STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(DONOFRIO PJ, and WHITE and TALBOT, JJ)

JOYCE McDOWELL, a Formal Special Personal Representative Intestate of the Estates of BLAKE BROWN, deceased, JOYCE BROWN, deceased, CHRISTOPHER BROWN, deceased, NAOMI FISH, deceased, JOHNNY C. FISH, deceased, JERMAINE FISH, deceased, as Special Conservator of JONATHAN FISH, a minor, and as Special Conservator of JOANNE CAMPBELL and JUANITA FISH, adults,

Plaintiff-Appellee,

v.

CITY OF DETROIT, individually and acting by and through the DETROIT HOUSING COMMISSION,

Defendants-Appellants.

Supreme Court No. 127660
Court of Appeals No. 246294
Wayne Circuit Court
Case No. 00-039668-NO
Hon. Edward M. Thomas

PLAINTIFF -APPELLEE'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED****

PROOF OF SERVICE

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Concurrence With Defendants' Jurisdictional Statement

Defendants' recitation of the underlying proceedings in this case is correct and Plaintiff acknowledges this Court's jurisdiction pursuant to MCR 7.301(A)(2).

Counterstatement Of The Questions Presented

I. Does A Fire Occurring Within The Wall Of Leased Premises Constitute An "Intrusion" Into Plaintiff's Leased Premises Sufficient To Bring It Within The Trespass-Nuisance Exception To Governmental Immunity As Discussed In *Hadfield v Oakland County Drain Commissioner*, 430 Mich 139 (1988)?

The trial court said "Yes."

The Court of Appeals said "Yes."

Plaintiff-Appellee says "Yes."

Defendants-Appellants say "No."

A. Has The Common Law Rule That A Landlord Was Under No Obligation To Keep The Tenant's Premises In Repair Been Abrogated By Michigan Statutes?

The trial court did not answer this Question.

The Court of Appeals said "Yes."

Plaintiff-Appellee says "Yes."

Defendants-Appellants say "No."

B. Does the Express Language of The Lease Reserving The Exclusive Right To Make Repairs And "Maintain Electrical ... In Safe Working Order And Condition" Establish That The Detroit Housing Commission Controlled The Interstitial Space Of The Wall Where The Fire Began?

The trial court did not answer this Question.

The Court of Appeals said "Yes."

Plaintiff-Appellee says "Yes."

Defendants-Appellants say "No."

C. Is The Scope Or Extent Of Plaintiff Lessee's Possession Of The Physical Premises Irrelevant To The Issue Of Defendant Landlords' Liability For An Electrical Fire That Began In The Wall And Spread Into The Living Space Of The Premises Killing Six Children, Because Defendants Retained Control Of Common Areas And Utilities On The Premises Including The Interstitial Space Of The Wall With The Electrical Wiring Where The Fire Began?

The trial court did not answer this Question.

The Court of Appeals said "Yes."

Plaintiff-Appellee says "Yes."

Defendants-Appellants say "No."

Counterstatement Of Facts

This tragic case arises out of the fatal December 1, 2000 apartment fire at 2537 St. Antoine, in Detroit, in premises owned by the Detroit Housing Commission. Six children under the age of eight were killed, and Plaintiff's sister, Juanita Fish, and another of Juanita's children were injured. This Court has granted leave to consider whether Plaintiff may recover on the theory of trespass-nuisance.

A. The Lease And The Fire Tragedy At 2537 St. Antoine Street

On July 22, 1999, Jo-Ann Campbell entered into a dwelling lease (the "Lease") (Defendants' Apx p 2A) with the Detroit Housing Commission ["DHC"] for premises at 2537 St. Antoine in the Brewster-Douglas Housing Project in the City of Detroit. Defendants have expressly acknowledged that the City of Detroit owns the real estate that DHC operates and administers. Under the Lease, Section VII.A.1. **"Obligation And Rights Of Parties,"** the DHC, as **Management**, agreed to, in part:

> **a. Repair and maintain the dwelling unit, equipment and appliances, and the common areas and facilities which are needed to keep the housing in decent, safe and sanitary condition.**
>
> **b. Comply with all requirements of applicable state and local building and housing codes and HUD regulations concerning matters materially affecting the health or safety of the occupants.**
>
> **c. Keep development buildings, facilities and common areas, not otherwise assigned to Residents for maintenance and upkeep, in a clean and safe condition.**
>
> **d. Maintain electrical, plumbing, sanitary, heating, ventilating**

and other facilities and appliances, supplied or required to be supplied by Management in good and safe working order and condition.

* * *

k. **Respond to and satisfy Resident's damage claims, unless Management determines that Resident's damages or loss was not caused by Management but by theft or casualty, among other things, in which case Management shall not be liable.** (Defendants' Apx pp 7A-8A; emphasis added).

Subsection VII A.2.b. required **Management** to conduct routine inspections. **Subsection VII A.3.a.** gave **Management** the **"Right to Entry"** on **"Reasonable Notice" for "the purpose of performing routine inspections and maintenance, for making improvements or repairs ..."** (Defendants' Apx p 8A; emphasis added).

As to the "**Obligations And Rights**" of the "**Resident,**" Ms. Campbell, paragraph **VII.B.1.** of the Lease stated, in part:

B. Resident, Resident's Household and Guests.

1. **General. Resident, including Resident's Household, guests, or others whom the Resident controls, shall comply with the following rules. Resident understands that Resident is responsible for all acts committed by Resident's Household or guests or others whom the Resident controls and for requiring Resident's Household and guests to comply with the same:**

* * *

g. **To make no alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of Management. To make no changes to locks or install new locks or anti-theft devices without written consent of Management. However, in the event Resident changes the locks, Resident shall provide Management with a key within ten (10) days. Otherwise, Resident will be charged for damage or expenses incurred because of Management's necessary entry into the dwelling unit.**

* * *

l. **To notify Management promptly of known need for repairs to the dwelling unit, and known unsafe conditions in the common areas and grounds of the site which may lead to damage or injury.** (Defendants' Apx pp 9A-10A, emphasis added).

Further, paragraph **VII.B.2.a.** required in part:

2. **Provide Notification to Management Regarding Hazardous Defects.**

a. **Duty to Notify. Resident shall immediately notify Management of damages which create conditions which are hazardous to the life, health or safety of the occupants. Management shall be responsible for repair of the dwelling unit within a reasonable time, ...** (Defendants' Apx p 11A, emphasis added).

As alleged in the amended complaint, in the months prior to December 1, 2000, Jo-Ann Campbell repeatedly informed the Detroit Housing Commission that she was experiencing problems with the electricity in the apartment and with sparks coming from a light in the basement and a light in the kitchen (Defendants' Apx pp 24A, 26A: Amended Complaint, ¶ 6). As far back as March 1999, Ms. Campbell had complained of electrical problems at the apartment including at that time, a thermostat on the wall shooting flames and making popping sounds (Plaintiff's Apx p 2b: Excerpt of Exhibit 189 from Campbell dep, 3/4/99 Repair Order).

For several months before the fire, Ms. Campbell had also noticed that every time she tried to plug electrical appliances into the outlet located in the north wall of the first floor bedroom, the outlet always sparked and fumes would come from it that smelled like a burnt piece of paper (Plaintiff's Apx pp 3b-10b: Campbell dep excerpts, pp 67-69; 74; 99). She described all of these problems to DHC in telephone complaints and testified she had "made several complaints because that [outlet] wasn't the only one messing up ..." (Plaintiff's Apx pp 7b; 12b-

13b: Campbell dep excerpts, pp 74; 104-105).

Despite her complaints, nobody at DHC ever did anything about the outlet (Plaintiff's Apx p 14b: Campbell dep excerpts, p 161). She did not use the outlet and she pushed her double bed up against the north wall outlet, to keep the children away from it (Plaintiff's Apx p 11b: Campbell dep, p 99). Jo-Ann's sister, Juanita Fish, had also noticed the burning smell when she was at the apartment (Plaintiff's Apx pp 16b-17b: Plaintiff's Answers to Interrogatories and Requests to Produce Dated July 26, 2002, Answer 4).

On November 30, 2000, DHC employee J.L. Whitley came by to inspect the premises. Ms. Campbell was there alone and she told Whitley that the socket was sparking and it smelled like it was burning a little (Plaintiff's Apx p 10b: Campbell dep excerpts, p 98). Whitley was more interested in flirting with her. Instead of inspecting the sparking socket and the other premises defects, he went to a party store and brought back a six-pack of beer which they split and got "high" (Plaintiff's Apx pp 8b-9b: Campbell dep excerpts, pp 95-96). Despite Ms. Campbell's complaints about the premises, Whitley later prepared a Smoke Detector and Fire Extinguisher Inspection Report and HUD Inspection Report that passed the premises in every respect (Plaintiff's Apx p 27b: 11/30/00 Report). Because Jo-Ann Campbell had to be at the bank the next morning when it opened, on the night of November 30, 2000, her sister Juanita Fish, and her four children, Naomi Fish, Johnny C. Fish, Germaine Fish, and Jonathon Fish, spent the night at the premises sleeping in an upstairs bedroom so that Juanita could watch Jo-Ann's children the next day (Plaintiff's Apx p 14b: Campbell dep excerpts, p 124). On the morning of December 1, 2000, Jo-Ann Campbell left early for the bank while Juanita Fish and the seven children remained asleep. Fire broke out from inside the north wall of the first floor

bedroom and spread rapidly through the apartment resulting in the deaths of Ms. Campbell's three children, Blake Brown, Joyce Brown, and Christopher Brown, the deaths of three of the Fish children, Naomi, Johnny, and Germaine, and serious injuries to Jonathon Fish and to Juanita Fish.

Plaintiff presented the testimony of two causation and origin and fire pattern analysis experts. They confirmed that the fire originated in the interstitial space of the north wall of the first floor bedroom inside the electrical duplex outlet in the wall as the result of an electrical malfunction. After smoldering in the wall, flames eventually spread to the bed and a flash over occurred.

Daniel Churchward, Plaintiff's fire cause and origin expert, stated that arcing at the plug outlet was the most likely failure mechanism (Plaintiff's Apx 59b-62b: Churchward dep, pp 35-42, 46). The arcing "ignited fuels in the wall space including, but not limited to, any insulating materials that were in there that may have had a combustible component ..." (Plaintiff's Apx p 63b: Churchward dep, pp 47-48). The fire slowly burned inside the wall where it may have smoldered for a couple of hours "until it eventually broke through and began to receive sufficient oxygen for flaming combustion" (Plaintiff's Apx pp 63b; 74b: Churchward dep, pp 49, 94). The fire clearly began in the interstitial space, not the living area, although combustion of the bed may have caused the flash over (Plaintiff's Apx pp 76b-77b: Churchward dep, pp 103-105). Mr. Churchward also noted that Detroit Fire Department investigator Vargas stated in his deposition that his investigation had found no evidence that anything was plugged into the receptacle at the time of the fire and that the receptacle cover plate had apparently still been in place (Plaintiff's Apx pp 68b; 78b: Churchward dep, pp 69, 109).

Patrick M. Kennedy, Plaintiff's fire patterns analysis expert, agreed that the fire originated inside the north wall at the electrical outlet based upon his physical review of the scene, his review of the photos and the application of origin analysis standards in NFPA 921 (Plaintiff's Apx pp 90b; 97b; 99b; 101b-102b: Kennedy dep, pp 14, 44, 52, 60-61). The fire spread to the bed after it came out of the wall after starting inside the wall (Plaintiff Apx p 95b: Kennedy dep, p 34). The only heat-producing implement at the point of origin is the electrical outlet box (Plaintiff's Apx p 102b: Kennedy dep, p 64).

B. The Trial Court Litigation And The Summary Disposition Ruling

The wrongful death suit seeking to recover for these horrendous losses was filed on December 6, 2000 (Defendants' Apx p 17A: Complaint). On March 15, 2001, the complaint was amended (Defendants' Apx p 24A: First Amended Complaint). Following discovery, Defendants sought summary disposition on governmental immunity and other grounds.

A hearing was held on December 11, 2002 (Defendants' Apx p 50A: Tr 12/11/02). On December 18, 2002, Wayne Circuit Judge Edward Thomas announced from the bench that he was denying summary disposition based on governmental immunity on Count I, Nuisance *Per Se*; Count II, Nuisance; and Count III, Trespass (Defendants' Apx p 88A: Tr. 12/18/02, pp 3-4). He also denied summary disposition on Plaintiff's contract and breach of warranty claims including the statutory MCL 554.139 covenants of habitability and quiet enjoyment (Counts IV and V). After first denying summary disposition on Count VI, Violation of Housing Code, MCL 125.538, pursuant to MCR 2.116(C)(8), Judge Thomas later reconsidered and granted the motion pursuant to (C)(10) (Defendants' Apx p 88A: Tr. 12/18/02, pp 5, 12-13). Judge Thomas also

held that the facts could not support a proprietary exception to governmental immunity claim under MCL 691.1413 (Defendants' Apx p 88A: Tr. 12/18/02, p 5).

C. The Court Of Appeals Decision

Defendants appealed and Plaintiff cross-appealed In the November 9, 2004 opinion (Plaintiff's Apx p 122b), authored by Judge Patrick Donofrio, the Court of Appeals reversed on the contract claims which the opinion called misnamed tort claims.[1] 264 Mich 337, 354-356 (2004) (Plaintiff's Apx pp 126b-127b). The Court affirmed as to Plaintiff's cross-appeal claims. 264 Mich App 356-359. (Plaintiff's Apx pp 127b-128b).

As to the tort claims, the Court ordered the dismissal of Plaintiff's nuisance per se and trespass claims saying that Plaintiff failed to establish facts demonstrating those two torts. 264 Mich App at 345-348. (Plaintiff's Apx pp 122b-125b). The Court did, however, agree that the record established a genuine issue of material fact with respect to Plaintiff's nuisance in fact and trespass-nuisance claims. 264 Mich App at 348-351. (Plaintiff's Apx pp 124b-126b). As to trespass-nuisance, the Court held that under the Lease, "the interstitial space is totally within the control of the lessor and not subject to intervention by the lessee as a matter of law." 264 Mich App at 350, 353-354. (Plaintiff's Apx p 114A).

D. The Supreme Court Proceedings

Defendants filed, and Plaintiff opposed, their Application for Leave. On September 23,

[1] Judge Michael Talbot joined in Judge Donofrio's opinion and Judge Helene White concurred in the result. It must further be pointed out that the slip opinion contained in Defendants' Appendix at page 106A is not the official reported version of the Court of Appeals opinion which differs in several respects. Accordingly, Plaintiff has provided a copy of the official reported version in her Appendix at 121b-129b.

2005, this Court scheduled oral argument on the Application, and ordered the parties to address (1) "whether the Court of Appeals erred in holding that negligent nuisance is an exception to governmental immunity under *Hadfield v Oakland County Drain Commissioner*, 430 Mich 139 (1988) ..." and, (2) "whether, if a fire begins in the space between an inner and outer wall of leased premises, the fire "trespasses" to the tenant's premises when it spreads beyond the inner wall." (Plaintiff's Apx p 131b: 9/23/05 Order). In supplemental briefing and at the December 15, 2005 argument on the Application, Plaintiff acknowledged that after again reviewing the caselaw, the Court of Appeals did err by declaring that a negligent nuisance is an exception to governmental immunity. Plaintiff continued to maintain that the lower courts correctly found a viable common law trespass-nuisance claim.

On January 13, 2006, this Court granted leave to appeal on the remaining trespass-nuisance exception question reiterating that, "The general issue presented is whether a fire occurring within the wall of leased premises constitutes an 'intrusion' into plaintiff's leased premises sufficient to bring it within the trespass-nuisance exception to governmental immunity as discussed in *Hadfield v Oakland County Drain Commissioner*, 430 Mich 139 (1988)." The Court further directed the parties to brief:

> (1) whether, in general, a lease includes both the inner and outer walls of the leased premises, see, *e.g.*, *Forbes v Gorman*, 159 Mich 291, 294 (1909), and (2) whether the general rule was modified by the portion of the subject lease that limited the tenant's right to make "alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of Management." (Defendants' Apx p 119A: 1/13/06 Order).

Counterstatement/Concurrence In Standard Of Review

Plaintiff generally concurs that the applicable standard of review is de novo. *Smith v Globe Life Ins Co*, 460 Mich 446 (1999) [summary disposition]. Additionally, whether a claim is barred because of immunity under MCR 2.116(C)(7) "requires consideration of all documentary evidence filed or submitted by the parties." *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613 (2003), quoting *Glancy v Roseville*, 457 Mich 580, 583 (1998). Such documentary evidence must be viewed in the light most favorable to the nonmoving party. *Lavey v Mills*, 248 Mich App 244, 250 (2001). The reviewing court must also accept as true the contents of the complaint unless specifically contradicted by submitted documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119 (1999).

Law And Argument

An Electrical Fire That Began Inside The Wall Of Leased Premises And Then Spread Into The Tenant's Premises, Constitutes An "Intrusion" Sufficient To Bring It Within The Trespass-Nuisance Exception To Governmental Immunity Discussed In *Hadfield v Oakland County Drain Commissioner*, 430 Mich 139 (1988).

In *Pohutski v City of Allen Park*, 465 Mich 675 (2002), this Court prospectively overruled *Hadfield v Oakland County Drain Commissioner*, 430 Mich 139 (1988), which had recognized a common law trespass-nuisance exception to governmental immunity.[2] *Hadfield* was overruled

[2] To the extent that Defendants assert at pages 10-11 of their brief that the second sentence of §1407(1) of the GTLA is relevant to this case, they are wrong. *Pohutski* makes it clear that, in a trespass-nuisance case involving a city, "the second sentence of §7 does not apply... ." *Id* at 689; 699-700. The roots of trespass-nuisance are in the common law, not in a statutory exception.

because trespass-nuisance is not one of the five statutory exceptions in the Governmental Tort Liability Act [GTLA]. *Pohutski*, 465 Mich at 689. The *Pohutski* majority prospectively applied the change in interpretation overruling *Hadfield* after citing *Lindsey v Harper Hospital*, 455 Mich 56, 68 (1997), for the proposition that "a more flexible approach is warranted where injustice might result from full retroactivity." The Court said that "a holding that overrules settled precedent may properly be limited to prospective application." *Pohutski*, 465 Mich at 696. Accordingly, "after consideration of the effect"of its decision on "the administration of justice," *Pohutski*'s overruling of precedent was limited to prospective application applying only to cases brought on or after April 2, 2002. In all cases, filed before that date, like the case at bar which was filed on December 6, 2000, the interpretation of §1407(1) set forth in *Hadfield* continues to apply. 465 Mich at 699. See also: *Mollhagen v Allegan County Bd of Rd Comm'rs*, No. 230316, 2003 Mich App LEXIS 60 (unpubl rel'd 1/4/03); *Horning v Lapeer County Drain Comm'r*, No. 229054, 2003 Mich App LEXIS 5 (unpubl rel'd 11/5/03); *Antonian v City of Dearborn Heights*, 224 F Supp 2d 1129, 1142-1143 (ED Mich 2002).

Under *Hadfield* and its progeny, trespass-nuisance is a "trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage." *Continental Paper v City of Detroit*, 451 Mich 162, 164; (1996); *Hadfield* at 169, 209. To establish trespass-nuisance, a plaintiff must show: (1) condition [nuisance or trespass]; (2) cause [physical intrusion], (3) causation or control [by government]. *Continental Paper*, at 164; *Hadfield* at 169. At the Court of Appeals, Defendants challenged only the "cause" or "physical intrusion" element, claiming that the facts alleged by Plaintiff do not support a claim of trespass-nuisance because Defendants did not create

or maintain the fire condition on its land and then allow it to spread to the lessee's premises. The Court of Appeals properly rejected this "no physical intrusion" argument.

The Court of Appeals recognized that Plaintiff's experts, Daniel Churchward and Patrick Kennedy, testified that the fire originated in the interstitial spaces of the north wall of the first floor bedroom at the electrical duplex outlet because of its failure. The Court of Appeals concluded that Defendants controlled the interstitial space of the wall where the electrical fire began.

In *Continental Paper*, the Supreme Court held that the City was not liable for a fire that originated at an abandoned warehouse complex and spread to plaintiff's building. The City was in the process of having the warehouse complex condemned and demolished, but did not have title to the buildings at the time of the fire. The Court found that condition and cause had been established, but that since the City had neither title nor control over the buildings, it could not be liable under the trespass-nuisance exception. 451 Mich at 163-164.

Here, by contrast, as Defendants have conceded, the City of Detroit owns the real property and the Detroit Housing Commission owns the premises. The Lease itself demonstrates that Defendants had the right to exercise, and indeed did exercise, control over the common areas of the property including the interior of the walls and the electrical system in those walls. This satisfies the control prong.

With respect to establishing the other two elements, condition and cause, the *Continental Paper* Court cited *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630 (1970). In *Buckeye Union*, the Court stated that a fire hazard is a nuisance (condition) and a physical intrusion (cause) to neighboring land.

Here, according to Plaintiff's experts, the fire started in the wall of the premises that was owned by Defendants. The *Continental Paper* Court, at 165, n 7, explained that:

> "Control may be found where the defendant creates the nuisance, **owns or controls the property from which the nuisance arose** or employs another to do work that he knows is likely to create a nuisance. **It may also be found where the governmental defendant is under a statutory duty to abate the nuisance.** *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 606 (1995)." (emphasis added).

In *Continental Paper*, the Court found no liability because the city did not use the property in any way, "At no point did the city lease the property, collect rents, exclude people from the property, or invite them onto it." 451 Mich at 168. Contrasting *Continental* with the present case, all three elements for trespass-nuisance are established. Defendants claim that Plaintiff cannot establish an "intrusion," but as will be shown, this is nonsense. As explained further in the subsections that follow, based on the common law, the statutes, and the Lease itself, Plaintiff has stated a claim in avoidance of governmental immunity and issues of fact preclude summary disposition.

A. While The Common Law Rule Was That In The Absence Of Any Agreement Between The Parties, The Landlord Was Under No Obligation To Keep The Tenant's Premises In Repair, For Over A Hundred Years, This Court Has Acknowledged A Corollary That When A Landlord Reserves Control Over Common Areas, The Landlord Has "An Implied Obligation To Use Reasonable Diligence To Keep In A Safe Condition The Parts Over Which He Reserves Control."

Plaintiff's amended complaint, Count II Trespass, at paragraph 24 alleges that:

> **"As a direct and proximate result of the failures of the Defendant to properly inspect, maintain and repair the electrical and furnace devices within the premises, a fire developed..."** (emphasis added).

According to Plaintiff's experts, faulty wiring in the wall or the electrical receptacle caused the

fire that originated in the wall, then spread or "intruded" into the premises, killing the children. Yet, Defendants contend that there was no "direct trespass from Defendants' government-owned property onto JoAnn Campbell's leasehold. Defendants' arguments are unavailing.

This case is indistinguishable from *Buckeye Union*, *supra*, where, as here, Defendants had notice and knowledge of the condition for months before the fire. Further, in *Hadfield*, 430 Mich 160, n9, the Court pointed to *Alberts v City of Muskegon*, 146 Mich 210 (1906), where plaintiff's property was burned by a fire caused by sparks from a steamroller used by the city to repave a street, the *Hadfield* Court said that, although, in 1906, sparks were apparently not a trespassory invasion, "under present law it is likely that such an invasion would constitute that requisite physical intrusion for trespass-nuisance." See, e.g., *Peterson v Clearly*, 257 Mich 640 (1932) [allowing negligence recovery for fire destruction of plaintiff's house as result of sparks from steamroller paving road in front of house]. *Buckeye Union* and *Alberts* support Plaintiff's trespass-nuisance claim here.

Moreover, one hundred twenty-five years ago in *Boyd v Rice*, 38 Mich 599 (1878), Justice Cooley authored an opinion in a trespass claim where defendant Boyd negligently permitted fire to pass from his premises to those of plaintiff Rice, burning wood on Rice's land. See also: *Talley v Courter*, 93 Mich 473 (1892) [trespass action for having wilfully, maliciously, and negligently set fire to premises and adjoining those of plaintiff with fire passing over and destroying portion of plaintiff's land]; *Fisk v Wabash RR Co*, 114 Mich 248 (1897) [recovery under trespass on case theory where sparks and cinders from defendant's engines burned and destroyed portions of plaintiff's land and meadow]. And, in *Cribbs v Stiver*, 181 Mich 82 (1914), plaintiff recovered a judgment against the road commissioner for starting a fire that

burned plaintiff's barn while clearing a road with it being held immaterial whether the recovery was based on trespass or trespass on case theory.[3]

This Court, citing *Forbes v Gorman*, 159 Mich 291, 294 (1909), has directed the parties to address whether "in general, a lease includes both the inner and outer walls of the leased premises." *Forbes* was an advertising signage case involving a commercial lease for the first floor and basement which also included a license to the tenant to place a sign for his own business on the roof provided it did not interfere with other tenants. The lessee later assigned his rights to Gorman who contracted with a sign company to place a "conspicuous electric sign" on the roof. *Id* at 293.

While this Court, in what would fairly be characterized as dictum, did say that the lease of a building includes the outer and inner walls, this Court actually affirmed the Wayne Circuit decree for the complainant landlord on the basis that the lease did not include the privilege or license to put signage on the roof because the roof was not part of the lease. *Id* at 296. As the subsequent case *Lewis v Baxter Industries*, 254 Mich 216, 217 (1931), makes clear, the interest specifically involved in *Forbes* was a license, not a lease. Moreover, Defendants' string citation of exterior wall sign cases from other jurisdictions (Defendants' brief, pp 9-10) is impressive, but

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[3] The Michigan cases that establish that a fire that spreads onto a plaintiff's property is a trespass are in accord the law of other jurisdictions. See *Zimmer v Stephenson*, 403 P2d 343, 345 (Wash 1965) [actionable trespass where adjacent landowner's tractor set Plaintiff's field of wheat on fire]; *Martin v Union P.R. Co*, 474 P2d 739, 739-740 (Ore 1970) [spread of fire from defendants' land onto plaintiffs' land an intrusion sufficient to constitute a trespass]; *Koos v Roth*, 652 P2d 1255, 1267-68 (Ore 1982) [same]; *Elton v Anheuser-Busch Beverage Group, Inc*, 50 Cal App 4th 1301, 58 Cal Rptr 2d 303; 306-407 (1996) [liability for adjacent landowner's controlled burn that went awry]; *Robinson v United States*, 175 F Supp 2d 1215, 1222 (ED Cal 2001) ["controlled" fire that escaped and damaged landowner's property a trespass].

these commercial lease wall sign cases are irrelevant to the issue presented in this personal lease case.

Likewise, Defendants' reliance upon the unpublished and non-precedential Court of Appeals opinion in *Morris v Fredenburg*, No. 186186 (unpubl 10/25/96) is misplaced. Clearly, in *Morris*, unlike here, defendant had no notice of the wiring defect. The Court of Appeals also observed that defendant had no duty to inspect the premises. Here, by contrast, Defendants knew from the multiple complaints set forth in the record that there were specific problems with electricity in the unit.

It is true that, at common law, in the absence of an ordinance or statute, or any agreement between the parties, a landlord has no obligation to keep the premises in repair. *Cooper v Lawson*, 139 Mich 628, 631-632 (1905). But, in Michigan the corollary to that common law rule for more than one hundred years has been that "when a landlord leases separate portions of the same building to different tenants, and reserves control of those parts of the building or premises used in common by all tenants, he is under an implied obligation to use reasonable diligence to keep in safe condition the parts over which he reserves control." *Id* at 632. This Court recently cited *Cooper* with approval in *Woodbury v Bruckner*, 469 Mich 983 (2003) for the proposition that, "Under our common law, a landlord is typically liable only for hazards in areas over which he or she retains control." Thus, for example, almost 75 years ago in *Everson v Albert*, 261 Mich 182 (1933), this Court, citing *Cooper*, affirmed a judgment for the tenant who moved out because of foul odors and no running water because it was the duty of the landlord to maintain a water supply and the pipes were not solely within the control and exclusive use of any particular tenant. So it is here with respect to the electrical wiring inside the walls.

B. Moreover, As The Trial Court And The Court Of Appeals Properly Recognized, The Common Law Rule Has Been Abrogated By The Michigan Housing Law And The Real Property Code.

As the Court of Appeals opinion recognized,[4] a landlord now owes statutory duties to its tenants. First, MCL 554.139, an amendment to R.S. 1846, c66 in the Real Property Code, mandates compliance with the implied warranty of habitability to maintain the premises in reasonable repair:

> **"§554.139. Covenants of lessor or licensor; construction.**
>
> Sec. 39. **(1) In every lease or license of residential premises, the lessor or licensor covenants:**
> **(a) That the premises and all common areas are fit for the use intended by the parties.**
> **(b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenant's willful or irresponsible conduct or lack or conduct.**
>
> * * *
>
> **(3) The provision of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein."**

Further, Michigan's Truth In Renting Act, MCL 554.631 *et seq,* in MCL 554.633(1)(a) expressly prohibits the waiver or modification of the covenants of fitness and habitability in MCL 554.139. Subsection (1)(e) further prohibits an agreement exculpating the lessor from "liability for the lessor's failure to perform, or negligent performance of, a duty imposed by law."

Likewise, the Michigan Housing Law, MCL 125.438 makes it **"unlawful for any owner**

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[4] Discussing nuisance in fact. (Defendants' Apx pp 111A-112A).

or agent thereof to keep or maintain any dwelling or part thereof which is a dangerous building as defined in section 139 [MCL 125.539]." In relevant part, §139 states that **'dangerous building'** means a building or structure that has 1 or more of the following defects or is in 1 or more of the following conditions:

> "(f) **The building, structure, or a part of the building or structure is manifestly unsafe for the purpose for which it is used.**
>
> * * *
>
> (g) **A building or structure used or intended to be used for dwelling purposes, including the adjoining grounds, because of dilapidation, decay, damage, faulty construction or arrangement, or otherwise, is unsanitary or unfit for human habitation, is in a condition that the health officer determines is likely to cause sickness or disease, or is likely to injure the health, safety, or general welfare of people living in the dwelling.**"

Additionally, since 1917, MCL 125.471 has provided in relevant part, **"Every dwelling and all parts thereof including** plumbing, heating, ventilating and **electrical wiring shall be kept in good repair by the owner."** (emphasis added). These statutes abrogate the common-law rule that the landlord, in the absence of an agreement to do so, is under no obligation to make repairs. *Annis v Britton*, 232 Mich 291 293 (1925); *Crawford v Palomar*, 7 Mich App 21, 26 (1967).[5]

Thus, while Defendants assert that Plaintiff's common-law trespass-nuisance claim under *Hadfield* is not a cognizable governmental immunity exception, both the corollary to the common law rule and the obligations created by the statutes discussed above establish these Defendants' obligations toward maintenance and repair of the common areas and utilities including here the electrical wiring inside the walls of the dwelling unit.

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[5] Dobbs, The Law of Torts, § 241 pp 628-630 (2000) discusses this warranty of habitability or continuing duty to repair.

C. Under The Express Language Of The Lease Itself, By Reserving The Exclusive Right To Make Repairs And "Maintain Electrical ... In Safe Working Order And Condition," Defendant Detroit Housing Commission Controlled The Common Areas Including The Interstitial Space Of The Wall Where The Fire Began.

A lease involves either an express or implied contract between the owner and one who occupies the owner's premises. *Grant v Detroit Ass'n of Women's Clubs*, 443 Mich 596, 603, 605, n6 (1993). A lease, and hence a landlord-tenant relationship, is created when the owner of an estate conveys to another a portion of his interest for a term less than his own for valuable consideration, thereby granting the lessee use and enjoyment of the premises during use the period stipulated. *Dep't of Natural Resources v Bd of Trustees of Westminster Church of Detroit*, 114 Mich App 99 (1982). A lease partakes of the nature of both a contract and a conveyance. *Royal Oak Wholesale Co v Ford*, 1 Mich App 463 (1965).

The rules governing the construction of contracts apply generally to the construction of leases, thus a lease must be read as a whole with a view toward ascertaining the intention of the parties. *Detroit Trust v Howenstein*, 273 Mich 309 (1935). Ambiguities or doubt arising from provisions of a lease must be resolved most rigidly against the party preparing it, presumptively the landlord. *Fuller v Michigan Nat Bank*, 342 Mich 92 (1955); *Lincoln Square Corp v Motor City Paper Tube Co*, 339 Mich 602 (1954). A covenant in a lease should be construed to ascertain and give effect to the intention of the parties as shown by the words used by them in the instrument. *Mansfield v Mansfield*, 92 Mich 112 (1892). The parties intention is a matter of law for the court, and not a question for the jury. *Brown v Schiappacassee*, 115 Mich 47 (1897).

With these rules of construction in mind, after considering the Lease, this Court must answer in the affirmative the second question that it has posed to the parties: whether the Lease

drafted by the DHC reserved to Defendants control over the electrical wiring in the wall and the interstitial space of the wall itself where the Lease limited JoAnn Campbell's right to make "alterations or repairs or redecoration to the interior of the Premises ... without the written consent of Management."

Defendants' recitation in its Brief of the relevant Lease provisions ignores language in the Lease that make it overwhelmingly clear that Defendants retained control over the common areas including the walls and the electrical system.

Specifically, Defendants would ignore the express Lease provisions that Management **"Repair and maintain the dwelling unit, ... and the common areas and facilities which are needed to keep the housing in decent, safe and sanitary condition"** (Defendants' Apx p 7A: Lease VII A.1.a.). Defendants also ignore Management's express obligation to **"Comply with all state and local building and housing codes and HUD regulations concerning matters affecting the health or safety of the occupants"** (Defendants' Apx p 7A: Lease VII A.1.b.). They ignore the express duty **to keep common areas "in a clean and safe condition** (Defendants' Apx p 7A: Lease VII A.1.c.). Nor is there any reference by Defendants to their express duty according to the Lease to **"Maintain electrical, plumbing, sanitary, heating, ventilating and other facilities and appliances, supplied or required to be safe working order and condition"** (Defendants' Apx p 7A: Lease VII A.1.d.).

Based upon the applicable rules of construction, it cannot be doubted that Defendants intended to retain control, and did in fact retain control, over all common areas and facilities including the interior of the walls and the electrical system that served the premises.

Nonetheless, Defendants undertake a convoluted "possession" versus "control" argument

that finds no support whatsoever in either law or logic. If adopted, Defendants' ill-conceived argument would set real property law, landlord-tenant law and modern insurance law back to the Stone Age.

D. The Scope Or Extent Of Plaintiff Lessee's Possession Of The Physical Premises Is Irrelevant To The Issue Of Defendant Landlords' Liability For An Electrical Fire That Began Inside The Wall And Spread Into The Living Space Of The Premises Killing Six Children Where Defendants Retained Control Of Common Areas And Utilities On The Premises Including The Interstitial Space Of The Wall With The Electrical Wiring Where The Fire Began.

After studying the Lease, the Court of Appeals concluded that "the interstitial space between the outer walls of the premises is under the sole control of the lessor." 264 Mich App at 353. (Plaintiff's Apx p 127b). Stating that under the Lease, the lessee "had only very limited control over even the interior of the premises," the Court of Appeals held, "under our plain reading of the lease agreement, the interstitial space is totally within the control of the lessor and not subject to intervention by the lessee as a matter of law." 264 Mich App at 353-354. (Plaintiff's Apx p 127b). The Court of Appeals is correct.

At oral argument on the Application and again in their Brief, defense counsel strenuously argues that the Paragraph V Lease provision giving the lessee "the exclusive right to occupy the lease premises" somehow means that the lessee's demise of the premises excludes all possessory or dominion right in the landlord over common areas appurtenant to the premises and to the landlord's express retention of control over parts of the premises which they have a duty by law or by contract to maintain. In short, Defendants say that Plaintiff and the Court of Appeals have confused possession and control. In fact, it is Defendants who are confused.

Defendants predicate their entire argument on possession, but they misconstrue the

concept as it applies here. Black's Law Dictionary (6th ed 1990) defines possession as "having control over a thing with the intent to have and to exercise such control." The Black's definition continues in relevant part:

> The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Black's then further defines "constructive possession":

> *Constructive possession.* Possession not actual but assumed to exist, where one claims to hold by virtue of some title, without having the actual occupancy, as, where the owner of a tract of land, regularly laid out, is in possession of a part, he is constructively in possession of the whole. *See also* general definition above.

Under these definitions, Defendants were, at all times, in constructive possession of the walls and utilities including the electricity over which the express terms of the Lease provided that the lessor retained control.

In *Merritt v Nicholson*, 80 Mich App 663, 667 (1978) aff'd 407 Mich 544 (1980), the Court of Appeals, in a case involving the death of an invitee at a dragstrip owned by a mother and her son as tenants in common, stated that the determinative factors in the imposition of liability are possession and control. In *Merritt*, the Court of Appeals found a question of fact as to whether the mother, despite her status as a co-possessor, had any control over the operation of the dragstrip:

> "Possession" differs from the "right to possession" and "ownership" because of the concept of control. Possession is the detention and control of anything which may be subject of property, for one's use and enjoyment. Blacks Law Dictionary (4th ed), p 1325. The mere "right to possession" does not necessarily entail the control inherent in the nature of "possession". *Id.*

Accordingly, Defendants' central premise is fatally flawed. It is Defendants' right to control the interstitial space of wall and not possession that determines liability based on trespass-nuisance.

To the extent that this Court finds any bona fide issue whatsoever with Defendants' "geographical scope of possession" argument, Plaintiff submits that the scope of the "premises" under the Lease does not include anything beyond the paint on the walls. In *Meredith v McCormick*, 208 Mich 563, 569 (1919), this Court held that a residential lease included only so much of a lot upon which a building is situate as was necessary to the complete enjoyment of the building for the purpose for which it was let and nothing more. Thus, factually in *Meredith*, the landlord could build a garage in part of the backyard, but the landlord had to provide the tenant with access to the back alley, he had to allow some backyard space for a clothesline, and he could not remove the tenant's woodpile which he needed for heat as part of the tenant's enjoyment of the building. Accord *H B Earhart v Haw*, 251 Mich 11, 14 (1930) [lease of house by street number includes only so much of lot on which building stands as necessary for complete enjoyment of building, and does not include vacant land in rear of building]; *Kuschinsky v Flanigan*, 170 Mich 245, 249 (1912) [lease of house by street number entitled lessee to use all of the lot not occupied by a barn that opened on adjacent premises]. Here, by analogy, above and beyond the express retention in the Lease by Defendants of control over the maintenance of utilities including electricity to the extent of allowing the lessee "no alterations or repairs or decoration to the interior of the Premises ...," the interstitial space of the walls on the demised premises was not "necessary to the complete enjoyment" of the building by JoAnn Campbell as her family's residence, i.e. per the Lease, "To use the unit solely as a private place to live ... ." (Defendants' Apx p 9A, Lease VII B.1.c.).

Here, in fact whether by constructive possession or by express or actual retention of possession of common areas or by Defendants' express covenant to repair and maintain the premises, it was, as the Court of Appeals held, Defendants who controlled the interstitial space of the walls and the electrical wiring in that space. Defendants have asserted at least in passing that this is not a case involving a common area. Plaintiff begs to differ.[6] Under the terms of the Lease, the wall and the electrical wiring and outlet inside it are retained in the control of the lessor. Thus, they are within the definition of common areas.

The Lease itself does not specifically define, and Plaintiff has found, no Michigan case that defines "common area." Black's Law Dictionary states in pertinent part:

> *Common area.* In law of landlord-tenant, the portion of demised premises used in common by tenants over which landlord retains control (*e.g.* hallways, stairs) and hence for whose condition he is liable, as contrasted with areas of which tenant has exclusive possession.

In *Gladden v Walker & Dunlop, Inc*, 168 F2d 321, 322 (DC Cir 1948), the federal appellate court found that even though each tenant at an apartment house paid for the current he used, under the rule that a landlord who keeps control over parts of an apartment house must use reasonable care for the tenants' safety, the landlord could be liable for a tenant's electrical shock. Remarking that as to plumbing and heating systems, "the principle extends to operative fixtures in the apartments leased to tenants and operation through them," the Court added:

We think the principle is equally broad with regard to the electrical system.

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[6] Counsel acknowledges that in Plaintiff's Application Response at p 16, he stated that the interstitial space between the walls is not a "common area." After further research and reflection, for the reasons set forth here, the utilities in the wall are indeed subject to a common area analysis.

> Plumbing, heating, and electrical fixtures are not isolated either in use or maintenance. They must be maintained and used, if at all, in conjunction with the systems of which they are parts. Accordingly the tenant who uses them is usually not expected to maintain them, but only to notify the landlord when they appear to be out of order. Since appellees sent an electrician in response to appellants' original complaint, the usual expectation obviously existed here. We think it immaterial whether the injury to appellant appears to have been caused by defects in operative fixtures or in other parts of the electric system. The law should follow custom and convenience in classifying such fixtures among the things that the landlord controls. *Id.*

Here, the utilities including heating, plumbing and electrical wiring in the walls of the premises are used in common by all the tenants. By the express language of the Lease, Management "agrees to ... Repair and maintain ... the common areas and facilities which are needed to keep the housing in decent, safe and sanitary condition" (Defendants' Apx pg 7A, Lease VII A.1.a.). Defendants also agreed to "Keep development buildings, facilities and common areas, not otherwise assigned to Residents for maintenance and upkeep in a clean and safe condition" (Defendants' Apx pg 7A, Lease VII A.1.c.). Here, the electrical wiring including the duplex outlet, and for that matter, the inside of the walls themselves, where the utilities are routed, fit well within the definition and the caselaw and the intent of the parties in the Lease as a part of a "common area" over which Defendants retained control.[7] Any other rule would be

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[7] At the argument on the Application, in the course of discussing the concepts of "possession" and "control" the Court and defense counsel also used the word "dominion." Plaintiff has found no Michigan case that defines "dominion," but the common dictionary definition in Webster's New Collegiate Dictionary (1976) is "absolute ownership" and Black's Law Dictionary (6th ed 1990) defines dominion as "perfect control in right of ownership," implying both title and possession and "appears to require a complete retention of control over disposition." To the extent that "dominion" is a factor in this case, Plaintiff submits that as to the interior space of the walls and the electrical system including the outlets under the Lease and the caselaw, Defendants retained complete control.

nonsensical.

At the argument on the Application and in their Brief, Defendants also cavalierly ignore the Lease obligation to **Management** to **"Maintain electrical, plumbing, sanitary, heating, ventilating and other facilities and appliances, supplied or required to be supplied by Management in good and safe working order and condition."** (Defendants Apx pg 7A, Lease VII A.1.d.). Quoting from Prosser, Torts (4th ed) §63 pp 408-410, Defendants assert that under the covenant to repair, a lessor's "control" is a threadbare fiction that simply arises out of the privilege to enter and supervise the condition of the property.[8] This argument, however, fails to account for the lessor's liability under what Prosser calls the minority position in 2 Restatement Torts, 2d §357. This Court unanimously and expressly adopted § 357 in *Mobil Oil Corp v Thorn*, 401 Mich 306, 311-312 (1977). *Mobil Oil* expressly overruled the prior limitations in the older authority on landlord liability.

Section 357 provides:

§ 357 Where Lessor Contracts to Repair

> **A lessor of land is subject to liability for physical harm caused to this lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if**

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[8] In the current successor to the Prosser hornbook, Dobbs, The Law of Torts § 240 pp 625-628 (2000), the Prosser quotation that defense counsel recited at argument on the Application is completely omitted.

Dobbs, discussing retained control and referring to what he calls "common passageway rules," states "similar rules apply to other portions of the land that are not intended for the tenants' use but that must be safe if the leased premises are to be safe." In this regard, Dobbs expressly states that "the lessor must not negligently allow ... wiring within the walls to become a fire hazard." Dobbs cites *Leavitt v Glick Realty Corp*, 362 Mass 370 (1972) which is discussed *infra*.

(a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and

(b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and

(c) the lessor fails to exercise reasonable care to perform his contract.

The express covenant to repair in this Lease fits squarely under § 357. Moreover, the interstitial wall space and the electrical wiring and outlet are subject to the Restatement, Torts, 2d § 360 retained control analysis:

§ 360 Parts of Land Retained in Lessor's Control Which Lessee Is Entitled to Use

A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.

Since *Siegel v Detroit City Ice & Fuel Co*, 324 Mich 205, 214-215 (1949), this Court has followed § 360.

In addition, the Court is directed to Restatement 2d of Property: Landlord & Tenant § 17.4 which provides:

§ 17.4 Parts of Leased Property Retained in Landlord's Control Necessary to Safe Use of Part Leased.

A landlord who leases a part of his property and retains in his own control any other part necessary to the safe use of the leased part, is subject to liability to his tenant and others lawfully upon the leased property with the consent of the tenant or a subtenant for physical harm caused by a dangerous condition upon that part of the property retained in the landlord's control, if the landlord by the exercise of reasonable care could have:

(1) discovered the condition and the risk involved; and

(2) made the condition safe.

Further, by the terms of the Lease, by common sense, and under 2 Restatement, Torts, 2d § 361, the interstitial space is "Part of Land Retained in Lessor's Control But Necessary to Safe Use of Part Leased:"

> A possessor of land who leases a part thereof and retains in his own control any other part which is necessary to the safe use of the leased part, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care
>
> (a) could have discovered the condition and the risk involved, and
>
> (b) could have made the condition safe.

Comment (b) to § 361 further states:

> *b.* The rule stated in this Section applies to the maintenance of walls, roofs, and foundations of an apartment house or office building. It applies also to any other part of the land the careful maintenance of which is essential to the safe use of the rooms or offices or portion of land leased to the various lessees, such as the central heating, **lighting**, or water system. (emphasis added).

Thus, in *Leavitt v Glick Realty Corp*, 362 Mass 370, 374-376, 285 NE2d 786 (Mass 1972), the Massachusetts Supreme Court held liable the defendant landlord corporation in an electrical fire case under Restatement §361 because the ceiling in the apartment was under the control of the landlord "which had the duty of using due care to see that the wiring within it remained in a reasonably safe condition." In another electrical fire case, the Nevada Supreme Court followed *Leavitt* in *Horvath v Burt*, 98 Nev 186, 189, 643 P2d 1229 (Nev 1982), noting there that defendant was aware of the dangerous condition because "tenants had made numerous

complaints to the management concerning frequent power outages and blown fuses." See also: *Boe v Healy*, 84 SD 155, 159-160, 168 NW2d 710 (1969) [question of fact as to actual or constructive notice under Restatement §361 regarding hazardous chimney condition where fire spread through walls]. Here, there was no unknown latent defect because Plaintiff had repeatedly complained about the electrical problem: Defendants clearly had notice, and under §361, as well as the express provisions of the Lease, Defendants were responsible for the wiring inside the walls.

Defendants cite cases about the exposed area of the inner walls and the exposed visible area of the outer walls, but they cite no authority for the proposition that the interstitial area between the inner and outer walls is in the control of the lessee, and, on the facts presented, the argument defies logic and common sense. Defendants' argument that "the fire started on the tenant's premises and that there was no actionable "intrusion" from Defendants' premises is patently without merit.

Defendants claim that the Court of Appeals opinion and Plaintiff's arguments contain "no less than five independent and alternative legal and logical flaws" (Defendants' Brief p 15). Plaintiff has already fully addressed and rebutted the Defendants' misbegotten "possession" argument and, their "control" argument.

Still, it must be pointed out that on the very page where Defendants charge Plaintiff and the Court of Appeals with "legal and logical flaws," immediately above that statement and again on page 16, Defendants directly quote and argue from language that does not ultimately appear in the official reported opinion. The Court of Appeals opinion does not say that "the lessee had no control over even the interior of the premises ..." as Defendants assert. What the official reported

opinion states is that "[t]he plain language of the contract indicates that the lessee had **very limited control** over even the interior of the premises ..." and earlier in that paragraph that "the interstitial space between the **outer** walls of the premises is **under the sole control of the lessor.**" (Plaintiff's Apx pg 122b). Defendants' argument about "possession" and "control" thus started from a misreading of the Court of Appeals opinion and ends with a convoluted analysis that requires the suspension of all disbelief.

Mysteriously, Defendants also repeatedly refer to statutory immunity, the five statutory exceptions and the applicable rules of construction for those exceptions. Plaintiff reiterates that in *Pohutski* this Court made it clear that trespass-nuisance is a common law exception which the Court was prospectively eliminating 15 months post filing of Plaintiff's complaint. Based on the applicable common law elements articulated in *Hadfield*, Plaintiff has pleaded, and the Lease and the depositions and the documentary proofs establish, a viable trespass-nuisance cause of action.

At bottom, Defendants' Brief cites and discuss many cases, but none stand up to critical analysis under the present state or direction of the fabric of the law. Ultimately, Defendants' argument is spun out of thin air. The clear language of the Lease and the applicable rules of construction compel the affirmance of the Court of Appeals on the question of trespass-nuisance.

Relief Requested

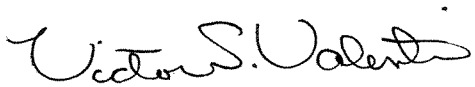
For the reasons set forth, the Court of Appeals properly affirmed the trial court's denial of the governmental immunity-based motion for summary disposition on Plaintiff's trespass-nuisance claim. The Court should issue an opinion or order affirming the Court of Appeals on the trespass-nuisance claim and remand this case for settlement or trial in the Wayne Circuit

Court.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & JOHNSON, P.C.

Dated: June 30, 2006



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