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Ohio Tenants Who Fail to Pursue Statutory Remedies Do Not Waive Their Right to Recover Damages

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Wrongful Dishonor of Cashier's Checks

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personal defenses to assert against Warren's claim, Warren was entitled to payment upon depositing the checks into its account. Additionally, Warren did not need to prove that it was a holder in due course because Barnett bank had no real or personal defenses on the check. Thus, the supreme court vacated the appellate court's decision and ordered the appellate court to reinstate the decision of the trial court in favor of Warren.

Laura L. Giorgolo

OHIO TENANTS WHO FAIL TO PURSUE STATUTORY REMEDIES DO NOT WAIVE THEIR RIGHT TO RECOVER DAMAGES

In *Miller v. Ritchie*, 543 N.E.2d 1265 (Ohio 1989), the Supreme Court of Ohio held that by continuing to occupy a defective apartment, a tenant neither waives the landlord's duty to maintain the property, nor waives the tenant's right to recover damages for the landlord's breach of that duty. The court also held that damages should be calculated according to the amount by which the apartment's defects and the reduction in use lessened the leasehold's value.

Background

In 1984, Anthony and Belinda Ritchie ("the Ritchies") entered into an oral, month-to-month tenancy lease with Dexter Miller ("Miller"), agreeing to pay \$200 per month rent for an apartment in Bethel, Ohio. During their two year occupancy, the Ritchies complained to Miller of dangerous electrical wiring, holes in the floor, inadequate plumbing, and no heating system. Miller generally ignored the Ritchies' complaints and only made a few repairs.

In February 1987, Miller brought a forcible entry and de-

tainer action against the Ritchies seeking possession of the apartment and payment of back rent. The Ritchies counterclaimed for damages based on Miller's failure to maintain the property as required by Ohio's Landlords and Tenants Act ("the LTA"), Ohio Rev. Code §§ 5321.01-.15 (1974). Thereafter, the Ritchies voluntarily vacated the apartment. The parties stipulated that the Ritchies owed Miller four months' rent, but did not agree on the amount.

The trial court held that Miller had violated section 5321.04(A) of the LTA (Ohio Rev. Code § 5321.04(A)) by failing to comply with the Ohio building code, failing to make reasonable repairs, and neglecting to keep the apartment in a safe and sanitary condition. The trial court granted judgment for the Ritchies in the amount of \$3,000 plus interest and costs, and awarded Miller \$800 for four months' unpaid rent.

The Ohio Appellate Court reversed, holding that the Ritchies were not entitled to damages because they had occupied the apartment for a lengthy period without pursuing the statutory remedies established section 5321.07 of the LTA (Ohio Rev. Code § 5321.07).

The Ohio Supreme Court Opinion

The Ohio Supreme Court decided three issues upon review: (1) whether the Ritchies waived their right to recover damages by paying rent and declining to pursue statutory remedies under section 5321.07 (Ohio Rev. Code § 5321.07); (2) whether the Ritchies waived their right to recover damages under section 5321.04 (Ohio Rev. Code § 5321.04) by continuing to occupy the apartment after notifying the landlord of its defective condition; and (3) whether the trial court applied the proper measure of damages.

Paying Rent Does Not Waive Right To Recover Damages. In analyzing the first issue, the Ohio Supreme Court looked to the purpose of the LTA. The LTA placed duties upon a landlord that did not exist at common law. Section 5321.07 of the LTA provided to tenants a method to redress

ANNOUNCEMENT

Child Restraints

The Center for Auto Safety published a new report on car child restraints. *Children At Risk: Failure of the Federal Child Restraint Compliance and Recall Program* details the results of the Center's study of the National Traffic Safety Administration's records concerning child restraints. The report found that child restraints are inadequate and that the National Traffic Safety Administration did not adequately enforce and oversee the use of child restraints.

A copy of the report is available by sending \$35.00 to:

Center for Auto Safety
Publication Department
2001 S. St., N.W. Suite 410
Washington, D.C. 20009

breaches of those duties. If a landlord failed to meet his statutory or contractual obligations, the tenant had three options: the tenant could (1) deposit the rent owed with the court; (2) apply for a court order directing the landlord to remedy the condition; or (3) terminate the rental agreement. In order to utilize these remedies, a tenant had to give the landlord written notice of the violations and to have made all rent payments.

The Ohio Supreme Court initially observed that the remedies created by the LTA were not the only recourse for tenants alleging a landlord's breach of duty. Section 5321.07 of the LTA stated that a tenant "may" implement the statutory remedies, provided the tenant has notified the landlord of the code violations and the tenant is current in rent. However, the LTA did not limit the tenant to these remedies because the LTA was intended to supplement other remedial measures.

Although the tenant risks being evicted by failing to pursue one of the LTA remedies, the tenant does not thereby waive his right to recover damages for the landlord's

breach of duty. The court stated that under the Ohio forcible entry and detainer statute (Ohio Rev. Code § 1923.061(B)), in a landlord's action for nonpayment of rent, the defendant-tenant may counterclaim for any amount recoverable under the rental agreement or the LTA. Consistent with this, the LTA stated that a landlord's forcible entry and detainer action does not prohibit the tenant from recovering damages for the landlord's violation of the rental agreement or the LTA.

Continued Occupancy Does Not Waive Damages. The court also held that a tenant does not waive the right to recover damages merely because the tenant continues to pay rent and attempts to convince the landlord to make repairs, rather than utilizing the LTA remedies. Even though the Ritchies occupied the apartment for two years without pursuing the LTA remedies, this did not indicate their acquiescence to the defective condition of the apartment. Miller initially promised to repair the apartment and the Ritchies repeatedly requested those repairs. The court stated that as a matter of policy, those who seek to resolve disputes without litigation should not be discouraged by a threat of waiving their legal rights. Moreover, even if the Ritchies had acquiesced to the flawed condition of the apartment, Miller would not be relieved of his duty to maintain the apartment in accordance with the LTA.

Similarly, a tenant's acquiescence does not constitute an enforceable contractual waiver of the tenant's right to recover damages. The LTA prohibits any agreement that purports to relieve the landlord of his duties or to waive the tenant's right to bring an action for damages.

Necessary to Recalculate Damages. The Ohio Supreme Court held that the trial court erred in awarding \$3,000 in damages to the Ritchies and \$800 to Miller. Although the trial court stated that the apartment was of no value to the Ritchies, the court awarded Miller the full back rent of \$800. The supreme court observed that if the apartment had no rental value, Miller was not entitled to an award

for rent. Conversely, if the property had a value less than the rental price but greater than zero, the trial court erred in failing to ascertain that amount and award damages in accordance with that finding.

In an effort to sustain the trial court's award, the Ritchies argued that the supreme court should either adopt a reduction-in-use measure of damages or find that the rent was completely abated. The court rejected this view and reaffirmed *Smith v. Padgett*, 32 Ohio St.3d 344, 513 N.E.2d 737 (1987), a previous decision concerning the proper measure of damages. The *Padgett* court held that where a landlord breaches a duty to maintain rental property and the tenant does not make the repairs, the measure of damages is the difference between the rental value of the property in its defective condition and the rental value had the property been maintained. The supreme court in the instant case found that evidence of reduction-in-use can be a relevant factor in determining damages, but that damages should be determined by measuring the effect of the reduction-in-use on the rental value of the property.

Miller argued that the record did not contain sufficient evidence from which to make a damage award. Rejecting Miller's argument, the court noted that the rent charged is presumptive evidence of the rental value of the property without defects. The Ritchies' undisputed testimony regarding the extent of the defects was sufficient evidence on which to base a damage award, despite the fact that the Ritchies never stated their opinion as to the value of the defective property. The finder of fact must determine the monetary amount by which the defects and the reduction in use have decreased the value of the rental property. The supreme court reversed the court of appeals and remanded the case to the trial court for a recalculation of the damages.

Sheila M. Hanley

THE SUPREME COURT OF WASHINGTON REJECTS CLAIMS OF PATIENT WHO CONTRACTED AIDS THROUGH BLOOD TRANSFUSION

In *Howell v. Spokane & Inland Empire Blood Bank, et. al.*, 785 P.2d 815 (Wash. 1990), the Supreme Court of Washington ruled on issues arising from the Plaintiff's contraction of the Human Immunodeficiency Virus ("HIV") after receiving a blood transfusion. The court held that the amendment including AIDS among diseases shielded by the Washington blood shield statute only applied prospectively. The court also held that blood transfers by hospitals and blood banks are services, and not sales of goods, and therefore could not serve as the basis for strict liability or implied warranty claims. In addition, the court rejected the patient's Washington Consumer Protection Act ("CPA") claims against the hospital and blood bank.

Background

Virgil T. Howell ("Howell") was admitted to Deaconess Medical Center ("Deaconess") in early October of 1984 for elective knee surgery. After surgery Howell received two units of packed red blood cells. Spokane & Inland Empire Blood Bank ("the SIEBB") provided the blood, which a third party had donated to the SIEBB in the fall of 1984. One of the units of blood allegedly was contaminated with the HIV. Howell himself had been a lifetime donor to the SIEBB and in November of 1985, after Howell donated blood, the SIEBB learned that Howell tested positive for HIV. The SIEBB did not inform Howell that he had contracted the HIV until October of 1986.

Howell and his wife, Geraldine Howell, filed an action in the Superior Court for Spokane County, Washington, pleading twelve causes of action against several defendants, including Deaconess

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