
IN THE SUPREME COURT OF OHIO

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

APPELLEES' RESPONSE TO APPELLANTS' MOTION FOR RECONSIDERATION

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MEMORANDUM IN RESPONSE TO MOTION FOR RECONSIDERATION

Supreme Court Practice Rule 18.02 admonishes that “[a] motion for reconsideration **shall not** constitute a reargument of the case[.]” (Emphasis added). Despite this clear limitation, the motion for reconsideration filed by Defendants-Appellants Village Green of Beachwood, LP, et al. (“Defendants”)¹ is nothing more than a regurgitation of the misguided arguments submitted in their merit and reply briefs.² The motion thus was improperly submitted and should be denied.

Defendants are apparently under the misconception that this Court did not adequately review their previous arguments on the issue of punitive damages, despite the lengthy and deliberate consideration (over one calendar year between submission following oral argument and the issuance of the opinion) the Court gave to this appeal. In fact, Defendants allege in their motion that the Court ‘avoided’ the issue of punitive damages. To the contrary, however, the issued decision adequately addressed and resolved all issues the Court agreed to review and found Defendants’ proposed interpretation of Ohio law, as applied to the facts established in the record on appeal, to be misplaced.

Because this Court does not review challenges to the manifest weight of the evidence, the unanimous opinion properly determined that Defendants’ second proposition of law raised the question of whether the trial judge erred in denying their Rule 50 motion for a directed verdict on the issue of punitive damages. More succinctly, the inquiry was limited to whether the trial court abused its discretion by submitting the issue of punitive damages for the jury’s consideration. (Slip Opinion, ¶9). The Court then determined that “[t]he circumstances attendant to both fires –

¹ In actuality, only one appellant, Village Green of Beachwood, L.P., has proper standing to seek reconsideration as it was the only defendant against which punitive damages were awarded.

² Plaintiffs-Appellees incorporate herein their arguments previously submitted on the issues restated in the motion for reconsideration.

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 for the rights and safety of other persons that has a great probability of causing substantial harm.’” (Slip Opinion, ¶10, citing *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 652) (emphasis added).

The inherent flaw in Defendants’ second proposition of law has always been that it assumed certain facts which are not supported by the record, particularly when the appropriate standard of review is applied. In fact, during oral argument, this Court felt compelled to inquire of counsel for Defendants whether he “was looking at a different record.” Indeed, Appellants’ argument in support of their second proposition of law improperly relies entirely on the **false** factual conclusion that they did not have the requisite degree of actual/conscious knowledge to merit submission of the question of punitive damages to the jury. The trial judge, the jury, the unanimous panel for the Eighth Appellate District, and the entire panel of this Court all dismissed any such contention.

Furthermore, just as in their briefing on the merits, Defendants continue to misapply this Court’s decision in *Malone v. Courtyard by Marriot, L.P.*, 74 Ohio St.3d 440 (1996). Contrary to Defendants’ assertions, *Malone* did not change the law in Ohio on the issue of punitive damages. Rather, *Malone* “is a rephrasing of the requirement set out in *Preston v. Murty*... that a party possess knowledge of the harm that might be caused by his behavior.” *Pavrides v. Niles Gun Show, Inc.*, 112 Ohio App.3d 609 (App. 5 Dist. 1996).

The existence of actual malice necessary to award punitive damages is uniquely a question of fact for the jury. *Osler v. Lorain*, 28 Ohio St.3d 345 (1986). Moreover, because it is difficult to ascertain a tortfeasor’s mental state, a finding of actual malice may be inferred from conduct and surrounding circumstances. See *Joyce-Couch v. DeSilva*, 77 Ohio App.3d 278, 288,

602 N.E.2d 286 (App. 12 Dist. 1991). Deliberations on punitive damages were held due to clear and abundant evidence supporting a finding of Defendants' **conscious disregard**³ for the safety of their tenants, and the likelihood that such disregard had a great probability of causing substantial harm. Cf. Preston v. Murty, 32 Ohio St.3d 334 (1987). Following proper instruction, with which Defendants take no issue, the jury correctly concluded that one defendant (Village Green) did in fact consciously disregard the dangers posed.

The two-week jury trial produced evidence more than capable of supporting a finding that Defendants consciously disregarded code violations materially affecting health and safety; 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. The evidence unequivocally established that Building 8 was plagued with rampant electrical irregularities and extensive water infiltration for a significant period of time leading up to the 2007 fire. (Tr. 407-32). Yet, when contractors were brought to the property to supply specifications for repairs, they were told "to only bid the obvious." (Ex. C-21; C-13; Tr. 348-57). These contractors were left with no choice but to simply inform Defendants of their observations and advise that the conditions observed required further follow-up. (Tr. 347). Most of the issues noted at the complex in the months leading up to the 2007 fire related specifically to Building 8. (Tr. 360-61).

One of those issues indisputably known to all involved was the rampant, extensive, and unchecked water infiltration. Defendants would prefer to ignore the exterior maintenance issues

³ Merriam-Webster dictionary defines 'conscious' as "perceiving, apprehending, or noticing with a degree of controlled thought or observation." 'Disregard' is defined as "to pay no attention to; treat as unworthy of regard or notice." Quite obviously, to consciously disregard a danger, one must possess actual knowledge of the danger.

allowing this water infiltration and the hazard caused by water mixing with electrical faults, but as Plaintiffs' expert (not contradicted by Defendants) testified:

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.

(Tr. 1187). These same warnings were issued by independent expert consultants and the City's fire inspectors following the 2004 fire in Building 3. **Defendants presented no contradictory expert evidence.**

Utterly confounding and disturbing is how the Defendants continue to this day to argue that the notices provided were limited solely to exterior maintenance issues. Indeed, it was these unrepaired exterior maintenance issues which allowed water to enter through the roof, siding, flashing, and windows and freely travel through the walls and open-web truss ceilings where the electrical wiring was located. But Defendants would also have this Court ignore the extensive record of witnesses who testified as to the electrical irregularities in the building and the notices given regarding those maintenance issues, including notices of electrical irregularities in the two suites between which the fire started. They also ignore the testimony of their own maintenance supervisor who provided key evidence as to Defendants' knowledge of these defects and management's unwillingness to expend the funds necessary to make the needed repairs. Most notably, Defendants make no mention of the hundreds of photographs and detailed testimony provided after the first fire in 2004 which detailed the poor wiring practices, code violations, and other construction assembly defects discovered in the interior of these buildings – the same undisputed expert evidence of the cause of the fire in this case.

The investigation into the 2007 fire gathered statements by numerous tenants regarding various electrical and water infiltration problems which, following the 2004 fire in a structurally identical building, the fire investigators identified as indicative of conditions that dramatically increase the likelihood of an electrical fire. (Ex. D-3a, Supp. 57; D-2, Supp. 42). The complaints of electrical and water problems in the subject building are strikingly similar, and identical in significantly more respects than not, to the **documented** complaints provided by the tenants of Building 3 following the 2004 fire. (Tr. 1304-08). These **identical** complaints included, but were not limited to: noises in the walls; power surges; power outages; unusually high electric bills; constantly blown fuses and light bulbs; lights buzzing, dimming, and flickering; water infiltration; mold; elevator malfunctions; and false fire alarms. (Ex. D-2, Supp. 42, D-3a, Supp. 57; Tr. 1304-08).

In addition to tenant complaints, Mike Farlow (Tr. 407-32, 519-28), the former maintenance supervisor for the complex who had actually resided in Building 8 from September 2006 until just a few weeks before the fire, reported to the police and testified at trial that he was not surprised about the fire. (Tr. 519). Farlow noted multiple unattended maintenance issues with Building 8, which he described to the police as “water logged.” (Tr. 416-18). At trial, he testified that there was “no doubt” in his mind that water was entering into and traveling throughout the building. (Tr. 426). He further confirmed that, in his capacity as Maintenance Supervisor, he observed numerous electrical problems in Building 8. (Tr. 422). The problems observed included (but were not limited to) water dripping on electrical junction boxes, quick-fix electrical wiring, flooding, mildew and mold problems, lights flickering on and off, and false alarms. He noted that the exterior wood was rotted, that the roof was experiencing significant leaks and was in desperate need of replacement, and that the appliances were not properly or

regularly maintained. He further noted that **management was fully aware prior to the fire** that the water infiltration was already causing short circuits in the alarm system, circuit breakers, and electrical fixtures. Water was entering the building through the roof, siding, and foundation. Moreover, it was no secret that the shoddy construction and lack of preventative maintenance of these buildings was the reason why these problems persisted. (Tr. 430-32).

Farlow, who resigned and fortunately (for him) moved out of the building a few weeks before the fire, voiced his concerns with management but little (if anything) was ever done to curb the readily apparent problems. Although Farlow informed Defendants about the multiple safety concerns he observed, including electrical issues, management just brushed him off and indicated they did not want to address the problems at that time. (Tr. 430-31). Farlow also maintained regular contact with and raised his concerns to his supervisors at Defendants' corporate office, including their V.P. of Engineering. (Tr. 431).

In addition to the numerous issues identified in the police report by current and former tenants of Building 8, the tenants called to testify at the trial reported similar concerns, noted an incompleteness in the maintenance records which Defendants falsely suggested to the jury were all-inclusive, and affirmed that management did nothing more than the bare minimum to resolve the numerous issues brought to its attention. (Tr. 1304-08, 1313-14, 1315-17, 1340-47, 1367-71, 1398-1421, 1432-39).

Defendants' actions and, more importantly, their non-actions were more than 'sufficient' to support the finding of actual malice required for the jury to consider punitive damages. While inadequate funding was the main 'excuse' provided to the jury, Defendants also supplied some very puzzling reasons for the unattended maintenance issues and why they remained unresolved. Regarding the City's July 2006 notice of violations relative to Building 8 (Ex. C-16), Defendants

told the jury that no action was taken prior to the October 2007 fire because the repairs could not be completed in the “middle of Winter.” (Tr. 318-319). They blamed the rotted exterior on woodpeckers and other “creatures.” (Tr. 339, 377). They further attempted to claim that the water and mold **on the inside** of the building was caused by “toilet overflows” and condensation on the windows. (Tr. 265-66, 286, 331, 378). Regardless of how many excuses were offered, Defendants could not deny that they **continued to rent the units in clear violation of the City’s Order NOT to do so.**

Defendants’ testimony notably included their continued misrepresentations that Building 8 was wrapped with a plastic vapor barrier which kept the building water-tight. (Tr. 250, 256, 279-83, 327). In fact, as part of their assurance that the tenants would remain secure living in this building, Defendants falsely represented to the City inspector that the building had been wrapped in tyvek “during original construction.” (Ex. C-19). Plaintiffs’ expert, again uncontested by Defendants, showed photographs to the jury which completely refuted this claim. (Tr. 953). The building was constructed without a vapor barrier and the result was a deadly mixture of water and electricity which had caused a fire in an identical building in the same complex just a few years prior.

The subject buildings were developed by Village Green. The buildings were owned by Village Green since the original construction. Village Green owned the buildings when the 2004 fire occurred. Village Green was named as a defendant in the litigation which followed the 2004 fire and was aware of the expert findings and conclusions with regard to the wiring practices and construction defects in these buildings. Nonetheless, between the time of the 2004 fire and the 2007 fire, Village Green consciously disregarded these dangers. This conscious disregard continued in the face of the very same maintenance issues arising in Building 8 prior to the 2007

fire which were noted as existing in Building 3 prior to the 2004 fire. As this Court concluded, the circumstances presented **were more than enough** to support submission of the issue of punitive damages to the jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Appellees' Response to Appellants' Motion for Reconsideration was served, via regular U.S. Mail, this 23rd day of April, 2015, upon the following:

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