

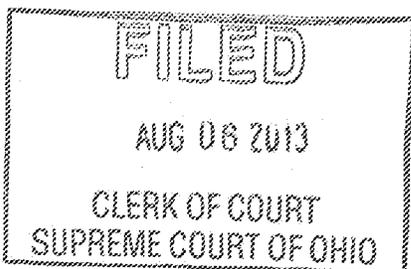
IN THE SUPREME COURT OF OHIO

CARLOS SIVIT, et al.)	No. 2013-0586
)	
Appellees)	On Appeal from Cuyahoga County
)	Court of Appeals, Eighth
v.)	Appellate District
)	
VILLAGE GREEN OF BEACHWOOD,)	Court of Appeals
L.P., et al.)	Case No. 98401
)	
Appellants)	

**MERIT BRIEF OF APPELLANTS VILLAGE GREEN OF BEACHWOOD, L.P.
AND FOREST CITY RESIDENTIAL MANAGEMENT, INC.**

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STATEMENT OF THE CASE AND FACTS

A. The Consolidated Lawsuits

This case consists of five consolidated lawsuits arising from a fire that occurred on October 23, 2007, in Building 8 of an eleven-building apartment complex (“the Village Green Apartments”) located in Beachwood, Ohio. The plaintiffs -- who were either tenants or subrogated insurers of tenants in that building -- sought compensatory damages for personal property that was destroyed in the fire. The individual plaintiffs also sought punitive damages. All five lawsuits, filed in the Common Pleas Court for Cuyahoga County, alleged that the fire had resulted from (a) “negligent construction” (i.e., negligent installation of electrical wiring) back in 1994 by an electrical contractor hired by the owner-developer of the complex, defendant Village Green of Beachwood, L.P. (“Village Green”) and (b) subsequent “negligent maintenance” of the electrical wiring, in violation of the Ohio Landlord-Tenant Act (R.C. 5321.04), by defendant Village Green and by the company that had been managing the complex since September 1, 2006, defendant Forest City Residential Management, Inc. (“Forest City Residential”).

B. The Cause and Origin of the Fire

Building 8 stood three stories high and contained twelve apartments on the first floor, twelve on the second floor and eight on the third floor. The only testimony given during the December, 2011 trial with respect to the cause and origin of the fire was that of plaintiffs’ expert witness, Ralph Dolence, who opined that the fire originated in the interstitial space that was located “between the floor and ceiling space between Apartment 210 and 310” (Tr. 804, 922 and 1012; Supp. 5, 6 and 9), which interstitial space was sixteen inches high. (Tr. 934;

Supp. 7).¹ The only “potential for the ignition source” in that “area of origin” were several electrical wires that had been stapled to the ceiling joists in that space (Tr. 1203-1204, 1075; Supp. 26-27, 23), which wires fed the switches and base plugs for Apartment 210. (Tr. 1078; Supp. 24). Mr. Dolence therefore concluded that the fire had started after one of the metal staples that was holding those wires in place had worn through the insulation of one of those wires, so that the cause of the fire “was most likely, more than fifty percent in my mind, * * * a misdriven staple” (Tr. 1019-1020; Supp. 11-12).

Q: So * * * somewhere in this area there was a staple in one of those five wires that eventually caused this fire to occur?

A: [by Mr. Dolence] Or a cut from a gusset plate or a cut in the wire.

Q: Okay.

A: 50 percent or more it was a staple. * * *

(Tr. 1076-1077; Supp. 24-25).²

C. The Jury Instructions

At the conclusion of the trial, the trial judge instructed the jury that the plaintiffs were claiming that defendants Village Green and Forest City Residential had “breached liability

¹ For convenience of reference, the pages of the transcript of Mr. Dolence’s testimony that are specifically cited in this Brief are included in the Supplement to Appellants’ Merit Brief as pages Supp. 3-27.

² Earlier Mr. Dolence testified:

I said at least 50 percent of the potential causes were misdriven staples. There was only so much wire in that area [the sixteen-inch interstitial space above the ceiling of Apartment 210]. There is only so many things you can do to a wire. A misdriven staple, we saw physical evidence of which, to me, at least in my mind, that was a real strong potential cause.

(Tr. 1025; Supp. 17).

created by statute for landlords towards tenants” [i.e., R.C. 5321.04] (Tr. 2176); that “an act or failure to act in accordance with any of these [statutory] duties is **negligence as a matter of law**” (Tr. 2177; Supp. 36);³ that “before you [the jury] can find the landlord liable for a defective or dangerous condition on the rented property, you must find by the greater weight of evidence, that the landlord **received notice** of the condition, knew or should have known of the condition,” and “failed to remove or correct the condition within a reasonable time” (*Ibid.*); that the “defendants [were] required to use **ordinary care** to discover and avoid danger on the rental property” (Tr. 2179; Supp. 38); that “you may find the defendants **negligent** if they looked but did not see that which would have been seen by a reasonably cautious, careful, and prudent person under the same circumstances” (Tr. 2180; Supp. 39); and that a “landlord is liable to his tenant * * * for damages proximately caused by the **negligent acts** or failures to act of the landlord, his employees, agents or independent contractors hired by him to construct and/or repair the rented property” (Tr. 2180-2181; Supp. 39-40).

Over defendants’ objections the trial judge further instructed the jury that plaintiffs were also claiming that “Defendant Village Green of Beachwood, LP was the developer and therefore is responsible for **negligence in construction** of the subject apartment building” back in 1994. Hence, if the jury found that Village Green was the developer of the complex, it should find that “Village Green is responsible to these plaintiffs for any negligent acts during the course of construction alleged to have caused their damages.” (Tr. 2183; Supp. 42).

³ For convenience of reference, the trial judge’s instructions to the jury are included in the Supplement to Appellants’ Merit Brief as pages Supp. 28-50.

D. The Verdict, the Punitive Damages Trial and the Appeal

The jury then returned verdicts in favor of the plaintiffs on (a) their “negligent maintenance claims” against both defendants (Tr. 2210-2211) and on (b) their “negligent construction claims” against defendant Village Green (Tr. 2211), and awarded compensatory damages to the individual tenants totaling \$597,326.⁴

The judge then submitted to the jury, in a bifurcated trial (consisting of arguments by counsel and instructions by the judge), the claims of the individual tenants for punitive damages. The jury thereupon awarded punitive damages against **the 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 that had been awarded the individual tenants (\$597,326). Defendant Village Green then moved the trial judge to reduce the punitive damages award to the limit prescribed by the “cap” provision of R.C. 2315.21(D)(2)(a), namely, “two times the amount of the compensatory damages awarded to the plaintiff[s] from the defendant.” The trial judge, however, refused to do so, holding that R.C. 2315.21 “does not apply” to this case (Tr. 2563-2569).

Several months later, the trial judge awarded an additional \$1,040,000 to the individual plaintiffs as attorneys fees, which amount represented 40% of the total compensatory and punitive damages that had been awarded to those plaintiffs. (See Final Judgment Entry of May 11, 2012; App. 43).

Defendant Village Green and defendant Forest City Residential Management both appealed to the Eighth District Court of Appeals. In their Assignments of Error, defendants

⁴ The jury verdicts actually totaled \$582,326 (Tr. 2213). The trial court then awarded \$15,000 in stipulated damages to two additional plaintiffs. In addition, the trial judge awarded \$171,631 to the subrogated insurance companies. See Final Judgment Entry of May 11, 2012; App. 43).

argued that the trial court had erred (a) in denying both defendants' motions for directed verdict with respect to plaintiffs' claims for negligent maintenance; (b) in denying defendant Village Green's motion for directed verdict with respect to plaintiffs' claim for negligent construction of Building 8; (c) in allowing plaintiffs' claims for punitive damages to go to the jury; (d) in refusing to "cap" the jury's award of punitive damages as required by R.C. 2315.21; and (e) in calculating plaintiffs' attorneys fees on the basis of plaintiffs' 40% contingent fee agreements.

On January 17, 2013, the Eighth District affirmed all of the trial judge's rulings. With respect to the trial judge's refusal to apply to this case the punitive damages "cap" set forth in R.C. 2315.21, the Eighth District held that plaintiffs' claims against defendants should be deemed to constitute a "breach of contract action," rather than a "tort action" within the meaning of R.C. 2315.21(A), notwithstanding the fact that plaintiffs' pleadings had repeatedly alleged that defendants had "negligently maintained" and "negligently constructed" Building 8 and notwithstanding the fact that the trial judge's instructions to the jury were grounded entirely on negligence (see pages 2-3 above). The Eighth District then held that R.C. 2315.21 does not apply to punitive damage claims where the duties breached by the defendant arose out of a "contractual relationship" -- in this case, a landlord-tenant relationship. (App. 31).

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 holdings in the panel's January 17, 2013 Opinion conflicted with two previous Eighth District decisions. One of those previous decisions (*Luri v. Republic Servs.*, 143 Ohio App.3d 682, 2011-Ohio-2399, rev'd on other grounds, 132 Ohio St.3d 316 (2012)) had held that the "cap" provision of R.C. 2315.21 was applicable to a statutory retaliatory discharge claim filed under Chapter 4112 of the Revised Code, even though the parties to that lawsuit had a contractual relationship, namely, that of

employer-employee. The *Luri* decision was therefore directly contrary to the holding in the instant case that R.C. 2315.21 has no application to a negligence claim brought by a tenant against a landlord because the landlord's duties arose out of a "contractual" (landlord-tenant) relationship. The second conflict was with the holding of *Gonzales v. Spofford*, 2005-Ohio-4315 (8th Dist.), that when a trial court determines the amount of attorneys' fees to be awarded to a plaintiff, that determination should **not** be grounded on the contingent fee percentage contained in the fee agreement between the plaintiff and his or her attorneys. On March 5, 2013, the Eighth District denied the application for *en banc* consideration. (App. 38-40).

Defendants then filed a Notice of Appeal in accordance with S.Ct. Prac.R. 7.01(A)(6). (App. 1-6). On June 26, 2013, this Court accepted jurisdiction.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: 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 may have arisen from a breach of duty created by a contractual relationship and even though the defendant’s conduct may have constituted both tortious conduct and a breach of contract.

A. The Legislative Objectives of R.C. 2315.21

In 2005, after almost two decades of attempting to enact limitations on punitive damage claims and other “tort-reform” statutes that would withstand judicial review, the General Assembly adopted a group of statutes known, collectively, as “Tort Reform III.” Included in that legislative “package” was a new version of R.C. 2315.21 dealing with punitive damages. That statute contained several significant provisions, the most important of which -- paragraph (D)(2)(a) -- provided that “[i]n a tort action,” a trial court must impose a “cap” on the amount of punitive damages awarded by a jury so that the total award shall not be “in excess of two times the amount of the compensatory damages awarded to the plaintiff from the defendant.” A second significant provision -- paragraph (B) -- required that “the trial of the tort action shall be bifurcated” between the claims for compensatory damages and the claims for punitive damages.

Subsequently, both of these provisions of R.C. 2315.21 were held to be constitutional. Thus, in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 880 N.E.2d 420 (2007), this Court, in an opinion written by Chief Justice Moyer, pointed to “several studies and other forms of evidence” upon which the General Assembly had relied “in concluding that the court justice system as it then existed [in 2005] was harming the state economy” and that “punitive damages awards were part of the problem.” (§ 100). The General Assembly, stated

the Chief Justice, had specifically noted that the “absence of a statutory ceiling upon recoverable punitive or exemplary damages in tort actions [i.e., a cap] has resulted in occasional multiple awards * * * that have no rational connection to the wrongful actions or omissions of the tortfeasor.” (*Ibid.*) The “reforms codified in R.C. 2315.21 were [therefore] an attempt to limit the subjective process of punitive-damages calculation, something the General Assembly believed was contributing to the uncertainty.” (*Ibid.*) A majority of this Court then concluded that the “general goal of making the civil justice system more predictable is logically served by **placing limits** that ensure that punitive damages generally cannot exceed a certain dollar figure” and that “the General Assembly believes that such predictability will aid the state economy” ((¶ 102). R.C. 2315.21 is therefore “rationally related to the legitimate state interest of improving the state’s civil justice system and its economy” (¶ 106). Recognizing that “the wisdom of damages limitations and whether the specific dollar amounts available under them best serve the public interest are not for us to decide,” this Court concluded that “the General Assembly has responded to our previous decisions and has created constitutionally permissible limitations.” ((¶ 113).

The constitutionality of the bifurcation provision of R.C. 2315.21, paragraph (B), was similarly upheld in *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 2009-Ohio-6481 (10th Dist.), ¶ 21, and in *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, ¶ 30. In the *Hanners* case, the Tenth District, in an opinion written by Judge (now Justice) French, also pointed out (as Chief Justice Moyer had done in *Arbino*) that, in enacting R.C. 2315.21, the General Assembly had specifically found that “[r]eform to the punitive damages law in Ohio is urgently needed to restore balance, fairness, and predictability to the civil justice system” (¶ 25).

To the same effect was the subsequent *Havel* decision, written by Justice O'Donnell. In that case, this Court again cited the statements made by the General Assembly in 2005 that “[r]eform to the punitive damages law in Ohio [was] urgently needed to restore balance, fairness and predictability to the civil justice system.” (¶ 30).

B. The Limitations Imposed on R.C. 2315.21 By the Eighth District Court of Appeals

No sooner, however, did it appear that the limits on punitive damages long sought by the General Assembly were finally settled in place, then along came the decision of the Eighth District Court of Appeals in the instant case which, if allowed to stand, will dramatically restrict the “tort actions” in which those legislative limits can actually be imposed. For the Eighth District held that the “cap” provision of R.C. 2315.21 (and, by the same reasoning, the bifurcation provision as well) does not apply to **any** claim of tortious conduct giving rise to punitive damages where “the only relationship between the plaintiff and defendant is borne out by a contract, such as a rental agreement.” (Opinion, ¶ 62; App. 32). The Eighth District therefore allowed the plaintiffs herein to recover from defendant Village Green punitive damages in the amount of \$2,000,000, which was more than three-and-a-half times the total compensatory damages that the jury had assessed against Village Green for “negligent construction” and “negligent maintenance” (i.e., \$597,326).⁵

The Eighth District arrived at that conclusion by focusing on the “definition” provision of R.C. 2315.21, i.e., paragraph (A), which reads:

(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**

⁵ As indicated earlier, this amount includes the total of the jury’s December, 2011 awards, plus \$15,000 awarded to two additional plaintiffs by stipulation.

**for damages for a breach of contract or another agreement
between persons.**

(See Opinion, ¶ 57; App. 30).⁶

According to the Eighth District, the exemption for “a civil action for damages for a breach of contract or another agreement between persons” encompasses **every action** where “the only relationship” between the plaintiff and defendant is “contractual,” even though the claim actually asserted by the plaintiff was that the defendant had “breached the contractual agreement by **negligently**,” or tortiously, engaging in certain conduct. (*Id.*, ¶ 62; App. 32). Thus, in the instant case, even though the plaintiffs’ pleadings repeatedly alleged that defendant Village Green had “negligently constructed” Building 8 and then “negligently maintained” that apartment building in violation of its obligations under R.C. 5321.04, the Eighth District concluded that the critical fact, from the standpoint of determining the applicability of R.C. 2315.21, was that “the only relationship between Village Green and the individual plaintiffs is that borne out in the rental agreement.” (*Id.*, ¶ 60; App. 31) Consequently, the provisions of the Ohio Landlord-Tenant Act (R.C. 5321.04) allegedly violated by defendants should be deemed to constitute **implied terms** of the parties’ rental agreement, which means that, when the landlord “breached its duties imposed by the statute,” the landlord also “breached the rental agreement between the parties” (*Ibid.*). Hence, when plaintiffs alleged that “Village Green had **negligently maintain[ed]** Building 8” (¶ 62), plaintiffs were, in effect, alleging that Village Green “breached the contract agreement,” i.e., the lease (*Ibid.*). The “basis of plaintiffs’ negligence action” was therefore “Village Green’s non-compliance with the Landlord-Tenant Act [R.C. 5321.04] and the duties

⁶ It should be noted that this same language (“but does not include a civil action for damages for a breach of contract or another agreement between persons”) was also used by the General Assembly in previous (1987 and 1998) versions of R.C. 2315.21.

that arise from the rental agreement.” (§ 64; App. 33) As a result, “R.C. 2315.21 does not apply to the punitive damages recovered in the instant case.” (*Ibid.*)

The Eighth District did concede that “punitive damages are generally **not recoverable** in a breach of contract action” (*Id.*, § 62; App. 32), citing *Digital & Analog Design Corp. v. North Supply Co.*, 44 Ohio St.3d 36, 540 N.E.2d 1358 (1999). 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 a “hybrid action” (i.e., where a breach of contract “is also a tort”), the breach of contract claim “trumps” the tort claim insofar as R.C. 2315.21 is concerned. In other words, the “cap” and bifurcation provisions of that statute are **inapplicable to** such a hybrid lawsuit, and the plaintiff in such a case will therefore be allowed to recover punitive damages **in an unlimited amount**, even though punitive damages are not supposed to be recoverable at all in a breach of contract action. (See *Digital & Design Corp.*, 44 Ohio St.3d at 46, stating that “This has been the nearly universal rule for some time.”)

The end result is that, although the purpose of the General Assembly in enacting R.C. 2315.21 in 2005 was to “**limit** the subjective process of punitive-damages calculations” (see *Arbino*, §100), the effect of that statute, as now interpreted by the Eighth District, is to **expand the imposition of punitive damages** into areas where such damages were never before allowed and to remove any and all limits in such cases. The instant case is a graphic example: a purported breach of contract case (according to the Eighth District) in which the defendant is being assessed with \$2,000,000 in punitive damages.

C. The Circularity of the Eighth District’s Reasoning

The reasoning by which the Eighth District reached this result is strikingly circular. For even though a fire-damage lawsuit by a tenant that alleges “negligent maintenance”

by a landlord under R.C. 5321.04 is clearly an “action for damages for injury to loss of a person’s property” within the meaning of R.C. 2315.21(A), the Eighth District says that such an action is not a “tort action” but must be deemed, instead, to be a “breach of contract action.” And why? Because “the only relationship” between the tenant and the landlord is “contractual.” (Opinion, ¶ 60; App. 31). But if it is then pointed out that Ohio law has **never before** permitted the plaintiff in “a breach of contract action” to recover punitive damages in **any** amount (see *Digital & Analog Design Corp.*, 44 Ohio St.3d at 45-46 and *Saberton v. Greenwald*, 146 Ohio St. 414, 426, 66 N.E. 2d 224, 229 (1946)), the Eighth District’s answer is that punitive damages may be recovered in such a case because the conduct constituting the breach of contract “is also a tort.” (Opinion, ¶ 62; App. 32). But if the conduct on which the punitive damages are predicated is “also a tort,” why doesn’t R.C. 2315.21(D) apply? To which question the Eighth District’s answer is apparently: because the tortious conduct is “also a breach of contract.” That answer, however, makes the Eighth District’s reasoning totally circular, for if plaintiff’s claim is to be viewed as a claim for a breach of contract, how can the plaintiff obtain punitive damages in the first place?

The way to avoid this circular reasoning, of course, is to recognize that when punitive damages are awarded in any of these “hybrid cases” (i.e., where defendant’s conduct is both a breach of contract and “also a tort”), such damages are being awarded **solely for the tort** and not for the breach of contract. See, in this regard, *Sweet v. Grange Mut. Casualty Co.*, 50 Ohio App.2d 401, 407, 364 N.E.2d 38 (5th Dist. 1975) and *Ali v. Jefferson Insurance Co.*, 5 Ohio App.3d 105, 107 449 N.E.2d 495 (6th Dist. 1982), recognizing that in cases where punitive damages are awarded for acts “that constitute **both** a breach of contract and a cause of action in tort,” the “allowance of such damages [is] for the tort and not for the breach of contract.” See

Sweet, p. 407, quoting from 25 C.J.S. Damages, Sec. 120, p. 1128. Therefore, R.C. 2315.21 clearly should be held applicable to such cases.

D. How the Eighth District's Decision Severely Limits and Curtails the Cases to Which R.C. 2315.21 Applies

Apart from being illogical, the Eighth District's interpretation of R.C. 2315.21 will drastically limit and curtail the application of that statute. After all, there are any 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." Examples include claims for retaliatory discharge, sexual harassment, age discrimination and sex discrimination brought by employees against employers; claims for legal malpractice filed by persons who entered into oral or written contracts with lawyers; claims for bad faith asserted by insureds against insurance companies that violated the provisions of insurance policies; and bailments.⁷ All of such claims have long been deemed to be "tort actions" in which punitive damages are recoverable. Yet under the narrow (and, we submit, patently erroneous) approach taken by the Eighth District, punitive damage claims asserted in all of such actions will henceforth be exempted from the "cap" and bifurcation provisions of R.C. 2315.21, thereby seriously undercutting the public policy that the General Assembly sought to implement when it enacted that statute and which was expressly

⁷ See *Agricultural Insurance Co. v. Constantine*, 144 Ohio St.275, 58 N.E.2d 658 (1944), holding that "bailments rest upon contracts express or implied" and that the bailor "may bring an action based upon breach or contract or upon negligence"; and *Hofner v. Davis*, 111 Ohio App.3d 255, 675 N.E.2d 1339 (6th Dist. 1996), upholding the award of punitive damages in a bailment action.

cited by this Court in the *Arbino* and *Havel* cases discussed above. Hence, if allowed to stand, the Eighth District's decision will eviscerate a major element of "Tort Reform III."⁸

The correct approach to be taken in these hybrid cases is therefore that taken by the Eleventh District Court of Appeals in *Stewart v. Siciliano*, 2012-Ohio-6123 (11th Dist.), which approach was the direct opposite of that taken by the Eighth District in the instant case. In *Stewart* (which was decided only three weeks before the Eighth District's decision), an insured under an automobile policy sued the insurer (Progressive) for breach of the policy 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 with respect to plaintiffs' "negligent maintenance" claims in the instant case, namely, that the 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," and that the entire case was therefore "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 against an insurance company "**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

⁸ The above listing of examples is only the beginning, given the fact that Ohio courts have repeatedly stated that a party's "negligent failure" to perform his "obligations under a contract *** may be **both** a tort and a breach of contract." *Thompson v. Germantown Cemetery*, 188 Ohio App.3d 132, 2010-Ohio-1920 (2nd Dist.) at ¶ 65. Accord: *Fouty v. Ohio Department of Youth Services*, 167 Ohio App.3d 508, 2006-Ohio-2957 (10th Dist.) at ¶ 65 ("the breach of a duty, even if arising via contract, can constitute a tort, because there is a common-law duty to perform contract obligations with care, skill, reasonable expedience and faithfulness; negligent failure to do so is both a tort and a breach of contract.")

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 [contractual] relationship of the parties.”

E. Cases That Allege Violations of R.C. 5321.04 “Sound In Tort”

This same approach should be taken with respect to cases, like this one, in which tenants seek punitive damages from landlords for a violation of R.C. 5321.04, inasmuch as such cases also “sound in tort.” See, for example, *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.**” For in such a case the tenant’s action “depends upon evidence that her landlord **tortiously breached** the statutory duties that the Landlord-Tenant Act attaches to the rental agreement.”

To the same effect is *Maduka v. Parries*, 14 Ohio App.3d 191, 193, 470 N.E.2d 464 (8th Dist. 1984), footnote 5, where an Eighth District panel declared that a personal injury claim by a tenant seeking damages under R.C. 5321.04 “sounds in tort,” since the issue to be determined is whether the landlord “**tortiously breached** duties imposed by the statute.”

See also *Sikora v. Wenzel*, 88 Ohio St.3d 493, 498, 2000-Ohio-406, where this Court held that a violation of R.C. 5321.04 “constitutes negligence *per se*.”

F. How the Language of R.C. 2315.21(A) Should Be Interpreted

What, then, is the correct interpretation that should be given to the language of paragraph (A) of R.C. 2315.21 that was focused upon by the Eighth District, namely, the clause that states that “tort action” does “not include a civil action for damages for a breach of contract or another agreement between persons”? Appellants submit that that language (which, as

pointed out in footnote 6 above, has been included in each version of R.C. 2315.21 since 1987) was simply intended to convey that R.C. 2315.21 is not to apply to actions that are purely actions for breach of contract -- in other words, actions in which punitive damages have **never been recoverable**.⁹ There is no rational reason to construe that language as having been intended to exclude from the application of R.C. 2315.21 “hybrid” claims that are **both** (a) claims for breach of contract (for which punitive damages are **not** recoverable) and (b) tort claims for which punitive damages **are** recoverable. As pointed out above, the General Assembly’s objective was to limit punitive damages, not to expand the granting of such damages. And Ohio law is clear that courts must construe a statute “in a manner that carries out the intent of the General Assembly.” *State v. Roberts*, 134 Ohio St.3d 459, 2012-Ohio-5684, ¶ 12. That intent will not be carried out if hybrid cases are deemed to be exempt from this statute.

⁹ See *Digital & Analog Design Corp.*, 44 Ohio St.3d at 45-46 and *Saberton v. Greenwald*, 146 Ohio St. 414, 66 N.E.2d 224 (1946), where this Court quoted the following pronouncements from 25 Corpus Juris Secundum, *Damages*, § 126:

As a general rule exemplary damages are not recoverable in actions for the breach of contracts, irrespective of the motive on the part of defendant which prompted the breach. No more can be recovered as damages than will fully compensate the party injured.* * * *

Proposition of Law No. II: In order to recover punitive damages against a landlord on the ground that the landlord consciously disregarded the rights and safety of a tenant, the tenant must prove that the specific danger that caused tenant'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 the tenant's injury.

A. **The Rule Laid Down by This Court in *Malone v. Courtyard by Marriott*, 74 Ohio St.3d 440 (1996)**

Aside from wrongly refusing to apply the "cap" provision of R.C. 2315.21(D) to the jury's punitive damages award, the trial judge in the instant case should never have allowed the issue of punitive damages to go to the jury in the first place.

For in order to obtain punitive damages in **any** amount, the plaintiff tenants 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, 512 N.E.2d 1174 (1987), and, indeed, the trial judge so instructed the jury (Tr. 2229; Supp. 49). This, in turn, means that plaintiffs were required to prove that defendant Village Green had **actual or subjective knowledge** of the danger posed to plaintiffs by defendant's conduct. This requirement comes from *Malone v. Courtyard by Marriott, L.P.*, 74 Ohio St.3d 440, 446, 639 N.E.2d 1242 (1996), where this Court held that, absent "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." In the *Malone* case, a hotel guest who had been raped by another guest claimed that the hotel's failure to send a security guard to investigate plaintiff's several complaints regarding a disturbance in a

neighboring room gave rise to punitive damages under the “conscious disregard” rule. This Court disagreed, holding that the defendant hotel, “through its agents, must have **actually known** of the threat to its guests” before being subjected to a punitive damages claim that was “premised on the ‘conscious disregard’ theory of malice.” (*Ibid.*) And since nothing in any of the calls to the front desk, either from the plaintiff or from other hotel guests, “provided Marriott personnel with information about the physical threat confronting appellees, a charge to the jury on punitive damages would have been unjustified.” (*Ibid.*)

B. How the *Malone* Rule Applies to This Case

The *Malone* rule has direct application to the instant case. According to plaintiffs’ fire expert, the “dangerous condition” that allegedly caused the October, 2007 fire involved one of the wires that were stapled to wooden joists in the “interstitial space between the floor and ceiling of Units 210 and 310.” (Court of Appeals Opinion, ¶¶ 26 and 36; App. 20 and 24; Tr. 804, 1203-1204, 1075-1076; Supp. 5, 26-27, 23-24). That sixteen-inch-high space (between the ceiling of Unit 210 and the floor of Unit 310) was, however, concealed from view or inspection. (Tr. 1043; Supp. 20). Plaintiffs’ expert further opined that the fire started because the insulation on one of those concealed wires wore away because one of those staples had been “misdriven.” (Tr. 1019-1024; Supp. 11-16). There was, however, no evidence whatever that either of the defendants herein had **any subjective knowledge** that such a wearing away of insulation had been occurring above the ceiling of Apartment 210 -- or anywhere else in Building 8, for that matter. The trial court therefore erred in allowing the issue of punitive damages to go to the jury.¹⁰

¹⁰ Plaintiffs’ expert also suggested that there was a **possibility** that the insulation had been worn away by a metal gusset in that space. (Tr. 1024; Supp. 16). However, regardless of whether the cause was a staple or a gusset, the critical fact is that the wearing away of the

C. The Eighth District's Erroneous Reasoning

The Eighth District, however, ignored the *Malone* case entirely and instead held that a “decision whether to award punitive damages is within the trial court’s discretion.” (Opinion, ¶ 49; App. 27). That statement, of course, begged the question. The plaintiffs still had an obligation to prove all of the elements of punitive damages, including actual malice, as set forth by this Court in *Preston v. Murty*, and the trial judge could not properly allow a punitive damages claim to go to the jury where, as here, the plaintiffs had failed to present such proof. See *Malone* at p. 446.

The Eighth District also attempted to justify the trial judge’s ruling by stating that “the testimony presented at trial established that Village Green consciously ignored the severe **state of disrepair of Building 8**” and that such “inaction [by Village Green] was sufficient to support a finding of malice.” (Opinion, ¶¶ 51 and 52; App. 28). The principal flaw in these statements 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 2006 letter sent by the Beachwood Building Department and which was referred to by the Eighth District in ¶ 21 of its Opinion. (See Plaintiffs’ Exhibit C-16, a copy of which is included in the Supplement to Appellants’ Merit Brief as Supp. 1-2). Significantly, there was **no evidence** presented of any disrepair of any **electrical wiring** inside Building 8. 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

insulation was occurring in a “concealed space” (Tr. 1043; Supp. 20) and hence not discoverable by defendants.

from several tenants that, over the years, 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), plaintiffs presented no testimony from any witness that any of those incidents constituted “notice” to the defendants that insulation was being worn away on one of the internal wires that were located above the ceilings, or behind the walls, of any of the thirty-two apartments in Building 8.

Accordingly, to allow the Eighth District’s decision to stand would mean that, henceforth, every Ohio landlord will be 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 or subjective knowledge** of the particular defect that **did** cause the tenant’s injury or damage. The rule announced by this Court in *Malone v. Courtyard by Marriott* will therefore become a “dead letter” in the landlord-tenant situation, unless this Court makes it clear that, in order to impose punitive damages on a landlord, evidence must be presented that the landlord had “actual” or “subjective” knowledge of the particular defective condition that actually caused the tenant’s injury.

Proposition of Law No. III: 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 above ceilings or behind walls.

A. R.C. 5321.04 Requires a Tenant to Prove That the Landlord Had Actual or Constructive Knowledge of the Particular Defective Condition That Caused the Tenant's Damage

This Court has repeatedly held that the Ohio Landlord-Tenant Act, 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, *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20, 427 N.E.2d 774 (1981); *Sikora v. Wenzel*, 88 Ohio St.3d 493, 498, 2000-Ohio-406; and *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6382 at ¶ 23.

Consequently, up until 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 defendant landlord had actual or constructive knowledge of the particular defective condition that actually caused the occurrence. See, for example, *Mounts v. Ravotti*, 2008-Ohio-5045 (7th Dist.) ¶ 30, holding that a "violation of [this] statute does not in and of itself render the landlord **liable**. The tenant must also show proximate cause and that the landlord had **knowledge** of the defective condition," citing *Shroades v. Rental Homes, Inc.*. Therefore, a "landlord will be excused from liability if he 'neither knew nor should have known of the factual circumstances that caused the violation,'" quoting *Sikora*.

Accord: *Sabolik v. HGG Chestnut Lake Ltd. Partnership*, 180 Ohio App.3d 576, 2009-Ohio-130 at ¶ 13 (tenant has "obligation to prove that the landlord received actual or constructive notice of the condition causing the statutory violation"); and *Parks v. Menyhart*

Plumbing and Heating Supply Co., Inc., 1999 WL 1129591 (8th Dist.) (“The Landlord-Tenant Act does not require the landlord to do that which is unreasonably difficult or impossible * * *”)

B. The Erroneous Holding of the Eighth District in the Instant Case

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 -- or, indeed, any ability to even discover -- that defective condition.

As pointed out above, the cause of the October 23, 2007 fire (according to plaintiffs’ expert) was that a metal staple had worn through the insulation of one of several internal wires that lay above the ceiling of Apartment 210. (Tr. 1019-1020, 1076-1077; Supp. 11-12, 24-25). Plaintiffs’ expert further acknowledged that those wires (and the staples that held them in place) were in “a concealed space” (Tr. 1043; Supp. 20) and had been there for thirteen years (*Ibid.*). Hence, those wires were not subject to reasonable inspection. Nevertheless, while acknowledging that “the fire originated in the interstitial space between the floor and ceiling space of units 210 and 310” (Opinion, ¶ 6; App. 11) and that plaintiffs’ expert had “pinpointed the root source of the fire to three wires under the living room floor of Unit 310” (*Id.*, ¶ 26 and ¶ 36; App. 20 and 24), the Eighth District held that the landlord (defendant Village Green) and the 2006-2007 property manager (defendant Forest City Residential Management) could still be held liable for a fire that started in that concealed space (Opinion, ¶ 24; App. 20).

C. The Conflict Between the Eighth District’s Decision and the Decision of the Sixth District in *Abbott v. Haight Properties*

The Eighth District’s decision is therefore in direct conflict with the holding of the Court of Appeals for the Sixth District in *Abbott v. Haight Properties, Inc.*, 2000 WL

491731, that a landlord cannot be held liable for a fire that resulted from defects that occurred in electrical wiring concealed **above a ceiling or behind a wall** and of which the landlord had no knowledge. In the *Abbott* case, 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 wall 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 open 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 can be no reasonable justification under the statute for imposing legal 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. In other words, in order for the landlord to have discovered that a staple or metal gusset was wearing through the insulation on one of the wires, the landlord would have had to tear open the walls and the ceilings of thirty-two apartments and then physically inspect each of the interior wires that were located behind those ceilings and walls -- a requirement that the Sixth District regarded as “nonsensical.”

Significantly, however, the Eighth District never even mentioned the *Abbott* decision, even though that decision was directly in point, factually and legally. Instead, after acknowledging that plaintiffs’ expert, Ralph Dolence, had “pinpointed the root source of the fire to three wires under the living room floor of Unit 310” (Court of Appeals Opinion, ¶ 26), i.e., above the ceiling of Apartment 210 -- which fact should have excused defendants from liability under the *Abbott* and *Mounts* cases discussed above -- the Eighth District held that the trial court

“properly denied [defendants’] motion for directed verdict on [plaintiffs’] negligent maintenance claim.” (*Id.*, ¶ 24; App. 20). And why? Because plaintiffs had presented evidence of “maintenance issues” that several tenants had observed from time to time over the years, including “electrical surges; lights flashing off and on, lights dimming” (*Id.*, ¶ 18; App. 16); “water and electrical problems downstairs in the parking garage” (*Id.*, ¶ 19; App. 17); and “water infiltrating the building” (*Ibid.*; App. 18). The Eighth District also cited the testimony of Rod Brannon, Forest City Residential Maintenance’s Vice President of Engineering, that, after Forest City took over management of the complex in late 2006, “Building 8 needed a lot of work” (*Id.*, ¶ 20; App. 18) and evidence that, in 2006, “the City of Beachwood housing department inspected the properties and specifically noted numerous violations in Building 8” (*Id.*, ¶ 21; App. 19). However, all of the “violations noted” by the City at that time related to the **exterior of the building**, i.e., “deteriorated siding,” “missing brick veneer,” “broken exhaust vents,” and “missing gutters.” (See Plaintiffs’ Exhibit C-16, Supp. 1-2). Significantly, not a word was said by the City about internal electrical wiring.

Moreover, although Mr. Brannon testified that “we knew that we needed a lot of repairs on the **exterior of the building** on the site” (Tr. 378-379), he never testified that any repairs needed to be made to any interior electrical wiring in 2006.¹¹ And, as pointed out at pp. 19-20 above, there was absolutely no testimony from any witness, expert or non-expert, that any of the purported electrical problems described by the tenants (occasional loss of power, false fire alarms, “brown outs,” etc.) constituted “notice” to the defendants that, somewhere in Building 8,

¹¹ To the contrary, Mr. Brannon testified that, during their 2006 inspection of the entire eleven-building Village Green complex, Forest City’s maintenance team of engineers had checked out the electrical system of every one of the 360 apartments (Tr. 1644-1666) and that they had found **nothing** to indicate that anything needed to be done with respect to any of those electrical systems. (Tr. 1673-1674).

the insulation of a wire was being worn through by a staple or a metal gusset or anything else. Indeed, these incidents could have been caused by the power company or by other events off the premises that had no connection whatever with the internal wiring.

Therefore, to uphold the approach taken by the Eighth District -- which allowed liability to be imposed upon a landlord and a building manager simply because individual tenants had observed electrical problems of various kinds over the years (e.g., surges, "brown outs," etc.), or because the exterior of the subject building needed repairs -- would mean that, henceforth, any Ohio landlord can be held liable for any damage or injury sustained by a tenant even though the landlord had no actual knowledge of the defective condition that caused that damage or injury, simply because the landlord had knowledge of a **different** defective condition that had no connection whatever with the tenant's injury.

Proposition of Law No. IV: An owner-landlord of an apartment building is not liable for the torts committed by his independent contractors during original construction and owes no implied duty of good workmanship to persons who subsequently became tenants of the building.

A. Why the Trial Court Should Have Directed a Verdict With Respect to Plaintiffs' "Negligent Construction" Claim

Although the verdicts for “negligent maintenance” entered against defendant Village Green (the owner of the complex) and defendant Forest City Residential Management (the manager of the complex in 2006-2007) should be set aside because neither of those defendants had any knowledge of the wearing away of the insulation on one of the wires located in the interstitial space above the ceiling of Apartment 210, plaintiffs will argue that defendant Village Green is still liable to them under a further jury verdict, i.e., for “negligent construction” by an electrical subcontractor that Village Green employed back in 1994. (Tr. 2211).

Accordingly, in order to vacate the compensatory damages judgment against defendant Village Green (\$597,326), it is necessary for this Court to further hold that plaintiffs’ claim for “negligent construction” was also contrary to law and should therefore have been dismissed, either by the trial judge or by the Eighth District, when those courts were asked by defendant Village Green to do so (see Tr. 1958-1959 and 1982; and Court of Appeals Opinion, ¶¶ 25-29, App. 20-21). See *State v. Steffen*, 70 Ohio St.3d 399, 407, 639 N.E.2d 67 (1994) holding that “Section 2(B)(1)(f), Article IV of the Ohio Constitution authorizes this court to enter such judgments in causes it hears on review as are necessary to provide a complete and final determination thereof.”

The primary reason that Village Green’s motion for directed verdict with respect to plaintiffs’ negligent construction claim should have been granted is that, even if it were

assumed, *arguendo*, that the electrical subcontractor who installed the wiring in Building 8 back in 1994 had been negligent in some way,¹² defendant Village Green was **not legally responsible** for that subcontractor's negligence. Ohio law has long been settled that "an employer is not vicariously liable for the negligence of an independent contractor since the employer has no right to control the mode and manner used by the independent contractor to perform the work." *Schelling v. Humphrey*, 120 Ohio St.3d 387, 2009-Ohio-4175.

The trial court, however, held that defendant Village Green could not rely upon the "independent contractor rule" in this case. Rather, the trial court took the position that Village Green was **strictly liable** for any negligent construction by the 1994 electrical contractor, and so instructed the jury:

If Defendant Village Green of Beachwood LP is found to be the developer of the apartments, the Defendant Village Green of Beachwood LP is responsible to these plaintiffs for any negligent acts during the course of construction alleged to have caused their damages.

(Tr. 2183; Supp. 42).

B. The Point East Condominium Case

The trial court based its position on *Point East Condominium Owners' Association, Inc. v. Cedar House Associates Company*, 104 Ohio App.3d 704, 663 N.E.2d 343 (8th Dist.1995), which held that the developer of a condominium (Cedar House Associates) was liable to the **vendees** of the condominium units for defects in the construction of the building, even though those defects had been caused by a general contractor and by subcontractors of the developer. In reaching that conclusion, the *Point East* panel relied upon *Mitchem v. Johnson*, 7 Ohio St.2d 66, 218 N.E.2d 594 (1966), wherein this Court held that the law imposes a duty

¹² Plaintiffs' expert testified that the staple that caused the October, 2007 fire had been installed "thirteen years before the fire during the original construction" when the staple was "misdriven * * * by the original installation electrician" (Tr. 1026-1027; Supp. 18-19).

“upon a builder-vendor of a real-property structure to construct the same in a workmanlike manner.” Therefore, concluded the *Point East Condominium* court, “[i]f the violation of that duty proximately causes a defect hidden from revelation by an inspection reasonably available to the vendee, **the vendor is answerable to the vendee** for the resulting damages.” (104 Ohio App.3d at 711). The *Point East Condominium* court reasoned that, since the *Mitchem* case imposed on builder-vendors of buildings an “implied duty of good workmanship,” it “would be contrary to the public policy announced in” *Mitchem* to relieve a builder-developer of that implied duty simply because the actual work had been done by an independent contractor. Stated the Court of Appeals (at p. 718):

If [defendant] Cedar House’s argument [that it had no *Mitchem* duty because it was not the builder] had merit, a developer could avoid the duty imposed under *Mitchem v. Johnson* (1966), 7 Ohio St.2d 66, 218 N.E.2d 594, by the simple expedient of delegating all of the work to contractors and subcontractors who are not in privity with the ultimate purchasers.

C. Why the *Point East Condominium* Case Has No Applicability to Claims by Tenants

However, unlike the plaintiffs in *Point East*, the plaintiffs **in the instant case** were **not vendees**; instead, they were **tenants** of an apartment building. Therefore, no implied duty of good workmanship was owed to those tenants by the developer, Village Green (see cases discussed below). Nevertheless, the trial court took a holding (*Point East*) that was grounded upon the implied duty owed by a developer to its **vendees**, and improperly extended that holding to include a negligence action filed by a **tenant** against his landlord. That extension was improper. Indeed, attempts by litigants in other cases to obtain such an extension have been **consistently rejected by Ohio appellate courts**. See, for example, *Baraby v. Swords*, 166 Ohio App.3d 527, 537, 851 N.E.2d 559 (3rd Dist. 2006), where the Third District, after noting that *Mitchem v. Johnson* “clearly allows a **vendee** to bring a cause of action against a

builder/vendor,” pointed out that “[n]o court in Ohio has allowed a **tenant** to assert a cause of action against a builder/vendor unless the builder/vendor has built a structure based on a commercial tenant’s specific needs.” The Third District then stated that it could “find no reason to expand Ohio law to create a new class of plaintiffs,” i.e., tenants (§ 20). The Third District therefore concluded that a landlord could not be held liable to a tenant for a fire that destroyed the tenant’s apartment and which had been caused by the negligent remodeling of the tenants’ apartment by a contractor who had been hired by the landlord.

To the same effect is *Sedar v. Knowlton Constr. Co.*, 49 Ohio St.3d 193, 196, 551 N.E.2d 938 (1990) (overruled on other grounds in *Brenneman v. R.M.I. Co.*, 70 Ohio St.3d 460, 466-467, 639 N.E.2d 425 (1994)), where this Court, after stating that “[p]rivacy of contract is not a necessary element of an action in negligence brought by a vendee of real property against the builder-vendor,” pointed out that this Court “has not had occasion to recognize a similar cause of action against builders or architects brought by third parties **other than vendees.**”

Moreover, none of the public policy considerations that the *Point East Condominium* case relied on with respect to the claims of vendees (see pages 27-28 above) apply in the case of tenants. “**Purchasers** from a builder-seller” stated the court in *Point East Condominium*, “depend on [the builder-seller’s] ability to construct and sell a home of sound structure.” (104 Ohio App.3d at 717). Therefore, in cases like *Mitchem* this Court developed rules of liability to protect **vendees**. Ohio courts, however, have refused to adopt such common law rules in favor of **tenants**. As stated by the Eighth District in *Sabolik v. HGG Chestnut Lake Limited Partnership*, 180 Ohio App.3d 576 (8th Dist. 2009) at ¶ 11, “[a] common law, a landlord generally had **no duty** to a tenant and was **immune** from tort liability arising from a dangerous condition on the leased premises, unless the landlord retained control of the premises.” To the

same effect is *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 419, 1994-Ohio-427, where this Court stated that any exceptions to a landlord's "common-law immunity from liability" have had to be created by "a court or legislative body." One of those statutory exceptions, stated this Court in *Shump*, is R.C. 5321.04. (*Ibid.*) Accord: *Burnworth v. Harper*, 109 Ohio App.3d 401, 406, 672 N.E.2d 241 (4th Dist. 1996), stating that R.C. 5321.04 was enacted "to negate the previous common-law tort immunities for landlords."

In the instant case, however, the Eighth District ignored all of these distinctions. Instead, in overruling defendant Village Green's several assignments of error relating to plaintiffs' "negligent construction" claims, the Eighth District relied upon the holding of the *Point East Condominium* case that "a developer of a condominium project is liable for construction defects, notwithstanding the fact that a general contractor was hired to perform the construction work" (Court of Appeals Opinion, ¶ 28; App. 21), and ignored the fact that the *Point East Condominium* case gave the right to enforce such liability only to vendees. The Eighth District thus ended up doing what no Ohio court had ever done: it extended that right-to-sue to the tenants of an apartment building. It therefore did what the Third District refused to do in *Barahy v. Swords*, which was "to expand Ohio law to create a new class of plaintiffs."

D. The Inapplicability to the Instant Case of *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414 (1999)

The Eighth District also cited (in ¶ 28 of its Opinion) the statement of this Court in the *Shump* case (71 Ohio St.3d 414) that a "landlord may not shift the responsibility to an independent contractor of complying with laws designed for the physical safety of others * * * Such duties are not delegable." The *Shump* holding, however, has no applicability to this case. Rather, the *Shump* case dealt with a landlord's non-delegable duty to comply with a **municipal ordinance** requiring landlords to install smoke detectors. This Court held that the fact that the

defendant landlord had hired an independent contractor to install a smoke detector in an apartment did not eliminate the landlord's liability to a tenant's guest who had died in the fire. "The landlord may not shift to an independent contractor the responsibility of complying with laws designed for the physical safety of others." (*Id.* at 421) This Court then quoted Section 424 of the Restatement of the Law 2d, Torts, that "one who **by statute or by administrative regulation** is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions." (*Ibid.*)

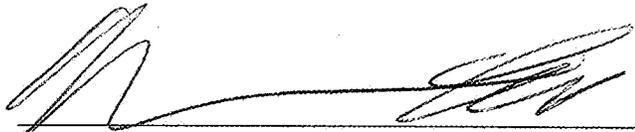
The claim asserted in the instant case against defendant Village Green for negligence in the original (1994) wiring of Building 8, however, did not involve any claim that Village Green failed, in 1994, to comply with a statute or administrative regulation designed for the physical safety of others. Hence, the *Shump* holding has no application to this case.

Therefore, for all of these reasons, this Court should make it clear in this proceeding that a building owner cannot be held liable to a tenant for the negligence of an independent contractor except in situations where the building owner failed to comply with a statutory duty -- which situation, of course, did not exist in the instant case.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the Eighth District upholding the judgments against both of the defendants-appellants herein should be vacated and the Common Pleas Court should be ordered to enter final judgment in favor of both defendants. Alternatively, this Court should order the Common Pleas Court to reduce the amount of the punitive damages judgment against defendant-appellant Village Green of Beachwood, LLP so as to conform with the limitation imposed by R.C. 2315.21(D).¹³

Respectfully submitted,



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¹³ Such a reduction would also include the amount of attorneys fees awarded to plaintiffs, which award, as pointed earlier in this Brief, was in the amount of forty percent of the total compensatory and punitive damages.

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellants Village Green of Beachwood, L.P. and Forest City Residential Management Company, Inc. has been served by regular U.S. Mail, this 12 of August, 2013, upon the following:

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IN THE SUPREME COURT OF OHIO

13-0586

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 DAVID and SIDNEY GRUHIN,)
 JASON and RENEE EDWARDS,)
 NATALIE RUDD, PRATHIBHA)
 MARATHE, HALLIE GELB,)
 MOHAMMED MARWALI/SELVEY)
 PANGKEY, LUCIANA ARMANIJIGAN,)
 MITCHELL ROSENBERG, STATE)
 FARM FIRE CASUALTY COMPANY,)
 NATIONWIDE MUTUAL FIRE)
 INSURANCE COMPANY, ALLSTATE)
 INSURANCE COMPANY, and SAFECO)
 INSURANCE COMPANY OF AMERICA)

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

 Court of Appeals
 Case No. 98401

Appellees

v.

VILLAGE GREEN OF BEACHWOOD,)
 L.P., and FOREST CITY)
 MANAGEMENT, INC.)

Appellants

NOTICE OF APPEAL
 OF APPELLANTS VILLAGE GREEN OF BEACHWOOD, L.P.
 AND FOREST CITY MANAGEMENT, INC.

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**NOTICE OF APPEAL OF APPELLANTS VILLAGE GREEN OF BEACHWOOD, L.P.
AND FOREST CITY MANAGEMENT, INC.**

Appellants Village Green of Beachwood, L.P. and Forest City Management, Inc. hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 98401 on January 17, 2013.

On January 28, 2013, appellants filed an application for *en banc* consideration pursuant to App. R. 26 and Local App. R. 26. On March 5, 2013, the Court of Appeals denied that application.

This case is one of public and great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail on this 10th day of April, 2013, to:

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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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FILED AND JOURNALIZED
PER APP.R. 23(C)

JAN 17 2013

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OF THE COURT OF APPEALS
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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 tortuous 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.

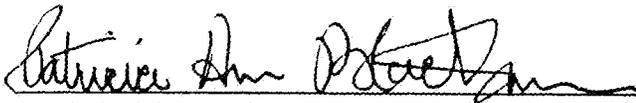
{¶74} Judgment affirmed.

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

-vs-

COMMON PLEAS COURT

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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MAR X 5 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Deputy

MELODY J. STEWART
Administrative Judge

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.

MÉLODY 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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MAR X 5 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Deputy

CASE NO. 671776
Sivit, et al.

ASSIGNED JUDGE Hanna
VS YGOB

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<input type="checkbox"/> 03 REINSTATED (C/A)		<input type="checkbox"/> 82 ARBITRATION DECREE	<input type="checkbox"/> 91 COGNOVITS
<input type="checkbox"/> 04 REINSTATED		<input type="checkbox"/> 83 COURT TRIAL	<input type="checkbox"/> 92 DEFAULT
<input type="checkbox"/> 20 MAGISTRATE		<input type="checkbox"/> 85 PRETRIAL	<input type="checkbox"/> 93 TRANS TO COURT
<input type="checkbox"/> 40 ARBITRATION		<input type="checkbox"/> 86 FOREIGN JUDGMENT	<input type="checkbox"/> 95 TRANS TO JUDGE
<input type="checkbox"/> 65 STAY		<input type="checkbox"/> 87 DIS. W/O PREJ	<input type="checkbox"/> 96 OTHER
<input type="checkbox"/> 69 SUBMITTED		<input type="checkbox"/> 88 BANKRUPTCY/APPEAL STAY	

NO. JURORS _____	COURT REPORTER _____	<input type="checkbox"/> PARTIAL
START DATE ___/___/___	START DATE ___/___/___	<input checked="" type="checkbox"/> FINAL
END DATE ___/___/___	END DATE ___/___/___	<input type="checkbox"/> POST CARD

DATE 5.11.12 (NUNC PRO TUNC ENTRY AS OF & FOR ___/___/___)

Final Judgment Entry.

Costs to Defts.

O.S.J.

JUDGE _____

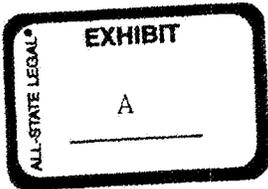
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CPC 43-2



**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

<p>CARLOS SIVIT, et al.</p> <p style="padding-left: 40px;">Plaintiffs,</p> <p style="padding-left: 40px;">v.</p> <p>VILLAGE GREEN OF BEACHWOOD, L.P., et al.</p> <p style="padding-left: 40px;">Defendants.</p>	<p>)</p>	<p>Case No. 08-CV-671776</p> <p>Judge: Harry Hanna</p> <p><u>FINAL JUDGMENT</u></p> <p><u>ENTRY</u></p>
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This matter came on for hearing before this Court pursuant to the post-verdict motions filed by the respective parties, all of which were thoroughly briefed, argued and supported by supplemental evidentiary hearings over the past four months.

The Court finds that the within action was filed some 4 years ago and related to an apartment building fire in 2007;

The Court further finds that the case, through no fault of the parties, eventually went through four judges, ending with this Court for trial on December 5th, 2012.

The Court further finds that on December 16, 2012, after a two-week trial, the jury awarded the following compensatory damage awards in favor of Plaintiffs Carlos Sivit, et al. ("the Sivit Plaintiffs") and against Defendants Village Green of Beachwood, L.P. ("VGOB") and Forest City Residential Management, Inc. ("FCRM"):

Sonya Pace.....	\$214,873.00
David and Sidney Gruhin.....	\$111,233.00
Carlos Sivit.....	\$107,430.00
Jason and Renee Edwards.....	\$47,484.00
Natalie Rudd.....	\$38,850.00
Prathibha Marathe.....	\$35,020.00
Hallie Gelb.....	\$27,256.00

Additionally, pre-trial stipulations (contingent upon a finding of liability) were filed on the issue of compensatory damages for the following Sivit Plaintiffs and for the following amounts:

Mohammed Marwali / Selvey Pangkey....	\$12,000
Luciana Armanijigan.....	\$3,000
Mitchell Rosenberg.....	Nominal damages (\$1)

Further, pre-trial stipulations (contingent upon a finding of liability) were also filed on the issue of compensatory damages for the following insurance subrogation plaintiffs ("insurance plaintiffs") and for the following amounts:

State Farm Insurance.....	\$95,500.00
Nationwide Insurance.....	\$41,026.00
Allstate Insurance.....	\$25,104.95
Safeco Insurance.....	\$10,000.00

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that judgment for compensatory damages in the amounts above stated be awarded to the above named claimant groups of Plaintiffs respectively, and against both Defendants, jointly and severally, for the total aggregate sum of \$768,777.95.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, pursuant to the jury award of punitive damages, that judgment is granted in favor of the 10 claimant groups of Sivit Plaintiffs aforementioned, and against Defendant Village Green of Beachwood, LP, the sum of \$2,000,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, for the reasons stated on the record on May 8, 2012, that the Sivit Plaintiffs' motion for prejudgment interest is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, for the reasons stated on the record on May 8, 2012, Defendants' motion to reduce the punitive damages award is hereby denied.

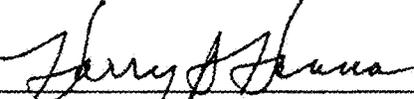
IT IS FURTHER ORDERED, ADJUDGED AND DECREED, for the reasons stated on the record on May 8, 2012, that the Sivit Plaintiffs' motion for attorney fees and costs is approved and reasonable attorneys fees are hereby adjudged in favor of the 10 claimant groups of Sivit Plaintiffs for the sum of \$1,040,000.00, plus their litigation costs in the amount of \$51,757.15, against the Defendant Village Green of Beachwood, LP..

IT IS FURTHER ORDERED that Defendants shall pay the costs of this action.

IT IS FURTHER ORDERED that this judgment is final and appealable, and there is no just cause for further delay.

IT IS SO ORDERED.

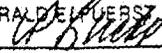
CUYAHOGA COUNTY COURT OF COMMON PLEAS


JUDGE HARRY HANNA

DATE: 5-11-12

RECEIVED FOR FILING

MAY 14 2012

GERALD DEWERTS, CLERK
By  Deputy