Supreme Court of Ohio Clerk of Court - Filed April 13, 2015 - Case No. 2013-0586

IN THE SUPREME COURT OF OHIO

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| 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 | ) | |

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**MOTION OF APPELLANTS**
**FOR RECONSIDERATION**

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## MOTION FOR RECONSIDERATION

### A. The Punitive Damages Issue, Relating to Actual Knowledge and Causal Connection, That This Court Agreed to Hear

One of the issues of public and great general interest set forth in defendants-appellants' Memorandum in Support of Jurisdiction (filed on April 11, 2013) was that, as a consequence of the Court of Appeals' decision, all landlords in Ohio will henceforth be subject to punitive damages whenever they fail to repair **any** defective condition of which they had notice, even though that defective condition had **no causal connection** with the particular injury or damage for which the landlord is being sued and even though the landlord had **no actual knowledge** of the particular defective condition that **did** cause the injury.

The issue of whether landlords should be subjected to punitive damages in such situations was squarely presented by the facts of the instant case, where the trial court allowed the jury to award punitive damages against an apartment building landlord because of a specific "dangerous condition" that allegedly caused the subject fire. According to the Eighth District Court of Appeals, that dangerous condition involved one of the **concealed overhead wires** that were stapled to wooden joists in the sixteen-inch high "interstitial space between the floor and ceiling of Units 210 and 310." (See Court of Appeals Opinion, ¶¶ 26 and 36). Plaintiffs' expert opined that the fire started because a portion of the insulation on one of those concealed wires had been "worn away" by one of the staples, which had been "misdriven" during the original construction of Building 8, some thirteen years prior to the fire (Tr. 1019-1024; Supp. 11-16). There was, however, **no evidence presented at trial** that either of the defendants herein -- to wit, the current landlord and the current building manager -- had any knowledge that such a wearing away of insulation had been occurring. Plaintiffs' expert himself testified that this particular wire was in a "concealed space." (Tr. 1043) Hence, for either of the defendants to

have discovered that "defective condition," they would have had to cut open the ceilings of each of the thirty-two apartments in Building 8 and checked the insulation of all of the wires in all of the interstitial spaces, a procedure that would have gone far beyond anything required by R.C. 5321.14. See *Abbott v. Haight Properties, Inc.,* 2000 WL 491731 (6th Dist.). Accordingly, in Proposition No. II of their Memorandum in Support of Jurisdiction, defendants asked this Court to make it clear that imposing punitive damages on a landlord for conditions that the landlord did not create and of which it had no actual knowledge is not fair, is not proper and is not consistent with Ohio public policy. Moreover, imposing punitive damages in such a situation is directly contrary to the rule of law laid down by this Court in *Malone v. Courtyard by Marriott, L.P.,* 74 Ohio St. 3d 440, 446, 639 N.E.2d 1242 (1996), where this Court expressly 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.**"

A majority of the justices of this Court obviously agreed that this was an issue of sufficient public interest to warrant consideration by the Court, since this Court granted defendants' discretionary appeal of Proposition of Law No. II (see 136 Ohio St.3d 1404, 2013-Ohio-2645).

Accordingly, in the merits briefs that they filed herein in the summer of 2013, defendants-appellants discussed this issue in some detail, pointing out that there was absolutely no evidence in the record that either of the defendants had any "subjective knowledge of the danger allegedly posed to" plaintiffs-appellees and which (according to plaintiffs' expert) had caused fire damage to plaintiffs' property, namely, the wearing away of the insulation on one of the electrical wires that had been stapled to the wooden joists in the interstitial space above the

ceiling of Apartment 210. Defendants further pointed out that, in the absence of such subjective knowledge, a punitive damages award against either of the defendants, premised on the "conscious disregard" theory of malice, was "not warranted," given the holding of this Court in the *Courtyard by Marriott* case. The trial court therefore erred in allowing the jury to consider (and award) such damages in this case.

**B. <u>The Court's Subsequent Avoidance of That Issue</u>**

Surprisingly, the Opinion issued by this Court on April 2, 2015 (and concurred in by four justices) avoided this particular issue, i.e., whether a landlord can be subjected to punitive damages in the absence of any evidence that the landlord had subjective knowledge of the claimed defective condition that allegedly caused a tenant's injury. Instead, the Opinion adopted the Eighth District's view that a "decision whether to award punitive damages is within the trial court's discretion." (Court of Appeals Opinion, ¶ 49; Supreme Court Opinion, ¶ 9).

**1. <u>The Fallacy of the "Abuse of Discretion" Approach</u>**

Defendants submit that this latter approach (as to when a trial judge may permit a claim for punitive damages to go to the jury) is wrong. Neither this Court nor the Eighth District cited any Supreme Court case holding that a trial court has "discretion" to determine whether or not to grant a motion for directed verdict with respect to such a claim. To the contrary, the case cited in ¶ 9 of the Court's Opinion, *Roberts v. United States Fid. & Guaranty Co.,* 75 Ohio St.3d 630, 665 N.E.2d 664 (1996), dealt only with the discretion of judge, **in a bench trial,** to determine the **amount** of compensatory damages to be awarded to a plaintiff. Similarly, the case cited by *Roberts,* namely, *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), involved the discretion of a domestic relations judge to "fashion an equitable division of marital property." Neither of those cases discussed any of the rules governing motions for directed verdict. Hence, neither of those cases have any bearing on Civ. Rule 50(A)(4), which

clearly states that, if a trial judge finds that "upon any determinative issue reasonable minds can come to but one conclusion upon the evidence submitted" and that conclusion is adverse to the non-moving party, the trial court "**shall sustain the motion.**" In other words, the trial judge has **no discretion** in ruling on such a motion: if there is evidence supporting each of the necessary elements of a plaintiff's claim, the motion must be denied; if, however, there is no evidence to support one of those necessary elements, the motion must be granted.

The same point was made by this Court in both the *Courtyard by Marriott* case (74 Ohio St.3d 440) and in *Preston v. Murty,* 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987) with respect to directed verdict motions in punitive damages cases. Thus, in the *Preston* case, this Court held (at page 336) that before

> submitting the issue of punitive damages to the jury, a trial court must review the evidence to determine if reasonable minds can differ as to whether the party was aware his or her act had a great probability of causing substantial harm. Furthermore, the court must determine that sufficient evidence is presented revealing that the party consciously disregarded the injured party's rights or safety.

And, in the *Courtyard by Marriott* case, this Court stated:

> As Chief Justice Moyer noted in *Preston,* an award of punitive damages based on conscious disregard malice requires "a positive element of conscious wrongdoing. This element has been termed conscious, deliberate or intentional. It requires the party to possess knowledge of the harm that might be caused by his behavior." *Preston,* 32 Ohio St.3d at 335, 512 N.E.2d at 1176.
>
> In other words, Marriott, through its agents, must have actually known of the threat to its guests. Absent such 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.

(74 Ohio St.3d at 446).

In other words, it is axiomatic that the plaintiff in a case seeking punitive damages has an absolute obligation to prove all of the elements of punitive damages, including actual malice, "by clear and convincing evidence" (see R.C. 2315.21(D)(4)). Therefore, such a claim **cannot** go to a jury where the plaintiff has failed to present any evidence with respect to one of those necessary elements, including evidence that the defendant had subjective knowledge of the particular danger that ultimately caused injury to the plaintiff. If no such evidence has been presented, submission of the punitive damages claim to the jury "is not warranted." (74 Ohio St.3d at 446). There is nothing "discretionary" about that rule of law.

**2. <u>The Inapplicability of the Purported "Code Violations"</u>**

The Court's Opinion also states, in paragraph 10, that the trial court "did not abuse its discretion when it allowed the claim for punitive damages to go to the jury" because the "circumstances attendant to both fires -- the conscious disregard of code violations that affected health and safety -- were more than enough for the jury to conclude that Village Green had acted with 'a conscious disregard* * *'." However, the only purported "code violations" presented to the jury were those set forth in a July, 2006, letter from the City of Beachwood Building Department that related entirely to the **exterior of the building.** Those exterior "code violations" included "deteriorated siding," "missing brick veneer," "broken exhaust vents," and "missing gutters," none of which had anything to do with the fire. Significantly, that letter (Plaintiffs' Ex. C-16, Supp. 1-2, referred to in paragraph 21 of the Court of Appeals Opinion) said nothing about the **electrical wiring** inside Building 8.

Hence, the statement in paragraph 10 further undercuts the rule of the *Courtyard by Marriott* case, for that statement allows a landlord to be subjected to punitive damages because of defective conditions that had **no causal connection** with the damage suffered by the tenant. Thus, the result of the Court's Opinion is to impose punitive damages liability on Ohio

landlords and building managers for any and all fires that occur in a leased building, simply because there was a "code violation" of some kind, somewhere in the leased building, even though that "violation" had nothing whatsoever to do with the fire. This, it should be noted, was one of the two concerns specifically set forth in Proposition of Law No. II, which, rather than being directly addressed by the Court in its Opinion, has now been tacitly reinforced by that Opinion.

Nor did the fact that there was a prior fire (in February, 2004) in another building (Building No. 3) constitute evidence that defendants, from February, 2004 to October, 2007, consciously disregarded the wearing through of the insulation on one of the wires in Building No. 8. Indeed, although plaintiffs' fire investigator, Ralph Dolence, submitted to the City of Beachwood, in May, 2005 (more than a year after the 2004 fire), three written recommendations as to procedures that might be undertaken with respect to the wiring in the **ten other buildings** of the Village Green complex (see 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).

Appellants therefore urge this Court to reconsider its decision and to directly address the issue set forth in Proposition of Law No. II, an issue which is of vital importance to Ohio landlords. In other words, this Court should make it clear that, before a jury may impose punitive damages on landlords, evidence must be presented that the landlord had "subjective" knowledge of the particular defective condition that actually caused the tenant's injury. This

Court should also make it clear that a landlord cannot be subjected to such punishment because of defective conditions that had no causal connection to the occurrence that actually damaged the plaintiff tenant.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

A copy of the foregoing Motion of Appellants for Reconsideration has been served by regular U.S. Mail, this 13th of April, 2015 upon the following:

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