COURT OF APPEALS, FIFTH DISTRICT

DELAWARE COUNTY, OHIO

Russell Higgins, et al.,	*Hon. Norman J. Putman, P.J. Hon. David D. Dowd, Jr., J.
PLAINTIFFS-APPELLANTS,	*Hon. Leland Rutherford, J.
vs.	* CASE NO. 78-CA-3
Harold P. Roe, et al.,	* M E M O
DEFENDANTS-APPELLEES.	*
10	*Decided_____

APPEARANCES

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RUTHERFORD, J.

This appeal is from a judgment at the close of Plaintiffs' evidence. On motion of Plaintiff Donna Higgins for leave to dismiss her cause of action without prejudice to a new action and motion of Defendants for a directed verdict, the court entered judgment dismissing the claim of Plaintiff Donna Higgins with prejudice to a new action and sustaining the motion of Defendants for a directed verdict in their favor followed by judgment in favor of Defendants against Plaintiffs. The court found that upon consideration of the evidence offered most favorably to the Plaintiffs reasonable minds could only come to the one conclusion which is that the Plaintiffs were both contributorily negligent and assumed the risk of injury in continuing to reside in the house rented by Plaintiffs from Defendants knowing that the electrical wiring system in the house was defective and dangerous and making no proper steps to correct it, and furthermore that the Plaintiff Russell Higgins was contributorily negligent and assumed the risk of smoke inhalation from which he suffered.

On May 3, 1975, by oral agreement providing for a month to month tenancy at a monthly rental of $120.00, Plaintiffs-Appellants, Russell and Etta Higgins rented

a small farm house located on County Road 365, Liberty Township, Knox County, Ohio, from the Defendants Harold P. Roe and Bernice Roe. The dwelling was a one and one-half story house at least 50 years old consisting of two bedrooms, a bath, livingroom and kitchen downstairs with two bedrooms located on the second floor. The electric wiring had been installed in 1954, well before the Defendants-Appellees purchased the property in 1975.

Plaintiffs in their complaint alleged that on or about September, 1975, Plaintiffs became aware that the electrical system in the residence was defective. The lights on the second floor flickered on and off and finally would not light at all at which time Plaintiffs used an extension cord to provide light. The second floor lights were controlled by a round switch in the stairwell to the second floor and the wiring was on the outside of the stairs along the railing to the second floor. Plaintiffs alleged and testified that on three or four occasions they told the landlord of the condition and were told by Mr. Roe that he would take care of the matter. Mr. Roe the landlord testified that before Plaintiffs moved into the property in May, 1975, everything was checked to see that it was working including the electrical wiring system and that everything was

alright, that they had an agreement with the tenants that if anything was wrong the tenants were to get it fixed and send the landlord the bill, that after the tenant moved in the water pump didn't work and that Mr. Higgins, the tenant, got it fixed for $150.00 and Mr. Roe, the landlord, paid the bill. Mr. Higgins testified:

(TR 89-91)

"Q. When did you first find something to worry about?

A. When the lights kept going on and off and that is when I called the electric company out.

Q. What time was that, what month?

A. I have no idea.

Q. You don't have any idea?

A. I don't recall.

Q. Well, with reference to the time the fire started, how long before that was it?

A. Oh, not too much longer before the fire. I would say possibly -- maybe a month or something like that.

Q. So everything was all right until just about a month before the fire, is that it?

A. No, we had trouble with the well, with the electric motor, and Mr. and Mrs. Roe had it fixed. And then - well, they had it fixed. That is all I can say right now.

Q. Isn't it true that they told you when you moved in to go ahead and fix it and they would take care of the bill?

A. Providing it wasn't too much.

Q. Well, what do you mean by that?

A. Well, when the man came out to fix the pump, he told me how much it would be and I said, 'Well, you will have to talk to Mr. and Mrs. Roe.' I guess he did and he said it was going to be $150 or maybe a little bit more. I said, 'Well, I can't go that. You have to get ahold of them.'
He got ahold of them and I guess they give that the okay to go ahead and fix it.

Q. Did you at any time ask anybody else to fix something and have them refuse to fix it?

A. No.

Q. Did you ever call anybody else out to get an estimate of what it would take to fix what you claimed was wrong?

A. When the electric company was out there and told me about the poles into the house, all right. Then I asked another construction guy, I can't think of the pump man, I believe it was who fixed the pump about the electric wire, he put me a wire unit in my wife's dryer and he said it was going to cost so much money. He said, 'I wouldn't fool with it.'

Q. Did you get him to tell you how much it was?

A. He said $150 or $200 because the fuse box needed to be replaced."

(TR 92-93)

"Q. Did you take that up with Mr. and Mrs. Roe?

A. No, I told them what it would be and she said, 'Can't you do it?' I don't fool with electrical work.

Q. And now, you never did write them at any time complaining about the condition of this property, did you?

A. In the beginning, no.

Q. Did you ever?

A. I called them up.

Q. Did you ever write to them?

A. I did not write them.

- - -

Q. Did you keep advising Mr. and Mrs. Roe that the fuses were blowing all the time?

A. I told them that the fuses had blown.

Q. How often did you tell them?

A. I don't recall." (emphasis added)

(TR 94)

"Q. - - - Did you, before this fire happened, feel that you were living in a house that was dangerous to live in?

A. No, not right then, no, I didn't.

Q. It wasn't until the fire happened?

A. Until just a little while before the fire happened I got kind of nervous about it, about the condition of the wiring. After I found out that the wire was bad.

Q. You say that was a month before the fire started?

A. Possibly a month, month-and-a-half." (emphasis added)

Regarding smoke inhalation Plaintiff Russell Higgins in pertinent part, testified:

(TR 98)

"Q. You walked into the smoke?

A. Sure, trying to get some of my kids stuff out."

(TR 99-102)

"A. I went to try and get some of the stuff if I could.

Q. What was the stuff you were trying to get out?

A. I first tried to grab the stove because it is the lightest thing there. It is an electric stove and is very light and I got it so far and there was so much smoke I just shoved it back.

Q. The kitchen is rapidly filling with smoke, is that right?

A. That is right.

Q. But you are still in there too?

A. I got it almost to the door and pushed it back in.

Q. Were you after anything else?

A. I tried to get the dryer out.

Q. And all this time it was getting smokier and smokier?

A. Yes, but I didn't see no flames at this time.

Q. Were you inhaling smoke?

A. Well, a little, not much because I had a rag over my face.

Q. Now, in the meantime, when one of the girls went to call for the fire department, or help ---

A. I don't know which one it was.

Q. Did you ask one of them to do it?

A. I just told them fire and said, 'Get help,' you know, and they took off.

Q. Where would be the nearest attempt to get help?

A. Well, at the end of the driveway there is a house right across the street, just offset a little bit from the driveway. I don't know, I think -- I don't know where they went to get help.

Q. We have already established, haven't we, that the house is a quarter of a mile from road?

A. Yes.

Q. Whoever went for help would have to go a quarter of a mile to the highway and then over to wherever this house was and then make the call and come back to the house?

A. They came back, they said they would make the call.

Q. How long would it take to go from your house to the road to the house that had the phone and back?

A. Well, if you are a good runner you can make it in less than five minutes.

Q. All this time you are still in the kitchen?

A. No, I was in different parts of the house trying to get some stuff out.

Q. But you were in the house that was filled with smoke?

A. There was smoke coming down from upstairs quite heavy at this time.

Q. All the time you were still in the kitchen or in the bathroom or someplace else where there was a lot of smoke?

A. There wasn't too much smoke in the living room. Most of the smoke was in the kitchen and the upstairs.

Q. Then when you got in the bathroom you were clear of the smoke?

A. Not completely clear of it, just a little haze-like in there.

Q. Is that when you said you fell in the bathtub or got in the bathtub?

A. I went to get the pictures off the wall and some important papers we thought we needed really bad, and as I started out the door it got so smokey at that time, it began to get so heavy in the living room that I couldn't see.

The kids kept hollering at me and the only place I knew was I fell in the bathtup and like I said, there is two doors in the bathroom, one coming from the one bedroom and one coming from the living room and I fell in the tub.

I knew where I was at and then I came out to my left and finally found my way to the door."

The only written communication between the parties was a letter from Mrs. Russell Higgins to Mrs. Roe dated November 1, 1975, 21 days before the fire, and postmarked

November 3, 1975, Defendants' Exhibit A-2, which reads:

"Dear Mrs. Roe:

So sorry we are having such a time trying to get our rent paid up to date. We never like to get behind on our rent but, the last couple months have been very rough on us. Sickness and a lot of car trouble, school clothes & heating fuel really made it rough on us. However we shall be caught up soon. Hope you understand as we love it out here in the country as it has been very good on my nerves. We received a notice from the bank the check for $250.00 was returned. This has us both very worried but, we are doing our best right now. Hope we can get caught up soon. When you get the check back just hang on to it and when we get the other $130.00 paid then you can tear it up. Thank you both for your kindness and may God bless you all.

I am feeling better now but, may have to have heart surgery at Mayo Clinic. All the Cardilogist tell me then think I will. Thanks again for your kindness.

Mrs. Russell Higgins"

A verdict being directed for Defendants at the close of Plaintiffs' case, the foregoing is the pertinent testimony most favorable to Plaintiffs as limited by their own admissions.

Mr. Roe called by Plaintiffs on cross-examination testified:

(TR 13)

"Q. Did you go to the property then just before they moved in?

A. Yes.

Q. What did you do on this occasion?

A. Well, we checked everything to see if it was working and we had open house the day before they were in it."

(TR 15)

"Q. During the time that Mr. and Mrs. Higgins lived in that property, did either Mr. or Mrs. Higgins ever complain to you or comment about any defects in the property?

A. No. Well, just a minute.
Well, I might say that our agreement was that if anything was wrong, for them to get it fixed and we would take care of the bill.
After they moved in, the water pump didn't work. They had somebody from Mt. Vernon fix it and it cost us $150 and we paid the bill.

Q. Did they complain about anything else while they were there, Mr. Roe?

A. No, they didn't."

(TR 18)

"Q. Were you in Mr. and Mrs. Higgins' home anytime after they rented the property from you in May of 1975?

A. Yes, probably two weeks after they moved in.

Q. That would be sometime either in late May or early June of 1975, is that correct?

A. I would say in late May.

Q. Did you observe any wires of any kind other than the ordinary wiring that was already in the house installed there after these folks took possession?

A. Well, I didn't inspect the house at this time. I just went up and asked them if everything was okay and she told me it was."

On November 22, 1975, the residence in which Plaintiffs were tenants was distroyed by fire, as alleged in the complaint of Plaintiffs to have been proximately caused by:

> "5. - - - the defective condition of the electrical system in the residence.
>
> 6. Defendants' negligence in failing to make necessary repairs and to maintain in good and safe working order the electrical and heating fixtures and appliances in the rented premises, as required by statute, was the proximate cause of the fire, and the ensuing damage.",

further that:

> "7. Defendants knew or should have known that failure to exercise due care in its failure to repair and maintain a safe electrical system in the residence would increase significantly the risk of fire and would endanger the health and safety of the occupants, and that Defendants failed to make necessary repairs and to do what was necessary to put and keep the premises in a fit and habitable condition; and failed to maintain in good and safe working order all electrical and heating fixtures and appliances; all in violation of Ohio Revised Code, Section 5321.04(A)."

In the First Cause of Action Plaintiff Russell Higgins alleged physical injuries including burns and smoke inhalation, hospitalization and other medical expenses, and loss of wages.

In the Second Cause of Action Plaintiffs alleged loss of personal property in the amount of approximately $10,000.00 as a proximate result of Defendants' willful and wanton neglect of the health and safety of the Plaintiffs.

In the Third Cause of Action Defendants incorporated allegations from the First Cause of Action and alleged failure of Defendants to perform the legal obligations imposed by law, that Defendants knew or should have known that, as a foreseeable result of its breach of the rental agreement by violation of Ohio Revised Code, Section 4321.04(A), Plaintiffs would be physically injured and would suffer damage to their personal property.

In the Fourth Cause of Action Plaintiff, Etta Higgins, says that she is the wife of Russell Higgins and as a direct and proximate result of the acts of the Defendants, she was denied loss of companionship, loss of society, loss of service and loss of consortium.

In the Fifth Cause of Action Plaintiff, Donna Higgins, alleged injuries to her person as a direct and proximate cause of the alleged acts of the Defendants.

In the Sixth Cause of Action Plaintiff alleged that as a result of the alleged acts of Defendants he incurred medical, doctor and hospital expenses for his daughter, Donna Higgins.

In the Seventh Cause of Action, Plaintiffs alleged that the fire destroying their residence was the proximate result of Defendants willful and wanton neglect of the

health and safety of the Plaintiffs and the cause of the aforementioned damages and injuries.

Plaintiff, Russell Higgins, demanded judgment in the amount of $45,000.00 plus $10,000.00 punitive damages, and Plaintiff, Etta Higgins, demanded judgment in the amount of $45,000.00 plus $10,000.00 punitive damages. Also, the daughter, Donna Higgins, separately demanded judgment in the amount of $10,000.00 plus $10,000.00 punitive damages.

Defendants answer in addition to denials plead as affirmative defenses, that injuries and damages were proximately caused or contributed to:

1. by Plaintiffs own negligence;

2. by Plaintiffs themselves in failing to comply with the provisions of Section 5321.05, Revised Code, and;

3. assumption of risk by voluntary inhalation of smoke after discovery of the condition.

Following entry of the judgments Plaintiffs, Russell and Etta Higgins filed notice of appeal from the judgment rendered in favor of Defendants against them as Plaintiffs. No notice of appeal was filed by Donna Higgins from the judgment dismissing her action against the

Defendants with prejudice. The assigned errors of Russell and Etta Higgins are:

> "1. The trial court erred in not applying the new Landlord Tenant Act, Am. Sub. S.B. No. 103 (Sections 5321.01 to 5321.19, inclusive, Revised Code, eff. 11/4/74), granting plaintiffs-appellant a cause of action for damages for failure to maintain the electrical system in good and safe working order.
>
> 2. The trial court erred in ruling that plaintiffs-appellant were guilty of contributory negligence and assumption of the risk as a matter of law."

Section 5321.05, Revised Code, in pertinent part provides:

> "OBLIGATIONS OF TENANT.
>
> (A) A tenant who is a party to a rental agreement shall:
>
> (1) Keep that part of the premises that he occupies and uses safe and sanitary;
>
> - - -
>
> (4) Use and operate all electrical fixtures - - - properly;
>
> - - -"

Section 5321.04, Revised Code, in pertinent part provides:

> "OBLIGATIONS OF LANDLORD.
>
> (A) A landlord who is a party to a rental agreement shall:
>
> (1) Comply with the requirements of all applicable building, housing, health, and

safety codes which materially affect health and safety;

(2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;

- -

(4) Maintain in good and safe working order and condition all electrical, - - - supplied, or required to be supplied to him;

- - -

(8) Except in the case of emergency or if it is impracticable to do so, give the tenant reasonable notice of his intent to enter and enter only at reasonable times. Twenty-four hours is presumed to be a reasonable notice in the absence of evidence to the contrary."

Section 5321.06, Revised Code, provides:

"RENTAL AGREEMENT TERMS.

A landlord and a tenant may include in a rental agreement any terms and conditions, including any terms relating to rent, the duration of an agreement, and any other provisions governing the rights and obligations of the parties that are not inconsistent with or prohibited by Chapter 5321. of the Revised Code or any other rule of law."

Section 5321.07, Revised Code, provides:

"NOTICE TO REMEDY CONDITIONS.

(A) If a landlord fails to fulfill any obligation imposed upon him by section 5321.04 of the Revised Code or by the rental agreement, or the conditions of the premises are such that the tenant reasonably believes that a landlord has failed to fulfill any such obligations, or a governmental agency has found that the premises are not in compliance with building, housing, health, or safety codes which apply to any condition of the residential premises that could materially affect the health and safety of an occupant, the tenant may give notice in writing to the landlord, specifying the acts, omissions, or code violations which constitute noncompliance with such provisions. Such notice shall be sent to the person or place where rent is normally paid.

(B) If a landlord receives the notice described in division (A) of this section and after receipt of such notice fails to remedy the condition within a reasonable time considering the severity of the condition and the time necessary to remedy such condition, or within thirty days, whichever is sooner, and if the tenant is current in rent payments due under the rental agreement, the tenant may do one of the following:

(1) Deposit all rent that is due and thereafter becomes due the landlord with the clerk of court of the municipal or county court having jurisdiction in the territory in which the residential premises are located;

(2) Apply to the court for an order directing the landlord to remedy the condition. As part thereof, the tenant may deposit rent pursuant to division (B)(1) of this section, and may apply for an order reducing the periodic rent due the landlord until such time as the landlord does remedy the condition, and may apply for an order to use the rent deposited to remedy the condition, the court may require the tenant to deposit rent with the clerk of court as provided in division (B)(1) of this section.

(3) Terminate the rental agreement.

(C) This section does not apply to any landlord who is a party to any rental agreements which cover three or fewer dwelling units and who provides notice of such fact in a written rental agreement or, in the case of an oral tenancy, delivers written notice of such fact to the tenant at the time of initial occupancy by the tenant. This section does not apply to any private college and university dormitories." (emphasis added)

Section 5321.12, Revised Code, provides:

"RECOVER DAMAGES.

In any action under Chapter 5321. of the Revised Code, any party may recover damages

for the breach of contract or the breach of any duty that is imposed by law."

With regard to the availability to the landlord of the common-law defense of assumption of risk see Westwood v. Thrifty Boy Super Markets, 29 Ohio St. 2d 84, 87, where it is stated:

> "Three years before employees and employers were accorded the benefits, as well as the detriments, of the Workmen's Compensation Act (103 Ohio Laws 72), the General Assembly, by enacting what is now R.C. 4113.06 in 1910, withdrew the defense of assumption of risk only from actions described in R.C. 4113.03, that is, employee-employer actions. The legislative purpose undoubtedly was to render the inequality in bargaining power between an employee and his employer. If the employee were compelled by contract to work under unsafe conditions, the employer should not be permitted to escape liability which he created by pleading assumption of risk. See Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney (1916), 95 Ohio St. 64, and Ford Motor Co. v. Tomlinson (1956), 229 F. 2d 873. But, even this policy was not carried over into R.C. Chapter 4101, the antecedents of which were first adopted in 1913 (103 Ohio Laws 95). Thus, no language in the entirety of R.C. Chapter 4101 even purports to abolish any common-law defense in either employee or frequenter actions brought under that chapter.
>
> We hold, therefore, that in the absence of a statute abrogating the common-law defense of assumption of risk, the defense remains available in an action brought either at common law or under R.C. 4101.11."

There is likewise an absence in Chapter 5321, Revised Code, of any provision abrogating the common law defense

of assumption of risk in the absence of which the defense remains available in an action either at common law or under the Section 5321.12, Revised Code.

In regard to Plaintiff Russell Higgins' alleged injuries from smoke inhalation the evidence of record most favorable to Plaintiffs discloses that Russell Higgins as a matter of law voluntarily and intentionally assumed the known risk of the consequences of smoke inhalation, such as could not be justified under the rescue doctrine by his testimony as to the purpose of his acts, for which reason there was no error in the direction of the verdict for Defendants as related to Plaintiffs' cause of action for damages resulting from smoke inhalation. Also, see Westwood v. Super Markets, supra. There being no error in the direction of a verdict in favor of Defendants upon Plaintiff Russell Higgins cause of action for injury from smoke inhalation neither was there any error in direction of a verdict for Defendants upon the derivative cause of action of Etta Higgins, wife of Russell, for loss of consortium.

The evidence of record most favorable to Plaintiffs is insufficient as a matter of law to establish such willful, wanton and malicious misconduct of Plaintiffs as to establish a prima facia case for punitive damages. With respect to Plaintiffs' claim for punitive damages we find

no error in direction of the verdict for Defendants upon Defendants' motion after Plaintiffs rested.

Remaining for consideration is Plaintiffs' claim for damages for the fire loss of personal property, to which we give independent consideration, although the reasons which follow, to the extent that they overlap, will also apply to Plaintiffs' causes of action, supra, for smoke inhalation and punitive damages.

The "Landlord-Tenant" statutes, Chapter 5321, Ohio Revised Code, are not an example of clarity, but no error having been assigned questioning their constitutionality, claiming vagueness, or inequality of application, we have not given further consideration thereto at this time.

Section 5321.07(A), Revised Code, supra, with respect to the failure of the landlord to fulfill any obligation imposed upon him by Section 5321.04, Revised Code, supra, or by the rental agreement, provides that the tenant may give notice in writing to the landlord, specifying the acts, omissions, or code violations which constitute noncompliance with such provisions. Section 5321.07(B), Revised Code, with respect to the withholding of rent further provides that the tenant must be current in rent payments due under the rental agreement. The section

does not apply to any landlord who is a party to any rental agreements which cover three or fewer dwelling units, and who provides notice of such fact in a written rental agreement or in case of any oral tenancy, by delivering written notice of such fact to the tenant at the time of initial occupancy by the tenant. This section could not in any event authorize withholding of rent in the instant case, since the evidence does not disclose the tenant to have been current in rental payments due under the rental agreement.

Turning back to Section 5321.12, Revised Code, supra, which provides that "any party may recover damages for the breach of contract or the breach of any duty that is imposed by law." Apparently this is a right in addition to the right to withhold rent where Section 5321.07, Revised Code, supra, is applicable and exclusive where the withholding of rent as provided by Section 5321.07, Revised Code, supra, is not applicable. Again see Westwood vs. Super Markets, supra, as to availability of common law defense of assumption of risk, such defense not being precluded by Chapter 5321, Revised Code.

Finally we come to the matter of notice from the tenant to the landlord. The only provision with respect to notice in Chapter 5321, Revised Code, is that contained

in Section 5321.07(A), Revised Code, supra, which provides that:

> "(A) If a landlord fails to fulfill any obligation imposed upon him by section 5321.04 of the Revised Code, (supra), or by the rental agreement, or the conditions of the premises are such that the tenant reasonably believes that a landlord has failed to fulfill any such obligations, or a governmental agency has found that the premises are not in compliance with building, housing, health, or safety codes which apply to any condition of the residential premises that could materially affect the health and safety of an occupant, the tenant may give notice in writing to the landlord, specifying the acts, omissions, or code violations which constitute noncompliance with such provisions. Such notice shall be sent to the person or place where rent is normally paid." (emphasis added)

We find such notice in writing to be the sole means provided by which a tenant may give notice to the landlord of any obligation imposed upon the landlord by R.C. 5321.04, conditioned upon the giving of which a tenant may later have an action in the event of failure of the landlord to meet obligations imposed upon him. Failure of the tenant to keep rent current is a breach of contract which is a bar to liability of the landlord arising out of contract, i.e., the oral monthly rental agreement.

In may be argued that sub-paragraph (C) of Section 5321.07, Revised Code, supra, renders inapplicable the entire section where the provisions of (C), supra, are applicable but we read it to express an intent of the legislature to render inapplicable only the provisions for

withholding of rent as imposed under sub-paragraph (B) of R.C. 5321.07 where there is a statutory violation and rents are current but not applicable to sub-paragraph (A) of said Section 5321.07, supra, which makes provision for written notice by the tenant if the landlord fails to fulfill any obligation imposed upon him by Section 5321.04, Revised Code.

With respect to such notice we find:

1. the letter, supra, by Plaintiff Etta Higgins written to Defendant Mrs. Roe dated November 1, 1975, 21 days before the fire, and postmarked November 3, 1975, not to indicate any violation or failure of Defendants of any of their obligations either with the provisions of the rental contract or the requirements of Section 5321.04, Revised Code, supra;

2. the claimed statements testified to by Russell Higgins as being made to the Defendants were insufficient because they were not in writing, the means specified in Chapter 5321, Revised Code, for placing an obligation upon the landlord by service of notice of his failure to fulfill any obligation imposed upon him by Section 5321.04, Revised Code, or the rental agreement. See Revised Code Section 5321.07(A), supra.

In our opinion the reason the legislature did not use the word shall rather than the word may in the provision of Section 5321.07(A), Revised Code, supra, that:

> "If a landlord fails to fulfill any obligation imposed upon him by section 5321.04 of the Revised Code or by the rental agreement - - - the tenant may give notice in writing to the landlord, specifying the acts, omissions, or code violations which constitute noncompliance with such provisions. - - -" (emphasis added)

is that the legislature did not intend to require the tenant to complain of such violations if he did not elect to do so, but did intend to require such notice in writing to the landlord if he did not wish to waive such violations but to proceed with enforcement of his rights as provided under Chapter 5321, Revised Code, said requirement of written notice to the landlord being a mandatory requirement for enforcement of those rights if he elected to so proceed.

For the reasons herein set forth, Appellants' first assignment of error that the trial court erred by not so applying the new Landlord Tenant Act, Am. Sub. S.B. No. 103 (Sections 5321.01 to 5321.19, inclusive, Revised Code, eff. 11/4/74), as to grant Plaintiffs-Appellants a cause of action for damages for failure to maintain the electrical system in good and safe working order is overruled.

For the reasons set forth in this opinion we do not reach the second assignment of error of Plaintiffs-Appellants, Russell and Etta Higgins; however, were we to do so and had timely notice in writing been given by Plaintiffs to the landlord of claimed failure by the landlord to fulfill obligations placed upon him by Section 5321.04, Revised Code, or by the rental agreement, we would find that the court erred in granting Defendants' motion for a directed verdict in their favor at the close of Plaintiffs' evidence upon a finding as a matter of law of contributory negligence and assumption of risk by Plaintiffs as related to their claim of damages for loss of personal property.

For the reasons set forth herein, we find no error prejudicial to the Appellants and the judgment appealed from rendered in favor of Defendants upon a directed verdict in favor of Defendants at the close of Plaintiffs' testimony is affirmed.

Judgment affirmed.

JUDGES.

COURT OF APPEALS, FIFTH DISTRICT

DELAWARE COUNTY, OHIO

RUSSELL and ETTA HIGGINS,	:	
Plaintiffs-Appellants,	:	
and	:	
DONNA HIGGINS,	:	JUDGMENT ENTRY
Plaintiff-Appellee,	:	CASE NO. 78-CA-3
vs.	:	
HAROLD P. and BERNICE ROE,	:	
Defendants-Appellees.	:	

Appellants' assignments of error are ruled upon in the manner set forth in the memorandum decision filed herewith.

For the reasons set forth in said memorandum decision, from the record and under the law of Ohio we find no error prejudicial to Plaintiffs-Appellants and the judgment appealed from rendered in favor of the Defendants Harold P. Roe and Bernice Roe upon Defendants' motion for a directed verdict after Plaintiffs rested at the close of their evidence is affirmed.

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COURT OF APPEALS
APR - 2 1979
Betty J. Porter
CLERK, DELAWARE CO., OHIO

JUDGES.