

IN THE SUPREME COURT OF OHIO

CARLOS SIVIT, ET AL.,)	Case No. 2013-0586
)	
Appellees)	<i>On Appeal from the Eighth District</i>
)	<i>Court of Appeals, Cuyahoga County,</i>
v.)	<i>Ohio</i>
)	
VILLAGE GREEN OF BEACHWOOD,)	<i>Court of Appeals Case No. 98401</i>
L.P., ET AL.)	
)	
Appellants.)	

APPELLEES CARLOS SIVIT, ET AL.'S MEMORANDUM IN RESPONSE TO MEMORANDA IN SUPPORT OF JURISDICTION

JOSEPH W. DIEMERT, JR. (0011573)
 (Counsel of Record)
 receptionist@diemertlaw.com
 DANIEL A. POWELL (0080241)
 dapowell@diemertlaw.com
Diemert & Associates Co., L.P.A.
 1360 S.O.M. Center Road
 Cleveland, Ohio 44124
 Phone: (440) 442-6800
 Fax: (440) 442-0825

MARVIN L. KARP (0004852)
 (Counsel of Record)
 mkarp@ulmer.com
 LAWRENCE D. POLLACK (0042477)
 lpollack@ulmer.com
Ulmer & Berne L.L.P.
 Skylight Officer Tower, Suite 1100
 1660 West 2nd Street
 Cleveland, Ohio 44113
 Phone: (216) 583-7000
 Fax: (216) 583-7001

Counsel for Appellees
Carlos Sivit, Sonya Pace,
David Gruhin, Sidney Gruhin,
Jason Edwards, Renee Edwards,
Prathibha Marathe, Selvey Pangkey,
Mohammed Marwali, Hallie Gelb,
Natalie Rudd,, Luciana Armaganijan,
and Mitchell Rosenberg

Counsel for Appellants
Village Green of Beachwood, L.P. and
Forest City Residential Management, Inc.

RECEIVED
 MAY 13 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 MAY 13 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

JAMES MARX (0038999)
jmarx@shaperolaw.com
Signature Square 11, Suite 220
25101 Chagrin Boulevard
Beachwood, OH 44122
Phone: 216.831.5100
Fax: 216.831.9467

*Counsel for Appellee
Allstate Insurance*

JOSEPH FERRANTE (0040128)
ferranj@nationwide.com
323 Lakeside Avenue W.
Cleveland, OH 44113
Phone: 216.623.1155
Fax: 216.623.1176

*Counsel for Appellee
Nationwide Insurance*

ROBERT JAMES (0078761)
rjames@bricker.com
Bricker & Eckler, L.L.P.
1001 Lakeside Avenue E., Ste 1350
Cleveland, OH 444114
Phone: 216.523.5405
Fax: 216.523.7071

*Counsel for Appellee
State Farm Fire Casualty Ins.*

JEFFREY A. KALEDA (0069149)
Kaleda@m-r-law.com
2368 Victory Parkway
Suite 200, P.O. Box 45206
Cincinnati, OH 45206
Phone: 513-961-6200 ext. 309
Fax: 513-961-6200

*Counsel for Appellee
Safeco Insurance*

TABLE OF CONTENTS

	<u>Page</u>
APPELLEES' POSITION AS TO WHETHER THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF CASE AND FACTS.....	5
APPELLEES' ARGUMENT IN RESPONSE TO APPELLANTS' PROPOSITIONS OF LAW	
<u>Proposition of Law I</u>	8
<u>Proposition of Law II</u>	11
<u>Proposition of Law III</u>	13
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	16

**APPELLEES' POSITION AS TO WHETHER THIS CASE IS OF PUBLIC OR
GREAT GENERAL INTEREST**

Defendants-Appellants Village Green of Beachwood, L.P. (“VGOB”) and Forest City Residential Management, Inc. (“FCRM”) (collectively “Defendants”) submitted three propositions of law, none of which raise a question of public or great general interest. Two of the propositions (I and III) seek to disturb the jury’s findings of fact and the verdict reached following a lengthy trial and careful deliberations. The other proposition (II) seeks to judicially redefine the duties of landlords in Ohio already set by statute. All three propositions ask this Court to reverse a unanimous court of appeals panel decision rejecting Defendants’ arguments and affirming the verdicts, which the 12 judge En Banc panel unanimously declined to review. Moreover, propositions II and III are premised on misrepresentations of both the evidentiary record and rationale of the lower courts.

Defendants’ first proposition of law involves an elementary question of statutory construction. By its plain and unambiguous language, R.C. 2315.21 and the ‘tort caps’ it imposes simply cannot be applied to reduce the jury’s verdict. Indeed, this “civil action for damages for a breach of contract or another agreement between persons” is explicitly excluded from the ‘caps’ on damages set by R.C. 2315.21.

Ignoring the general rules of statutory construction and the obvious implication of the legislative language, Defendants resort to a ‘slippery slope’ argument which grossly over expands the lower courts’ reasoning beyond its logical limits, suggesting that the decisions below “drastically restrict” the cases in which R.C. 2315.21 can be applied. However, the lower courts simply and very specifically held that the ‘caps’ have no application to the claims brought in *this* case for the breach of the agreements required and attendant duties imposed by R.C. Ch. 5321.04. The General Assembly provided

clear limitations on the application of R.C. 2315.21's, and the lower courts honored those explicit and clear limitations in this case.

No Ohio court has determined R.C. 2315.21's provisions to be applicable to claims concerning the duties R.C. 5321.04 attaches to rental agreements. Moreover, the decision does not allow for limitless recovery of punitive damages as Defendants suggest. This Court is well aware that civil litigation defendants are entitled to bring due process challenges to excessive punitive damage awards, which Defendants have not.

The jury endured a two-week trial in which it heard an abundance of evidence demonstrating the absurd disregard Defendants had for the rights and safety of its tenants. The jury learned of the monetary savings Defendants accumulated while its rental property languished in a severe state of disrepair, with further knowledge that the Defendants' combined assets exceeded \$130,000,000.00. The jury heard testimony of the actual knowledge Defendants possessed of the severe and life-threatening dangers presented by the mixture of electrical faults and water leaks. The jury was made aware that this was the second electrical fire at the same complex over the course of three years, both resulting from the exact same construction assembly defects and lack of maintenance. The tenants all testified how they were forced to flee from their burning building in the pre-dawn hours, some barely escaping with their lives. In fact, due to the regularity of false fire alarms in the building (another result of the constant electrical irregularities), it is beyond fortunate that Plaintiff Prathibha Marathe and her young daughter, Ananya, ran through the building screaming "REAL FIRE!" after Ananya had awoken to an orange glow in her bedroom and rising flames outside her window. With all of the evidence in mind, the jury carefully deliberated and determined an amount

which would both properly punish the owner/landlord and have a deterring effect on other landlords in Ohio who choose to ignore the safety of their tenants.

The lower court decisions declining application of R.C. 2315.21¹ to this case were well reasoned and carefully detailed in the announced opinions. What Defendants now desire is for this Court to engage in some kind of guessing game as to legislative intent which leads to a different conclusion than a plain reading of the statute would allow. This Court should refuse to engage in such a pointless exercise and decline to accept jurisdiction over Defendants' first proposition of law.

Defendants' second proposition of law completely ignores the findings of the jury and basis for its award of punitive damages. The unequivocal law in Ohio is that the actual knowledge necessary to find malice may be inferred from the circumstances. Obviously, defendants do not admit when their actions demonstrate an evil spirit or a conscious disregard for the rights and safety of others. Utterly confounding and disturbing is how these Defendants continue to this day to argue that the notices provided were limited to the exterior maintenance issues. Indeed, it was these unrepaired exterior maintenance issues which allowed water to enter through the roof, siding, flashing, and windows and freely travel through the walls and ceilings where the electrical wiring was located. But Defendants would have this Court ignore the extensive record of witnesses who testified as to the electrical irregularities in the building and the notices given regarding those maintenance issues, including notices of electrical irregularities in the two suites between

¹ Earlier in the proceedings, Defendants had filed a motion to bifurcate the trial pursuant to R.C. 2315.21, which the trial court denied. Plaintiffs agreed to a bifurcation in exchange for a dismissal of the interlocutory appeal filed shortly after the trial court's ruling. Plaintiffs made this agreement in order to preserve the trial date and prevent further delay, but never acknowledged that R.C. 2315.21 was applicable to their case.

which the fire started. They also ignore the testimony of their own maintenance supervisor who provided key evidence as to Defendants' knowledge of these defects and management's unwillingness to expend the funds necessary to make the needed repairs. Most notably, Defendants make no mention of the hundreds of photographs and detailed testimony provided after the first fire in 2004 which detailed the poor wiring practices, code violations, and other construction assembly defects discovered in these buildings; the same undisputed expert evidence of the cause of the fire in this case.

If ever punitive damages were warranted due to a finding of actual malice for a landlord's failure to make necessary repairs, this is the case. The jury was properly instructed on the legal standards for actual malice and returned a verdict against VGOB (but not FCRM) for punitive damages. Given that VGOB was the developer (as confirmed by jury interrogatory), owned the property since before construction began, contracted directly with all of the trades, was the landlord at the time of the prior fire, and was a named party in the lawsuit following that prior fire, the jury's finding of actual malice was well supported by the evidence. The court of appeals thoroughly reviewed that finding. VGOB is not worthy of a 'third bite at the apple' by asking this Court to review the wealth of evidence demonstrating VGOB's conscious disregard for safety.

Finally, with regard to the issues identified relative to the general question of liability (proposition of law III), Defendants' entire argument is premised on the blatantly false notion that they had no notice of the mixture of electrical wiring defects and water leaks which caused the subject fire. Certainly, Defendants *claimed* at trial that they had no such knowledge, but the jury was properly instructed on R.C. 5321.04's 'notice' requirement and explicitly found that the same had been clearly satisfied. After a careful

review of the entire record, the appellate court correctly identified the notice requirement attached to R.C. 5321.04 and unanimously upheld the jury's verdict.

There is no absolute rule, nor should there be, that a landlord cannot be held liable when a dangerous, unrepaired condition exists behind a wall or another concealed space. These Defendants were well aware of the defective conditions which were shown by uncontested expert testimony to be the proximate cause of the fire. Defendants were aware of the mixing of electrical wiring defects and water leaks, that the conditions were caused by construction assembly defects and a lack of preventative maintenance, and that the conditions were worsening. They knew that the conditions were repairable, albeit costly, and were further aware that such conditions create an unreasonable fire hazard and were further still aware that these very same conditions had recently caused a fire of total destruction in another building in the same complex. Yet, with this abundance of notice, Defendants made no effort to make the necessary repairs and fulfill their duties, opting instead to spare every expense in order to increase their profit margin.

The jury properly disregarded Defendants' pleas of ignorance, witnessed the clear greed as opposed to concern for safety, and held them liable for the damages inflicted. This decision is not a matter of public or great general interest. Justice has been served.

STATEMENT OF THE CASE AND FACTS

The subject apartments were developed and owned by Defendant Village Green of Beachwood, L.P. ("VGOB") through a complex web of entities. The 2007 fire was the result of electrical wiring defects contaminated by water leaks. In 2004, a separate yet eerily identical electrical fire destroyed another building at the same complex. The resulting litigation involved essentially the same claims, defenses, and expert opinions

which were presented to the jury in this case. See Gilmore, et al. v. Village Green Mgt. Co., et al., 2008-Ohio-4556.

Following the 2004 fire, it was discovered that numerous tenants had reported constant electrical problems and other maintenance issues. Both public and private fire investigators determined that the fire had been sparked by an electrical fault caused from wiring defects contaminated by water leaks. These conditions were all well documented in the investigative reports and photographs disseminated shortly after the 2004 fire and during the course of the ensuing litigation, and found to be the cause of the fire.

In 2006, while the *Gilmore* litigation was still ongoing, Defendants purchased the balance of the partnership interest in VGOB from other partners and retained all on-site staff to carryover their duties relative to management and maintenance. Prior to the buy-out, Defendants performed a 'due diligence' inspection of the property. This inspection revealed a stunning "lack of preventative maintenance." Specific to Building 8, the inspection report acknowledged that "[w]e knew that we needed a lot of repairs[.]" The 2004 fire and ongoing litigation were also noted, along with an observation of "13 years of capital needs neglect." The final acquisition document included provisions for the complete indemnification of the sellers and a deduction of \$5.8 million from the agreed upon market value due to the abundance of unattended maintenance issues.

In addition to Defendants' own inspection, the City inspected the property in 2006 and identified several code violations specific to Building 8's state of disrepair. The City issued a letter identifying the violations "so that arrangements can be made to correct these conditions as soon as possible for the safety and well being of the community[.]" The notice further advised that the Defendants shall not rent or lease it until all repairs are

made and verified by the City. Despite acknowledging in its response to the City that that “the building was allowed to deteriorate due to the lack of preventative maintenance[,]” and assuring the City that the repairs would be made “as quickly as possible[,]” Defendants continued to rent the units and did not remedy the violations prior to the 2007 fire, keeping the \$5.8 million held back for its own profits. In fact, relative to the issues identified, management was instructed to not repair several items and to have contractors “only bid the obvious” on others.

Investigations into the 2007 fire were conducted by city personnel, the State Fire Marshall’s office, and other professional fire investigators, including Ralph Dolence, whom the City had also hired to investigate the 2004 fire. The exact same conclusions were reached with regard to cause and origin as was found with respect to the 2004 fire. The investigators observed and documented numerous electrical code violations largely identical to the observations noted in the reports, photographs, and testimony following the 2004 fire. The conclusion of a slow, smoldering electrical fire beneath unit #310 was further supported by the testimony of the occupant of unit #310, who related his observations of a burning smell in his unit the evening before the fire and notices he gave and attempted to give to Defendants and their employees regarding the suspicious odor.

The investigators also noted what was obvious to *all* witnesses – water infiltration was rampant and widespread. As Dolence had clearly explained following the 2004 fire, “[i]f a water problem persisted, a damp or wet environment at or about an electrical fault or failure would stimulate electrical conductivity, which could promote electrical activity at an electrical fault or failure.” Not surprisingly, Defendants never once mention in their brief to this Court any issue with water leaks. Instead, they grossly misrepresent

Dolence's opinions by continuing to harp on some single misdriven staple. In actuality, Dolence's **uncontradicted testimony was that, without a doubt ("100%"), this fire was caused by "faulty electrical wiring contaminated by water leaks."**

The City gathered the statements of numerous other tenants regarding various electrical and water infiltration problems which, following the 2004 fire, the City and other investigators had identified as conditions which dramatically increase the likelihood of an electrical fire. Notably, as confirmed by the police detective who obtained the statement following both fires, the complaints were *identical* to the issues reported by the tenants of Building 3 during the investigation of the 2004 fire.

Mike Farlow, the Defendants' former maintenance supervisor who had actually resided in Building 8, noted multiple unattended maintenance issues. He confirmed the numerous electrical irregularities, the shoddy construction practices, the lack of preventative maintenance, and Defendants' knowledge of the buildings state of disrepair. The tenants, including the occupants of unit #210 and #310, testified of similar observations about the disrepair and the notices provided to Defendants concerning electrical and water infiltration issues. Defendants 'produced' volumes of maintenance records, but the tenants confirmed that these 'records' were missing many of their complaints. Not a single tenant from the complex testified in support of Defendants.

APPELLEES' ARGUMENT IN RESPONSE TO PROPOSITIONS OF LAW

Response to Proposition of Law No. 1: The Lower Courts Properly Declined to Reduce the Jury Award through Application of R.C. 2315.21.

Section 2315.21 does not universally apply to every case in which punitive damages are properly awarded. The General Assembly clearly limited its application to "tort actions" as defined, in relevant part, in subsection (A)(1) as follows:

“Tort action” means a civil action for damages for injury or loss to person or property. “Tort action” * * * **does not include** a civil action for damages for a breach of contract or another agreement between persons. (Emphasis added).

Due to this unequivocal limiting language, the lower courts correctly ruled that R.C. 2315.21 could not be used by VGOB to reduce the jury’s punitive damages award.

The R.C. 5321.04 obligations applicable to a “landlord who is a party to a rental agreement” are “created by virtue of the rental agreement.” *Cotrell v. City of Piqua* (2 Dist.), 2001 WL 62811. The entire existence of these duties “rests on the privity of estate between [Landlord and Tenant] that their lease agreement creates.” *Robinson v. C&L Assoc.* (2 Dist.), 2010-Ohio-3118.

With respect to R.C. 5321.04, the indisputable “purpose of the statute is to protect persons using rented residential premises from injuries.” *Shroades*, supra, at 25. Any landlord who signs a rental agreement must ‘agree’ to fulfill, without exception, those non-delegable duties for the benefit of the tenant. Any breach of these duties would result in a civil action concerning an “agreement between persons” for which the General Assembly never intended to substitute its wisdom for that of the jury.

Defendants rely upon *Stewart v. Siciliano* (11 Dist.), 2012-Ohio-6123, which involved the question of whether the bifurcation provision of R.C. 2315.21 applied to a case involving claims against an insurance company for both breach of contract and the tort of bad faith. In *Stewart*, the Eleventh District initially noted that “[i]t is not apparent how the statute would apply in a hybrid case such as this one.” Despite acknowledging that “it would not be an unreasonable interpretation of the statute to conclude that *the entire case* is outside the contemplation of R.C. 2315.21(B)(1)” (emphasis in the original), the court ultimately found the separate bad faith claim, for which punitive

damages were awarded, to be within the contemplation of “tort action” as defined by R.C. Ch. 2315. The court’s analysis was limited to the specific law of bad faith claims against insurance companies, and did not expand its decision for the much more encompassing proposition of law Defendants seek to create in this case.

Nor does *Sherman v. Pearson* (1 Dist. 1996), 110 Ohio App.3d 70, a case which in no way addresses the application of R.C. 2315.21 to R.C. 5321.04 claims, support Defendants’ arguments. *Sherman* simply recognized that R.C. 5321.04 claims could be considered a compulsory counterclaim under Civ.R. 13(A) to a landlord’s action for forcible entry and detainer. But, as far as application to this case is concerned, the *Sherman* court *did* recognize that the tenant’s claim for damages “does not sound entirely in tort” and that “[i]t is therefore inaccurate to characterize Sherman’s personal injury claim as purely a tort claim.” The court further correctly noted “[t]he rental agreement... gave rise to the landlord’s statutory duty... [and the tenant’s] negligence action depends upon evidence that her landlord tortiously breached the statutory duties that the Landlord and Tenant Act attaches to the rental agreement.”

Applicable to the specific question presented in this case, the court in *Beaumont v. Albert* (12 Dist.), 2009-Ohio-6176 declined to apply the “caps” of R.C. 2315.21 to the punitive damages awarded to the appellee. The *Beaumont* court initially noted that punitive damages are generally not recoverable in an action involving breach of contract, as was presented. However, the court also acknowledged the well-settled law in Ohio that punitive damages *are* recoverable in a civil action alleging a breach of contract if “the conduct constituting the breach is also a tort for which punitive damages are

recoverable.” *Id.*, citing *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 381.

The court then reasoned:

* * * R.C. 2315.21, which governs the award of punitive damages in *tort actions*, is inapplicable to “a civil damage for a breach of contract or another agreement between persons.” Therefore, because Beaumont’s claim was a civil action for damages resulting from her breach of contract, R.C. 2315.21(D)(2)(b) is inapplicable.

Beaumont at ¶ 36 (emphasis in the original and internal citations omitted).

Similarly, the federal court in *Kramer Consulting, Inc. v. McCarthy* (S.D. Ohio Mar. 8, 2006) determined that R.C. 1701.59 claims for breach of fiduciary duties are not contemplated within the definition of “tort action” set forth in Tort Reform III. 2006 WL 581244. The courts in both *Beaumont* and *Kramer*, as well as the lower courts in this case, correctly limited their analysis to applying the plain language of the statute to the claims at issue. The statute has clear limitations as defined by the language selected by the General Assembly. Any other conclusion would expand the statute beyond its plain meaning and require an advisory opinion as to what the legislature actually intended. There can be no dispute that this case is a civil action for a breach of agreement between persons, and there can be no dispute that R.C. 2315.21 does not, in any circumstance, apply to such a case.

Response to Proposition of Law No. 2: The Jury Properly Awarded Punitive Damages after Finding that VGOB Acted with a Conscious Disregard for the Rights and Safety of its Tenants.

The existence of actual malice is uniquely a question of fact for the jury. *Osler v. Lorain* (1986), 28 Ohio St.3d 345. Deliberations on punitive damages were held due to Defendants’ conscious disregard for the safety of their tenants, and the likelihood that such disregard had a great probability of causing substantial harm. *Cf. Preston v. Murty*

(1987), 32 Ohio St.3d 334. Furthermore, because it is difficult to ascertain a tortfeasor's mental state, a finding of actual malice may be inferred from conduct and surrounding circumstances. See *Joyce-Couch v. DeSilva* (1991), 77 Ohio App.3d 278, 288.

The trial court correctly emphasized to the jury the strict standards required for an award of punitive damages. The jurors were instructed that a finding of actual malice was necessary and that the burden was on the Plaintiffs to show by clear and convincing evidence that VGOB and/or FCRM consciously disregarded the rights and safety of their tenants. The jury concluded that VGOB (but not FCRM) did in fact consciously disregard the dangers posed.

Defendants' reliance on *Malone v. Courtyard by Marriot, L.P.* (1996), 74 Ohio St.3d 440 is misplaced. *Malone* did not change the law in Ohio on the issue of punitive damages, "but rather is a rephrasing of the requirement set out in *Preston v. Murty*... that a party possess knowledge of the harm that might be caused by his behavior." *Pavrides v. Niles Gun Show, Inc.* (5 Dist. 1996), 112 Ohio App.3d 609.

Merriam-Webster dictionary defines 'conscious' as "perceiving, apprehending, or noticing with a degree of controlled thought or observation." 'Disregard' is defined as "to pay no attention to: treat as unworthy of regard or notice." Obviously, to consciously disregard a danger, one must possess actual knowledge of the danger.

The lengthy trial produced an abundance of evidence to support a finding that Defendants consciously disregarded code violations which materially affect health and safety; consciously disregarded their duty to make all repairs and do whatever is reasonably necessary to put and keep the residential premises in a fit and habitable condition, and consciously disregarded its duty to maintain in good and safe working

order the conditions in Building 8. The punitive damages awarded were in an amount determined appropriate as punishment for the malicious conduct and, perhaps more importantly, to deter similar disregard of statutory duties by Ohio landlords.

Response to Proposition of Law No.3: Appellants are Properly Liable under R.C. 5321.04 for their Failure to Correct Known Defects in the Electrical Wiring.

Plaintiffs do not and never have contended that R.C. 5321.04 is a strict liability statute. However, Revised Code § 5321.04 does indeed impose affirmative, non-delegable duties on all residential landlords in Ohio. This Court has noted “the public policy and drastic changes made by the statutory scheme of R.C. Chapter 5321” and the legal implications which follow:

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. A violation of a statute which sets forth specific duties constitutes negligence *per se*.

Shroades v. Rental Homes, Inc. (1981), 68 Ohio St.2d 20 at 25

Given the overwhelming abundance of evidence, Defendants wisely do not contest that a statutory violation occurred. Instead, Defendants premise their appeal on the unsupportable argument that they should be ‘excused’ for their neglect because they, allegedly, had no knowledge of the specific defect which caused the fire. However,

[t]he concept of ‘actual notice’ is not limited to notice that a specific condition exists and that it is harmful. ‘[I]f it appears that the party has knowledge or information of facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make an inquiry or having begun it fails to prosecute it in a reasonable manner, then, also, the inference of actual notice is necessary and absolute.’

Walker v. Barnett Mgmt., Inc. (8 Dist.), 2004-Ohio-6632 at ¶ 50.

Indeed, complaints of general electrical problems have routinely been found to be sufficient to satisfy the notice requirement of the Landlord-Tenant Act in cases involving fires at residential premises. *McKenzie v. Marlowe* (8 Dist.), 1996 WL 715502. “Notice * * * need not specifically express the state of the defect with particularity beyond the scope of a layperson’s knowledge of a faulty electrical system.” *Id.*, citing *Blakley v. Riley* (10 Dist.), 1992 WL 1163. The tenant is *not* required to provide the landlord with notice of the *exact* defect if the landlord had notice of and failed to address a defective condition with the electrical system. *McKenzie* at 5. Consequently, whether Defendants “knew of the precise source of the hazards in the electrical system or not, [they had] * * * sufficient notice to satisfy the *Shroades* test and attach liability under R.C. 5321.04.” *Id.* Other districts presented with similar cases have likewise concluded that notice of general electrical irregularities is sufficient to satisfy the *Shroades* standard. See *Wilhelm v. Heritage Mgmt. Co.* (12 Dist), 1998 WL 24342 (reasoning that “although [the tenants] did not know the precise source of the electrical system malfunctions, [the landlord] was provided with sufficient notice to... attach liability”); *Blakley v. Riley*, *supra* (complaints regarding electrical irregularities sufficient to satisfy notice requirement).

In this case, *at an absolute minimum*, Defendants were “aware of some defective condition which needed attention.” Defendants were given ample notice of electrical malfunctions through tenant complaints, maintenance staff reports, inspections, official notices of code violations, prior fire investigations, and their own observations. Their ‘due diligence’ inspection and report used to buy-out the former ownership partner revealed a lack of preventative maintenance and an abundance of deferred maintenance for which \$5.8 million was offset from the purchase price, yet Defendants did nothing to

correct the dangerous conditions. The notices which came in various forms were more than sufficient to put Defendants on 'actual' notice of the faulty electrical system and satisfy the notice requirement announced in *Shroades*.

Defendants' gross neglect cannot be excused by arguing that the final spark which caused the fire was in a concealed space. The evidence proved, and the jury concluded, that a great amount of causation was visible, not concealed. Regardless, what is "reasonably necessary" depends on the particular circumstances of each individual case and the law imposes no limitation on the burden that may accompany compliance with R.C. 5321.04. If the circumstances require an inspection of the wiring practices behind walls or even a rewiring of the entire residential premises, then that is exactly what the landlord must do for the safety of the tenants.

CONCLUSION

Based upon all of the foregoing, Appellees Carlos Sivit, et al. respectfully requests that this Court decline to accept jurisdiction over this case.

Respectfully submitted,



JOSEPH W. DIEMERT, JR. (0011573) (counsel of record)

jwdiemert@diemertlaw.com

DANIEL A. POWELL (0080241)

dapowell@diemertlaw.com

Diemert & Associates Co., L.P.A.

1360 S.O.M. Center Road

Cleveland, OH 44124

Phone: (440) 442-6800

Facsimile: (440) 442-0825

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

A copy of the foregoing was served, **via regular US Mail**, this 9th day of May,

2013, upon the following:

Marvin. L. Karp, Esq.
Lawrence D. Pollack, Esq.
Ulmer & Berne, L.L.P.
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, OH 44113

Robert James, Esq.
Bricker & Eckler, L.L.P.
1001 Lakeside Avenue, Ste. 1350
Cleveland, OH 44114

James Marx, Esq.
Signature Square 11, Suite 220
25101 Chagrin Boulevard
Beachwood, OH 44122

Jeffrey A. Kaleda, Esq.
2368 Victory Parkway
Suite 200, P.O. Box 45206
Cincinnati, OH 45206

Joseph Ferrante, Esq.
323 Lakeside Avenue W.
Cleveland, OH 44113



DANIEL A. POWELL (0080241)

*Counsel for Plaintiffs-Appellees
Carlos Sivit, et al.*