

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)	

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

Marvin L. Karp (0021944), Counsel of Record
 Lawrence D. Pollack (0042477)
 ULMER & BERNE LLP
 Skylight Office Tower, Suite 1100
 1660 West 2nd Street
 Cleveland, OH 44113
 (216) 583-7000
 (216) 583-7001 (Fax)
 E-mail: mkarp@ulmer.com
lpollack@ulmer.com

*Counsel For Appellants Village Green and
Forest City Residential Management, Inc.*

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Joseph W. Diemert, Jr. (0011573)
 Daniel A. Powell (0080241)
 DIEMERT & ASSOCIATES CO., L.P.A.
 1360 S.O.M. Center Road
 Cleveland, OH 44124
 (440) 442-6800
 (440) 442-0825 (Fax)
 E-mail: receptionist@diemertlaw.com

*Attorneys for Appellees Carlos Sivit, Sonya Pace,
David Gruhin, Sidney Gruhin, Jason Edwards,
Renee Edwards, Prathibha Marwal, Selvey
Pangkey, Mohammed Maswali, Hallie Gelb, Natalie
Rudd, Luciana Armaganijan and Mitchell
Rosenberg*

Robert James (0078761)
BRICKER & ECKLER, L.L.P.
1001 Lakeside Avenue, East, Suite 1350
Cleveland, Ohio 44114-1142
(216) 523-5482
(216) 523-7071 (Fax)
E-mail: rjames@bricker.com

*Counsel for Appellee
State Farm Fire and Casualty Company*

Joseph Ferrante (0040128)
2 Summit Park, Suite 540
Independence, OH 44131
(216) 623-1155
(216) 623-1176 (Fax)
E-mail: FERRANJ@nationwide.com

*Counsel for Appellee
Nationwide Mutual Insurance Company*

James Marx (0038999)
Signature Square 11, Suite 220
25101 Chagrin Boulevard
Beachwood, OH 44122
(216) 831-5100
(216) 831-9467 (Fax)
E-mail: jmarx@shaperolaw.com

*Counsel for Appellee
Allstate Insurance Company*

Jeffrey A. Kaleda (0069149)
2368 Victory Parkway
Suite 200, P.O. Box 45206
Cincinnati, OH 45206
(513) 961-6200, Ext. 309
(513) 961-6200
E-mail: Kaleda@m-r-law.com

Counsel for Appellee
Safeco Insurance Company of America

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REPLY 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. **Appellees Make No Attempt to Defend the Court of Appeals’ Erroneous Interpretation of R.C. 2315.21**

In their principal Brief, these appellants pointed out that the decision of the Eighth District Court of Appeals, if allowed to stand, will dramatically restrict the “tort actions” to which the “cap” on punitive damages imposed by the General Assembly in R.C. 2315.21(D) will apply. For under the Eighth District’s interpretation, that “cap” will not apply to any action where the “only relationship” between plaintiff and defendant is “contractual” and the duty breached by defendant arose from that relationship (Opinion, ¶ 60; App. 31), even though the claim asserted by the plaintiff is that the defendant acted negligently or tortiously.

Thus, in so-called “hybrid actions” -- where the conduct of the defendant can be construed as giving rise to both a claim for breach of contract and a claim in tort -- the Eighth District concluded that the breach of contract claim “trumps” the tort claim insofar as R.C. 2315.21 is concerned and that the “cap” and bifurcation provisions of that statute (R.C. 2315.21(D) and (B)) are therefore inapplicable to such actions. (*Id.*, ¶ 62; App. 32). This means that in all such actions -- which would include, *inter alia*, insurance bad faith cases, legal malpractice cases, bailment cases, actions brought by employees against employers for retaliatory discharge, sexual harassment, age discrimination or sex discrimination, and actions

for negligent failure to perform an agreement to provide services¹ -- the plaintiffs will be allowed to recover punitive damages in an unlimited amount. Moreover, the reason why the Eighth District would allow unlimited punitive damages to be awarded in such cases is because, in the Eighth District's view, such cases should be deemed to be "civil actions for breach of contract," even though punitive damages are not supposed to be recoverable at all in breach of contract actions. Hence, the Eighth District has taken a statute that was intended to **limit** punitive damages (see *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 880 N.E.2d 420 (2007), ¶¶ 100, 102) and interpreted it in a way that will **expand** punitive damages.

Significantly, appellees, in their Merit Brief, do not dispute appellants' reading of the Eighth District's decision. Nor do appellees challenge appellants' analysis of the consequences of that decision. Indeed, appellees do not even mention (let alone attempt to defend) any portion of the Eighth District's reasoning, which reasoning, as indicated above, dramatically limits the cases to which R.C. 2315.21(D) and (B) can be applied.

B. Appellees' Contention That an Action Under R.C. 5321.04 Is an Action for Breach of Contract Is Contrary to Case Law

Instead, appellees' "Response to Proposition of Law No. 1" is confined to a single narrow argument, which is: Appellees' claim that appellants violated a duty imposed on landlords by R.C. 5321.04 (namely, to do what is "reasonably necessary" to keep the residential premises in a fit and habitable condition and maintain the premises' equipment in good and safe working order) constituted a "civil action for damages for a breach of contract or another agreement between persons" within the meaning of R.C. 2315.21(A); appellees' lawsuit was therefore exempt from R.C. 2315.21(D) and (B). (Appellees' Merit Brief, p. 18).

¹ See, for example, *Durham v. Warner Elevator Mfg. Co.*, 166 Ohio St. 31, 37, 139 N.E.2d 10 (1956), where this Court declared that "[I]iability in such instance is not dependent upon any contractual relation between the person injured and the contractor, but on the failure of the contractor to exercise due care in the performance of his obligation."

It is, however, noteworthy that appellees do not cite a single case that supports their assertion that a suit against a landlord for violating R.C. 5321.04 constitutes an action for breach of contract.

In fact, appellees' assertion is directly contrary to repeated holdings of this Court that a landlord's failure to fulfill the duties imposed by R.C. 5321.04 "**constitutes negligence per se.**" See *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20, 26, 427 N.E.2d 774 (1981); *Anderson v. Ceccardi*, 6 Ohio St.3d 110, 114, 451 N.E.2d 780 (1983), paragraph 2 of syllabus; *Sikora v. Wenzel*, 88 Ohio St.3d 493, 498, 2000-Ohio-406 (2000); *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, at ¶¶ 23 and 24. Nowhere in any of those cases did this Court say that a landlord's violation of R.C. 5321.04 constitutes a breach of contract.

In addition, there are several appellate decisions stating that actions under R.C. 5321.04 "**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." Rather, 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." See also *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."

Thus, the most that can be said in support of appellees' position is that, because a landlord is subject to R.C. 5321.04 only if the landlord is "a party to a rental agreement" (R.C. 5321.04(A)), a claim for violation of R.C. 5321.04 may constitute **both** a breach of contract and a tort. Compare *Fouty v. Ohio Dept. of Youth Services*, 167 Ohio App.3d 508, 2006-Ohio-2957 (10th Dist.), ¶ 65, where the Tenth District stated that

the breach of a duty, even if arising via a 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.

However, as discussed below at page 6, there is no valid basis for excluding such a "hybrid" case from the "cap" and bifurcation provisions of R.C. 2315.21.

C. Appellees' Argument is Also Contrary to Its Pleadings and to the Instructions Given to the Jury

In addition to being contrary to case law, appellees' argument ignores the fact that the complaints filed by appellees expressly alleged that appellants had "negligently maintained" the electrical wiring in Building 8. Appellees' argument also ignores the fact that the **jury instructions** given by the trial judge **made no mention** of any purported claim for breach of contract. Rather, those jury instructions (which, for the convenience of the Court, are set forth at pp. 28-50 of the Supplement to Appellants' Merit Brief) stated that plaintiffs were claiming that defendants Village Green and Forest City Residential had "breached liability created by statute for landlords towards tenants" [i.e., R.C. 5321.04] (Tr. 2176; Supp. 35); 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); 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). Nowhere in those instructions was the jury asked to determine whether there had been a breach of contract.

D. Appellees’ Position Is Contrary to the Settled Rule That Punitive Damages Are Not Recoverable in an Action for Breach of Contract

If, on the other hand, it is somehow concluded that appellees’ claims under R.C. 5321.04 were **solely** actions for breach of contract and therefore not subject to R.C. 2315.21(D) and (B), as asserted by appellees, then it should be held that appellees are not entitled to recover punitive damages in any amount, given the settled Ohio rule that punitive damages are not recoverable in a breach of contract action.

Appellees attempt to avoid this conclusion by asserting that punitive damages can be recovered in a breach of contract action where the duties breached by the defendant were “legally mandated” by statute. (Merit Brief, pp. 18-19). Appellees, however, cite no case authority for that unique proposition. Rather, the rule in Ohio is that “[p]unitive damages are not recoverable for a breach of contract **unless the conduct constituting the breach is also a tort** for which punitive damages are recoverable.” See *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 381, 613 N.E.2d 183 (1993), quoting from 3 Restatement of the Law 2d, *Contracts*

(1981), § 355. Accord: *Mabry-Wright v. Zlotnik*, 165 Ohio App.3d 1, 2005-Ohio-5619 (3rd Dist.), ¶ 19; and *Hofner v. Davis*, 111 Ohio App.3d 255, 259, 675 N.E.2d 1339 (6th Dist. 1996).

If, however, punitive damages may be recovered in a breach of contract action if the “conduct constituting the breach is also a tort,” it logically follows that such an action should not be exempted from the “cap” and bifurcation provisions of R.C. 2315.21. For whenever Ohio courts have allowed punitive damages to be recovered in hybrid cases (i.e., cases in which the defendant’s conduct constituted both a breach of contract and a tort), those courts have recognized that the punitive damages were being awarded, “not for the breach of contract, but for the tortious conduct.” See *Mabry-Wright v. Zlotnik*, at ¶ 20, citing *R&H Trucking, Inc. v. Occidental Fires & Cas. Co.*, 2 Ohio App.3d 269, 272, 441 N.E.2d 816 (10th Dist. 1981) and *Sweet v. Grange Mut. Cas. Co.*, 50 Ohio App. 2d 401, 407, 364 N.E.2d 38 (1975); *Ali v. Jefferson Insurance Co.*, 50 Ohio App.3d 105, 107, 449 N.E.2d 495 (6th Dist. 1982); *Stewart v. Siciliano*, 2012-Ohio-6123 (11th Dist.); and *Host v. Ursem*, 1993 WL 216901 (8th Dist.).

It should therefore be manifest that the clause in R.C. 2315.21(A) relied upon by appellees, stating that the term “tort action,” as used in R.C. 2315.21, does “not include a civil action for damages for a breach of contract or another agreement between persons,” should not be interpreted as exempting hybrid cases from the “cap” and bifurcation provisions of that statute. The clause in question was obviously intended to exempt from the operative paragraphs of R.C. 2315.21 only those actions in which punitive damages have **never** been recoverable, namely, actions that are **purely** actions for breach of contract. There is no valid reason to construe that clause as having been intended to exempt actions that constitute both claims for breach of contract and tort claims. As pointed out earlier, the General Assembly’s objective was to limit punitive damages, not to expand the allowance 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. A holding that hybrid cases are exempt from R.C. 2315.21(D) and (B) would be contrary to that intent.

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 Approach Urged by Appellees Would Negate the Rule Announced by This Court in *Malone v. Courtyard by Marriott*, 74 Ohio St.3d 440 (1996)**

In their principal Brief, appellants pointed out that the trial court committed prejudicial error when it allowed appellees’ claim for punitive damages to go to the jury, since there was no evidence that either defendant had any “actual or subjective knowledge of the danger allegedly posed to” appellees that ultimately caused appellees’ damage. In the absence of such knowledge, a “punitive damages claim against [the] defendant premised on the ‘conscious disregard’ theory of malice is not warranted.” *Malone v. Courtyard by Marriott*, 74 Ohio St.3d 440, 446, 639 N.E.2d 1242 (1996).

In this case, the alleged “danger” that caused the fire (according to appellees’ fire investigator, Ralph Dolence) was the wearing away of the insulation of one of the electrical wires that had been stapled to the wooden joists in the interstitial space above the ceiling of Apartment 210. (See pp. 1-2 and 18 of appellants’ Merit Brief; see also ¶ 26 of the Court of Appeals Opinion, App. 20-21, stating that “Dolence pinpointed the root source of the fire to three wires under the living room floor of Unit 310.”) Because of their location, those wires were concealed from appellants. Hence, there was no evidence whatsoever (let alone the “clear and convincing evidence” required for punitive damage claims) that either of the appellants had any knowledge, prior to the October, 2007 fire, that such a wearing away of insulation was occurring.

Appellees, at page 24 of their Merit Brief, concede that, “to consciously disregard a danger, one must possess actual knowledge of the danger.” However, appellees then attempt to gloss over the fact that appellants had no actual knowledge of the “danger” that caused the fire by ignoring the nature of that “danger,” namely, that something was occurring to at least one of the electrical wires in the interstitial space above Apartment 210. Instead, appellees rely on conditions in Building 8 that had nothing to do with that particular danger. Thus, at pp. 24-25, they argue that appellants “consciously disregarded their duty to **make all repairs** and do **whatever is reasonably necessary** to put and keep the residential premises in a fit and habitable condition, and consciously disregarded their obligation to maintain in good and safe working order the conditions in Building 8.” In other words, appellees are asking this Court to hold that “actual malice” is established in a landlord-tenant case if the landlord consciously fails to correct **any “defective condition”** that existed in the leased premises at the time of the occurrence that damaged the tenant (e.g., a fire), even though the uncorrected “defective condition” did not cause -- or, indeed, have anything to do with -- that occurrence.

Appellees’ approach, it should be noted, is essentially the same as that taken by the Eighth District, which stated that “the testimony presented at trial established that Village Green consciously ignored the severe **state of disrepair of Building 8**” and that such “inaction [by Village Green] was sufficient to support a finding of malice.” (Opinion, ¶¶ 51 and 52; App. 28). As pointed out in appellants’ Merit Brief (at pages 19-20), the principal flaw in the Eighth District’s reasoning was that the only evidence presented at trial with respect to the “severe state of disrepair in Building No. 8” related entirely to the **exterior of the building**, i.e., “deteriorated siding,” “missing brick veneer,” “broken exhaust vents,” “painting” of exterior, and “missing gutters,” according to a 2006 letter sent by the Beachwood Building Department and referred to

by the Eighth District in ¶ 21 of its Opinion. (A copy of that letter is included in the Supplement to Appellants' Merit Brief at Supp. 1-2.) Significantly, **no complaint** was made by the Beachwood Building Department with respect to the **electrical wiring** inside Building 8. Nor was there any indication in any of appellants' maintenance records that any significant electrical problem was occurring anywhere in that building without being corrected. (Tr. 447-506).

Hence, the conclusion reached by the Eighth District and now urged by appellees -- namely, that knowledge by the landlord of **any defective condition** in the leased premises satisfies the "actual or subjective knowledge" rule set forth by this Court in the *Courtyard by Marriott* case -- would subvert the purpose of that rule. For that approach would subject landlords in Ohio to punitive damages in R.C. 5321.04 cases even where the landlord had no knowledge of the particular condition that actually caused damage to the tenant.

B. Appellees' Emotional Arguments

In apparent recognition of the weakness of their legal argument, appellees devote much of this section of their Merit Brief to attacking appellants. Those attacks include hyperbolic denunciations of appellants' "collective wealth and value" (p. 25), "reckless disregard for the rights and safety of the men, women and children" (*Ibid.*), "missing documents," "false denials", and "appellants' motivation of greed" (*Id.*, p. 29), and the calumny that appellants' "overriding concern was money not safety." (*Id.*, pp. 25-26). In making these assertions -- which are essentially identical to the emotional exhortations that their counsel made to the Common Pleas Court jury -- appellees appear to have lost sight of the fact that they are now addressing, not a jury, but the justices of the Supreme Court of Ohio.

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. Appellees' Attempt to Avoid the Fact That Appellants Had No Knowledge of the Condition That Caused the Fire

In their principal Brief, appellants pointed out that the Ohio courts have consistently held that, in order to recover compensatory damages for negligent maintenance under R.C. 5321.04, a tenant must prove that the defendant landlord (a) had actual or constructive knowledge of the **particular defective condition** that actually caused the occurrence that damaged the plaintiff and (b) failed to “do whatever was reasonably necessary to correct” that condition (see cases cited at pp. 21-22 of Appellants’ Merit Brief).

In this case, there was absolutely no evidence that the particular defective condition that allegedly caused the fire -- the wearing away of the insulation of one of the three wires in the interstitial space above the ceiling of Apartment 210 -- was known to the appellants or discoverable by them through any reasonable inspection. For in order for appellants to have discovered what was happening, it would have been necessary for them to have cut open the ceilings of each of the thirty-two apartments in Building 8 and checked the insulation on the wires in the interstitial spaces, a procedure that would have been far beyond what R. C. 5321.04 requires. Thus, in an almost identical case, *Abbott v. Haight Properties, Inc.*, 2000 WL 491731 (6th Dist.), the Sixth District Court of Appeals expressly held that a landlord cannot be held liable for a fire that occurred in such a situation, i.e., a fire that resulted from a “fault that occurred in an electrical wire concealed above a ceiling or behind a wall and of which the landlord therefore had no knowledge.” The Sixth District pointed out that “in order to inspect the electrical wiring, 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.” (See appellants’ Merit Brief, pp. 22-23).

Tellingly, the Eighth District never even mentioned the *Abbott* decision in its Opinion. Nor did the Eighth District mention the fact that appellants herein had no knowledge that a problem was developing in one of the wires above the ceiling of Apartment 210. Instead, the Eighth District adopted appellees' notion that appellants could be held liable simply because they were aware that there were "various maintenance issues" with respect to Building 8 (Opinion, ¶ 18), including, in particular, the "numerous violations" listed in the Beachwood Building Department's July, 2006 notice to appellant Village Green (Opinion, ¶ 21; App. 19). Hence, the Eighth District essentially held that **any dereliction** by a landlord or building manager in the maintenance of the building -- such as the "deterioration in the exterior siding," the "missing brick veneer" and the "missing gutters" cited by the Building Department in its July, 2006 notice (see pages 8-9 above) -- was sufficient to impose liability on the landlord and the building manager for the fire that occurred in that building, even though none of those derelictions had any connection whatever with the particular defective condition that actually caused the fire (i.e., the wearing away of the insulation on an interior wire).

Appellees, in their Merit Brief, take that same position. Faced with the repeated holdings of this Court and several appellate courts that in order to establish a violation of R.C. 5321.04 "it must be shown that the landlord **received notice of the defective condition** of the premises" (see, for example, *Shroades*, 68 Ohio St.2d at 25-26; *Robinson v. C&L Associates, L.L.C.*, 188 Ohio App.3d 649 2010-Ohio-3118 (2nd Dist.), ¶ 19; and *Mounts v. Ravotti*, 2008-Ohio-5457 (7th Dist.), ¶ 30)), appellees argue that the "defective condition" of which the landlord has to have had knowledge need **not** be the particular defective condition that actually caused the tenant's loss. Rather, "the notice requirement is satisfied if the landlord was 'aware of **some defective condition** which needed attention'" (Appellees' Merit Brief, p. 32). In support of that

assertion, appellees cite another Eighth District decision, *McKenzie v. Marlowe*, 1996 WL 715502.

B. The Errors in Appellees' Argument

Appellants submit that such an interpretation of R.C. 5321.04 is clearly erroneous. As noted above, one of the “defective conditions [in Building 8] which needed attention” (to use appellees’ phrase) was the deterioration of portions of the exterior siding, referred to in the Beachwood Building Department’s July, 2006 notice. Therefore, according to the rationale adopted by appellees (and the Eighth District), appellants’ knowledge of that deteriorated siding was sufficient to impose liability on them for the October, 2007 fire, even though the siding deterioration in no way caused the fire. Appellants submit that that makes no sense. Indeed, appellees’ position is directly contrary to the holding of this Court in the *Sikora* case that the plaintiff in a R.C. 5321.04 case must show that the landlord “knew, or should have known, of the **factual circumstances that caused the violation.**” (88 Ohio St.3d at 498)²

Even if appellees’ “some defective condition” argument were limited to appellants having had knowledge of what appellees refer to as “electrical irregularities” or “general electrical malfunctions,” appellees’ argument would still be contrary to law. To begin with, by using such generalized descriptions, appellees avoid mentioning how relatively minor, isolated and scattered in time those “electrical irregularities” actually were: occasional “loss of power” (Tr. 1342 and 1433), false fire alarms (Tr. 1317) and “brown-outs” (when lights would dim) (Tr. 1405). More importantly, appellees fail to mention that there was **absolutely no testimony** that any of those “irregularities” indicated that the insulation on an interior wire was

² In the *Sikora* case, a deck attached to plaintiff’s condominium collapsed as a result of improper construction in violation of the Ohio Basic Building Code (“OBBC”). The evidence showed that the defendant landlord “neither knew nor had any way of knowing of the defective condition.” This Court therefore held that the landlord’s violation of R.C. 5321.04 “is excused and he is not liable to [the tenant] for failing to comply with the OBBC.” (*Id.* at 498).

being worn away somewhere in the building and that appellants should therefore open up all of the ceilings and walls in that thirty-two apartment building and inspect all of the concealed wires. In short, appellees “failed to provide evidence to show that the problems they complained of in their apartments were in any way linked to the electrical short [above] apartment [210].” *Wilhelm v. Heritage Management Company*, 1998 WL 24342 (12th Dist.), dissenting opinion.³

Thus, by focusing on those isolated “electrical irregularities,” appellees ignore the repeated holdings of this Court that the plaintiff in a R.C. 5321.04 case has to show a “**proximate causal relationship**” between (a) a landlord’s negligent failure to correct a defective condition of which the landlord had knowledge and (b) the occurrence that caused damage to the plaintiffs. See *Shroadess*, 88 Ohio St.2d at 2126; *Sikora*, 88 Ohio St.3d at 497 and *Robinson*, 112 Ohio St.3d 117, ¶ 13. The “electrical irregularities” referred to by appellees did not fulfill that requirement, since there was no evidence that any of those “irregularities” were caused by, or had any connection with, the particular defective condition that caused the October, 2007 fire, namely, the wearing away of the insulation on one of the wires above the ceiling of Apartment 210.

Appellees attempt to avoid these flaws in their argument by grossly misstating appellants’ position as to what appellees were required to prove. Contrary to what appellees suggest (at page 35 of their Brief), appellants have never contended that the appellee tenants had “to prove that their landlord had definitive knowledge of the *exact* staple or other *precise* defect which provided the source of ignition.” Rather, all that appellants have been saying is that, in

³ It should also be noted that Rod Brannon, Forest City Residential Management’s Vice President of Engineering, expressly testified that his team of engineers had checked out the electrical system of every one of the 360 apartments in the Village Green complex **during their 2006 inspection** (Tr. 1644-1646) and that they had found **nothing** to indicate that anything needed to be done with respect to any of those electrical systems. (Tr. 1673-1675).

order for them to be held liable for not repairing the defect that was developing in the interstitial space above Apartment 210, evidence had to be presented that they were (or should have been) aware that **something was amiss** with the wires in that space. If appellants had such knowledge, then it would have been their duty, under R.C. 5321.04, to open up the ceiling and find out what the problem was, be it a misdirected staple, a metal gusset plate, or something else that was wearing away the insulation.⁴ If, however, appellants had no such knowledge -- which is the only conclusion that can be reached here -- they should not be held liable for failing to take those steps. In other words, since appellants had no such knowledge, they cannot be held to have been negligent in failing to repair that wire, and it cannot be concluded that the fire was proximately caused by any “negligent maintenance” on their part.⁵

C. **The Irrelevance of Appellees’ Evidence Relating to the December, 2004 Fire That Occurred in Building No. 3**

Appellees also argue that the reports issued by fire investigators with respect to a previous (December, 2004) fire in Building No. 3 -- a different, totally separate building in the eleven-building Village Green apartment complex -- “supported a finding that Appellants were well aware that **these buildings** were negligently constructed and maintained in violation of R.C.

⁴ At page 11 of their Merit Brief, appellees assert that appellants “misrepresent Dolence’s opinion by continuing to harp on single misdriven staple. Dolence clearly testified that * * * this fire was caused by ‘faulty electrical wiring contaminated by water leaks’ within the building.” In attempting to obfuscate their expert’s testimony with generalities (“faulty electrical wiring”), appellees again miss the point of appellants’ argument, which is that there is absolutely no question but that the fire started in one of the three wires in the interstitial space above Apartment 210 (see Court of Appeals Opinion, ¶ 26; App. 20-21) and that that was “concealed space.” (Tr. 1043; Supp. 20). Whether the fault in that wire was caused by a “misdirected staple,” a metal gusset or something else is therefore immaterial.

⁵ See, in this regard, *Stegman v. Nickels*, 2008 WL 4684689 (6th Dist.), another fire case under R.C. 5321.04, where the Court of Appeals for the Sixth District upheld a summary judgment in favor of the defendant landlord because the plaintiff tenants “presented no evidence that the fire * * * would not have occurred if ordinary care had been observed by the [landlords].” (¶ 29).

5321.04.” (Appellees’ Merit Brief, p. 36). Appellees contend that the 2004 fire in Building No. 3 is germane to the 2007 fire in Building No. 8 because both fires were caused by some kind of “electrical fault” -- even though the City of Beachwood’s Official Fire Report stated, in its “Conclusion,” that the cause of the 2004 fire was “undetermined” (see Plaintiff’s Exhibit D-2) and even though Village Green’s fire investigation expert concluded that that fire had started on the **outside** of Building No. 3. (See Tr. 1727-1729).

However, at least one Ohio appellate court has held that evidence that certain conditions existed in one building prior to an occurrence does **not** constitute “notice” that similar conditions existed in another building. See *Hartford Fire Insurance Co. v. Pier I Imports-Midwest*, 1987 WL 8933 (6th Dist.), distinguishing the “separate building” situation from cases in which a previous incident “occurred at the same place or location,” such as the “same shaft in [an] apartment building,” the “same machine,” the “same stairway,” the “same furnace pit,” the “same place in [a] store,” or the “same sidewalk.”

In addition, this argument by appellees fails for the same reason that appellees’ other arguments fail: nothing in any of the investigation reports relating to the December, 2004 fire in Building No. 3 indicated that anything was wrong with any of the wires that were located above the ceiling of Apartment 210 in **Building No. 8** -- or with any of the other wires in Building 8, for that matter. Indeed, although Fire Investigator Dolence submitted to the City of Beachwood, in May, 2005, three recommendations as to procedures that might be undertaken with respect to the wiring in the **ten other buildings** of the Village Green complex (Plaintiffs’ Exhibit D-3A), Mr. Dolence admitted at trial that none of those recommendations, if implemented by the City or by the owners of the complex, would have involved “actually checking the wires * * * that were concealed behind the drywall in the [individual apartments]”

(Tr. 784). He further admitted that none of the inspections or tests he recommended would have detected any problem caused by a staple wearing through the insulation of any of those wires.

(Tr. 1158-1160).

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. Appellees' Brief Ignores Appellants' Arguments

Appellants' final proposition of law relates to the trial court's erroneous refusal to grant a directed verdict to appellant Village Green of Beachwood with respect to appellees' claim that Village Green was liable for "negligent construction" even though the negligent construction (the installation of the electrical wiring in Building No. 8, back in 1993) was by an independent contractor.

In holding Village Green liable for that "negligent construction," both the trial court and the Eighth District relied upon *Point East Condominium Owners' Association, Inc. v. Cedar House Associates Company*, 104 Ohio App.3d 704, 663 N.E.2d 343 (8th Dist. 1995). However, as pointed out at pp. 27-28 of appellants' Merit Brief, the panel in that case relied on the holding of *Mitchem v. Johnson*, 70 Ohio St.2d 66, 218 N.E.2d 594 (1966), that "a builder-vendor of a real property structure" has an implied duty to "construct the same in a workman-like manner." Because of that holding, the *Point East* court held that the developer of a condominium was therefore liable to the **vendees** of condominium units for defects in the construction of the building, even though such defects were caused by the negligence of subcontractors. The *Point East* case therefore has no applicability to claims filed by **tenants** of an apartment building (such as this case), since none of the policy considerations that the *Point East* court relied on with respect to the claims of vendees apply to claims asserted by tenants. In

fact, other Ohio appellate courts have repeatedly rejected attempts to extend the implied duty owed by sellers to their vendees (as per *Mitchem*) to claims filed by a tenant against a landlord. (See Appellants' Merit Brief, pp. 28-30).

Significantly, appellees' Merit Brief does not address the inapplicability of the *Point East* case to the instant case. Instead, for some unaccountable reason appellees devote pp. 45-46 of their Brief to arguing that their negligent construction claims against appellant Village Green were not "barred by the statute of repose," even though **appellant Village Green has never argued** -- in its Merit Brief, in the Court of Appeals or even in the trial court -- that they were.

Appellees also assert (at page 44) that, because this Court held, in *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 1994-Ohio-427, that a "landlord may not shift to an independent contractor the responsibility of **complying with laws** designed for the public safety of others," Village Green had a non-delegable duty with respect to the construction of the entire eleven-building apartment complex, and, for that reason, could be held liable for damages caused by the negligence of one of its original (1993) subcontractors. However, in the *Shump* case, this Court made it very clear that the non-delegable duties of a building owner who becomes a landlord are **limited to duties imposed by statute**. (*Id.*, p. 421) Therefore, that case is inapplicable here because there is no Ohio statute that imposes non-delegable duties on a landlord with respect to defects in the original construction.

B. Why This Court Should Consider This Proposition of Law

In a Motion to Strike that they filed back in August, appellees cited several cases in which this Court, when deciding an appeal on its merits, "refrained from considering an issue

which a party failed to raise in its jurisdictional memorandum.”⁶ However, there have been **other cases** in which this Court held that it was proper for it 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 have done 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.” (*Id.* at 280, fn. 1) That argument was rejected by this Court. This Court 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.

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, when this Court hears a case on the merits, this Court has discretion to consider 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

⁶ See, for example, *Corporex Development & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412 (2005), fn. 1.

discretion should be exercised in favor of considering appellants' Proposition of Law No. IV. For although appellants did point out, in their Memorandum in Support of Jurisdiction, p. 6, that appellees had claimed in the Common Pleas Court that the fire "had resulted from 'negligent construction' (i.e., negligent installation of electrical wiring) and subsequent 'negligent maintenance' of the electrical wiring," appellants, when preparing their Memorandum, concluded that the trial court's unprecedented imposition of liability on appellant Village Green for negligent construction by an independent contractor was so aberrational that there was little likelihood that such a ruling would be repeated in any future case. Appellants therefore decided that that ruling did not present an issue that would evoke the level of public or great general interest generated by the three propositions of law that were already being argued in appellants' Memorandum. Accordingly, appellants determined not to include in their Memorandum a proposition of law based on that aberrational ruling.

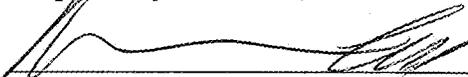
However, after this Court accepted jurisdiction and appellants began preparing their Merit Brief, appellants realized that, in order to obtain complete relief for appellant Village Green, it would be necessary to bring to this Court's attention the trial court's error with respect to the plaintiffs' claim for "negligent construction," inasmuch as the compensatory damages judgment against Village Green was based on both "negligent maintenance" and "negligent construction." Appellants concluded that the appropriate way of doing that would be to include, in their Merit Brief, a fourth proposition of law that discussed that particular error. In making that determination, appellants relied on the holding of the *C.E. Morris* case (54 Ohio St.2d 279), cited above, that this Court has jurisdiction to consider and adjudicate this additional proposition of law because it deals with an issue that was "clearly presented by the record in this case." (See appellants' Court of Appeals Brief, Assignment of Errors Nos. 5 and 6).

Therefore, in addition to determining whether the trial court erred in submitting appellees' **negligent maintenance** claim to the jury (Proposition of Law No. III), appellants urge this Court to also determine whether the trial court erred in submitting appellees' **negligent construction** claim to the jury (Proposition of Law No. IV). This Court will then be able to decide whether the compensatory damages judgment against appellant Village Green in the amount of \$597,326 -- which compensatory damages judgment was, as noted above, based on **both** of those negligence claims -- should be vacated. Such a decision would then afford "complete relief" to appellant Village Green, and justice will be done.

CONCLUSION

For all of the reasons set forth above, this case should be remanded to the Common Pleas Court for Cuyahoga County with instructions to: (a) vacate the \$2,000,000 punitive damages judgment entered against appellant Village Green of Beachwood, L.P., along with the \$1,040,000 judgment for attorneys fees awarded to plaintiffs because of the award of punitive damages; (b) in the alternative, reduce the amount of the punitive damages judgment against appellant Village Green of Beachwood, L.P., so as to conform with the limitations imposed by R.C. 2315.21(D); (c) vacate the judgments for compensatory damages entered against both appellant Forest City Residential Management, Inc. and appellant Village Green of Beachwood, L.P.; and (d) enter final judgment in favor of both appellants.

Respectfully submitted,



Marvin L. Karp (0021944), Counsel of Record
Lawrence D. Pollack (0042477)
ULMER & BERNE LLP
Skylight Office Tower, Suite 1100
1660 West 2nd Street
Cleveland, OH 44113

Attorneys For Appellants

CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief has been served by regular U.S. Mail, this

2013 of September, 2013, upon the following:

Joseph W. Diemert, Jr. (0011573)
Daniel A. Powell (0080241)
DIEMERT & ASSOCIATES CO., L.P.A.
1360 S.O.M. Center Road
Cleveland, OH 44124
(440) 442-6800
(440) 442-0825 (Fax)
E-mail: receptionist@diemertlaw.com

Counsel for Appellees Carlos Sivit, et al.

Robert James (0078761)
BRICKER & ECKLER, L.L.P.
1001 Lakeside Avenue, East, Suite 1350
Cleveland, Ohio 44114-1142
(216) 523-5482
(216) 523-7071 (Fax)
E-mail: rjames@bricker.com

Counsel for Appellee State Farm Fire Casualty Co.

Joseph Ferrante (0040128)
2 Summit Park, Suite 540
Independence, OH 44131
(216) 623-1155
(216) 623-1176 (Fax)
E-mail: FERRANJ@nationwide.com

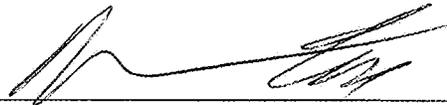
Counsel for Appellee Nationwide Mutual Insurance Co.

James Marx (0038999)
Signature Square 11, Suite 220
25101 Chagrin Boulevard
Beachwood, OH 44122
(216) 831-5100
(216) 831-9467 (Fax)
E-mail: jmarx@shaperolaw.com

Counsel for Appellee Allstate Insurance Co.

Jeffrey A. Kaleda (0069149)
2368 Victory Parkway
Suite 200, P.O. Box 45206
Cincinnati, OH 45206
(513) 961-6200, Ext. 309
(513) 961-6200
E-mail: Kaleda@m-r-law.com

Counsel for Appellee Safeco Company of America



Marvin L. Karp
One of the Attorneys for Appellants

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16576.00009