

ORIGINAL

IN THE SUPREME COURT OF OHIO

<b>CARLOS SIVIT, et al.,</b>	)	
	)	<b>CASE NO. 2013-0586</b>
Plaintiffs-Appellees	)	
	)	
v.	)	
	)	
<b>VILLAGE GREEN OF BEACHWOOD,</b>	)	<i>On Appeals from Eighth District</i>
<b>L.P., et al.</b>	)	<i>Court of Appeals Case No. 12-CA-</i>
	)	<i>098401 and Cuyahoga County C.P.</i>
Defendants-Appellants	)	<i>Case No. 08-CV-671776</i>

APPELLEES CARLOS SIVIT, ET AL'S MOTION TO STRIKE APPELLANTS' MERIT BRIEF

(alternative relief requested)

JOSEPH W. DIEMERT, JR. (0011573)  
(counsel of record)  
jwdiemert@diemertlaw.com  
DANIEL A. POWELL (0080241)  
dapowell@diemertlaw.com  
*Diemert & Associates Co., L.P.A.*  
1360 S.O.M. Center Road  
Cleveland, OH 44124  
Phone: (440) 442-6800  
Facsimile: (440) 442-0825

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

MARVIN L. KARP (0021944)  
(counsel of record)  
mkarp@ulmer.com  
LAWRENCE D. POLLACK (0042477)  
lpollack@ulmer.com  
*Ulmer & Berne L.L.P.*  
Skylight Office Tower, Suite 1100  
1660 West 2<sup>nd</sup> Street  
Cleveland, OH 44113  
Phone: (216) 583-7000  
Facsimile: (216) 583-7001

*Counsel for Defendants-Appellants  
VGOB, LP, et al.*

RECEIVED  
AUG 19 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

FILED  
AUG 19 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

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

*Counsel for Plaintiff-Appellee  
Nationwide Mut. Fire Insurance Co.*

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

*Counsel for Plaintiff-Appellee  
Allstate Insurance Co.*

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

*Counsel for Plaintiff-Appellee  
Safeco Insurance Co. of America*

ROBERT JAMES (0078761)  
(counsel of record)  
rjames@bricker.com  
1001 Lakeside Avenue E., Ste. 1350  
Cleveland, OH 44114  
Phone: (216) 523-5405  
Facsimile: (216) 523-7071

*Counsel for Plaintiff-Appellee  
State Farm Fire and Casualty Co.*

## MOTION TO STRIKE

Appellees Carlos Sivit, et al. (“Appellees”) respectfully request that this Court strike from the record the Merit Brief filed by Appellants Village Green of Beachwood, L.P. (“VGOB”) and Forest City Residential Management (“FCRM”). Appellants’ Merit Brief should be stricken because it improperly attempts to assert and argue a proposition of law for which this Court did not accept jurisdiction. While the appeal was filed and accepted on propositions of law concerning the award of punitive damages and landlord liability under R.C. 5321.04, Appellants’ Merit Brief urges reversal of the jury’s verdict and award against VGOB, as the developer of the subject apartment complex, on the wholly separate theory of liability asserted and litigated for negligent construction. VGOB did not perfect an appeal relative to the adverse judgment for its negligence in construction, Appellees were not provided the opportunity to oppose jurisdiction on any such proposition of law, and this Court never considered or accepted jurisdiction over the same.

The jurisdictional memorandum submitted by VGOB and FCRM along with their Notice of Appeal suggested three propositions of law for this Court’s consideration:

- I. An action to recover damages for injury to person or property caused by negligence or other tortuous conduct is a “tort action” within the meaning of R.C. 2315.21(A), even though the plaintiff’s claim arose from a breach of duty arising from a contractual relationship and even though defendant’s conduct constituted both tortuous conduct and a breach of contract.
- II. In order to recover punitive damages on the ground that a landlord consciously disregarded the rights and safety of a plaintiff, the plaintiff must prove that the specific danger that caused plaintiff’s injury was a danger of which the landlord had subjective knowledge. The fact that the landlord had knowledge of another danger on the premises is irrelevant if

that other danger had no causal connection to plaintiff's injury.

- 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 behind walls or above ceilings.

The first two propositions of law concern solely the issue of punitive damages, the second of which involving only the issue of punitive damages awarded following a finding of 'landlord liability' under R.C. 5321.04. The third proposition of law is limited to the question of the liability of both VGOB and FCRM under R.C. 5321.04. This Court accepted jurisdiction over the appeal to allow the parties to fully brief those three propositions of law.

Appellants' Merit Brief, submitted after this Court accepted the appeal on the three above stated propositions of law, contained a *new and fourth* proposition of law:

- 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 become tenants of the building.

The new proposition of law implicates legal issues and case components which were not briefed in the jurisdiction memoranda. Specifically, it involves the jury's finding that VGOB, as the *developer* (not landlord) of the apartment complex, was negligent in the construction of the buildings. (See Ex. A, Jury Interrogatory Verdict Form No. 3 and Jury Interrogatories Nos. 4-5).

For this motion to be considered in the proper context, a brief procedural history is necessary. The claims heard by the jury stemmed from a fire which occurred at an apartment complex owned and *built* by VGOB and managed by FCRM. According to

the definitions set forth in R.C. Ch. 5321, both entities were properly considered a “landlord” (VGOB as owner and FCRM as property manager) for the purposes of liability under that chapter and, specifically, section 5321.04. Appellees, all tenants of the building which was destroyed by the fire, asserted claims for violation of R.C. 5321.04. Appellees also asserted claims for negligent construction, separate and apart from their R.C. 5321.04 claims, against VGOB as the developer at the time of construction. The jury explicitly found (via interrogatory) that VGOB was the ‘developer’ during construction of the complex and held VGOB liable for the negligent construction which was evidenced in detail during the two-week trial. The jury’s finding of negligence in construction was independent of its verdict on Appellees’ R.C. 5321.04 claims.

The R.C. 5321.04 claims and the negligent construction claims have been treated as separate and distinct throughout this litigation. The two claims were alleged in separate counts in the complaints. Appellants sought summary judgment on each claim for different reasons, unsuccessfully arguing that the negligent construction claims were barred by the statute of repose. Individual jury interrogatories were posed and answered, covering the two separate theories of liability.

During the proceedings before the court of appeals, Appellants raised eleven assignments of error, two of which separately addressed the judgments which attached to the negligent construction claims:

- V. The trial court erred in denying defendant 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.

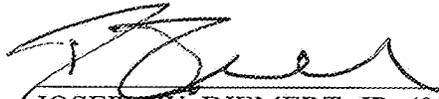
The court of appeals declined all eleven assignments of error, which covered a variety of case issues, including R.C. 5321.04 liability (negligence in maintenance), the admission of evidence, negligence in construction, compensatory damages, punitive damages, and attorney fees. Appellants elected to perfect an appeal to this Court only on certain issues involving R.C. 5321.04 liability and the award of punitive damages. All other issues decided in the case are now final, including but not limited to any and all verdicts and awards which attach to the negligent construction claims.

This Court has consistently refrained from considering an issue which a party fails to raise in its jurisdictional memorandum. See *Corporex Development & Constr. Mgt. Inc. v. Shook, Inc.*, 2005-Ohio-5409, 106 Ohio St.3d 412, fn1. Indeed, by failing to raise a claim of error in the jurisdictional memorandum required to perfect an appeal to this Court, the party waives the ability to assign such error after the appeal has been accepted for review. See *Estate of Ridley v. Hamilton Cty. Bd. of MR&DD*, 2004-Ohio-2629, 102 Ohio St.3d 230; see also *State v. Boswell*, 2009-Ohio-1577, 121 Ohio St.3d 575. The jurisdictional memorandum filed by Appellants does not raise or even allude to any alleged error in the appellate courts decision or the jury's verdict on the negligent construction claims and is therefore unequivocally waived.

Appellants did not request leave to file an additional proposition of law because there is no authority for the granting of such leave. Instead, Appellants simply attempted to 'slip-in' the new proposition of law, unrelated to any issue timely raised and accepted by this Court for review, with the rest of its Merit Brief.

For all of the foregoing reasons, Appellees respectfully request that this Court strike Appellants' Merit Brief from the record. In the alternative, Appellees request that the new, fourth proposition of law be ordered stricken and an Order issue clarifying that Appellees need not respond to the arguments raised therein.

Respectfully submitted,



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

[jwdiemert@diemertlaw.com](mailto:jwdiemert@diemertlaw.com)

DANIEL A. POWELL (0080241)

[dapowell@diemertlaw.com](mailto:dapowell@diemertlaw.com)

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

1360 S.O.M. Center Road

Cleveland, OH 44124

Phone: (440) 442-6800

Facsimile: (440) 442-0825

***Counsel for Plaintiffs-Appellees***

**CERTIFICATE OF SERVICE**

A copy of the foregoing was served, via regular US Mail, this 16<sup>th</sup> day of August, 2013, upon the following:

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

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

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

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

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

  
DANIEL A. POWELL (0080241)

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

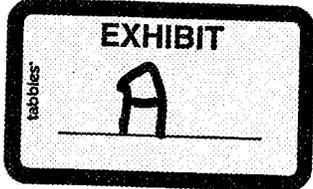
JURY VERDICT FORM NO. 1

Do you find for the plaintiffs on their negligent maintenance claims (Landlord Liability) against Defendant Village Green of Beachwood LP?

Yes   X  

No       

<del>Matthew J. ...</del>	<del>...</del>
Justin B. Kneale	Just ...
Kathleen A. Johnson	...
...	Laurence D. Moon



JURY VERDICT FORM NO. 2

Do you find for the plaintiffs on their negligent maintenance claims (Landlord Liability) against Defendant Forest City Residential Management Inc?

Yes   X  

No       

[Signature]  
Paul Sney  
Andrew B. [Signature]  
Katherine A. Johnson

[Signature]  
[Signature]  
Lawrence A. Ryan  
\_\_\_\_\_

JURY VERDICT FORM NO. 3

Do you find for the plaintiffs on their negligent construction claims (Developer Liability) against Defendant Village Green of Beachwood LP?

Yes

No

Fred J. ...  
Morgan ...  
Robert G. ...  
Kathleen A. Johnson

...  
...  
Laurence G. Johnson  
...



JURY INTERROGATORY NO. 1

Place an "x" on the line next to the name of the Defendant if you find by a preponderance of the evidence that that Defendant knew or should have known of a defect or condition that caused the fire to occur.

Village Green of Beachwood L.P.

X

Forest City Residential Management, Inc.

\_\_\_\_\_

[Signature]  
[Signature]  
[Signature]  
[Signature]

Kathleen A. Jensen  
[Signature]  
[Signature]  
Lawrence A. Hoar

JURY INTERROGATORY NO. 2

Do you find by a preponderance of the evidence that the fire was caused by a breach of Defendant Village Green of Beachwood LP's duties as landlord of the property?

Yes

X

No

\_\_\_\_\_

[Signature]  
[Signature]  
[Signature]  
[Signature]

Kathleen A. Johnson  
[Signature]  
[Signature]  
Lawrence R. Moon

JURY INTERROGATORY NO. 3

Do you find by a preponderance of the evidence that the fire was caused by a breach of Defendant Forest City Residential Management, Inc.'s duties as landlord of the property?

Yes X

No \_\_\_\_\_

[Signature]  
[Signature]  
Andrew C. Kowale  
Kathleen A. Johnson

[Signature]  
[Signature]  
Lawrence A. Mann  
\_\_\_\_\_

JURY INTERROGATORY NO. 4

Do you find by a preponderance of the evidence that that Defendant Village Green of Beachwood L.P. was the developer of the apartment complex?

Yes X No \_\_\_\_\_

[Signature]  
[Signature]  
[Signature]  
[Signature]

Kathleen A. Johnson  
[Signature]  
[Signature]  
Lawrence A. Moon

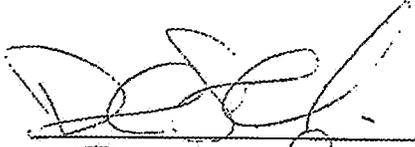
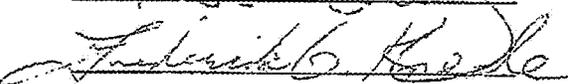
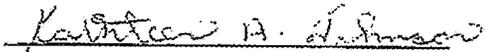


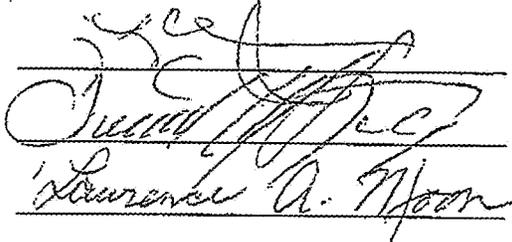
JURY INTERROGATORY NO. 6

If you find for the Plaintiffs in this case, you must determine the amount of compensatory damages awardable to each Plaintiff?

Carlos Sivit	\$ <u>107,430.00</u>
Hallie Gelb	\$ <u>27,256.00</u>
David and Sidney Gruhin	\$ <u>111,233.00</u>
Jason and Margaret Edwards	\$ <u>47,484.00</u>
Sonya Pace	\$ <u>214,873.00</u>
Natalie Rudd	\$ <u>38,850.00</u>
Prathibha Marathe	\$ <u>35,200.00</u>

Total 582,326

  
\_\_\_\_\_  
James Sun  
  
\_\_\_\_\_  
Frederick Kade  
  
\_\_\_\_\_  
Katherine A. Johnson

  
\_\_\_\_\_  
Lawrence A. Moon  
\_\_\_\_\_

JURY VERDICT FORM "A"

Do you find for the plaintiffs on their punitive damages claim against Defendant Village Green of Beachwood LP?

Yes

X

No

~~\_\_\_\_\_~~

[Signature]  
Juan Luis  
[Signature]  
Frankie Keale

Kathleen A. Johnson  
[Signature]  
Lauren B. [Signature]  
\_\_\_\_\_

JURY VERDICT FORM "B"

Do you find for the plaintiffs on their punitive damages claim against Defendant Forest City Residential Management Inc?

Yes

No

[Signature]  
[Signature]  
[Signature]  
[Signature]

Kathleen A. Johnson  
[Signature]  
[Signature]  
Lawrence A. Moon

JURY VERDICT FORM "C"

If you answered yes on either Verdict Form "A" or "B", please state the amount of punitive damages to be awarded

\$ 2,000,000<sup>00</sup>

[Signature]

[Signature]

Frederick C. Reese

Kathleen A. Johnson

[Signature]

Lawrence A. Moon

\_\_\_\_\_

\_\_\_\_\_

JURY VERDICT FORM "D"

Do you find for the plaintiffs on their claim for reasonable attorney fees against Defendant Forest City Residential Management Inc? (The amount to be reasonably determined by the Court)

VILLAGE GREEN OF BEACHWOOD LP

19  
3/5

Yes

No

  
\_\_\_\_\_  
John [unclear]  
\_\_\_\_\_  
Richard B. Keene  
\_\_\_\_\_  
Kathleen A. Lehner

  
\_\_\_\_\_  
Lawrence H. Moon  
\_\_\_\_\_  
\_\_\_\_\_

**JURY VERDICT FORM "E"**

Do you find for the plaintiffs on their claim for reasonable attorney fees against Defendant Forest City Residential Management Inc? (The amount to be reasonably determined by the Court)

Yes

No

~~\_\_\_\_\_~~  
Terry J. Jones  
Charles B. Keefe  
Kathleen A. Johnson

~~\_\_\_\_\_~~  
Lawrence R. Moor  
\_\_\_\_\_