

ORIGINAL

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)	

**RESPONSE OF APPELLANTS TO MOTION OF
 APPELLEES CARLOS SIVIT, ET AL.
 TO STRIKE APPELLANTS' MERITS BRIEF**

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**BRIEF OF DEFENDANTS-APPELLANTS IN
OPPOSITION TO MOTION TO STRIKE**

The issue raised by plaintiffs-appellees' Motion to Strike is whether this Court, when hearing a case on the merits, may consider a proposition of law that was not specifically raised in the appellants' Memorandum in Support of Jurisdiction. (In this appeal, that would be Proposition of Law No. IV, which is discussed at pages 26-31 of appellants' Merits Brief.)

Appellees' Motion to Strike does not cite any case in which a motion to strike was ever granted on such a ground. Instead, appellees cite three cases in which this Court, in deciding an appeal on its merits after oral argument, "**refrained from considering** an issue [raised in a merits brief] which a party fail[ed] to raise in its jurisdictional memorandum." (Motion to Strike, p. 6). However, there have been **other cases** in which this Court ruled differently and held that it was proper for this Court to consider such a proposition of law. See, for example, *C.E. Morris Company v. Foley Construction Company*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), where appellee Foley Construction Company argued (just as appellees do here) that "when a case is heard on the merits pursuant to the allowance of a motion to certify, the Supreme Court of Ohio will not consider any proposition of law which is not raised in the memoranda supporting or opposing claimed jurisdiction." (54 Ohio St.2d at 280, fn. 1) This Court, however, rejected Foley's argument and held that it could properly decide the new proposition of law raised in the appellant's merits brief "because a 'cause properly appealed to this court is here for the determination of all questions presented by the record * * *' (*Winslow v. Ohio Bus Line Co.* (1947), 148 Ohio St. 101, 73 N.E.2d 504), and the standard applied by the Court of Appeals [and challenged by appellant C.E. Morris Company in its merits brief] is clearly presented by the record in the instant case. Foley's contention is, therefore, without merit." (*Ibid.*).

See also *State v. Steffen*, 70 Ohio St.3d 399, 639 N.E.2d 67 (1994), where this

Court stated:

Section 2(B)(1)(f), Article IV of the Ohio Constitution grants original jurisdiction to this court “[i]n any cause on review as may be necessary to its complete determination.” We have interpreted this provision to authorize judgments in this court that are necessary to achieve closure and complete relief in actions pending before the court. *State ex rel Polcyn v. Burkhart* (1973), 33 Ohio St.2d 7, 62 O.O.2d 202, 292 N.E.2d 883 * * *

Appellants therefore submit that it is entirely within the discretion of this Court to consider, when hearing a case on the merits, a proposition of law that was not included in the appellant’s memorandum in support of jurisdiction. Appellants further submit that, in this case, that discretion should be exercised in favor of considering Proposition of Law No. IV (the new proposition of law in appellants’ Merits Brief), although this Court might defer making a final decision on this question until after it has had an opportunity to study the merits briefs of all of the parties and after it has heard oral argument; in other words, after this Court has become fully knowledgeable with respect to all aspects and nuances of this appeal. Appellants believe that such an approach is warranted by the history of this case, which is as follows:

a. On October 23, 2007, a fire occurred 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 -- then sued the owner of the complex, defendant Village Green of Beachwood, L.P. (“Village Green”), and the company that had been managing the complex since September 1, 2006, defendant Forest City Residential Management, Inc. (“Forest City Residential”), alleging that the fire had resulted from (a) “negligent construction” (i.e., negligent installation of electrical wiring) back in 1994 by an **independent electrical contractor** hired by Village Green and (b) subsequent “negligent maintenance” of the electrical wiring, in violation of

the Ohio Landlord-Tenant Act (R.C. 5321.04), by both Village Green and Forest City Residential.

b. In December, 2011, a jury returned verdicts in favor of the plaintiffs on (a) their “negligent maintenance” claims against **both defendants** and on (b) their “negligent construction” claims against defendant **Village Green** -- notwithstanding Village Green’s argument to the trial judge that, under established Ohio law, it could not be held liable for negligent construction by an independent contractor -- and awarded compensatory damages to the individual plaintiffs (and against both defendants) totaling \$597,326.

c. The jury then awarded the individual plaintiffs punitive damages against defendant Village Green in the amount of \$2,000,000. Since that amount was more than three-and-a-half times the total compensatory damages that had been awarded the individual plaintiffs (\$597,326), Village Green 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 this case was not a “tort action” within the meaning of R.C. 2315.21 and that the statute therefore “does not apply” to this case.

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

e. On January 17, 2013, the Eighth District rejected all of defendants’ claims of error. Both defendants then filed a notice of appeal to this Court.

f. In their Memorandum in Support of Jurisdiction, defendants-appellants set forth three propositions of law that they believed were of public or great general interest:

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

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

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

g. In their Memorandum in Support of Jurisdiction, appellants also stated that the plaintiffs’ complaints alleged that the fire “had resulted from ‘negligent construction’ (i.e., negligent installation of electrical wiring) and subsequent ‘negligent maintenance’ of the electrical wiring” (Memorandum in Support, p. 6). Appellants, however, did not include in their Memorandum a proposition of law with respect to the trial court’s having imposed liability on the owner of an apartment building liable for

negligent construction by an independent contractor. In deciding to not include such a proposition of law in their Memorandum, appellants concluded that the trial court's unprecedented ruling on that issue was so aberrational that there was little likelihood that such a ruling would be repeated in any future case. Therefore, appellants did not believe that that ruling presented an issue of public or great general interest that would even remotely approach the level of public or great general interest evoked by the three propositions of law that were set forth in their Memorandum (and which are quoted above). Appellants therefore decided not to include a fourth proposition of law based on that ruling.

h. However, after this Court accepted jurisdiction and appellants began preparing their Merits Brief, appellants realized that, in order to obtain complete relief for appellant Village Green, it would be necessary to bring to this Court's attention the trial court's error with respect to the plaintiffs' claim for "negligent construction," given the fact that the judgment against Village Green was based on both "negligent maintenance" and "negligent construction." Appellants then determined that the appropriate way of doing this, i.e., to make sure that this circumstance was not overlooked by this Court, would be to add a fourth proposition of law that would read as follows: "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." In arriving at the latter decision, appellants relied on the *C.E. Morris* case (54 Ohio St.2d 279) cited above. In other words, appellants believed that, under the holding of that case, this Court has jurisdiction to consider and adjudicate this additional proposition of law since it deals

with an issue that was clearly presented by the record in this case. Accordingly, "Proposition of Law No. IV" was added to appellants' Merits Brief.

Appellants therefore submit that, in deciding this appeal on its merits, this Court, in addition to determining whether the trial court erred in submitting plaintiffs' **negligent maintenance** claim to the jury (Proposition of Law No. III), should also determine whether the trial court likewise erred in submitting plaintiffs' **negligent construction** claim to the jury (Proposition of Law No. IV). This Court will then be able to determine whether the compensatory damages judgment against appellant Village Green in the amount of \$597,326 -- which compensatory damages judgment was, as pointed out above, based on **both** a verdict of "negligent maintenance" and a verdict of "negligent construction" -- should be vacated. That determination would then afford "complete relief" to appellant Village Green, and justice will be done.

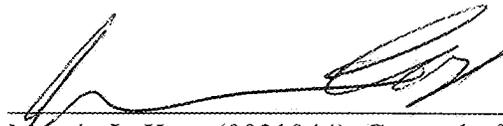
CONCLUSION

For all of the reasons set forth above, this Court should deny appellees' astonishing motion to strike appellants **entire** Merits Brief "from the record" -- an extreme and extraordinary step for which appellees cite no authority whatever -- as well as appellees' "alternative request" that "the new, fourth proposition of law be ordered stricken."

Appellants would further point out that appellees have made no claim that appellants' Merits Brief violates the Rules of Practice of this Court. Indeed, there appears to be no provision in those Rules of Practice that even refers to this situation. Hence, there is no legal basis for appellees' Motion to Strike.

Finally, for the reasons set forth above, this Court should adjudicate appellants' Proposition of Law No. IV after merits briefs have been filed by all parties and the Court has heard oral arguments.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Response of Appellants to Motion of Appellees Carlos Sivit, et al. to Strike Appellants' Merit Brief has been served by regular U.S. Mail, this 23rd of August, 2013, upon the following:

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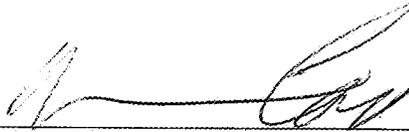
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