IN THE SUPREME COURT OF OHIO

AKRON METROPOLITAN HOUSING AUTHORITY, et al., Appellants, v. OHIO CIVIL RIGHTS COMMISSION, et al., Appellees.	))))))))))	On Appeal from the Summit County Court of Appeals, Ninth Appellate District Court of Appeals Consolidated Case Nos. 23056 and 23060

BRIEF OF *AMICUS CURIAE* HOUSING AND DEVELOPMENT LAW INSTITUTE IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

I. INTEREST OF THE *AMICUS CURIAE*[1]

The Housing and Development Law Institute (HDLI), based in Washington, D.C., is a non-profit, non-partisan member organization that for more than twenty-three years has served as a legal resource on public and affordable housing issues nationwide. HDLI's mission focuses solely on the legal issues that impact the public and affordable housing industry. HDLI's 250 members, located in Ohio and nearly every other metropolitan area across the nation, include small, medium, and large public housing and redevelopment agencies (collectively, "PHAs") currently managing public and affordable housing programs, and their legal counsel. HDLI and its members have considerable legal expertise in the complex public housing industry generally, and specifically with respect to fair housing law. Indeed, HDLI provides on-site fair housing training for PHAs, and has trained more than 1,800 employees of PHAs and other groups. HDLI regularly follows fair housing law and litigation, and addresses these issues in its various legal periodicals.

When legal issues, such as those pending in this case, are critical to the efficient and uniform operation of public and affordable housing programs, and are expected to have some precedential effect upon HDLI members across the nation, HDLI offers its expertise and perspective to the court through *amicus curiae* participation. Particularly with respect to issues of first impression, HDLI believes it advantageous to weigh in on the novel legal issues presented in the case.

[1]The Akron Metropolitan Housing Authority is a member of HDLI. Otherwise, HDLI has no relationship with any of the parties to this case.

II. STATEMENT OF THE CASE

This is a case of first impression in Ohio involving the intermediate appellate court's creation of a new cause of action, and standards of liability, for a "hostile living environment" under the Ohio Fair Housing Act. In addition to contractual remedies for tenant-on-tenant conduct already existing under Ohio landlord-tenant law, the Court of Appeals has created an additional "fair housing remedy" that can be enforced against Ohio landlords[2] in cases where neither the landlord nor any agent is accused of the underlying discriminatory conduct.

While HDLI is not taking a position on the efficacy of establishing a "hostile living environment" claim under the auspices of the Ohio Fair Housing Act, HDLI files this motion to challenge the standard adopted by the Court of Appeals to impose liability on landlords on the basis that it is inherently flawed. Because of the effect that imposing this standard undoubtedly will have on the successful operation and viability of low income housing programs in Ohio, and potentially elsewhere, this case has far-reaching application.

The parties are asking this Court to review a reversal by the Ohio Court of Appeals of the decision of the Court of Common Pleas, Summit County which granted the Appellant's motion for summary judgment. While the trial court did not reach the issue of whether Ohio recognizes a cause of action for "hostile living environment" under Ohio's Fair Housing Act, it nonetheless found that the evidence failed to establish that the alleged harassment was sufficiently severe and pervasive to create a hostile living environment, and found that the evidence failed to establish that the landlord, a housing authority, had sufficient notice of the alleged harassment.

[2] The application of this new cause of action is likely to be even more far reaching. It potentially could be applied against management companies and other managers of rental housing, as well.

On appeal, a majority of the Court of Appeals for the Ninth District reversed and remanded the judgment of the trial court. The Court of Appeals specifically recognized a "hostile living environment" cause of action under the Ohio Fair Housing Act, imposed the same standard for liability as exists under employment law, and concluded that a genuine issue of material fact existed as to whether the elements of the cause of action were present in this case.

At the core of the Court of Appeals' decision was its belief that a hostile living environment cause of action was a logical extension of the "hostile working environment" cause of action in the employment law context, such that the same standard for liability for employers should be imputed to landlords. Under this standard, landlords are liable simply if they "knew or should have known about the harassment and failed to take immediate and appropriate corrective action." Ct. App. Decision @ Paragraph 19.

It is with the Court of Appeals' liability standard that HDLI fundamentally disagrees and, as set forth below, HDLI is concerned about the practical adverse consequences of the court's holding, as it affects the viability of already financially-strapped public housing agencies. Specifically, HDLI disagrees that 1) landlords (or managers) of public housing units are analogous in function to employers; 2) landlords have the same level of control over the actions of their tenants as do employers over the actions of their employees, and 3) that the housing environment is so closely related to the employment environment that courts should impose the same "knew or should have known" legal standard for liability. Indeed, HDLI suggests that the relationship between landlord and tenant is so less controlled that a higher level of culpability should be required before imposing liability upon landlords. HDLI respectfully suggests that courts should only impose liability where the landlord's own conduct, or that of its duly authorized agent, serves as the basis of the underlying discrimination.

HDLI believes that the simple "knew or should have known" standard applied by the Court of Appeals below is inappropriate for landlords given the true nature of their relationship with, and control over, their tenants, and that this standard unfortunately will result in a further reduction of the scarce public resources available to PHAs to run effective public housing programs and house the poorest of our Country's tenants. The monies and human resources that will be necessary to respond to what may easily become an onslaught of "hostile living environment" claims whenever a tenant is unhappy with his/her neighbor can significantly hamstring a PHA of any size, if not bankrupt smaller PHAs. This is not to mention the adverse affect this will also have on market-rate landlords, and on busy court dockets. By this argument, HDLI does not suggest that landlords can or should turn a blind eye to the needs of residents to a safe and peaceful living environment. However, the existence of any *affirmative* duty of a landlord to become an investigator and enforcer of conduct should be, and is, a matter of common agreed lease obligations that courts enforce regularly. For these reasons, HDLI urges this Court to reverse the decision of the Court of Appeals and, should the court find such a cause of action exists, HDLI urges the court to impose a higher, more appropriate standard of liability for landlords in this context.

III. STATEMENT OF FACTS.

HDLI adopts the Statement of Facts submitted in Appellants' Brief.

IV. ARGUMENT

A. LANDLORDS SHOULD NOT BE LIABLE FOR CLAIMS OF "HOSTILE LIVING ENVIRONMENT" IN THE ABSENCE OF THEIR OWN DISCRIMINATION OR THAT IMPUTED TO THEM *VIA* THEIR AUTHORIZED AGENTS.

1. The Federal and Ohio Fair Housing Acts Are Not "All Purpose Civil Codes" And Do Not Contemplate The Assessment of Liability Against Landlords Absent Their Intentional Discrimination.

The Ohio Fair Housing Act makes it a discriminatory practice to:

> ***Discriminate*** against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, ***because of race, color, . . .***

Ohio R.C. 4112.02(H)(4)(emphasis added).

Like the federal Fair Housing Act., 42 U.S.C. Section 3601 *et seq*., the Ohio Fair Housing Act was not created to serve as "some all purpose civil code regulating conduct between neighbors." *Lawrence v. Courtyards at Deerwood Assoc.* 318 F. Supp.2d 1133, 1142 . (S.D. Florida 2004) (*quoting Gourlay v. Forest Lake Estates Civil Ass'n of Port Richey*, 276 F. Supp.2d 1222, 1232 (M.D. Fla. 2003); *see also Halprin v. Prairie Single Family Homes of Dearborn Park Assn.*, 388 F.3d 327, 330 (7th Cir. 2004)("[W]e do not want, and we do not think Congress wanted, to convert every quarrel among neighbors in which a racial or religious slur is hurled into a federal case"). The dissenting judge in the Court of Appeals decision below recognized this in stating, "[t]he majority's decision opens the door to judicially legislate against 'bad neighbors' within the context of public housing." Ct. App. Decision, Dissent @ Paragraph 26.

Both the federal and Ohio Fair Housing Acts prohibit landlords from *discriminating* against tenants or applicants for housing ***based upon*** the fact that the tenant or applicant belongs

to a class protected by the Act (race, color, etc.). Thus, both the federal and Ohio Fair Housing Acts require active discriminatory conduct on the part of the landlord or its authorized agent. Tenants who suffer from tenant-on-tenant harassment that does not directly involve conduct by the landlord have remedies under their leases that can be redressed in landlord-tenant court, such as for breach of quiet enjoyment or warranty of habitability. However, the fair housing act does not impose liability against a landlord for conduct that does not involve the landlord's own actions or those of its authorized agent.

In this case, Appellants do not allege that AMHA or its property manager ever participated in the harassment against Ms. Harper's family. Nor do they allege that race played any factor in AMHA's processing of Ms. Harper's complaint, or that the complaint of her African-American family was handled differently than that of a non-minority family. Indeed, the record reflects that AMHA followed its usual policies and procedures in this case in referring Ms. Harper's complaint to the local police department for an in-depth investigation. In this respect, the police department, acting pursuant to its agreement with AMHA, acted as the agent of AMHA, similar to a private investigator's role. Accordingly, there is no disparate treatment here, and thus no fair housing liability. See *Lawrence, supra*, 318 F. Supp.2d at 1147 (race must play some role in defendants' conduct); *Sofarelli v. Pinellas County*, 931 F.2d 718, 722 (11th Cir. 1991). The Court of Appeals erred in imputing liability to AMHA under the circumstances of this case.

With the exception of one case, in all of the hostile living environment cases cited in the parties' and lower court's papers, the perpetrator of the discriminatory conduct was the landlord or owner, or their employee or agent. *See, e.g., Halprin, supra,* 388 F.3d 327; (religious harassment by homeowners' association); *Neudecker v. Boisclair Corp,* 351 F.3d 361 (8th Cir.

2003) (harassment by landlord's employee); *Smith v. Mission Associates Ltd. Partnership*, 225 F. Supp.2d 1293 (D. Kan. 2002) (racial and sexual harassment by owner); *Dicenso v. Cisneros,* 96 F.3d 1004 (7th Cir. 1996) (sexual harassment by landlord); *Honce v. Vigil,* 1 F.3d 1085 (10th Cir. 1993) (sexual harassment by landlord).

The sole case involving attenuated conduct was *Bradley v. Carydale Ents.*, 707 F. Supp. 217 (E.D. Va. 1989), which is distinguishable from the facts *sub judice*. In that case, an African-American tenant also alleged that her landlord failed to investigate her complaints of racial harassment. However, notably distinguishable from the case at hand, the plaintiff argued that the landlord's failure to investigate or remedy was based upon the plaintiff's race since the landlord failed to address and resolve her complaints about her white neighbor while at the same time responding to the white neighbor's complaints. Here, the record reflects that AMHA processed Ms. Harper's complaint in the same manner that it processed all neighbor complaints, and that it addressed both the Harpers' and Kaisks' complaints simultaneously. Accordingly, there is no evidence that AMHA's manner of processing Ms. Harper's complaint had anything to do with her race.

2. Actions of Tenants Cannot Be Imputed to Their Landlords in the Same Manner That the Actions of Employees May Be Imputed to Employers.

The majority of the Court of Appeals erred in applying the legal liability standard in hostile working environment cases to the housing context. It reasoned that "just as an employer is liable for co-worker harassment, a landlord should be liable for the acts of tenant-on-tenant harassment." Ct. App. Decision @ Paragraph 16. However, the dissenting judge below recognized this error, stating:

> Private employers exercise immediate control over their employees, so that it is reasonable to hold them accountable for the known and tolerated hostile acts of their employees in the workplace. I believe that it is unreasonable to hold lessors in housing situations to the same level of accountability given the impracticability of both the exercise of such control over tenants and the burden of policing 'bad neighbors.'

Id. Dissent @ Paragraph 26.

HDLI concurs with the reasoning of the dissenting judge. Landlords, who often have little or no physical contact with their tenants and who have no agency relationship with them, have little direct or even indirect control over the tenant's actions. Once more, even employers are not liable for every act of employee-on-employee harassment. Employers are only liable for their employee's actions that legally can be imputed to them through established agency principles. M*eritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). Heretofore, tenants who are not employees have not been considered "agents" of their landlords. The lease agreement between the parties does not establish an agency relationship.

Because of the nature of the relationship between the parties, landlords simply do not possess any where near the same level of direct control over their tenants that employers have over their employees. Accordingly, liability should not be imputed in the same way. While employers have a range of options that they can use to control the behavior of their employees (such as progressive discipline, suspension, demotion, and firing), landlords really only have one option - eviction.

Eviction of a very low income family is a harsh remedy that may only be imposed after sufficient legal due process. In the public housing realm, HUD regulations govern the process and require legal due process, including the existence of good cause to evict, notice, and an opportunity for a grievance hearing. *See* 24 C.F.R. 966.50 *et seq*. (administrative grievance procedure). In situations like the case at hand where both parties are pointing fingers at the other

and the PHA is unable to determine the aggressor, eviction may not be an appropriate resolution. Here, both the Harpers and the Kaisks lodged, both with AMHA and with the local police department, contradictory complaints about the other family. It was the Kaisk family (and not the Harpers) that formally requested (and received) a transfer out of the development. As the facts of this case illustrate, in these situations a "knew or should have known" liability standard leaves the PHA without any recourse and wide open to a potential fair housing suit by either or both of the complaining families.

Strangely, creating such a cause of action against landlords, in theory, gives a "protection" to a tenant which a homeowner or non-tenant will not have. Why is it not reasonable for a tenant to resolve "neighbor" disputes without creating landlord liability? A non-tenant involved in a neighbor dispute can not look to a third party for protection, why should a tenant be granted such protection?

The creation of landlord liability may well encourage tenants to act inappropriately with impunity, knowing that the landlord has the liability. In addition, if a landlord has such liability, the landlords will eventually charge more rent to cover the cost of such liability. The court may take judicial notice that employee and employer discrimination cases are extremely expensive to defend and may result in high damages because of the potential for the award of attorney's fees to the employee.

Some, if not most, landlords will not have the resources to pay for such damages. The end result will be exorbitant rents and fewer rental units. In addition landlords will become more selective in whom they rent to resulting in fewer housing choices for many renters. The court may also consider whether such liability will also impact commercial landlords.

B. THE COURT OF APPEALS' DECISION FLIES IN THE FACE OF WELL-SETTLED PRECEDENT DEFINING THE SCOPE OF LANDLORD DUTIES *VIS-À-VIS* THEIR TENANTS

The Court of Appeals' decision to impose liability on a landlord for the acts of one tenant against another flies in the face of long-standing case law defining the scope of a landlord's liability. Heretofore, courts have not held landlords liable for the actions of one tenant against another when undertaken without the landlord's approval. *See, e.g., Siino v. Reices*, 216 A.D.2d 552; 628 N.Y.S.2d 757 (N.Y. App. Div. 1995) (landlord does not have a duty to control one tenant's racial slurs directed at another tenant); *Scarnati Owners of Georgetown of Columbus,* No. 96APEO1-52, 1996 Ohio App. Lexis 2538 (Ohio App. 1996) (landlord not responsible for breach of quiet enjoyment committed by other residents); *Darnell v. Columbus Show Case Co.*, 58 S.E. 631, 632 (GA. 1907) (proprietor not liable for negligence of tenant without his consent or authority). This is because courts have recognized that an unreasonable burden would result from the imposition of a duty to guard against the wanton acts of a third party over whom a landlord exerted no control. *See Johnson v. Slocum Realty Corp.,* 191 A.D.2d 613 (N.Y. App. Div. 1993). Courts likewise have held that a reasonable opportunity or effective means to control a third person does not arise from the mere power to evict. For example, in a case involving a housing authority landlord, the New York Supreme Court held that a housing authority had no special duty to protect its tenant because it did not have an opportunity to control the perpetrator tenant, nor did a special relationship exist between the tenant and the housing authority. *Blatt v. New York City Hous. Auth.* 123 A.D.2d 591, 593, 506 N.Y.S. 2d 877 (N.Y. App. Div. 1986).. *See also Donaldson v. Young Women's Christian Ass'n*., 539 N.W.2d 789, 792 (Minn. 1995) (citations omitted) (a person has no duty to protect another "even if he realizes or should realize that action on his part is necessary;" *Harper v. Herman,* 499 N.W. 2d

472, 475 (Minn. 1993) ("superior knowledge of a dangerous condition by itself, in the absence of a duty to provide protection, is insufficient to establish negligence"); *Nickleson v. Mall of Am. Co.*, 593 N.W. 2d 723, 726 (Minn. App. 1999) (the landlord-tenant relationship alone does not create a duty to protect"); *Funchess v. Cecil Newman*, 632 N.W.2d 666, 673 (Minn. 2002) (a person has no duty to protect another from harm caused by a third party's conduct).

C. THE COURT OF APPEALS' DECISION LIKELY WILL RESULT IN LESSER SERVICES AND HOUSING QUALITY FOR LOW INCOME TENANTS IN OHIO.

There are likely to be severely adverse consequences for Ohio's poorest of the poor if liability is imposed on landlords in the manner suggested by the Court of Appeals. If liability in this context is so easy to come by, it will impact PHAs in a manner perhaps not contemplated by the Court of Appeals. For the past several years, PHA federal funding (the lion's share of their budget) has been drastically cut and their budgets have been significantly prorated. Congress has imposed increasingly more unfunded administrative regulatory requirements upon them.

The Court of Appeals' decision exposes PHAs to increased liability for money judgments. Considering the current fiscal state of the industry, this may result in dire consequences for the PHAs' continued viability, as well as the sustainability and habitability of their public housing units. The decision will also force PHAs to make extremely difficult choices as to where to funnel precious and dwindling resources. When basic shelter is a challenge for many of our country's poor and PHAs struggle to provide safe and sanitary housing, diverting PHA resources to address tenant-on-tenant disputes based upon an employer's liability is not in the public's best interest.

V. CONCLUSION.

For the reasons set forth above, HDLI urges this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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