

PART 1

**EVICTION
PROCEDURE**

Outline

I. FORCIBLE ENTRY AND DETAINER (“FED”)

A. Causes of Action of FED Complaint:

1. First Cause of Action – for restitution of the premises, or possession

- a. Governed by R.C. 1923; Ohio Rules of Civil Procedure apply to eviction actions except “to the extent where they would by their nature be clearly inapplicable (Ohio R. Civ. P. 1(C); local court rules)
- b. Expedited hearing schedule; summary proceedings
- c. A written answer is not required by hearing date, unless counterclaim pursuant to R.C. 1923.061.
- d. Reasons for eviction action can include the following:
 - i. non-payment of rent
 - ii. breach of a lease term
 - iii. failure to comply with obligation set forth in R.C. 5321
 - iv. hold-over tenancy

2. Second Cause of Action – for money damages for back rent and/or damages to the premises

- a. File an answer within 28 days of service of summons
- b. Hearing on this claim scheduled after disposition of First Cause of Action, unless there is R.C. 1923.061 Counterclaim.
- c. Case assigned to judge for trial

B. Commencement of Action – Necessary Notices:

1. Preliminary Notices

- a. Notice to Cure: If Tenant violating R.C. 5321.05 in a manner materially affecting health and safety, Landlord must give 30-day notice to cure. See R.C. 5321.11
- b. Notice to Terminate Periodic Tenancy. R.C. 5321.17

2. FED Notices

- a. Notice to Vacate (commonly called a 3-day notice -- see attached)
 - i. Requires specific, conspicuous language (see box)
 - ii. Certified mail service (green card), personal service, *or* by leaving it at the place from which eviction is sought
 - iii. Must be served three full days (not counting posting day) prior to filing of complaint (R.C. 1923.04)
- b. Summons and Complaint
 - i. Summons is to be served and returned seven (7) days prior to hearing date, which when taken together with Civ. R. 6 means five (5) days.
 - ii. Summons to be served on defendant:
 - by personal service via bailiff on defendant or other resident of suitable age and discretion in household
 - certified mail
 - posting in conspicuous place at residence if service cannot be accomplished by personal service and ordinary mail (R.C. 1923.06)

3. Hearing on First Cause of Action:

- a. Location: 11th Floor, courtroom 11A, 375 S. High St.
- b. Presided over by Magistrate; no court reporter (may request court reporter); hearings in 11A are tape recorded

- c. Summary proceeding: present defenses – any defense may be asserted at trial on claim for restitution of premises even if written answer hasn't been filed
 - d. Typically, no continuances longer than eight (8) days past the original hearing date on first cause of action. R.C. 1923.08
 - e. Upon motion for more definite statement, Court should grant continuance if no lease attached to complaint. See Civ. R. 10 (B), 12(E)
 - f. If defendant fails to appear after being properly served, the court will proceed as if defendant were there. R.C. 1923.07
 - g. Right of trial by jury: Must demand three (3) days prior to hearing; \$300 deposit required unless prior indigency affidavit accepted.
 - h. If judgment for plaintiff, writ of restitution may issue as soon as same day and rental premises may be “red tagged” as soon as next day.
- 4. Writ of Restitution:**
- a. Must be issued within thirty (30) days of judgment, as Landlord's judgment is good for only 30 days. Franklin M.C. Rule 9.06(4). However, parties can agree to extend the writ, but not longer than 120 days.
 - b. May be issued as soon as judgment for plaintiff issued
 - c. Plaintiff must purchase writ within 30 days
- 5. Set-Out of Tenant:**
- a. Landlord can proceed with set-out under supervision of bailiff as soon as five (5) days after Tenant's door is red tagged, not counting day of tagging.
 - b. Bailiff must proceed with setting out the Tenant not sooner than five (5) days but within ten (10) days after the writ is issued. Franklin M.C. Rule 6.08.
- 6. Objections to Magistrate's Decision:**
- a. Fourteen (14) days to file objections as provided in Civ. R. 53(E)(2)
 - b. No automatic stay as provided in Civ. R. 53(E)(4)(c); must file motion for stay
 - c. Defendant may be required to post a bond on stay, pending final hearing on objections.
 - d. In practice, objections should be filed within five (5) days of writ of restitution to avoid set-out.
 - e. May also file Motion for Relief from Judgment (Civ. R. 60(B)), or motion for new trial (Civ. R. 59) and include Motion for Stay. Civ. R. 62.
- 7. Special Rules for Drug Related Evictions:**
- a. Three (3) day notice to vacate must specify that tenancy is terminated three (3) days after giving of notice. R.C. 5321.17
 - b. Service and return of summons must be made three (3) working days, if possible, after filing of complaint.
 - c. Hearing date must be no later than 30th calendar day after date Tenant served; failure to do this may result in striking this part of the complaint.
 - d. No continuances (unless by agreement)
 - e. Drug activity must be connected with rental premises.
 - f. Landlord must have actual knowledge of or reasonable cause to believe that Tenant/household members/guest previously have or presently are

- engaged in violation of R.C. 2925 or R.C. 3719 or substantially similar municipal ordinance involving a controlled substance R.C. 1923.02(A)(6)
- g. Requires search warrant, affidavit presented to obtain search warrant, controlled substance described in affidavit was found during search/seizure, Landlord informed law enforcement of violation R.C. 1923.02(A)(6)
- h. Columbus Police Department sends letters to Landlord to create “actual knowledge”

8. Sample Eviction Timeline

- **Monday, Dec. 10, 2018:** December’s rent, due the 1st of the month, hasn’t been paid. The Landlord tapes a Three-Day Notice to Leave the Premises on Tenant’s door with grounds “non-payment of rent”.
- The Landlord has to wait 3 full days (Tuesday, Wednesday, Thursday) before filing an eviction complaint at Franklin Municipal Court . In this case, Friday December 14th is the earliest day the landlord can file.
- **Friday December 14th:** Landlord files eviction complaint. Hearing is set for two weeks out, Friday, December 28th.
- **Friday, December 28th:** The tenant shows up for the hearing and tells the magistrate that he is trying to find an attorney to help him. The Magistrate continues the hearing for one week (until Friday, January 4th) so that the Tenant can try to get an attorney
- **Friday, January 4th:** The tenant is evicted for nonpayment of rent. The Landlord purchases a red tag and posts it on the Tenant’s door.
- **Wednesday, January 9th:** (Bailiff Sets Out Tenant) Five days after posting the red tag the bailiff supervises as the tenant’s belongings are set outside the apartment.
- **Summary: It took a little over 4 weeks from the Notice to Leave to the set out.**
- **If tenants can vacate before the hearing, the eviction can be dismissed as moot, which may look better to future landlords.**

II. SECOND CAUSE OF ACTION / DEFENDING MONEY CLAIMS

A. Defendant’s Answer:

1. Defendant should assert all possible affirmative defenses
2. Tenant’s surrender of premises, pursuant to notice to vacate or agreed entry on first cause of action, does not preclude recovery of rent by Landlord subsequent to Tenant’s surrender.
 - a. Tenant still is obligated on the lease agreement until a new Tenant is secured.
 - b. Landlord must exercise reasonable diligence to re-rent the premises in order to mitigate damages.

B. Counterclaims:

1. Compulsory counterclaims **must** be brought with Answer; permissive counterclaims **may** be brought with answer
2. Claim for return of security deposit
3. Rent abatement claim due to conditions of the premises
4. Claim for unlawful entry to rental premises
5. Attorneys' fees may be awarded to successful party

C. Discovery: Proceed with all means of discovery as with any other civil action.

D. Hearing on Second Cause of Action: If Defendant files an Answer to claim for damages, a trial will be set before a municipal court judge.

PART 2

**RIGHTS & DUTIES OF LANDLORDS AND
TENANTS**

Outline

I. STATUTORY SCHEME

A. Ohio Revised Code Chapter 1923 – Forcible Entry & Detainer (FED)

1. **Definition** of “landlord,” “tenant,” “rental agreement.” R.C. 1923.01
2. **Definition of persons subject to FED.** R.C. 1923.02
3. **Prefiling Notice Requirements** in general. R.C. 1923.04
4. Requirements for **complaint, summons and service.** R.C. 1923.05, 1923.06, 1923.051
5. **Continuances** generally. R.C. 1923.08
6. Procedure for **raising repair problems as a defense.** R.C. 1923.061
7. Court authority to handle “**Soldiers & Sailors Relief Act**” issues. R.C. 1923.062 (Effective 5/18/05)
8. Special procedures when eviction concerns **manufactured home in a park.** R.C. 1923.12, 1923.13(B), 1923.14(B)

B. Ohio Revised Code Chapter 5321 – Landlords & Tenants

1. **Definitions.** R.C. 5321.01 (Note the exclusions of certain types of dwellings from definition of “residential premises.”) See also new section regarding special termination procedures for university student housing at R.C. 5321.031)
2. **Retaliation** defined. R.C. 5321.02
3. When **Landlord can file FED.** R.C. 5321.03
4. **Landlord’s statutory obligations** regarding maintaining the premises, removing tenants using controlled substances, and entering the premises in general. R.C. 5321.04
5. **Tenant obligations** regarding maintaining the premises, giving consent to Landlord to enter the premises in general, and using controlled substances. R.C. 5321.05
6. **Sex offender** occupancy prohibitions and evictions. R.C. 5321.051
7. **30-Day Notice to cure** for violation of Tenant statutory obligations that materially affect health and safety. R.C. 5321.11
8. **Prohibited Lease Terms.** R.C. 5321.06, 5321.13--14
9. **Escrow process.** R.C. 5321.07--10
10. Prohibition against **lockouts and utility shutoffs.** R.C. 5321.15
11. **Security deposit** procedures. R.C. 5321.16
12. Pre-filing **notice requirements** for evictions based on controlled **substance abuse allegation(s).** R.C. 5321.17(C)
13. Pre-filing **notice requirements** for termination of **periodic** tenancy. R.C. 5321.17(A) and (B)

C. Ohio Revised Code Sections 4781.01--52 – Manufactured Homes

1. Applies to Tenants who **lease their manufactured home and/or the lot** from a manufactured home park operator. R.C. 4781.01, 5321.01
2. **Good cause required to evict** Tenants who own their homes and lease just the lot. **Prohibits periodic tenancy termination** under R.C. 5321.17, 1923.02(A)(1), 1923.02(A)(10). Annually park operator must offer new lease to owners of homes. R.C. 4781.40(A)
3. **Retaliation** Defense and Exceptions. R.C. 4781.36, and .37
4. **Notice to cure.** R.C. 4781.45

5. Chapter 5321 also applies to Tenants who lease their manufactured home from a manufactured home park operator. R.C. 4781.01, 5321.01
6. **Obligations of park operator.** R.C. 4781.38 (comparable to R.C. 5321.04)
7. **Obligations of resident.** R.C. 4781.39 (comparable to R.C. 5321.05)
8. **Escrow.** R.C. 4781.41--44 (comparable to R.C. 5321.07--§5321.10)
9. **Prohibited Rental agreement terms.** R.C. 4781.47 and .48 (comparable to R.C. 5321.13 & 5321.14)
10. **Prohibition against lock outs or utility shut offs.** R.C. 4781.49 (comparable to R.C. 5321.15)
11. **Security deposits.** R.C. 4781.50 (comparable to R.C. 5321.16)
12. **Lease term and Rental Increase Requirements.** R.C. 3733.11(A)
13. **Fee disclosure and Increase Requirements.** R.C. 4781.40(B), (H)(4)
14. **Park operator obligations regarding sale** by owner of manufactured home. R.C. 4781.40(H).

D. Ohio Revised Code Chapter 5313 – Land Installment Contracts

1. **Definition and minimum contents.** R.C. 5313.01--02
2. **FED prohibited and foreclosure required** when at least five (5) years of payments in accordance with contract or at least 20% of purchase price paid. R.C. 5313.07, .08
3. **Pre-filing notice requirements.** R.C. 5313.05, .06, .08
4. **Deficiency judgment** generally disallowed; exception. R.C. 5313.10

II. LANDLORD RIGHTS & DUTIES

A. Obligations – R.C. 5321.04

1. Comply with all **housing codes** that materially affect health and safety
 - a. No state code
 - b. City code (Columbus, many suburbs); See CCC 45 Chapter §4525, §4551
 - c. Franklin County Health Department
2. Make all **necessary repairs to keep in fit and habitable condition**
 - a. Codification of old common law warranty of habitability
 - b. Often used where there are no local codes
 - c. Cases often involve defective wiring, vermin infestation, inadequate plumbing or heat. See Shroads v. Rental Homes, Inc. (1981), 68 Ohio St. 2d 20, 427 N.E.2d 774; Glover v. Mussey (Jan. 11, 1990), Cuyahoga County App. Nos. 56315, 56802; Taylor v Alexander (July 11, 1986), Trumbull Cty. App. No. 3500; Miller v. Ritchie (1989), 45 Ohio St. 2d 222, 543 N.E.2d 1265.
3. Keep **common area safe and sanitary**

- a. Hallways, playgrounds, parking lots
 - b. Amenities like pools must be maintained, but probably can be taken away
 - c. Does not include removal of natural accumulation of ice and snow. See LaCourse v. Fleitz (1986), 28 Ohio St. 3d 209, 503 N.E.2d 159;
 - d. Or removal of natural accumulations of leaves. See Plush v. National Church Residences (July 27, 1990), Lucas Cty. App. No. 6-89-293.
 - e. Exception: Landlord can assume obligation by express agreement. See Hammond v. Moon (Franklin Cty. 1982), 8 Ohio App. 3d 66, 435 N.E. 2d 1301.
4. Maintain **electric and plumbing, heating, ventilation**
- a. Only those appliances supplied by Landlord – no duty to supply
 - b. No duty to supply air conditioning, but if Landlord does supply, Landlord has the duty to maintain. See Howard v. Simon (Cuyahoga Cty. 1984), 18 Ohio App. 3d 14, 480 N.E.2d 99.
5. Supply **trash receptacles** if four (4) or more units
- a. must also arrange for trash to be removed
6. Supply **running water, reasonable amount of hot water and heat**
- a. “Supply” does not mean “pay” for water; it means make available. See Jenkins v. Roger C. Perry & Co. and Moses v. Roger C. Perry & Co. (Franklin Cty., Dec. 10, 1992), 92 Ohio App. 634, 635.
7. **Do Not abuse the right to access**
- a. Must give reasonable notice
 - b. “Reasonable notice” is usually 24 hours.
 - c. Exception to “reasonable notice” for emergencies (i.e., pipes burst)
 - d. Must also have a reasonable purpose
 - e. Tenant’s remedies for breach by Landlord. R.C. 5321.04(B)
 - i. Actual damages
 - ii. Injunction
 - iii. Reasonable attorney fees
 - iv. Terminate lease agreement
8. File an FED if Landlord **believes Tenant is doing drugs**
- a. Landlord has duty to evict if he has actual knowledge or “reasonable cause.”
 - b. Reasonable cause defined in R.C. 1923 – very convoluted

B. Other Landlord Obligations or Prohibitions

- 1. No Retaliation
 - a. Definition. R.C. 5321.02
 - b. Definition is narrow – not all discriminatory acts equal retaliation (but may be illegal under other provisions of Ohio or Federal Law)

- c. Exceptions may allow Landlord to retaliate by evicting under certain circumstances. R.C. 5321.03
2. Prohibited lease terms
 - a. Laundry list. R.C. 5321.13
 - i. No agreement to pay attorney fees
 - ii. No indemnification
 - iii. Landlord cannot delegate duties under R.C. 5321.04 but can assume Tenant duties under R.C. 5321.05
 - iv. No unconscionable terms, but no definition in R.C. 5321.14, so lots of ambiguity

III. TENANT RIGHTS & DUTIES

A. Obligations – R.C. 5321.05

1. Keep premises **safe and sanitary**
 - a. catch-all provision listed first instead of last
2. **Dispose of garbage**, trash, etc.
3. **Keep plumbing fixtures clean**
4. **Use and operate all electric and plumbing fixtures** properly
5. **Comply with all housing codes**
 - a. Code Enforcement can cite tenants
6. **Refrain from damaging property**
 - a. intentional or negligent
 - b. applies to guests
7. **Maintain appliances** supplied by Landlord
8. **Do not disturb other tenants** and neighbors
 - a. applies to guests
9. **Do not do drugs**
 - a. Duty applies to the premises
 - b. Applies to guests
10. **Do not unreasonably withhold consent** for the Landlord to enter
 - a. Landlord has right to be there as long as Landlord follows R.C. 5321.04
 - i. Remedy for Tenant = Injunction
 - b. Remedies for Tenant violations:
 - i. FED
 - ii. Sue for damages
 - iii. Reasonable attorney fees
11. Do not allow occupancy of premises to “**sex offender**” under certain conditions. R.C. 5321.051

IV. ESCROW – R.C. 5321.07–.10

A. Prerequisites – R.C. 5321.07(A) and (B)

1. Landlord non-compliance with lease or R.C. 5321.04 or city code, and Tenant has “reasonable cause to believe” noncompliance exists
2. Written notice from Tenant
 - a. Sent where rent is paid
 - b. Question of whether a code notice complies with requirement
3. Notice waived if Landlord fails to provide mailing address. R.C. 5321.18; See Swogger v. Merkel (Nov. 14, 1988), Carroll Cty. App. No. 4139.

4. Reasonable time to make repairs
 - a. 30 days or less depending on severity of defect and time needed to remedy it
5. If Landlord fails to make necessary repairs after a reasonable amount of time, and Tenant current in rent, Tenant may terminate the lease or file an application to start a rent escrow account with the municipal court.

B. Tenant Remedies – R.C. 5321.07(B)

1. Initiate a Rent Escrow Account (Tenant begins paying monthly rent to the court. Money not released until Tenant agrees repairs are made, or court finds repairs are made.
2. Tenant may file motion to use deposited money to make repairs (only statutory mechanism by which Tenant receives the escrow money directly)
3. Tenant motion to reduce periodic rent due until conditions fixed
4. Tenant motion for Order that Landlord make repairs.
OR
5. Terminate lease. See Hald v. Beatlev (March 29, 1988), Franklin Cty. App. No. 87 AP 43; see also Pearson v. Huber Investment Corp. (March 21, 1985), Franklin Cty. App. No. 84.

C. Duties of Clerk of Courts – R.C. 5321.08

1. Accept money (mandatory). See State ex. Rel. Tavnor v. Hysell (Franklin Cty. 1984), 19 Ohio App. 3d 120, 483 N.E.2d 156
2. Charge fee (optional)
 - a. Maximum = 1% of deposit (Franklin County will always charge 1%)
 - b. Assessed to Landlord after release. See State ex. Rel. Gudzinis v. Constantino (Trumbull Cty. 1988), 43 Ohio App. 3d 52, 539, N.E.2d 173.
3. Notify Landlord (mandatory)

D. Escrow Court Procedure (Franklin County)

1. Tenant signs application and affidavit of prerequisites
 - a. If there is a lease, Tenant should take copy of lease with him/her when filing an escrow case
 - b. Escrow court only accepts money order or cash
2. Copy of application and deposit receipt sent to Landlord
3. Notice to small claims mediation (16th floor, 375 S. High)
4. Mediation notice sent to Landlord and Tenant
 - a. Optional
 - b. Regardless of application to release by Landlord
5. If petition, or motion or other pleading filed:
 - a. Hearing scheduled by court
 - b. Every Monday at 10:00am, 11B (R.C. 5321.09(B) requires trial within 60 days). See Chernin v. Welchans (6th Cir. 1988), 844 F.2d 322.

E. Application for Release to Landlord – R.C. 5321.09, .10

1. Grounds

- a. Tenant's failure of prerequisites
 - i. R.C. 5321.09(A)(2) – notice, not current in rent
 - ii. R.C. 5321.09(A)(3) – no violation existed, or violation remedied
 - b. Voluntary release by Tenant. R.C. 5321.09(A)(1) – written notice to clerk because condition has been remedied
2. **Prerequisites** to Involuntary Release
 - a. Landlord serves motion on Tenant
 - b. Tenant has right to file answer and counterclaim
 3. **Partial release** (R.C. 5321.10) during pendency of action for certain purposes:
 - a. Mortgage principal or interest payments
 - b. Insurance, taxes, utilities
 - c. Repairs
 - d. Other customary expenses for rental property
 4. **Factors** court will consider for release: income from other units, cost of repairs

F. Penalties – R.C. 5321.09(D)

1. Bad faith deposit by Tenant (intentional)
2. Tenant caused problem contained in notice
3. Remedies to Landlord if Tenant acted in bad faith:
 - a. Damages
 - b. Costs
 - c. Reasonable attorney fees

G. Release to Tenant

1. Rule – Court has no authority under the Ohio Revised Code to release money to Tenant upon Tenant application. Webling v. Rine (Aug. 30, 1977), Franklin Cty. App. No. 77 AP 355, 1977 Ohio App. LEXIS 7537.
2. Exceptions- ways in which the court can release rent to Tenant
 - a. Tenant counterclaim – court can order release to satisfy judgment. See Gill v. Lipkin (Oct. 31, 1979), Cleveland Hts. M.C. No. 78 LLT 88.
 - b. Tenant motion to use funds to pay for repairs
 - c. Agreement by Landlord
 - d. If repairs were never made, Tenant should file motion to dismiss and ask for escrowed funds.

H. Exceptions to Escrow Process

1. R.C. 5321.07(C) - escrow procedure not applicable to Landlord who rents three (3) or fewer units
 - a. Note: Landlord must provide written notice of this fact to Tenant, even in an oral tenancy.
2. R.C. 5321.07(D) – Escrow not applicable to a dwelling unit occupied by a student Tenant.

V. LOCKOUTS

- A. **No lockouts or utility shut-offs.** R.C. 5321.15

1. If Tenant does not leave voluntarily, Landlord MUST use court system to evict.
2. Landlord cannot shut off any utility
 - a. This does not apply in cases where utilities are in Tenant's name and are shut off due to nonpayment by Tenant
3. Purpose is to prevent self-help evictions
4. Cannot seize personal possessions
5. Remedies for Tenants – R.C. 5321.15(C)
 - a. **Actual damages** Craft v. Oney (Oct. 17, 1984), Montgomery App. No. 8766, Dirnberg v. Hack (March 20, 1987), Sandusky Cty. App. No. 5-86-39
 - b. **Attorneys' fees** (may be mandatory). See Thomas v. Papadelis (Medina Cty. 1984), 16 Ohio App. 3d 359, 476 N.E. 2d 726; Lewis v. Romans (Cuyahoga Cty. 1980), 70 Ohio App. 2d 7, 433 N.E.2d 622
 - c. **No punitive damages.** See O'Neil v. Walburg (Franklin Cty. 1980), 70 Ohio App. 2d 30, 433 N.E. 2d 1286
 - d. **Injunctive relief.** Civ. R. 65. See Colquett v. Byrd (Mansfield M.C., 1979), 59 Ohio Misc. 45, 392 N.E.2d 1328.

VI. SECURITY DEPOSITS – R.C. 5321.16

A. No limit on amount of deposit

1. Any amount greater than one (1) month rent shall bear interest @ 5% per annum if Tenant is in possession for 6+ months. Paid annually to Tenant.

B. Procedure for return – R.C. 5321.16(B)

1. Tenant gives Landlord written notice of forwarding address and vacates premises (returns keys); If Tenant fails to comply with this section, Tenant cannot be awarded double damages or attorneys' fees.
2. Landlord has 30 days to return deposit or itemized list of deductions (and any balance).
3. Landlord can lawfully withhold only for past-due rent owed and damages caused by Tenant non-compliance with R.C. 5321.05 and/or rental agreement terms (e.g., only for damage in excess of normal wear and tear.)
 - a. not to be used for carpet cleaning, painting, etc. or any normal refurbishment between tenancies

C. Double damages provision – R.C. 5321.16(C)

1. Double damages are double the amount that the court finds was **wrongfully withheld**; even if Landlord ignored its duty under R.C. 5321.16(B) to send Tenant an itemized list of deductions, Landlord may still appear at trial and prove amounts properly withheld. See Vardeman v. Llewellyn (1985), 17 Ohio St. 3d 24 (strong dissent by Douglas, Loucher and Brown)
2. Tenant must request double damages in order to obtain them.
3. Double damages are mandatory for any amount found to be wrongfully withheld. See Smith v. Padgett (1987), 32 Ohio St. 3d 344.

D. Attorneys' fees provision – R.C. 5321.16(C)

1. Fees are mandatory if any or all of deposit is found to be wrongfully withheld. See Smith v. Padgett, supra
2. However, attorneys' fees are awardable only for fees solely attributable to Tenant's security deposit claim, with no fees allowable for attorney's time defending Landlord's claims (even though it is not possible in fact to separate the two in a security deposit case). See Smith v. Padgett, supra, and Fant v. DiSabato (Dec. 29, 1987), Franklin Cty. App. No. 87 AP-265.
3. Attorneys' fees are costs, not damages, the amount of which is determined by the court not by the jury. Fant v. DiSabato, supra.

E. **Small Claims Court jurisdiction in Franklin County over R.C. 5321.16(C) double damages.** See Klemas v. Flynn (1993), 66 Ohio St. 3d 249, finding that double damages are not punitive damages and therefore may be awarded in Small Claims Court.

PART 3

EVICTIION DEFENSES

Outline

Note:

Due to the changing nature of the law, VRC encourages our volunteers to conduct their own independent research prior to citing any of the cases set forth herein.

Unreported Common Pleas and Municipal Court cases cited in this outline can be found at the following website:

<http://lasclev.org/landlordtenantbook/unpublished-ohio-landlord-tenant-law-decisions/>

EVICTION RELATED NOTICES

- 1) **5321.17 Notice Terminating Periodic Tenancy** (Tells month to month tenant, “You did nothing wrong, but we are going to stop renting to you effective 30 days from the next time your rent is due.”)
 - (a) Notice must be served at least 30 days prior to expiration of a month to month tenancy and must inform the tenant that the tenancy will be terminated as of a certain date. So if notice given February 15th, and rent is paid each month on the first, the tenancy will end 30 days after the next time rent is due. Next time rent is due is March 1st. Tenancy will end March 30th.
 - (b) If Tenant stays beyond the end of the tenancy, Landlord will need to then serve a Notice to Leave the Premises. Landlord cannot combine Notice Terminating the Tenancy with a Notice to Leave Premises. *Ewert v. Basinger* (Muni. Ct. Toledo, 1978), 59 Ohio Misc. 43; *Lincoln Management v. Ashiegbu* (Jan. 26, 1994), Franklin Cty. M.C. No. M 9312 CVG 037858.

- 2) **5321.11 Notice To Cure** (Tells tenant, “If you continue to engage in that bad behavior in the next 30 days and we will be terminating your lease”.)
 - (1) If the alleged breach violates R.C. 5321.05 in a manner that materially affects health and safety, then the Landlord must serve a notice to cure before evicting.
 - i. Notice must state violations with some specificity so tenant knows what behavior to cure.
 - ii. Tenant must be given reasonable opportunity to cure, not less than 30 days, and be told what the deadline date is. *Woodrose Limited Belmont Development Co. v. Debolt* (June 20, 1991), Perry Cty. App. No. CA-403, *Sandefur Management Co. v. Wilson* (Franklin Cty., 1985), 21 Ohio App. 160.
 - iii. If violation is one that violates both the lease and a tenant duty under R.C. 5321.05, the Landlord still has to serve the 5321.11 Notice. *Yutzy v. Hubner* (Franklin Cty. M.C., 1979), 14 Ohio Op. 3d 440; *Parker v. Fisher* (Summit Cty. 1984), 17 Ohio App. 3d 103.
 - iv. If a landlord does not properly serve the tenant with a required R.C. 5321.11 or R.C. 5321.17(B) notice, when required, it is a complete defense to an eviction. E.g., *Chillicothe Metro. Hous. Auth. v. Anderson*, No. 1406, 1988 WL 69118 (Ct. App. Ross Cty. June 28, 1988) (R.C. 5321.11 notice). *Sandefur Mgmt Co. v. Wilson*, 21 Ohio App.3d.

- 3) **1923.04 Notice to Leave the Premises (NTP)** aka “Notice to Vacate” (Tells tenant to be out in three days or eviction will be filed). Condition precedent to the commencement of any eviction action.

- (1) If a landlord fails to serve a Notice to Leave the Premises, or serves a NTLP but its content or the service fails to comply with R.C. 1923.04, the trial court lacks subject-matter jurisdiction over the action. *Associated Estates v. Bartell*, 24 Ohio App.3d, 6, 8-9.
- (2) A Notice to Leave Premises must contain the following statutorily required language: "YOU ARE BEING ASKED TO LEAVE THE PREMISES. IF YOU DO NOT LEAVE, AN EVICTION ACTION MAY BE INITIATED AGAINST YOU. IF YOU ARE IN DOUBT REGARDING YOUR LEGAL RIGHTS AND OBLIGATIONS AS A TENANT, IT IS RECOMMENDED THAT YOU SEEK LEGAL ASSISTANCE."
- (3) That statutory language needs to stand out in some way. For example a bigger font than the rest of the language on the notice, or ALL CAPS or **set apart with asterisks** or a box.
- (4) Examples of conspicuous/nonconspicuous: *Dayton Metropolitan Housing Authority v. Russell* (Montgomery Cty., 1980), 16 Ohio Op. 3d 94; *Owners Mgt. Co. v. Willis* (Feb. 12, 1988), Wood Cty. No. WD-87-59; *Neighbors Organized for Action in Housing v. Smith* (July 26, 1991), Cleveland M.C. No. 91-CVG-11983, aff'd on other grounds at No. 62219 (Ct. App. Cuyahoga Cty., Feb. 13, 1992), *Dayton Metro. Hsg. Auth. v. Westfall* (Oct. 15, 1979), Dayton M.C. No. 79-CVG-7932; *Administrator of Veterans Affairs v. Jackson* (Summit Cty., 1987), 41 Ohio App. 3d 274.
- (5) Can be served on the tenant by certified mail, personal service, or residence service (usually taped to the door). Actual receipt by tenant is not necessary.
- (6) Must be served three days before the landlord can file an eviction Complaint. 1923.04(A). When counting out the three days, do not include the day the notice was served. So if the Notice to Leave Premises was taped to the tenant's door on a Monday, the Landlord must wait all day Tuesday, Wednesday, and Thursday, and can file an eviction complaint on Friday. Courts are split on whether Civil Rule 6(A) applies and you can count weekend days or holidays when counting the three days.

COMMON EVICTION DEFENSES

1) The Landlord Accepted "Future Rent" and By Doing So Waived the Notice to Leave Premises.

- a) A landlord's acceptance of future rent, after the landlord has served a tenant with a R.C. 1923.04 notice to leave the premises, waives the NTLP because it is inconsistent with asking the tenant to leave. It indicates that the Landlord wishes to continue the tenancy. *Associated Estates Corp. v. Bartell*, 24 Ohio App. 3d 6, 492 N.E.2d 841 (Cuyahoga Cty. 1985); *Presidential Parks v. Colston* (Franklin Cty., 1980), 17 Ohio App. 3d 220; *Cornerstone Companies v. Zipkin* (Akron M.C. 1989), 60 Ohio Misc. 2d 14, 573 N.E.2d 228.

- ii) Future rent is any rental payment that could only be applied towards a period of time that falls after the date that the Landlord served Tenant with the 1923.04 notice.
- iii) Landlord does not waive the notice by accepting amounts that solely constituted back rent as of the date the 1923.04 notice was served.
- iv) If Landlord cashes a check from the tenant, that is “acceptance” of rent, even if Landlord tenders back payment after cashing. *Associated Estates v. Bartell* (Cuyahoga Cty. 1985), 24 Ohio App. 3d 6, 492 N.E.2d 841.

(1) Holding rent generally equals acceptance unless Landlord notifies Tenant that the rent is being held, but not accepted and/or the Landlord tries to return the rent to the Tenant before court. See *Pace v. Buck* (Franklin Cty., 1949), 86 Ohio App. 25, 85 N.E.2d 401; *Schmidt v. Hummell* (Franklin Cty., 1947), 81 Ohio App. 167, 73 N.E.2d 806; *Sunbury Garden v. Pizzi* (Feb. 6, 1986), Franklin Cty. M.C. No. M 85 CVG-036063.

- v) Note that acceptance of subsidized portion of rent may not be considered acceptance of rent for the purpose of this defense.

- b) Subsidy Payments by a Third Party: Future rent accepted from a third party (e.g. a Section 8 voucher subsidy payment from the local housing authority) also qualifies as acceptance of future rent and waives the notice. *E.g. Classic A. Props. v. Brown*, 2003 WL 22461816; *Baker v. Wade*, No. 2002-CVG-15892 (Mun. Ct. Cleveland, Oct. 2, 2002); *Rogers v. Jones*, No. 2014-CVG-028113 (Mun. Ct. Franklin, Oct. 30, 2014); See Peter M. Iskin, *Ohio Eviction and Landlord-Tenant Law* (4th ed.), at 138-142. One exception is a case where the landlord was a subsidized complex and received one subsidy payment for twenty units. *Premier Mgmt. LLC v. Nutt*, No. 6-09-15, 2010 WL 1175201 (Ct. App. Hardin Cty. Mar. 29, 2010).
- c) For a month-to-month tenancy, a landlord’s acceptance of a partial payment of the monthly rent renews the tenancy, even if tendered and accepted after the due date. *Fairborn Apts. v. Herman*, No. 90-CA-28, WL 10962 (Ct. App. Green Cty. Jan. 31, 1991).

2) Waiver of the R.C. 5321.11 or 5321.17 Notice of Termination

- a) If the landlord accepts future rent after the expiration of the thirty-day period of an R.C. 5321.11 or R.C. 5321.17(B) notice of termination, it may constitute waiver of the notice or create a new periodic tenancy.
 - a. Waiver: *Rababy v. City of Cleveland*, No. 93-CVG-11745 (Mun. Ct. Cleveland, June 16, 1993). See generally *Associated Estates Corp. v. Bartell*, 24 Ohio App. 3d 6, N.E.2d 841 (Cuyahoga Cty. 1985).
 - b. New tenancy: *Steiner v. Minkowski*, 72 Ohio App. 3d 754, 596 N.E.2d 492 (Lucas Cty. 1991).

3) Waiver of Tenant’s Breach of Rental Agreement

- a) Landlord waives any breach of a rental agreement if, with knowledge of the breach, the landlord accepts future rent, executes a new lease, or takes other action that is inconsistent with the termination of the tenancy. *Quinn v. Cardinal Foods, Inc.* (Shelby Cty. 1989) 20 Ohio App. 3d 194, 485 N.E.2d 741; *Petropoulos v. Clinical Pathology Facility, Inc.*, No. 87AP-685, 1988 WL 24397, at *4 (Ct. App. Franklin Cty. Feb 18, 1988). See Peter M. Iskin, *Ohio Eviction and Landlord-Tenant Law* (4th ed.), at 144-148.

4) Remedy of the Condition Specified in the R.C. 5321.11 Notice of Termination

- a) If a tenant remedies the R.C. 5321.05 violation prior to the date specified in the R.C. 5321.11 notice of termination, the rental agreement is not terminated pursuant to the notice and the tenant's conduct that violated R.C. 5321.05 cannot be the basis of the eviction. See *Meredith v. Nash*, No. 93-CVG-2334 (Mun. Ct. Massillon, Oct. 20, 1993).
- b) Landlord is required to prove that, as of the termination date specified in the 5321.11 notice, the tenant did not remedy the 5321.05 violation. See Peter M. Iskin, *Ohio Eviction and Landlord-Tenant Law* (4th ed.), at 149.

5) Course of Conduct of Accepting Late Payments

- a) Landlord does not have to accept late rent. However, a landlord's repeated acceptance of late rent payments may establish a course of conduct between the parties that waives the tenant's obligation to pay rent by the due date specified in the rental agreement. The due date for the tenant's rent payments is established by the course of conduct between the parties.
- b) *Fairborn Apts. v. Herman*, No. 90-CA-28, WL 10962 (Ct. App. Green Cty. Jan. 31, 1991).
 - i) Example Cases Finding Sufficient Pattern & Practice/Course of Conduct:
 - (1) 5 times in 2 years. *Fairborn Apartments v. Herman* (Jan. 31, 1991), Greene Cty. C.A. No. 90-CA-28.
 - (2) 30 times in 15 years. *Finkbeiner v. Lutz* (Hamilton Cty., 1975), 44 Ohio App. 2d 223.
 - (3) 4 times in 11 months. *Vistula Management Co. v. Scott* (May 23, 1991), Fremont M.C. 91 CVG-00205.
 - ii) Finding Insufficient Pattern & Practice/Course of Conduct:
 - (1) 3 late payments for tenancy that existed for 3 months. *Simoudis v. Diehl* (Trumbull Cty. 1996), 116 Ohio App. 3d 296, 688 N.E. 2d 16.
 - (2) 2 late payments in 10 months. *Simco Mgmt. Corp. v. Snyder* (Mar. 20, 2000), Mahoning Cty. C.A. No. 98-CA-210, 2000 WL 309396.
- c) If Landlord has been accepting rent late and wants to insist on strict compliance going forward, Landlord must provide written notice of strict compliance to end the pattern, giving a reasonable amount of time for Tenant to comply (probably at least 30 days). See *Crossroads Somerset Ltd. v. Newland* (Franklin Cty., 1987), 40 Ohio App. 3d 20; *Classic Real Estate v. Bowen* (Mar. 12, 1979), Franklin Cty. M.C. No. M 79-CVG-01404;

- d) New Landlord takes subject to pattern established by old Landlord. *Cassidy v. Voccariello* (Aug. 28, 1989), Franklin Cty. M.C. No. M 89 07 CVG-026439.
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6) Timely Tender of the Rent Refused

- a) A landlord may not refuse a timely tender of full rent and then evict for nonpayment. *Professional Invs. of Am., Inc. v. Ross*, No. 44540, 1982 WL 2579 (Ct. App. Cuyahoga Cty. Dec. 9, 1982).
- b) A landlord may refuse timely tender of partial rent then evict for nonpayment.

7) Tender of Rent Excused

- a) Tenant's obligation to tender rent is excused where the Landlord, through past refusal to accept rent, or other conduct indicating rent will be rejected, renders the requirement to tender meaningless, vain, or useless. *Showe Mgmt. Corp. v. Moore*, No. 08-CA-10, 2009 WL 1372986; *Greenbriar Estates v. Eberle*, 130 Ohio Misc. 2d, 11, 14-15.
- b) Tenant is excused from requirement to tender rent if Landlord instructs Tenant to not pay rent until a conditions problem at the Tenant's rental premises is fixed. E.g. *Waterford Glen LLC v. Dowell*, 05-CVG-1055 (Ohio Mun., Crawford Cty., Apr. 7, 2006).

8) Absence of Demand – Rent Collection at the Premises

- a) "In the absence of an agreement to the contrary, the general rule in Ohio is that payment of rent is to be made at the leased premises, and that it is the landlord's duty to go to the premises to collect rent from the tenant." *Davis v. Shullark*, No. 57456, 1990 WL 145642, at *2 (Ct. App. Cuyahoga Cty. Oct. 4, 1990).
- b) See Peter M. Iskin, *Ohio Eviction and Landlord-Tenant Law* (4th ed.), at 156-157.

9) Tenant R.C. 1923.061(B) Counterclaim for Rent Abatement

- a) Available in cases where Landlord is evicting for non-payment of rent. Tenant must file answer and counterclaim on or before day of trial. Tenant has to prove that the counterclaims offset or exceed the amount Landlord is claiming in the complaint.
- b) Typical Tenant counterclaim is for retroactive rent abatement or other damages incurred by Tenant due to Landlord's failure to remedy conditions problems in violation of lease agreement and/or R.C. 5321.04.
- c) For example, Tenant argues that Landlord's failure to fix a pipe caused him to live without water for a month and that the reasonable rental value of the unit without water, based on his rental experiences in Franklin County, was only \$200 per month. He paid the full \$600 rent, but really overpaid in the amount of \$400.
- d) When a Tenant asserts the 1923.061(B) defense, the court issues a judgment on the landlord's rent claim and on the tenant's counterclaims and, based on those judgments, determines to whom a net judgment is owed. *Sandefur Mgmt, Co. v. Smith*, 21 Ohio App.3d 145. If a net judgment is owed to the Tenant, the tenant keeps possession.

- e) If the Court opts to continue a hearing involving a 1923.061(b) counterclaim, the court may order the Tenant to pay rent as it comes due, and may also order the payment of some or all of the alleged past due amount. *Bester v. Owens*, No. 17388, 1999 WL 179261.
- f) In Franklin County if you file 1923.061(b) Answer and Counterclaims, the case will most likely be transferred to a judge (instead of a magistrate) and rescheduled for a time when the judge can hear it. The tenant will usually be required to pay rent into the court as it comes due.

10) Retaliation

- a) R.C. 5321.02(A) prohibits a landlord from bringing an eviction action against a tenant 1) because the tenant complained to an appropriate governmental agency of a code violation at the premises that materially affects health and safety, 2) because the tenant complained to the landlord of an RC 5321.04 violation, or 3) because the tenant joined a tenant organization.
- b) Tenant has the burden to show the causal link between the tenant's complaint (or other protected activity) and the landlord's decision to terminate the tenancy. Factors: (1) Landlord knew of the complaint and (2) decision to terminate (or to treat the tenant differently than other tenants) came shortly thereafter. *Reid v. Plainsboro Partners, III*, Nos. 09AP-442, 446, 2010 WL 3610931 (Ohio App., Franklin Cty., Sept. 16, 2010).
- c) Dual Motives: R.C. 5321.02 is violated whenever the retaliation is a resultant factor in the decision to terminate the tenancy. *Gateway Apts v. Darrah*, Nos. 76-CVG-725, 928 (Ohio Mun., Lyndhurst, Aug. 22, 1977).
- d) Exceptions: R.C. 5321.03(A)(1)-(4). 1) Tenant is in default in payment of rent; 2) the condition about which the tenant complained was caused by the tenant or the tenant's guest; 3) the performance of the repairs necessary to achieve code compliance would effectively deprive the tenant of the use of the premises; 4) the tenant is a holdover for the tenant's term. See Peter M. Iskin, *Ohio Eviction and Landlord-Tenant Law* (4th ed.), at 177-180.
 - i) Non-renewal of month to month tenancy can be retaliatory. Holdover tenant exception does not apply to month to month tenancies when the alleged retaliatory act was the service of the 5321.17(B) notice of termination of periodic tenancy after Landlord learned of Tenant's complaint. E.g. *Reid v. Plainsboro Partners, III*, Nos. 09AP-442, 446, 2010 WL 3610931 (Ohio App., Franklin Cty., Sept. 16, 2010).

11) Reasonable Accommodation Requirement

- a) The Fair Housing Act (as well as Section 504 and the ADA) requires a landlord "to make reasonable accommodations in the rules, policies, practices, and services," when it is necessary to accommodate the needs of a tenant with a disability. 42 U.S.C. 3604(f)(3)(B).
- b) In the eviction context, "a reasonable accommodation is required where there is a causal link between the disability for which the accommodation is requested and the

misconduct that is the subject of the eviction or other challenged action.” Boston Hous. Auth. v. Bridgewater, 452 Mass. 833, 848, 898 N.E.2d 848, 860 (2009).

- c) The tenant’s initial request for a reasonable accommodation may be made during the eviction action. *Id.* at 898.
- d) Under the Supremacy Clause, state courts are required to consider Fair Housing Act defenses in eviction actions. *Rodriguez v. Westhab, Inc.*, 833 F.Supp. 425 (S.D.N.Y. 1993).
- e) Two Franklin County eviction actions in which the court ordered a reasonable accommodation and, for that reason, denied the landlord’s eviction claim include: *Shiloh Grove Ltd. P’ship v. Ransom*, No. M9408-CVG-025818 (Franklin County Mun. Oct. 12, 1994) (reasonable accommodation: accept rent three weeks late); *Showe Mgmt. Corp. v. Stover*, No. M9306-CVG-17876 (Ohio Mun. Franklin Cty. Aug. 23, 1993) (reasonable accommodation: permit temporary absence from the rental unit).

12) Lease, Non-Material Breach

- a) A lease is a contract. Under common law contract rules, a party will not be found to have breached a contract so long as that party is in substantial compliance with the agreement. *Moonlight Mobile Home Parks, Inc. v. Eichner*, No. L-93-028, 1993 WL 434584, at *5 n.2 (Ct. App. Lucas Cty. Oct. 29, 1993).b
- b) This concept applies to leases in Ohio. A landlord may only evict a tenant for a breach of lease only if the breach is material. A landlord may not evict a tenant for an insignificant or a hypertechnical breach of the lease. *ACME Precision Bldg., Ltd. v. Dayton Forging & Heat Treating, Inc.*, 23 B.R. 79, 83-84 (Bankr. S.D. Ohio 1982)(applying Ohio law).

13) Lease, Unconscionable Provision, R.C. 5321.14

- a) Any unconscionable provision in a residential lease is unenforceable.
- b) A defense to an eviction is that the lease provision on which the landlord relies is unconscionable. *Heritage Hills, Ltd. v. Smith*, No. 78-CVG-268 (Mun. Ct. Chillicothe, May 8, 1978) (requiring registration and approval of guests).

14) Equity

- a) Equity abhors forfeiture (of a leasehold) and will only decree it when such relief is clearly required. *Whitmore v. Meenach*, 33 Ohio L. Abs. 95, 99, 33 N.E.2d 408, 410 (Ct. App. Montgomery Cty. 1940).
- b) When a party raises an equitable defense, it is the responsibility of the court to weigh the equitable considerations before imposing forfeiture. *Gorsuch Homes, Inc. v. Wooten*, 73 Ohio App. 3d 426, 436, 597 N.E.2d 554, 561 (Clark Cty. 1992).
- c) A tenant’s tender of the unpaid rent, as of the time of trial, may enable the tenant to succeed on the equity defense. E.g. *BWS Props. V. LaSalle, Inc.*, 1986 WL 9110; *Zanetos v. Sparks*, 13 Ohio App. 3d 242. The equity argument is strongest with project-based assisted housing where the tenant could make the landlord whole and faces

losing a tenancy with a subsidized rent. *Heritage Hills, Ltd. v. Nusser*, 1986 WL 7882 at *3; *Cincinnati Metro. Hous. Auth. v. Harris*, 1983 WL 8893 at *3.

15) Fictitious/Trade Name Registration

- a) If a landlord is doing business under a fictitious name that has not been properly registered with the Secretary of State in compliance with R.C. 1329.01, the landlord is barred from commencing or maintaining an eviction action. *Fisco v. Chisholm*, Nos. 52111, 52112, 1987 WL 11193 (Ct. App. Cuyahoga Cty. May 7, 1987). Note that this can be fixed by registering after the action is filed.

16) Unauthorized Practice of Law

- a) Revised Code 4705.01 prohibits any person who is not an attorney from commencing or maintaining a court action on behalf of another. See *Otto v. Peterson*, 173 Ohio St. 174 (1962).
- b) The Ohio Supreme Court in *Cleveland Bar Ass'n v. Picklo*, 96 Ohio St.3d 195 (2002) determined that 4705.01 applies to persons (typically managers of residential property) who may meet the 1923.01(C)(2) definition of landlord, but are not the owner of the premises, and not party to the lease. Such persons, if they proceed pro se as the Plaintiff, are engaging in the unauthorized practice of law, and the violation is a defense to the eviction action. *Ebbing v. Lawhorn*, 2012 WL 2877434.
- c) A corporation may not file or maintain an eviction action without an attorney. *Sheridan Mobile Village, Inc. v. Larsen*, 78 Ohio App. 3d 203, 604 N.E.2d 217 (Lawrence Cty. 1992). A Complaint file on behalf of a corporation by a non-attorney is a nullity. *Geiger v. King*, 2004-Ohio-2137, 2004 WL 886896, 10th Dist., April, 27, 2004 at ¶9.
- d) The defect is not cured by either 1) an attorney representing the corporation at the eviction hearing, *Larsen*, 78 Ohio App. 3d at 205, 604 N.E.2d 219, or 2) an amendment of the complaint to substitute an attorney's signature for the non-attorney's signature, *Fone-X Inc. v. Strohm*, No. CA-3653, 1991 WL 261824 (Ct. App. Licking Cty. Nov. 12, 1991).
- e) When a non-attorney files a complaint in a court in violation of R.C. 4705.01, the court should dismiss the complaint without prejudice. *Williams, Trustee v. Global Construction Co., Ltd.* 26 Ohio App. 3d 119 (10th Dist, 1985), syllabus.
- f) An R.C. Chapter 1705 limited liability company may not commence or maintain an eviction action without an attorney. *Markin Props. v. Gray*, No. 01-CVG-049054 (Mun. Ct. Clark Cty. Mar. 7, 2002); *Ritter Co. v. Clark*, No. 1999-CVG-30891 (Mun. Ct. Franklin Cty. Feb. 2, 2000).
- g) A partnership may not commence or maintain an action without an attorney. If a partnership files or maintains an eviction action without an attorney, it is grounds to dismiss the action. See *Lakeside Ave. Ltd. P'ship v. Cuyahoga County Bd. of Revision*, 85 Ohio St. 3d 125.

- h) A trustee who is not an attorney, may not file a complaint on behalf of the trust in court. *Williams, Trustee v. Global Construction Co., Ltd.* 26 Ohio App. 3d 119 (10th Dist, 1985), syllabus. A non-attorney trustee of a trust may not sign an eviction complaint on behalf of the trust. *Porter v. Myles*, No. 01-CVG-3344 (Ohio Mun., Akron, June 7, 2001);

1923.15 MOTIONS

Exhibits

Notice of Housing Code Violation
1923.15 Motion
Subpoena
Order Prohibiting Re-rental
Acknowledgment of Compliance Letter

- 1) When a tenant is being evicted from a residence that has unaddressed housing code violations, the tenant can file an ORC 1923.15 motion in the eviction case, requesting that the court (1) order a governmental agency to inspect the premises and (2) order any code violations be remedied or prohibit the re-rental of the property until the violations are corrected.
- 2) In practice we generally attach certified copies of code violations to the 1923.15 motions and the court accepts these in lieu of ordering an inspection. We generally don't subpoena a Code Officer to the first hearing, but we may call/email the Code Officer to introduce ourselves, advise we are filing the 1923.15 motion, and ask to confirm that to their knowledge the property has not yet been brought into compliance. Leaving a phone message and sending an email are good ways to initiate the conversation.
- 3) When the case comes for a hearing, the magistrate may first rule on whether or not the tenant should be evicted.
- 4) Per the statute, if the tenant is evicted, the court can forbid the landlord from re-renting the property until the conditions problems are corrected. We have a sample order prohibiting re-rental for the court's consideration, but so far we have never had a case end with such an order.
- 5) If the tenant is not evicted, or otherwise will remain in the property, the court can order the landlord to correct the conditions problems.
- 6) Practice varies among the magistrates. Some magistrates may not rule on the eviction at all at the first hearing, but instead ask the landlord for a date by when the code violations will be corrected, and continue the entire hearing (eviction and 1923.15 motion) until after that date.
- 7) Some magistrates will rule on the eviction, and even if the tenant is evicted, will schedule a second hearing in the case at which the landlord can prove he/she has corrected the violations listed in the code order.
- 8) If the case is scheduled for a second hearing, we advise the code officer that the case has been set for a hearing. We subpoena the code officer to the hearing (usually by dropping off a subpoena at the desk at 757 Carolyn Avenue) but advise that if the Code Officer is able to issue an Acknowledgment of Compliance Letter prior to the hearing, that we will advise the court, and withdraw the 1923.15 motion. (We have a sample motion withdrawing the 1923.15 motion).

- 9) At the second hearing the Code Officer reports to the Magistrate the progress on repairs. This is all done up at the bench rather informally. Typically the Code Officer has to explain that some things have been done, but the property is not yet in full compliance.
- 10) The court may schedule a third hearing. We again would subpoena the Code Officer and ask for an Acknowledgment of Compliance letter if the property is brought into compliance. If the conditions problems are still not remedied, the court will likely have had enough and will issue an order prohibiting the re-rental of the property.

PART 4

SECURITY DEPOSITS

Outline

Note:

Due to the changing nature of the law, VRC encourages our volunteers to conduct their own independent research prior to citing any of the cases set forth herein.

SECURITY DEPOSITS – R.C. 5321.16

a) No limit on amount of deposit

- i) Any amount greater than one (1) month rent shall bear interest @ 5% per annum if Tenant is in possession for 6+ months. Paid annually to Tenant.

b) Procedure for return – R.C. 5321.16(B)

- i) Tenant gives Landlord written notice of forwarding address and vacates premises (returns keys); If Tenant fails to comply with this section, Tenant cannot be awarded double damages or attorneys' fees.
- ii) Landlord has 30 days to return deposit or itemized list of deductions (and any balance).
- iii) Landlord can lawfully withhold only for past-due rent owed and damages caused by Tenant non-compliance with R.C. 5321.05 and/or rental agreement terms (e.g., only for damage in excess of normal wear and tear.)
 - (1) not to be used for carpet cleaning, painting, etc. or any normal refurbishment between tenancies

c) Double damages provision – R.C. 5321.16(C)

- i) Double damages are double the amount that the court finds was **wrongfully withheld**; even if Landlord ignored its duty under R.C. 5321.16(B) to send Tenant an itemized list of deductions, Landlord may still appear at trial and prove amounts properly withheld. See Vardeman v. Llewellyn (1985), 17 Ohio St. 3d 24 (strong dissent by Douglas, Loucher and Brown)
- ii) Tenant must request double damages in order to obtain them.
- iii) Double damages are mandatory for any amount found to be wrongfully withheld. See Smith v. Padgett (1987), 32 Ohio St. 3d 344.

d) Attorneys' fees provision – R.C. 5321.16(C)

- i) Fees are mandatory if any or all of deposit is found to be wrongfully withheld. See Smith v. Padgett, supra
- ii) However, attorneys' fees are awardable only for fees solely attributable to Tenant's security deposit claim, with no fees allowable for attorney's time

defending Landlord's claims (even though it is not possible in fact to separate the two in a security deposit case). See Smith v. Padgett, supra, and Fant v. DiSabato (Dec. 29, 1987), Franklin Cty. App. No. 87 AP-265.

iii) Attorneys' fees are costs, not damages, the amount of which is determined by the court not by the jury. Fant v. DiSabato, supra.

e) **Small Claims Court jurisdiction in Franklin County over R.C. 5321.16(C) double damages.** See Klemas v. Flynn (1993), 66 Ohio St. 3d 249, finding that double damages are not punitive damages and therefore may be awarded in Small Claims Court.