the most recent Maintenance Supervisor, because I don't think at the time they filled my position yet.

Q. Okay. What was your reaction to the news of the fire?

A. To be frank, I wasn't surprised.

*** * ***

Q. What did you tell the police officers at that time?

A. Well, that was like four years ago but I — like I said, I told them I wasn't surprised. I think he may have asked me why I said that, and I think I just said because there was a lot of water problems in that building, also with water and electrical problems downstairs in the parking garage.

Q. Okay. Did you mention anything to them about your characterization of the building as a whole?

A. I would say, to the best of my knowledge — like I said, I don't really recall the whole report, but I probably said it was waterlogged.

Q. And what did you mean by that?

A. With the siding especially and the roof problems with the vents and everything, there was a lot of water inside the walls; a lot of water infiltrating the building, especially a lot in the basement so —

Q. And so you could see visible water infiltrating inside the apartment building?

A. Oh, yes, absolutely. Tr. 416-418.

{¶20} Further, the record reveals that sometime in 2006, Forest City Enterprise ("FC") acquired a full interest in Village Green. Prior to the purchase, Rod Brannon, FC's Vice President of Engineering, conducted a due diligence inspection of the property. At trial, Brannon testified that the buildings needed a lot of work due to the lack of preventative maintenance and because of deferred maintenance. (Tr. 248.) Brannon testified that Building 8 needed a lot of work, admitted that he was aware of the 2004 fire in Building 3, but indicated that the purpose of his due diligence inspection was to justify a low bid offer for the property. Tr. 253-254.

{¶21} Subsequent to Brannon's inspection, the city of Beachwood housing department inspected the properties and specifically noted numerous violations in Building 8. The city inspector notified Village Green in writing of the numerous violations and advised them to refrain from renting the property until the violations were corrected, reinspected, and certified by the city. However, the record reveals that Village Green continued to rent out units in Building 8 despite not addressing the city's concerns.

{¶22} Pivotaly, Dolence, who as previously noted, investigated the 2004 fire in Building 3, was present at the site during the fire, testified that the 2007 fire in Building 8 was caused by faulty electrical wiring contaminated by water leaks within the building. Dolence specifically stated:

Water is very significant in a fire. It was the cause of this fire. If you have an electrical issue — we talked about resistance heating, we talked about arc tracking. Many of them are stimulated arc tracking; specifically by water and moisture. You could have an electrical fault if — you know, it can sit there forever or a code violation. If something doesn't stimulate it or a catalyst to induce it, nothing is going to happen. That's my opinion. And it's always been my opinion that it's been the water ingress contributed with or linked with poor wiring. That was the cause of this fire and the physical evidence in my opinion showed that. Tr. 1187-1188.

{¶23} Here, the testimony adduced at trial, through previous tenants and previous employees of Village Green and FCRM, as well as the city of Beachwood's Housing Inspection Department, along with fire investigator

Dolence, clearly established that Building 8 was in a general state of disrepair. Said testimonies also established that electrical and water infiltration issues noted as the cause of the fire in Building 8 paralleled the findings of the 2004 fire in Building 3.

{¶24} Of prime importance, said testimonies established that Village Green and FCRM knew or should have known of the complained-of conditions that caused the fire in Building 8. As such, Village Green and FCRM cannot be excused from liability under the duties imposed by R.C. 5321.04(A)(1) or 5321.04(A)(2). Consequently, the trial court properly denied Village Green and FCRM's motion for directed verdict on Sivit's negligent maintenance claim.

{¶25} We now turn our attention to Village Green's contention that Sivit's negligent construction claim should not have survived a motion for directed verdict.

{¶26} At trial, Dolence testified at length about his investigation, including presenting a slide presentation that showed numerous pictures of Building 8. Dolence testified that during his investigation, he observed numerous national electrical code violations and shoddy workmanship. Dolence stated that he observed numerous examples of unsecured feeder cables, wires double stapled, and wires pulled up against metal gusset plates with insulation damage. Ultimately, Dolence pinpointed the root source of the fire to three wires under the

living room floor of Unit 310. We conclude, Sivit established that Building 8 was negligently constructed.

{¶27} However, Village Green claims that liability should not have been attached because it hired independent contractors for the construction of the property. We are not persuaded.

{¶28} A landlord may not shift the responsibility to an independent contractor of complying with laws designed for the physical safety of others. *Shump v. First Continental-Robinwood Assn.*, 71 Ohio St.3d 414, 1994-Ohio-427, 644 N.E.2d 29. Such duties are not delegable. *Id.*, citing Restatement of the Law 2d, Property, Section 19.1. The record indicates that throughout the construction of the property, Village Green was the developer and maintained oversight on the project. We have previously held that a developer of a condominium project is liable for construction defects, notwithstanding the fact a general contractor was hired to perform the construction work. *See Point E. Condo. Owners' Assn. v. Cedar House Assn. Co.*, 104 Ohio App.3d 704, 663 N.E.2d 343 (8th Dist. 1994). Accordingly, we overrule the first and fifth assigned error.

{¶29} Based on the foregoing, the trial court properly denied Village Green's motion for directed verdict on Sivit's negligent construction claim. Accordingly, we overrule the first and fifth assigned errors.

Manifest Weight of Evidence and Negligent Maintenance

{¶30} In the second assigned error, Village Green and FCRM argue the judgment on Sivit's negligent maintenance claim was against the manifest weight of the evidence.

{¶31} In *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, the Ohio Supreme Court recently clarified the standard of review appellate courts should apply when assessing the manifest weight of the evidence in a civil case. The Ohio Supreme Court held the standard of review for manifest weight of the evidence for criminal cases stated in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, is also applicable in civil cases. *Eastley* at ¶ 17-19.

{¶32} A reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine "whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered." *Eastley* at ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001); see also *Sheet Metal Workers Local Union No. 33 v. Sutton*, 5th Dist No. 2011CA00262, 2012-Ohio-3549, citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶33} In the instant case, as discussed in detail in the first and fifth assigned error, we found the evidence presented at trial through the testimony of Building 8's tenants, former employees of Village Green and FCRM respectively, Detective Breckenridge, and Dolence, clearly established that the property was negligently maintained. In the face of the overwhelming evidence in the record regarding the state of disrepair of Building 8, we cannot conclude that the jury lost its way and created a manifest miscarriage of justice. Accordingly, we overrule the second assigned error.

Admission of Evidence and 2004 Fire

{¶34} In the third assigned error, Village Green and FCRM argue the trial court erred by admitting evidence of the 2004 fire in Building 3.

{¶35} The admission or exclusion of evidence is a matter within the trial court's discretion and will be reversed only for an abuse of that discretion. *Robertson v. Mt. Carmel E. Hosp.*, 10th Dist. No. 09AP-931, 2011-Ohio-2043, ¶ 27, citing *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683 ¶ 9. An abuse of discretion requires more than an error of law or judgment; it connotes that the court's attitude is unreasonable, unconscionable, or arbitrary. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). For evidence to be admissible, it must be relevant. *Pazin v. Pazin*, 7th Dist. No. 07-CO-43, 2008-Ohio-6975; Evid.R. 402. Evidence is relevant if it has any

tendency to make the existence of any fact that is of consequence in the determination of an action more or less probable. *Id.*; Evid.R. 401.

{¶36} In the instant case, as previously discussed, the cause of the 2004 fire in Building 3 was identical to the cause of the 2007 fire in Building 8. Detective Breckenridge, who investigated both fires, testified that the tenants' complaints regarding electrical and water problems were substantially the same. Dolence testified that the same factors caused both fires. Specifically, after the 2004 fire in Building 3, Dolence concluded that it originated in the interstitial space between the floor and ceiling of units 311 and 211. Likewise, and as previously stated, Dolence concluded that the 2007 fire in Building 8 originated in the interstitial space between the floor and ceiling of units 210 and 310.

{¶37} Here, introduction of evidence relating to the fire in 2004 was relevant to the claims of negligent construction and maintenance. In addition, it was relevant to show that Village Green and FCRM were on notice of the conditions leading to the 2007 fire in Building 8. As such, the trial court did not abuse its discretion in admitting evidence of the 2004 fire in Building 3. Accordingly, we overrule the third assigned error.

**Jury Instruction, Negligent Maintenance,
and Negligent Construction**

{¶38} We will address assigned errors 4 and 6 together because they both contend the trial court erroneously instructed the jury on Sivit's negligent maintenance and construction claims.

{¶39} When considering the appropriateness of a jury instruction, or when a specific jury instruction is in dispute, a reviewing court must examine the instructions as a whole. *Withers v. Mercy Hosp. of Fairfield*, 12th Dist. No. CA2010-02-033, 2010-Ohio-6431, citing *Enderle v. Zettler*, 12th Dist. No. CA2005-11-484, 2006-Ohio-4326; *Coyne v. Stapleton*, 12th Dist. No. CA2006-10-080, 2007-Ohio-6170.

{¶40} Taken in their entirety, when the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled. *Wozniak v. Wozniak*, 90 Ohio App.3d 400, 410, 629 N.E.2d 500 (9th Dist.1993), citing *Ohio Farmers' Ins. Co. v. Cochran*, 104 Ohio St. 427, 135 N.E. 537 (1922).

{¶41} Moreover, misstatements and ambiguity in a portion of the instructions will not constitute reversible error unless the instructions are so misleading that they prejudicially affect a substantial right of the complaining party. *Wozniak* at 410. *Silver v. Jewish Home of Cincinnati*, 190 Ohio App.3d 549, 2010-Ohio-5314, 943 N.E.2d 577 (12th Dist.).

{¶42} In the instant case, the evidence presented at trial on the issues of negligent maintenance and construction was exhaustive. The record indicates that the trial court's jury instructions comported with the evidence presented. As such, we find no merit to Village Green and FCRM's contention. Accordingly, we overrule the fourth and sixth assigned errors.

Damages

{¶43} In the seventh assigned error, Village Green and FCRM argue the trial court erred when it allowed seven plaintiffs to each recover an additional \$5,000 in damages that had not been previously included on the property inventory.

{¶44} We first note that the assessment of damages is a matter within the province of the jury. *Retina Assn. of Cleveland v. Smith*, 11th Dist. No. 2002-T-0170, 2003-Ohio-7188, citing *Weidner v. Blazic*, 98 Ohio App.3d 321, 334, 648 N.E.2d 565 (12th Dist.1994). Therefore, to prevail on a motion for a new trial based on the jury's assessment of damages, the moving party must demonstrate that the verdict was the result of jury passion or prejudice and that it was so disproportionate in amount as to shock reasonable sensibilities. *Id.*

{¶45} In the instant case, the jury awarded each plaintiff the additional \$5,000 to cover the loss of miscellaneous household items that had not been previously itemized. Under the circumstances, where you have lost all your personal belongings and invariably do not remember certain items until much

later, \$5,000 is hardly a sum that would shock reasonable sensibilities. Nonetheless, Village Green and FCRM contend the trial court erred in allowing the additional amount.

{¶46} A reviewing court generally will not reverse a trial court's decision regarding its determination of damages absent an abuse of discretion. *Kaufman v. Byers*, 159 Ohio App.3d 238, 2004-Ohio-6346, 823 N.E.2d 530 (11th Dist.), citing *Williams v. Kondziela*, 11th Dist. No. 2002-L-190, 2004-Ohio-2077, citing *Roberts v. United States Fid. & Guar. Co.*, 75 Ohio St.3d 630, 634, 1996-Ohio-101, 665 N.E.2d 664 (1996).

{¶47} Here, we find no evidence that the trial court exhibited an unreasonable, arbitrary, or unconscionable attitude in allowing the additional \$5,000 per plaintiff to stand. *Blakemore, supra*. Accordingly, we overrule the seventh assigned error.

Punitive Damages

{¶48} In the eighth assigned error, Village Green argues the trial court erred by including the issue of punitive damages in the trial.

{¶49} The decision whether to award punitive damages is within the trial court's discretion and, absent an abuse of discretion, the court's ruling will be upheld. *Kemp v. Kemp*, 161 Ohio App.3d 671, 2005-Ohio-3120, 831 N.E.2d 1038 (5th Dist.). Ohio law provides that an award of punitive damages is available

only on a finding of actual malice. *Berge v. Columbus Community Cable Access*, 136 Ohio App.3d 281, 316, 736 N.E.2d 517 (10th Dist.1999).

{¶50} The “actual malice” necessary for purposes of an award of punitive damages has been defined as “(1) that state of mind under which a person’s conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.” *Id.*, quoting *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), at syllabus.

{¶51} As discussed throughout, the testimony presented at trial established that Village Green consciously ignored the severe state of disrepair of Building 8, despite being presented with glaring evidence. Village Green totally disregarded the rights and safety of its tenants. The tenants had a litany of electrical and water-related complaints that remained unaddressed.

{¶52} As such, Village Green’s inaction was sufficient to support a finding of malice to justify awarding punitive damages. Consequently, the trial court did not err in allowing the claim for punitive damages to be submitted to the jury. Accordingly, we overrule the eighth assigned error.

Punitive Damages and Manifest Weight of the Evidence

{¶53} In the ninth assigned error, Village Green argues the award of punitive damages was against the manifest weight of the evidence.

{¶54} Punitive damages are intended to deter conduct resulting from a mental state that is so callous in its disregard for the rights and safety of others that society deems it intolerable. *Gold Craft Co. v. Egbert's Constr. & Remodeling, L.L.C.*, 10th Dist. No. 09AP-448, 2010-Ohio-3741, citing *Ward v. Hengle*, 124 Ohio App.3d 396, 405, 706 N.E.2d 392 (9th Dist.1997), quoting *Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St.3d 470, 473, 575 N.E.2d 416 (1991). A party seeking punitive damages has the burden of proving by clear and convincing evidence that it is entitled to them. *Cabe v. Lunich*, 70 Ohio St.3d 598, 601, 1994-Ohio-4, 640 N.E.2d 159.

{¶55} As discussed in the preceding assigned error, the issue of punitive damages was properly allowed to go to the jury. As previously stated, Village Green totally disregarded the rights and safety of its tenants by failing to address the electrical and water infiltration issues that were brought to their attention through tenants' complaints, previous employees, the city inspector, and the 2004 fire in Building 3.

{¶56} We conclude, the plaintiffs carried their burden of proving by clear and convincing evidence that they were entitled to punitive damages. Accordingly, we overrule the ninth assigned error.

Punitive Damages and Cap

In the tenth assigned error, Village Green argues the trial court erred when it failed to cap the award of punitive damages. Specifically, Village Green argues

that R.C. 2315.21 required the trial court to limit the punitive damages award to an amount that was two times the compensatory damages.

{¶57} The recovery and determination of punitive damage awards is addressed in R.C. 2315.21 and states in pertinent part as follow:

“(A) As used in this section: (1) “Tort action” means a civil action for damages for injury or loss to person or property. “Tort action” includes a product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.”

{¶58} Initially, we note, a plain reading of the statute reveals that the Ohio General Assembly specifically exempted civil actions for damages in contract when it stated the following: “but does not include a civil action for damages for breach of contract or another agreement between the parties.” In construing a statute, a court’s paramount concern is the legislative intent in enacting the statute. *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 1999-Ohio-361, 704 N.E.2d 1217. To this end, we must first look to the statutory language and the “purpose to be accomplished.” *Id.* In assessing the language employed by the General Assembly, the court must take words at their usual, normal, or customary meaning. Most important, it is the court’s duty to “give effect to the words used and to refrain from inserting words not used.” *Id.*

{¶59} Because Landlord-Tenant agreements are contractual in nature and injurious conduct arising out of the contract is not a tort action, as defined above,

but “another agreement between the parties,” we agree with the trial court and hold as a matter of law that this action is not subject to R.C. 2315.21. The trial court specifically invoked this provision when it denied Village Green’s motion to invoke R.C. 2315.21 and cap the punitive damages awarded.

{¶60} In the instant case, plaintiffs sued Village Green for violating the statutory duties imposed under R.C. 5321.04, Ohio’s Landlord-Tenant Act. The jury found that Village Green, the landlord, breached its duties imposed by the statute and as such breached the rental agreement between the parties. Of note, the only relationship between Village Green and the individual plaintiffs is that borne out in the rental agreement — specifically, Village Green’s promise to fulfill the duties imposed by R.C. 5321.04(A) and the plaintiffs-tenants’ duty to, but not limited to, pay the rent on time. As such, said rental agreement is a “* * * contract or another agreement between persons,” as defined above.

{¶61} As previously discussed at length in the first and fifth assigned errors, the jury found that Village Green breached the duty created by Section 5321.04 by failing to keep the premises in a fit and habitable condition, failing to keep all common areas of the premises in a safe and sanitary condition, and failing to maintain in good and safe working order and condition all electrical fixtures required to be supplied by them. The jury further found that Village Green demonstrated a reckless disregard for the rights and safety of these

tenants, the plaintiffs herein, and awarded punitive damages in accordance with that finding. Tr. 2564-2565.

{¶62} We are mindful that punitive damages are generally not recoverable in a breach of contract action. *Mabry-Wright v. Zlotnik*, 165 Ohio App.3d 1, 2005-Ohio-5619, 844 N.E.2d 858 (3d Dist.), citing *Digital & Analog Design Corp. v. N. Supply Co.*, 44 Ohio St.3d 36, 540 N.E.2d 1358 (1989). However, punitive damages are recoverable in a civil action alleging a breach of contract where the conduct constituting the breach is also a tort for which punitive damages are recoverable. *Unifirst Corp. v. Yusa Corp.*, 12th Dist. No. CA2002-08-014, 2003-Ohio-4463. Here, Village Green breached the contractual agreement by negligently maintaining Building 8.

{¶63} We also find that the trial court's reliance on *Kramer Consulting, Inc. v. McCarthy*, S.D. Ohio No. C2-02-116, 2006 U.S. Dist. LEXIS 12857 (Mar. 8, 2006), was not misplaced. In *Kramer*, the district court held that the definition of "tort action" outlined in R.C. 2315.21 did not apply to R.C. 1701.59, which governed the breach of fiduciary claim at issue.

{¶64} In addition, we remain reliant on our determination in *Luri v. Republic Servs.*, 193 Ohio App.3d 682, 2011-Ohio-2389, 953 N.E.2d 859 (8th Dist.), *rev'd on other grounds*, 132 Ohio St.3d 316, 2012-Ohio-2914, 971 N.E.2d 944, that R.C. 2315.21 applies to retaliatory discharge actions brought under R.C. Chapter 4112, and that the trial court was required to apply its provisions

if appropriately asked. *Id.* Unlike *Luri*, in the present action, it is Village Green's noncompliance with the Landlord-Tenant Act and the duties that arise from the rental agreement that formed the basis of plaintiffs's negligence action. In *Luri*, there was no semblance of "another agreement between the parties." As such, R.C. 2315.21 does not apply to the punitive damages recovered in the instant case.

{¶65} We conclude that in enacting R.C. 2315.21, the General Assembly was mindful that when parties agree in writing to a code of conduct, the legislature will not adjust or interfere in the parties' agreement. As such, when Village Green, the landlord, agreed to certain defined conduct, imposed by R.C. 5321.04(A), and plaintiffs-tenants agreed, among other things, to pay their rents on time, the intent of the legislature is not to interfere with the parties' contracts nor bring their agreement under the purview of R.C. 2315.21.

{¶66} Unlike an action where the parties have no agreement, but instead, the legal relationship is defined solely by the tortious conduct of the wrongdoer, such as in *Luri*, then R.C. 2315.21 would be applicable to cap a punitive damages award. Under the circumstances, the trial court did err when it denied Village Green's request to cap the punitive damages award. Accordingly, we overrule the tenth assigned error.

Attorney Fees

{¶67} In the eleventh assigned error, Village Green argues the trial court abused its discretion in the amount of attorney fees it awarded.

{¶68} Initially, we note, attorney fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted. *See, e.g., Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461, 644 N.E.2d 397.

{¶69} In the preceding assigned error, we concluded that the trial court did not err by refusing to limit the punitive damages award to twice the amount of the compensatory damages. The record reveals that plaintiffs' counsel was operating under a contingent fee basis. Specifically, the contingent fee was 40 percent of the amount recovered. The trial court awarded plaintiffs' attorney \$1,040,000 in fees or 40 percent of the approximately \$2,600,000 that plaintiffs received in compensatory and punitive damages.

{¶70} The record reveals that plaintiffs' counsel submitted an unchallenged lodestar calculation to justify the fees. The United States Supreme Court has prescribed the "lodestar" method for calculating reasonable attorney fees, which requires a multiplication of the "number of hours reasonably expended on the litigation times a reasonable hourly rate." *See Blanchard v. Bergeron*, 489 U.S. 87, 94, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989), quoting *Blum v. Stenson*, 465 U.S. 886, 888, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The lodestar is strongly

presumed to yield a “reasonable” fee. See *Burlington v. Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992).

{¶71} “Reasonable fees” are to be calculated according to the prevailing market rates in the relevant community, taking into consideration the experience, skill, and reputation of the attorney. See *Blum*, 465 U.S. at 895.

“To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence — in addition to the attorney’s own affidavits — that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.”
Id. at 896.”

{¶72} In the instant case, the trial court was mindful that the lawsuit was filed in 2008, involved extensive investigation and discovery, and involved a 10-day jury trial followed by significant post-verdict motions. The trial court also heard testimony that Village Green sent plaintiffs’ attorney 42 disorganized banker boxes of construction documents, maintenance records, and public records that had to be sifted through by the firm’s paralegal. Further, the trial court considered that plaintiffs’ counsel undertook the case on a contingent fee basis, expending time and resources, with no guarantee of success.

{¶73} Based on the aforementioned, we conclude that the trial court did not err in the amount of attorney fees awarded. Accordingly, we overrule the eleventh assigned error.

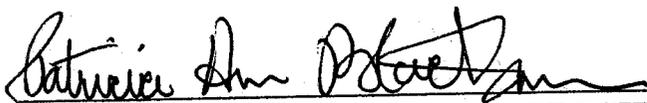
{¶74} Judgment affirmed.

It is ordered that appellees recover from appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



PATRICIA ANN BLACKMON, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
SEAN C. GALLAGHER, J., CONCUR

APPENDIX

Assignments of Error

I. The Trial court erred in denying defendants' motion for directed verdict with respect to plaintiffs' claim for negligent maintenance.

II. The judgment against each defendants with respect to negligent maintenance was contrary to the manifest weight of the evidence.

III. The trial court erred in allowing the jury to consider evidence relating to the 2004 fire in Building 3.

IV. The trial court erred in instructing the jury with respect to plaintiffs' negligent maintenance claim.

V. The trial court erred in denying Village Green of Beachwood's motion for directed verdict with respect to plaintiffs' claim for negligent construction of Building 8.

VI. The trial court erred in instructing the jury that defendant Village Green of Beachwood was strictly liable for any negligence in the construction of Building 8.

VII. The trial court erred in allowing seven plaintiffs to each recover \$5000 more than the amount of damages that they testified to at trial.

VIII. The trial court erred in allowing plaintiffs' claim for punitive damages to go to the jury.

IX. The judgment against defendant Village Green of Beachwood for punitive damages was contrary to the manifest weight of the evidence.

X. The trial court erred in refusing to "cap" the award of punitive damages as required by R.C. 2315.21(D)(2)(a).

XI. The trial court erred in its determination of the amount of attorney fees to be awarded to plaintiffs.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

CARLOS SIVIT, ET AL.

Appellee

COA NO.
98401

LOWER COURT NO.
CP CV-671776
CP CV-674795
CP CV-701195
CP CV-706333
CP CV-707545

COMMON PLEAS COURT

-VS-

VILLAGE GREEN OF BEACHWOOD, LP, ETAL

Appellant

MOTION NO. 461975

Date 03/05/13

Journal Entry

Application by Appellants for en banc consideration is denied. See separate journal entry of this same date.

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CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By [Signature] Deputy

[Signature]
MELODY J. STEWART
Administrative Judge

COPIES MAILED TO COUNSEL FOR

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

Carlos Sivit, et al.

Appellees

COA NO.
98401

LOWER COURT NOS.
CP CV-671776, CV-674795,
CV-701195, CV-706333, and
CV-707545

COMMON PLEAS COURT

-vs-

Village Green of Beachwood, L.P., et al.

Appellants

MOTION NO. 461975

Date 03/05/2013

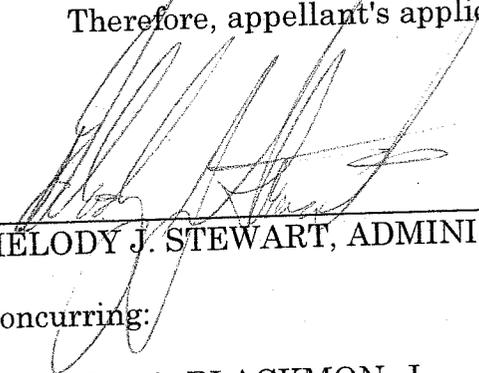
Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find no conflict between the panel's decision and *Luri v. Republic Servs.*, 143 Ohio App.3d 682, 2011-Ohio-2389, rev'd on other grounds, 132 Ohio St.3d 316, 2012-Ohio-2914. Each decision addressed the applicability of R.C. 2315.21 to a different kind of action. While appellant believes the two types of action were analogous, the panel did not.

We also find no conflict between the panel's decision and *Gonzales v. Spofford*, 8th Dist. No. 85231, 2005-Ohio-3415. The panel here did not base its award of attorney's fees solely or even primarily on the contingent fee agreement.

Therefore, appellant's application for en banc consideration is denied.



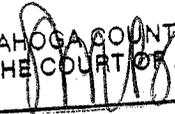
MELODY J. STEWART, ADMINISTRATIVE JUDGE

Concurring:

- PATRICIA A. BLACKMON, J.
- MARY J. BOYLE, J.,
- FRANK D. CELEBREZZE, JR., J.,
- EILEEN A. GALLAGHER, J.,
- EILEEN T. GALLAGHER, J.
- SEAN C. GALLAGHER, J.,
- LARRY A. JONES, J.,
- KATHLEEN ANN KEOUGH, J.,
- MARY EILEEN KILBANE, J.,
- TIM MCCORMACK, J., and
- KENNETH A. ROCCO, J.

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