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The Current Status of Landlord Liability for Injured Guests of Ohio Tenants: An Evaluation of *Shump v. First Continental-Robinwood Associates*

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THE CURRENT STATUS OF LANDLORD LIABILITY FOR INJURED GUESTS OF OHIO TENANTS: AN EVALUATION OF *SHUMP v. FIRST CONTINENTAL-ROBINWOOD ASSOCIATES*, 644 N.E.2d 291 (Ohio 1994)

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I. INTRODUCTION

At common law a landlord had virtually no liability to his tenants or their guests,[1] and a lease was considered a conveyance of land.[2] Once a landlord gave up his dominion and control over the leased premises, the landlord had no duty to maintain or repair the premises.[3] As the legal basis of a lease changed, exceptions to this freedom from liability for landlords developed.[4]

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1. See *infra* notes 23-44 for a discussion of the common law premises liability doctrines historically used by Ohio courts.

2. *See* Shroades v. Rental Homes, 427 N.E.2d 774, 776 (Ohio 1981).

3. *See* Pitts v. Cincinnati Metro. Hous. Auth., 113 N.E.2d 869 (Ohio 1953); Brown v. Cleveland Baseball Co., 106 N.E.2d 632, 635 (Ohio 1952) ("[O]ne having neither occupation nor control of premises ordinarily has no . . . duty with respect to the condition or use of those premises."); Cooper v. Roose, 85 N.E.2d 545 (Ohio 1949); Ripple v. Mahoning Nat'l Bank, 56 N.E.2d 289 (Ohio 1944) (same); Berkowitz v. Winston, 193 N.E. 343 (Ohio 1934) (same); Davies v. Kelley, 146 N.E. 888 (Ohio 1925) (same); Stackhouse v. Close, 94 N.E. 746 (Ohio 1911); Shindelbeck v. Moon, 32 Ohio St. 264 (Ohio 1877); Burdick v. Cheadle, 26 Ohio St. 393 (Ohio 1875). See also *infra* notes 30-34 and accompanying text for a discussion of the control doctrine.

4. *See Shroades*, 427 N.E.2d at 776-77; *Stackhouse*, 94 N.E.2d at 746 (finding a lessor could be held liable for the condition of the leased premises if an agreement to repair exists or violation of a duty imposed by statute occurred); *Shindelbeck*, 32 Ohio St. at 273 (holding lessor could be liable if plaintiff proves special circumstances that establish such liability). As courts began to develop exceptions to landlord immunity,

Nevertheless, Ohio courts were slow to adopt exceptions imposing liability on landlords in some circumstances.[5] Some courts, however, did manage to carve out areas of landlord liability.[6]

In 1974, the Ohio General Assembly enacted the Landlords and Tenants Act (Act).[7] The Act, however, did not address whether a landlord could be held liable for injuries sustained by a tenant's guest due to defective conditions on the property.[8] The absence of such a provision led to considerable confusion among Ohio courts.[9] Twenty years after the Act took effect, the Ohio Supreme Court reconciled this confusion by invoking section 5321.04 of the Act to impose on landlords equal liability to tenants and to their guests.[10]

Section II of this Note examines the common law regarding landlord liability to tenants and guests that existed prior to the promulgation of the Act.[11] Section II then details the Act's provisions.[12] Further, Section II examines the Act's impact on common law landlord-tenant doctrines and discusses the Ohio courts' attempts to accommodate both the Act and existing common law tort and property doctrines.[13] Finally, Section II details *Shump v. First Continental-Robinwood Associates*[14] and the Ohio Supreme Court's decision to include guests within the Act's purview.[15]

Section III of this Note analyzes the impact *Shump* may have on Ohio courts' resolution of landlord liability suits.[16] Section III suggests that the Ohio Supreme Court or the General Assembly should drop the notice requirement the *Shump* court grafted onto the Act.[17] Section III also suggests that the Ohio General Assembly or the Ohio Supreme Court should follow other states and abolish the current common law distinctions among invitees, licensees and

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leases were viewed as contracts rather than conveyances. Courts also found it less important to determine which party was in control of the premises. *See Shroades*, 427 N.E.2d at 776. Ohio courts began to treat leases as contracts and enforce their terms regardless of issues such as premises possession. *See id.*

5. See *infra* notes 52-81 and accompanying text for a discussion of Ohio courts' application of the Landlord and Tenants Act to excuse landlord liability prior to the *Shump* decision.

6. *See Shroades*, 427 N.E.2d at 776-77 (citing *Stackhouse*, 94 N.E.2d at 746); *Shindelbeck*, 32 Ohio St. at 273; see *infra* notes 23-44 and accompanying text for a discussion of the common law in Ohio prior to the Act's promulgation.

7. OHIO REV. CODE ANN. § 5321.01-.19 (Anderson 1986 & Supp. 1994). See *infra* note 47 for the full text of section 5321.04 of the Ohio Revised Code, the section directly applicable to the *Shump* decision.

8. See *infra* notes 45-51 and accompanying text for the full text of section 5321.04 of the Landlords and Tenants Act and a discussion of its divisions.

9. See *infra* notes 52-81 and accompanying text for a discussion of the courts' varying combinations of the Act and common law doctrines.

10. Shump v. First Continental-Robinwood Assoc., 644 N.E.2d 291 (Ohio 1994); see *infra* notes 52-81 and accompanying text for a discussion of the various theories Ohio courts crafted in their interpretations of the Act.

11. *See infra* notes 19-51 and accompanying text.

12. *See infra* notes 45-51 and accompanying text.

13. *See infra* notes 52-81 and accompanying text.

14. 644 N.E.2d 291 (Ohio 1994).

15. *See infra* notes 83-117 and accompanying text.

16. *See infra* notes 118-35 and accompanying text.

17. *See infra* notes 121-28 and accompanying text.

trespassers.[18] This Note concludes that the Ohio Supreme Court or General Assembly can further simplify Ohio law governing landlord liability by eliminating the notice requirement and common law classifications.

II. BACKGROUND

The common law refused to impose liability on landlords for defective conditions on leased premises over which landlords had no immediate possession and control.[19] For over a century, the Ohio Supreme Court declined to hold landlords liable for injuries sustained in leased areas over which landlords had no "control."[20] The Ohio Supreme Court developed common law doctrines governing landlord liability prior to the passage of the Act.[21] This Section examines those doctrines and how courts have responded to the Act's imposition of a duty on landlords to their tenants.[22]

A. Ohio Common Law Doctrines Prior to the Act

Prior to the Act's promulgation, Ohio courts followed several common law doctrines of tort and property law to fashion rules governing the liability of landlords to persons injured on rented premises.[23] The most prominent of these rules were the dominion and control doctrine[24] and the common law classifications of invitee, licensee, and trespasser.[25] These long-held doctrines

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18. *See infra* notes 129-35 and accompanying text.

19. At common law, the possessor, rather than the owner, of a leased premises owed the applicable legal duty to the entrant. Shump v. First Continental-Robinwood Assoc., 644 N.E.2d 291, 295 (Ohio 1994) (citing 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS §§ 27.2 & 27.16, at 134, 271 (2d ed. 1986); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 434 (5th ed. 1984); JOSEPH A. PAGE, LAW OF PREMISES LIABILITY 2-3 (1976); RESTATEMENT (SECOND) OF TORTS §§ 328e-350 (1965)). See *infra* notes 27-34 and accompanying text for a discussion of the control doctrine.

20. *See* Pitts v. Cincinnati Metro. Hous. Auth., 113 N.E.2d 869 (Ohio 1953); Brown v. Cleveland Baseball Co., 106 N.E.2d 632, 636 (Ohio 1952); Cooper v. Roose, 85 N.E.2d 545, 546 (Ohio 1949); Ripple v. Mahoning Nat'l Bank, 56 N.E.2d 289 (Ohio 1944); Berkowitz v. Winston, 193 N.E. 343 (Ohio 1934); Davies v. Kelley, 146 N.E. 888 (Ohio 1925); Stackhouse v. Close, 94 N.E. 746 (Ohio 1911); Shindelbeck v. Moon, 32 Ohio St. 264 (Ohio 1877); Burdick v. Cheadle, 26 Ohio St. 393 (Ohio 1875). See *infra* notes 27-34 and accompanying text for a detailed discussion of the control doctrine.

21. See *infra* notes 35-44 and accompanying text for a discussion of the development of Ohio common law governing landlord liability for the injuries of tenants and guests on leased premises prior to the promulgation of the Act.

22. See *infra* notes 45-117 and accompanying text for a discussion of the Act and the Ohio courts' application of the Act to landlord liability to tenants and guests.

23. *See generally* Presley v. Norwood, 303 N.E.2d 81 (Ohio 1973); Scheurer v. Trustees of the Open Bible Church, 192 N.E.2d 38 (Ohio 1963); *Cleveland Baseball Co.*, 106 N.E.2d 632; Scheibel v. Lipton, 102 N.E.2d 453 (Ohio 1951); *Ripple*, 56 N.E.2d 289; *Berkowitz*, 193 N.E. 343; *Davies*, 146 N.E. 888; Hannan v. Ehrlich, 131 N.E. 504 (Ohio 1921); *Shindelbeck*, 32 Ohio St. 264; *Burdick*, 26 Ohio St. 393; R.K.O. Midwest Corp. v. Berling, 199 N.E. 604 (Ohio Ct. App. 1st Dist. 1935).

24. *See Pitts*, 113 N.E.2d 869; *Cleveland Baseball Co.*, 106 N.E.2d 632; *Cooper*, 85 N.E.2d 545; *Ripple*, 56 N.E.2d 289; *Berkowitz*, 193 N.E. 343; *Davies*, 146 N.E. 888.

25. *See* Provencher v. Ohio Dep't of Transp., 551 N.E.2d 1257 (Ohio 1990); Light v. Ohio Univ., 502 N.E.2d 611 (Ohio 1986); *Presley*, 303 N.E.2d 81; *Scheurer*, 192 N.E.2d 38; *Scheibel*, 102 N.E.2d 453; *Hannan*, 131 N.E. 504. Many Ohio courts followed the distinctions set forth in the landmark California

played a vital role in the Ohio courts' development of landlord liability to tenants and guests prior to the enactment of the Act.[26]

1. The Dominion and Control Doctrine

Historically, the common law protected the property interests of landlords at the expense of the personal rights of tenants and their guests.[27] This protection derived from the common law's treatment of a lease as a conveyance of an estate interest in real property.[28] The common law held that a tenant purchased an interest in the land the tenant rented.[29] Since the landlord did not physically possess the premises due to the presence of the lessor, the law held the landlord was not in dominion and control of the premises.[30] Because the law held the landlord was not in possession or control of the land, the landlord was not liable for any injuries incurred on the land.[31]

The courts developed a test under which neither a tenant nor the tenant's guest could recover damages for an injury sustained on a part of the premises over which the landlord did not have a right to control.[32] Further, unless the landlord had control over the premises, courts would not impose tort liability, even in cases in which the parties had entered into an agreement assigning certain repair duties to the landlord.[33] Ohio courts thus afforded landlords vast immunity privileges under the common law.[34]

2. Distinctions of Invitee, Licensee, and Trespasser

In addition to the dominion and control requirements which shielded landlords from liability for injuries sustained by tenants and their guests, many Ohio courts also wove the historic common law distinctions of invitee, licensee and trespasser into their analyses of landlord liability.[35] These courts

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opinion of Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

26. *See infra* notes 27-44 and accompanying text.

27. *See Pitts*, 113 N.E.2d 869; *Cleveland Baseball Co.*, 106 N.E.2d 632; *Cooper*, 85 N.E.2d 545; *Ripple*, 56 N.E.2d 289; *Berkowitz*, 193 N.E. 343; *Davies*, 146 N.E. 888; Stackhouse v. Close, 94 N.E. 746 (Ohio 1911); *Shindelbeck*, 32 Ohio St. 264; *Burdick*, 26 Ohio St. 393.

28. *See Pitts*, 113 N.E.2d 869; *Cleveland Baseball Co.*, 106 N.E.2d 632; *Cooper*, 85 N.E.2d 545; *Ripple*, 56 N.E.2d 289; *Berkowitz*, 193 N.E. 343; *Davies*, 146 N.E. 888; *Stackhouse*, 94 N.E. 746; *Shindelbeck*, 32 Ohio St. 264; *Burdick*, 26 Ohio St. 393.

29. *See* Shroades v. Rental Homes, 427 N.E.2d 774, 776 (Ohio 1981).

30. See *supra* notes 23-24, 27-29 for the cases which discuss the control doctrine.

31. See *supra* notes 27-30 and *infra* notes 32-34 for a detailed discussion of the control doctrine.

32. *See Ripple*, 56 N.E.2d 289. This test asks whether the landlord had a right to control the premises to the exclusion of any control by the tenant. *See id.*

33. *See* Cooper v. Roose, 85 N.E.2d 545 (Ohio 1949).

34. *See* Shroades v. Rental Homes, 427 N.E.2d 774, 776 (Ohio 1981).

35. *See* Scheurer v. Trustees of the Open Bible Church, 192 N.E.2d 38 (Ohio 1963); Scheibel v. Lipton, 102 N.E.2d 453 (Ohio 1951); Hannan v. Ehrlich, 131 N.E. 504 (Ohio 1921); Weigel v. Cottage Bldg. & Loan Co., 42 N.E.2d 171 (Ohio Ct. App. 1st Dist. 1941); R.K.O. Midwest Corp. v. Berling, 199 N.E. 604 (Ohio

determined the duty of a landlord based on the status of the user of the premises.[36] As defined by Ohio courts, an invitee is a business visitor, or one who is rightfully on the premises for purposes in which the occupant has a beneficial interest.[37] A licensee is one who enters the premises of another with the permission or acquiescence of the possessor, but for the licencee's own pleasure, convenience, or benefit, rather than for any interest of the possessor.[38] A trespasser is one who enters the premises without right, lawful authority, or express or implied invitation or license.[39]

An owner of a premises owes a duty to an invitee "to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition."[40] In contrast, a licensee "takes his license subject to its attendant perils and risks."[41] An owner of a premises owes no duty to an undiscovered trespasser beyond refraining from injuring the trespasser by willful or wanton conduct.[42] At common law, the tenant in dominion and control was considered the owner of the leased premises.[43] A tenant's liability for injuries sustained by his guests, therefore, was based upon the guest's classification as an invitee, licensee, or trespasser.[44]

B. The Landlords and Tenants Act of 1974

By the 1970s, a number of exceptions to the landlord's general freedom from duty to his tenants and their guests began to arise.[45] The Ohio General

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Ct. App. 1st Dist. 1935).

36. *See Scheurer*, 192 N.E.2d 38; *Scheibel*, 102 N.E.2d 453; *Hannan*, 131 N.E. 504; *Berling*, 199 N.E. 604; *Weigel*, 42 N.E.2d 171.

37. *See Scheibel*, 102 N.E.2d at 453; 76 OHIO JUR. 3D *Premises Liability* § 4 (1986).

38. *See Hannan*, 131 N.E. at 507; 76 OHIO JUR. 3D *Premises Liability* § 5 (1986).

39. *See* Foti v. Lewis, 161 N.E. 365, 365 (Ohio Ct. App. 9th Dist. 1925); 76 OHIO JUR. 3D *Premises Liability* § 6 (1986).

40. Light v. Ohio Univ., 502 N.E.2d 611, 613 (Ohio 1986).

41. *Hannan*, 131 N.E. at 507; *see* Scheurer v. Trustees of the Open Bible Church, 192 N.E.2d 38 (Ohio 1963).

42. *See* 76 OHIO JUR. 3D *Premises Liability* § 6 (1986).

43. *See* Shroades v. Rental Homes, 427 N.E.2d 774, 776 (Ohio 1981).

44. *See* Pitts v. Cincinnati Metro. Hous. Auth., 113 N.E.2d 869 (Ohio 1953); Brown v. Cleveland Baseball Co., 106 N.E.2d 632 (Ohio 1952); Cooper v. Roose, 85 N.E.2d 545 (Ohio 1949); Ripple v. Mahoning Nat'l Bank, 56 N.E.2d 289 (Ohio 1944); Berkowitz v. Winston, 193 N.E. 343 (Ohio 1934); Davies v. Kelley, 146 N.E. 888 (Ohio 1925); Stackhouse v. Close, 94 N.E. 746 (Ohio 1911); Shindelbeck v. Moon, 32 Ohio St. 264 (Ohio 1877); Burdick v. Cheadle, 26 Ohio St. 393 (Ohio 1875).

45. Some of the common exceptions that give rise to landlord liability are "concealment or failure to disclose known, nonobvious latent defects; defective premises held open for public use; defective areas under the landlord's control; failure to perform a covenant to repair; breach of a statutory duty; and negligent performance of contractual or statutory duty to repair." Shump v. First Continental-Robinwood Assoc., 644 N.E.2d 291, 295-96 (Ohio 1994) (citing W. E. Shipley, Annotation, *Modern Status of Landlord's Tort Liability for Injury or Death of Tenant or Third Person Caused by Dangerous Condition of Premises*, 64 A.L.R. 3d 339 (1975); 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 27.16, at 271 (2d ed. 1986); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 436-46 (5th ed. 1984); JOSEPH A. PAGE, LAW OF PREMISES LIABILITY 2-3 (1976)). In *Shump*, the Ohio Supreme Court examined the common law history preceding the Act and found that the exceptions to the historical immunity had nearly

Assembly enacted the Landlords and Tenants Act of 1974 "[i]n light of the previous common law immunity of landlords, and in recognition of the changed rental conditions and the definite trend to provide tenants with greater rights."[46] The Act changed the common law relationship between landlords and tenants by statutorily imposing several new obligations upon landlords.[47]

"swallowed up the general rule of landlord immunity." *Id.* at 295.

46. *Shroades*, 427 N.E.2d at 777. The Ohio Supreme Court in *Shroades* cited Prosser's appraisal of the evolving law regarding this erosion of landlord immunity:

> Modern ideas of social policy have given rise to a number of exceptions to these general rules of non-liability of the lessor. . . . There is increasing recognition of the fact that the tenant who leases defective premises is likely to be impecunious and unable to make the necessary repairs, and that the financial burden is best placed upon the landlord, who receives a benefit from the transaction in the form of rent. This policy is expressed by statutes in a number of states, which require the landlord to put and keep certain types of premises, such as tenement houses, in good condition and repair, and have been held to impose liability in tort upon him for his failure to do so.

Id. (quoting WILLIAM L. PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 400 (4th ed. 1971)). The *Shroades* court went on to find the Ohio Act was such a statute and that the General Assembly promulgated the Act in "an attempt to balance the competing interests of landlords and tenants." *Id.*

47. Section 5321.04 of the Act provides:

> (A) A landlord who is a party to a rental agreement shall do all of the following:
>
> (1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety;
>
> (2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;
>
> (3) Keep all common areas of the premises in a safe and sanitary condition;
>
> (4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by him;
>
> (5) When he is a party to any rental agreements that cover four or more dwelling units in the same structure, provide and maintain appropriate receptacles for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of a dwelling unit, and arrange for their removal;
>
> (6) Supply running water, reasonable amounts of hot water and reasonable heat at all times, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection;
>
> (7) Not abuse the right of access conferred by division (B) of section 5321.05 of the Revised Code;
>
> (8) Except in the case of emergency or if it is impracticable to do so, give the tenant reasonable notice of his intent to enter and enter only at reasonable times. Twenty-four hours is presumed to be a reasonable notice in the absence of evidence to the contrary;
>
> (9) Promptly commence an action under Chapter 1923 of the Revised Code, after complying with division (C) of section 5321.17 of the Revised Code, to remove a tenant from particular residential premises, if the tenant fails to vacate the premises within three days after the giving of the notice required by that division and if the landlord has actual knowledge of or has reasonable cause to believe that the tenant, any person in the tenant's household, or any person on the premises with the consent of the tenant previously has or presently is engaged in a violation as described in division (A)(6)(a)(i) of section 1923.02 of the Revised Code, whether or not the tenant or other person has been charged with, has pleaded guilty to or been convicted of, or has been determined to be a delinquent child for an act that, if committed by an adult, would be a violation as described in that division. Such actual knowledge or reasonable cause to believe shall be determined in accordance with that division.
>
> (B) If the landlord makes an entry in violation of division (A)(8) of this section, makes a lawful entry in an unreasonable manner, or makes repeated demands for entry otherwise lawful that have the effect of harassing the tenant, the tenant may recover actual damages resulting from the entry or demands,

In *Shroades v. Rental Homes*,[48] the Ohio Supreme Court ruled the Act "clearly imposes a duty to repair on landlords."[49] The *Shroades* court further held that the Ohio General Assembly's purpose in passing the Act was to protect tenants from injury.[50] Regardless of these noble intentions, the Act caused confusion and dissension among Ohio courts as they sought to reconcile the Act's provisions with Ohio's common law landlord-tenant doctrines.[51]

C. Ohio Courts' Interpretations of the Act

Since at common law a tenant's guest stepped into the tenant's shoes, it seems logical that the Act, which already protects the tenant, also should cover the guest.[52] Until *Shump*, however, Ohio courts relied upon the common law distinction between invitee and licensee status to either impose or negate a landlord's liability for injuries sustained by a tenant's guest due to defective conditions on rented premises.[53] Guests classified as invitees enjoyed greater success against landlords than those classified as licensees; however, even guests deemed invitees often were unsuccessful against landlords.[54] The courts followed their traditional resistance to the imposition of duties upon landlords to tenants and guests until and following the Act's emergence.[55] Because Ohio courts sought to conform the existing common law rules to the mandates of the

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obtain injunctive relief to prevent the recurrence of the conduct, and obtain a judgment for reasonable attorney's fees, or may terminate the rental agreement.

OHIO REV. CODE ANN. § 5321.04 (Anderson 1989 & Supp. 1994).

48. 427 N.E.2d 774 (Ohio 1981).

49. *Id.* at 777. The *Shroades* court further held "a landlord is liable for injuries, sustained on the demised residential premises, which are proximately caused by the landlord's failure to fulfill the duties imposed by [the Act]." *Id.* The court concluded "the General Assembly intended both to provide tenants with greater rights and to negate the previous tort immunities for landlords." *Id.* at 777-78.

50. *Id.* at 778.

51. See *infra* notes 52-81 and accompanying text for a discussion of the courts' treatment of the Act prior to the *Shump* decision.

52. In *Stackhouse v. Close*, the Ohio Supreme Court stated that landlords owe guests who are lawfully on leased premises the same duty that landlords owe to their tenants. 94 N.E. 746 (Ohio 1911). The general rule is that the guest "stand[s] in [the] shoes" of the tenant, assuming the same rights as those of the tenant. Caldwell v. Eger, 8 Ohio L. Abs. 47 (Ohio Ct. App. 8th Dist. 1929). The court in *Caldwell* expounded: "The guest, servant, etc., of the tenant is usually held to be so identified with the tenant that this right of recovery for injury as against the landlord is the same as that of the tenant would be had he suffered the injury." *Id.* (quoting 16 R.C.L., *Landlord Tenant* § 588, at 1067 (1929 & Supp. 1943)).

53. *See* Provencher v. Ohio Dept. of Transp., 551 N.E.2d 1257 (Ohio 1990); Light v. Ohio Univ., 502 N.E.2d 611 (Ohio 1986); Davies v. Kelley, 146 N.E. 888 (Ohio 1925); Defiance Water Co. v. Olinger, 44 N.E. 238 (Ohio 1896); Jones v. Greene Countrie Apts., No. 94APE01-105, 1994 Ohio App. LEXIS 2587 (Ohio Ct. App. 10th Dist. June 14, 1994); Ricciardo v. Weber, No. CA-3452, 1989 Ohio App. LEXIS 4833 (Ohio Ct. App. 5th Dist. Dec. 22, 1989); Rodriguez v. Rodriguez, No. L-86-167, slip op. (Ohio Ct. App. 6th Dist. Feb. 6, 1987) (LEXIS, States library, Ohio file); Damas v. Thompson, No. L-84-155, slip op. (Ohio Ct. App. 6th Dist. Sept. 14, 1984) (LEXIS, States library, Ohio file); *Caldwell*, 8 Ohio L. Abs. 47; Seiger v. Yeager, 542 N.E.2d 1119 (Ohio C. P. Clermont County 1988).

54. *See Greene Countrie Apts.*, No. 94APE01-105, 1994 Ohio App. LEXIS 2587, at *2 (finding plaintiff-guest an invitee of landlord); *Ricciardo*, No. CA-3452, 1989 Ohio App. LEXIS 4833, at *7-8 (same); *Damas*, No. L-84-155, slip op. (same); *Seiger*, 542 N.E.2d at 1120 (same).

55. *See infra* notes 57-81 and accompanying text.

new legislation, the introduction of the Act into this already confusing combination of common law doctrines only served to further complicate matters.[56]

1. Guests as Invitees

Ohio courts that classify the guests of tenants as invitees on leased premises start with the initial assumption that the guest is an invitee of the tenant.[57] These courts then conclude that an invitee of the tenant is also an invitee of the landlord.[58] Several courts equated the duty imposed upon landlords to invitees at common law with the duty that the Act imposes upon landlords.[59] In *Shroades*,[60] the definitive case addressing the Act prior to *Shump*, the Ohio Supreme Court recognized the broad coverage that the Ohio General Assembly intended the Act to have by clarifying the Act's imposition of a landlord's duty to repair and maintain leased premises.[61] The *Shroades* court found that, in passing the Act, the General Assembly intended to provide tenants with greater rights against landlords and to negate the tort immunities that landlords had enjoyed under the common law.[62] The *Shroades* court stated that section 5321.04 of the Act imposes a duty on landlords to "do whatever is necessary to put and keep the premises in a fit and habitable condition."[63] The court found that the imposition of this duty furthers the purpose of the Act, to protect any persons using rented premises from harm.[64]

Finally, the *Shroades* court found a notice requirement inherent in the Act, requiring that the landlord "received notice of the defective condition of the rental premises, that the landlord knew of the defect, or that the tenant had made reasonable, but unsuccessful, attempts to notify the landlord."[65] Although the *Shroades* decision involved an injury to a tenant rather than to a tenant's guest, the court, along with lower courts in following cases, clearly read the Act broadly in order to impute a duty to landlords to maintain their premises, regardless of the status of the injured person.[66] The Ohio courts thus

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56. See *supra* notes 45-51 and accompanying text for a discussion of the Act; see *infra* notes 57-117 for a discussion of the courts' interpretation and application of the Act.

57. *See Greene Countrie Apts.*, No. 94APE01-105, 1994 Ohio App. LEXIS 2587, at *5.

58. *See id.*; Rodriguez v. Rodriguez, C.A. No. L-86-167, slip op. (Ohio Ct. App. 6th Dist. Feb. 6, 1987) (LEXIS, States library, Ohio file); Martin v. Konstam, 602 N.E.2d 1273, 1274 (Ohio Hamilton County Mun. Ct. 1992).

59. Shroades v. Rental Homes, Inc., 427 N.E.2d 774, 777-78 (Ohio 1981); *Greene Countrie Apts.*, No. 94APE01-105, 1994 Ohio App. LEXIS 2587, at *8. The duty imposed upon a landlord toward a guest who is considered the landlord's invitee is one of reasonable care. *See Martin*, 602 N.E.2d at 1274-75.

60. 427 N.E.2d 774 (Ohio 1981).

61. *Id.*

62. *Id.*

63. *Id.* at 778.

64. *Id.*

65. *Id.*

66. *See id.* at 774; Jones v. Greene Countrie Apts., No. 94APE01-105, 1994 Ohio App. LEXIS 2587

recognized the importance of effectuating the legislative intent expressed in the Act to join the increasing number of states that afford tenants necessary rights.[67]

Despite some Ohio courts' interpretation of the Act as mandating the classification of guests as invitees of landlords, several of these courts still held that the landlords owed no duty to these guests.[68] These courts interpreted the notice requirement developed in *Shroades* to excuse many landlords from liability when the landlord lacked notice of the defective condition of the premises that caused the guest's injuries.[69] Some Ohio courts also added the common law control doctrine to their analyses of landlord liability to guests, mandating not only that landlords have notice of defects, but also that these defects occur in areas over which the landlords possess specific control.[70] Clearly, the Ohio courts' use of different common law tenets combined with

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(Ohio Ct. App. 10th Dist. June 14, 1994).

67. *See Shroades*, 427 N.E.2d at 778; *Greene Countrie Apts.*, No. 94APE01-105, 1994 Ohio App. LEXIS 2587, at *3.

68. *See Shroades*, 427 N.E.2d 774; *Greene Countrie Apts.*, No. 94APE01-105, 1994 Ohio App. LEXIS 2587; Rodriguez v. Rodriguez, C.A. No. L-86-167, slip op. (Ohio Ct. App. 6th Dist. Feb. 6, 1987) (LEXIS, States library, Ohio file).

69. *See Greene Countrie Apts.*, No. 94APE01-105, 1994 Ohio App. LEXIS 2587; *Rodriguez*, C.A. No. L-86-167, slip op. In *Greene Countrie Apartments.*, the Tenth Appellate District Court for Franklin County addressed the claim of a tenant's guest against the owner of the apartment complex where the tenant lived. *Greene Countrie Apts.*, No. 94APE01-105, 1994 Ohio App. LEXIS 2587, at *2. The plaintiff sustained injuries when she fell while descending the stairs in the common area of the complex. *Id.* A shaky step collapsed under the plaintiff, causing her to fall. *Id.* The stairway was the only available means of ingress and egress into the complex. *Id.* Although the trial court had characterized the plaintiff as a licensee of the defendant-owner, the court of appeals found that she was an invitee of the defendant. *Id.* at *5. The court stated that the "guest of a tenant of an apartment who is invited by such tenant to the apartment is an invitee of the landlord as well. In other words, invitees of tenants are also invitees of the landlord." *Id.* The problem in holding the defendant liable for the plaintiff's injuries arose because of the defendant's lack of notice of the defective condition of the stairs. *Id.* at *6. The court held that the landlord could not be liable for the plaintiff's injuries because the landlord did not have actual notice of the defective condition of the premises. *Id.* at *7. Thus, the court found that while section 5321.04 of the Act imposes an affirmative duty upon landlords to repair and maintain leased premises, landlords must have actual or constructive notice of the defect, even under the Act's unquestionable duty. *Id.* at *8. While the court combined the Act's provisions with the common law invitee status, the court still carved out a safe haven for landlords.

70. *See Rodriguez*, C.A. No. L-86-167, slip op.; *see also* Martin v. Konstam, 602 N.E.2d 1273, 1274 (Ohio Hamilton County Mun. Ct. 1992). In *Rodriguez*, a tenant's guest suffered injuries when the guest leaned on a railing on an outside deck at the landlord's apartment complex and fell to the ground. C.A. No. L-86-167, slip op. The Sixth Appellate District Court found that not only did the owner have no notice of the defective railing, but the owner also could not be held liable for the plaintiff's injuries since the deck railing was contained within the tenant's living quarters. *Id.* Although the plaintiff was held to be an invitee of the owner, the court did not impose duties on the owner beyond the owner's obligation to warn of known defects. *Id.* Since the owner claimed no knowledge of the defect and because the owner had no control over the portion of the premises where the accident occurred, the owner had no duty to the plaintiff. *Id.*

In *Martin*, however, the court used the combination of the control and notice doctrines and the invitee status of a guest to hold a landlord liable for the injuries of a tenant's guest. *Martin*, 602 N.E.2d at 1276. The court in *Martin* recognized the inconsistency of holding a landlord liable for his tenant's injuries while denying relief to a guest for the same injuries. *Id.* The division of Ohio courts in this area is highlighted by the failure of some courts, such as the *Martin* court, to even use the Act in their assessments of guest's injuries. *Id.*

varying interpretations of the Act to create an intimidating morass of landlord liability law.

2. Guests as Licensees

Adding to this confusion were the many Ohio courts that classified tenants' guests as licensees.[71] Notwithstanding the Act's clear imposition of an affirmative duty on landlords to maintain and repair their leased premises, these courts refused to broadly apply the Act, declining to identify guests as invitees. Instead, these courts classified guests as licensees.[72] In *Ricciardo v. Weber*,[73] an Ohio court ignored Ohio's mandatory statutory authority and declared itself "bound to the 'licensee' user designation by principles of stare decisis."[74] *Ricciardo* involved a guest of a tenant who suffered injuries when the guest fell through a stairway door in a common area of the defendant's apartment complex.[75] Although the *Ricciardo* court recognized that the Ohio General Assembly had attempted to correct the imbalance between landlords and tenants through the Act, the court nevertheless found section 5321.04 of the Act inapplicable.[76] The court refused to extend the section's duty to a third-party licensee.[77] Thus, according to the *Ricciardo* court, a landlord merely had a duty to refrain from wantonly or willfully causing injury to his tenants' guests.[78]

Other Ohio courts used different reasoning in refusing to extend the scope of the Act to social guests of tenants.[79] According to these courts, neither the Ohio General Assembly nor the *Shroades* court, the first court to extend the Act's coverage to impose an affirmative duty on landlords, intended to impose such a broad duty on landlords.[80] Despite the Act's clear abolition of such

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71. *See* Rose v. Cardinal Indus., Inc., 588 N.E.2d 947, 950 (Ohio Ct. App. 6th Dist. 1990); Ricciardo v. Weber, No. CA-3452, 1989 Ohio App. LEXIS 4833, at *11 (Ohio Ct. App. 5th Dist. Dec. 22, 1989).

72. *See Rose*, 588 N.E.2d at 949-50; *Ricciardo*, No. CA-3452, 1989 Ohio App. LEXIS 4833.

73. No. CA-3452, 1989 Ohio App. LEXIS 4833.

74. *Id.* at *10-11.

75. *Id.* at *1. In *Ricciardo*, the guest entered a common stairwell through a double door, only to find that there was no landing behind the right-hand door. *Id.* at *3. There was only a stairway, through which the plaintiff-guest fell. *Id.* There was no light in the stairwell to facilitate navigation of the "dummy" door. *Id.* The court identified the guest as a licensee to whom the landlord owed only a duty "to refrain from wantonly or willfully causing injury." *Id.* at *9.

76. *Id.* at *14.

77. *Id.* at *15. The *Ricciardo* court acknowledged the *Shroades* court's recognition of an affirmative duty of landlords to maintain leased premises under the Act, but the court refused to extend the Act's coverage to a party other than the actual tenant because the *Shroades* court dealt only with landlord liability to a tenant. *Id.* The court in *Ricciardo* stated that "[t]here is no suggestion therein that that standard [applied in *Shroades*] was in any way to be extended beyond the specific parties named in the statute, i.e., the landlord and tenant." *Id.* at *16. Using the licensee distinction, the court found that the only duty owed the guest by the landlord was to refrain from wantonly or willfully causing her injury. *Id.*

78. *Id.* at *9.

79. *See* Seiger v. Yeager, 542 N.E.2d 1119, 1120-21 (Ohio C.P. Clermont County 1988); Damas v. Thompson, No. L-84-155, slip op. (Ohio Ct. App. 6th Dist. Sept. 14, 1984) (LEXIS, States library, Ohio file).

80. *See Damas*, No. L-84-155, slip op.; *see also Seiger*, 542 N.E.2d at 1120-21. The *Damas* case

immunities, these courts were reluctant to depart from the common law immunities that the licensee, and even invitee, distinctions had afforded landlords.[81] These courts, combined with the courts identifying guests as invitees but holding the Act inapplicable, left Ohio's law of landlord liability in complete disarray. Finally, in 1994, the Ohio Supreme Court, in *Shump v. First Continental-Robinwood Associates,*[82] attempted to settle the issue.

D. The Resolution of the Debate: The Shump *Decision*

In 1994, twenty years after the promulgation of the Act, the Ohio Supreme Court finally ruled on the extent of landlord liability under the Act.[83] The court recognized the lower courts' confusing and often incorrect interpretations of the Act.[84] The court, therefore, examined both the Act's provisions and the common law principles used by the lower courts, formulating a uniform standard of landlord liability applicable to tenants and guests.[85] The Ohio Supreme Court thus ended a long period of landlord immunity for guests' injuries sustained due to defective conditions of leased premises.[86]

1. Facts and Lower Court Decisions

On October 11, 1987, Sandra Burnside was the overnight guest of Ronald Daugherty at an apartment Daugherty leased from the defendant, First Continental-Robinwood Associates (First Continental), which owned and operated the apartment complex.[87] At 1:30 a.m., while Burnside slept in an upstairs bedroom of the two-story townhouse, a fire began in the couch in the downstairs living room as a result of careless smoking.[88] Both Burnside and Daugherty awoke and tried to escape, but they were overcome by carbon monoxide and died.[89] The apartment had only one smoke detector, which was

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involved a tenant's guest who fell due to a natural accumulation of ice and snow in the driveway adjacent to an apartment building owned by the defendants. *Damas*, No. L-84-155, slip op. The *Damas* court found "nothing in the language of *Shroades*, or in the language of the statute itself, which would indicate the intention of [section] 5321.04 to impose upon a landlord the duty to remove snow and ice, in contravention of the common law." *Id.*

81. *See* Rose v. Cardinal Indus., Inc., 588 N.E.2d 947, 949 (Ohio Ct. App. 6th Dist. 1990); *Seiger*, 542 N.E.2d at 1121. The *Rose* court relied upon the reasoning of the *Damas* court, declining to read the Act as extending a landlord's duty thereunder to social guests of tenants. *See Rose*, 588 N.E.2d at 949.

82. *See* Shump v. First Continental-Robinwood Assoc., 644 N.E.2d 291 (Ohio 1994); see also *infra* notes 82-117 and accompanying text for a discussion of the *Shump* case and its implications on landlord liability in Ohio.

83. *See Shump*, 644 N.E.2d 291.

84. *Id.*

85. *Id.* at 295-97.

86. *Id.*

87. Shump v. First Continental-Robinwood Assoc., No. 13173, 1993 Ohio App. LEXIS 2512, at *1 (Ohio Ct. App. 2d Dist. May 11, 1993).

88. *Id.* at *2.

89. *Id.*

installed on the ceiling above the stairway leading to the second floor and the upstairs bedrooms.[90] According to a neighbor, the smoke detector did sound at some point after the fire started.[91]

Two years later, Shump, the administrator of Burnside's estate, filed a wrongful death action against First Continental and Bill Goessl Electric, the subcontractor First Continental hired to install the smoke detector.[92] Shump alleged that the defendants were negligent in failing to install smoke detectors on both floors of the apartment as required by the smoke detector manufacturer and the city of Dayton fire prevention ordinances.[93] The trial court granted Goessl's motion for summary judgment, but it overruled that of First Continental.[94] Both Shump and First Continental appealed.[95] The appellate court dismissed both appeals for lack of jurisdiction.[96] On remand, pursuant to First Continental's motion for reconsideration, the trial court reversed its original decision and granted First Continental's motion for summary judgment.[97]

On a second appeal by Shump, the Second Appellate District Court reversed the trial court's final decision and remanded the cause for further proceedings.[98] The court of appeals found that the defendant's breach of its duty to maintain the apartment in a reasonably safe condition did not exonerate Goessl.[99] The court also found that genuine issues of material fact existed regarding First Continental's willful and wanton acts, and that the common law distinctions of invitee and licensee should continue to determine the landlord's duty owed to a tenant or guest.[100] First Continental appealed, and Shump cross-appealed.[101] Shump primarily argued that the court should abolish the

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90. *Id.*

91. *Id.* The smoke detector in the apartment operated by detecting particulates, which are the particles of soot and other substances that comprise common "smoke." *Id.* Since these particles are affected by gravity, the particles grow and become heavier, while the lighter carbon monoxide gases are not so affected. Thus, the heavier particles that must set off the detector rose to the detector long after the noxious carbon monoxide fumes. *Id.* at *2-3.

92. *Id.* at *3.

93. *Id.* The Dayton fire code conforms to the National Fire Protection Association's standards, which requires a smoke detector on each floor of a family living unit. *Id.* Shump alleged that if there had been a smoke detector on the lower floor of Daugherty's apartment, the detector would have sounded sooner than the upper detector, allowing the possibility for an escape. *Id.*

94. *Id.*

95. Shump v. First Continental-Robinwood Assoc., No. 12693 & 12695, 1991 Ohio App. LEXIS 4663 (Ohio Ct. App. 2d Dist. Oct. 1, 1991).

96. *Id.* at *3.

97. *See* Shump v. First Continental-Robinwood Assoc., 644 N.E.2d 291, 293-94 (Ohio 1994) (the trial court opinion that granted summary judgment for First Contenental-Robinson Association is unreported).

98. *Id.*

99. *See* Shump v. First Continental-Robinwood Assoc., No. 13173, 1993 Ohio App. LEXIS 2512 (Ohio Ct. App. 2d Dist. May 11, 1993).

100. *Id.* at *5-11.

101. *See Shump*, 644 N.E.2d 291.

Ohio premises liability common law distinction between licensees and invitees and that First Continental owed Burnside a duty of reasonable care.[102]

The Ohio Supreme Court allowed First Continental's motion and Shumps' cross-motion to certify the record, holding the common law distinctions of trespasser, licensee, and invitee did not govern the defendant's liability.[103] The court recognized the duty the Act imposes on landlords to all who are lawfully on leased premises, but stopped short of abolishing these distinctions.[104] Finally, the court affirmed the appellate court's decision denying the defendant's motion for summary judgment and remanded the case for a determination of whether the defendant breached its duty to Burnside under the Dayton city ordinance.[105]

2. Ohio Supreme Court Decision

The *Shump* court began its analysis of Burnside's claims by declaring "the duty that First Continental owed Burnside should [not] be governed by the common-law classifications of trespasser, licensee or invitee."[106] Rather, the court applied the "common law governing the tort liability of a landlord for injury or death caused by the dangerous condition of a leased premises" to the guest's claims.[107] The court noted the apartment was in the exclusive possession of Daugherty, the tenant, when the fire overtook Burnside.[108] Nevertheless, the court stated that "with regard to areas within the exclusive possession of a tenant, the common-law classifications [of trespasser, licensee, and invitee] do not affect the legal duty that a landlord owes a tenant or others lawfully upon the leased premises."[109]

After tracing the common law origins of the traditional immunity that landlords enjoyed thereunder,[110] the *Shump* court declared a "landlord's liability to a tenant is determined by a landlord's common-law immunity from liability and any exceptions to that immunity that a court or a legislative body

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102. *Id.* at 297-98.

103. *Id.*

104. *Id.* at 297. The court recognized that the General Assembly created the Act to abrogate the immunities for landlords carved out through the use of these distinctions. *Id.* The court held that the Act did not change the well-settled principle that a landlord owes the same duties to persons lawfully on the premises as the landlord owes to the tenant. *Id.* at 295. The court found that "it is improper to treat a tenant's guest as a licensee with regard to a landlord and to hold that a landlord merely owes a tenant's guest the duty to refrain from wanton or willful misconduct." *Id.* at 296.

105. *Id.* at 298.

106. *Id.* at 294.

107. *Id.*

108. *Id.* at 295.

109. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 357 & 362 (1965); W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 434 (5th ed. 1984)).

110. See *supra* notes 19-44 and accompanying text for a detailed discussion of the common law of landlord liability prior to the Act.

has created."[111] The court found section 5321.04 of the Act to be one of the "statutory exceptions to a landlord's common-law immunity [that] has expanded the duties a landlord owes to 'persons using rented residential premises.'"[112] The court refused to distinguish between the duties a landlord owes his tenants and the duties the landlord owes to those on the premises with the permission of a tenant.[113] The court, making clear its unwillingness to exempt landlords from liability on the basis of the status of the injured party, thus held that "a landlord owes the same duties to persons lawfully upon the leased premises as the landlord owes to the tenant."[114]

Turning to the Act, the *Shump* court found that the Act's provisions complement, rather than disturb, this common law principle.[115] The court thus determined the obligations that section 5321.04 of the Act imposes upon landlords extend equally to tenants and to other persons, such as guests, lawfully on the leased premises.[116] Through this combination of the common law and the Act, the Ohio Supreme Court resolved the twenty-year debate among the lower Ohio courts surrounding the Act's application to tenants' guests.[117]

III. ANALYSIS

While the Ohio Supreme Court in *Shump* clearly announced the Act's application to persons lawfully on leased premises, the opinion is problematic because it lacks guidance in other areas where landlords may still seek to avoid

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111. Shump v. First Continental-Robinwood Assoc., 644 N.E.2d 291, 295 (Ohio 1994). The court noted that Ohio recognized some of these exceptions when the Ohio Supreme Court declared, "[a] lessor of a building out of possession and control is not liable to the tenant or other person rightfully on the premises for their condition, *in the absence of deceit or of any agreement or liability created by statute*." *Id.* at 296 (emphasis added) (citing Stackhouse v. Close, 94 N.E. 746 (Ohio 1911)).

112. *Id.* (citing Shroades v. Rental Homes, 427 N.E.2d 774, 778 (Ohio 1981)).

113. *Id.* The court applied the principle that the licensee guest of a tenant "stands in the shoes" of the tenant for purposes of landlord liability. *Id.* (citing Caldwell v. Eger, 8 Ohio L. Abs. 47 (Ohio Ct. App. 8th Dist. 1929)). The court noted that "the proposition that a landlord owes the same duties to persons lawfully upon the rental property as the landlord owes to the tenant is not unique to Ohio." *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 357-58 & 419 (1965); RESTATEMENT (SECOND) OF PROPERTY §§ 17.6 n.5 & 19.1 (1977); W. E. Shipley, Annotation, *Modern Status of Landlord's Tort Liability for Injury or Death of Tenant or Third Person Caused by Dangerous Condition of Premises*, 64 A.L.R. 3d 339 (1975)).

114. *Id.* In so holding, the court explicitly rejected the reasoning of both *Rose v. Cardinal Industries, Inc.* and *Seiger v. Yeager*, which improperly treated tenants' guests as licensees of the landlord to hold that landlords merely owed guests the duty to refrain from wanton or willful misconduct. *Id.* (citing Rose v. Cardinal Indust., Inc., 588 N.E.2d 947 (Ohio Ct. App. 6th Dist. 1990); Seiger v. Yeager, 542 N.E.2d 1119 (Ohio C.P. Clermont County 1988)).

115. *Id.*

116. *Id.* at 297. The court found support for its position in section 5321.12 of the Act, which reads, "[i]n any action under Chapter 5321 of the Revised Code, *any party may recover damages* for the breach of contract or the *breach of any duty that is imposed by law*." *Id.* (emphasis added) (citing OHIO REV. CODE ANN. § 5321.12 (Anderson 1986 & Supp. 1994)).

117. See *supra* notes 52-81 and accompanying text for a discussion of the Ohio courts' conflicting interpretations of landlord liability under the Act prior to *Shump*.

liability. This Section identifies the areas in which landlords still may be immune from liability and poses solutions to close those loopholes. First, this Section reconciles the *Shump* court's silence regarding whether the notice requirement is still applicable to landlord liability under the Act.[118] Next, this Section addresses the proper role of the common law distinctions of invitee, licensee, and trespasser in an analysis of landlord liability.[119] Finally, this Section suggests that Ohio abolish both the notice requirement and the common law classifications in order to streamline the law of premises liability.[120]

A. The Notice Requirement Loophole

Although the *Shump* decision effectively ended the twenty-year period of confusion among the state's lower courts regarding the proper scope of the Act, the Ohio Supreme Court left intact some of its own jurisprudence that may complicate the area of landlord liability in the future if it remains unaddressed. The court seemingly put to rest the musings of lower courts in this area by unequivocally declaring that the Act imposes a duty upon landlords to maintain rented premises in accordance with the standards specified in section 5321.04 of the Act. The Ohio Supreme Court's failure to address whether tenants and guests still must provide their landlords notice of defects ultimately resulting in injury, however, threatens to provide an escape for landlords under the Act. The relatively simple rule set forth in *Shump* that treats all persons lawfully on leased premises alike, thus, belies the rather complicated history of rental premises liability and leaves open an avenue to landlords seeking to avoid liability.

Ohio courts traveled various paths in interpreting the Act and its coexistence with the pre-existing common law.[121] Of particular note in the pre-*Shump* era was the Ohio Supreme Court's decision in the *Shroades* case.[122] In *Shroades*, the court found the landlord liable to a tenant because the Act imposed an affirmative duty upon the landlord to maintain the rented premises in a safe condition and to repair defects.[123] The *Schroades* court declared that a violation of the duties imposed by the Act amounted to negligence per se.[124] The court, however, qualified that liability by imposing upon a plaintiff the

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118. *See infra* notes 121-28 and accompanying text.

119. *See infra* notes 129-35 and accompanying text.

120. *See infra* notes 121-35 and accompanying text.

121. See *supra* notes 52-81 and accompanying text for a discussion of the approaches Ohio courts took in melding the common law with the Act.

122. *See supra* notes 59-68 and accompanying text.

123. Shroades v. Rental Homes, 427 N.E.2d 774, 778 (Ohio 1981). The court in *Shroades* held that the General Assembly, in promulgating the Act, "intended to both provide tenants with greater rights and to negate the previous tort immunities for landlords." *Id.* at 777-78.

124. *Id.* at 778.

requirement of showing that the landlord had notice of the defective condition of the premises or knew of the defect, or that the tenant himself had made reasonable, yet unsuccessful, attempts to notify the landlord of the problem.[125] Following *Shroades*, some Ohio courts imposed this notice requirement to exempt landlords from liability even where it appeared that the Act mandated liability.[126] These courts merely found that the landlords lacked the notice necessary to expose them to liability under the Act.[127]

In *Shump*, the Ohio Supreme Court did not address this potential loophole in the Act's coverage of injured tenants and guests. While the *Shump* court did mandate landlord liability for injuries to tenants and guests pursuant to the Act, the court neither accepted nor rejected the notice requirement set forth in *Shroades*.[128] The danger in the *Shump* court's omission of the notice requirement is that the notice requirement remains a possible immunity from liability for landlords. The Ohio Supreme Court, in *Shump*, did not clarify whether it intended to abolish the notice requirement from future analyses under the Act. Rather, the *Shump* court's silence effectively left the notice requirement available to both landlords seeking to escape liability and to courts seeking to allow landlord immunity from liability precluded by law. So long as the law set forth in *Shroades* remains untouched, the Act's provisions may be insufficient to protect injured tenants and guests.

B. Suggestions for Further Improvements in the Law of Landlord Liability

Although the Ohio Supreme Court made great strides in simplifying the law of premises liability in *Shump*, the court's failure to address the notice requirement's continued viability left a gaping hole in this area. If the Ohio Supreme Court is to realize its professed goal of securing protection for tenants and their guests, either the court or the Ohio General Assembly must address the notice requirement. The ideal remedy is an amendment to the Act unequivocally stating that a landlord need not have notice of a defective condition to nonetheless incur liability for injuries suffered upon the landlord's premises by tenants or guests. If the *Shump* court was correct in its assessment of the Ohio General Assembly's intent to protect tenants and guests from

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125. *Id.*

126. *See* Jones v. Greene Countrie Apts., No. 94APE01-105, 1994 Ohio App. LEXIS 2587 (Ohio Ct. App. 10th Dist. June 14, 1994); Rodriguez v. Rodriguez, C.A. No. L-86-167, slip op. (Ohio Ct. App. 6th Dist. Feb. 6, 1987) (LEXIS, States library, Ohio file). In *Greene Countrie Apartments*, the court found that although section 5321.04 of the Act imposes an affirmative duty on landlords to repair and to maintain leased premises, the notice requirement obviated that duty and allowed a landlord to escape liability under the Act. *Greene Countrie Apts.*, No. 94APE01-105, 1994 Ohio App. LEXIS 2587, at *3.

127. *See Greene Countrie Apts.*, No. 94APE01-105, 1994 Ohio App. LEXIS 2587, at *6; *Rodriguez*, C.A. No. L-86-167, slip op.

128. *See* Shump v. First Continental-Robinwood Assoc., 644 N.E.2d 291 (Ohio 1994). See *supra* notes 83-117 and accompanying text for a detailed discussion of the facts, holding and reasoning in the *Shump* case.

hazardous rental premises, the General Assembly should have no qualms about furthering that purpose.[129] Only with an amendment abolishing the notice requirement can tenants and guests secure the protection the Act guarantees.

In addition to abolishing the notice requirement, the General Assembly or the Ohio Supreme Court should take the final step needed to streamline the law of premises liability by abolishing the common law distinctions of invitee, licensee, and trespasser. As long as these classifications exist, they threaten to cloud the law that the *Shump* court attempted to clear. Officially eliminating these distinctions would put to rest any possible confusion regarding the law of premises liability. This disavowal would also prevent landlords from escaping liability by using the distinctions as a defense against guests' claims. If *Shump* remains the definitive law on landlord liability, the exceptions to the Act, such as the notice requirement, combined with the common law distinctions, may obliterate the coverage the Act affords to injured parties because landlords could easily claim a lack of notice of the defective conditions or invoke another exception to the Act in order to circumvent the Act's coverage.[130]

To further prevent landlords from escaping liability, Ohio should follow the lead of other states that have removed the common law classifications from consideration of landlord liability under statutes similar to the Act.[131] In addition to those states that have enacted premises liability statutes, many other states also have disavowed the use of the common law distinctions by imposing a duty of reasonable care upon landlords.[132] These states have removed from

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129. In *Shroades*, the Ohio Supreme Court found the General Assembly's purpose in promulgating the Act was to "balance the competing interests of landlords and tenants" by recognizing the "changed rental conditions and the definite trend to provide tenants with greater rights." Shroades v. Rental Homes, 427 N.E.2d 774, 777 (Ohio 1981).

130. Landlords still can escape liability under the current law by claiming an exemption, such as a lack of notice, from the Act as well as invoking the common law distinctions to classify their injured guests as licensees to whom they owe no affirmative duty. Further, landlords can admit that the guests are invitees, but that the landlords had no notice of the defective conditions on the premises. In either circumstance, landlords may still avoid liability by invoking the common law distinctions if the distinctions remain intact.

131. *See* KAN. STAT. ANN. § 58-2501-25, 126 (1994); OR. REV. STAT. § 90.100-940 (1990 & Supp. 1994); Jackson v. Wood, 726 P.2d 796 (Kan. Ct. App. 1986); Humbert v. Sellars, 708 P.2d 344 (Or. 1985). In *Jackson*, the court declared the invitee, licensee and trespasser distinctions were irrelevant in its analysis of landlord liability to a tenant's guest. *Jackson*, 726 P.2d at 798-99. The court instead focused on the contracted-for exception to landlord immunity imposed by the Kansas Residential Landlord and Tenant Act. *Id.* The court decided that, "under the rule of liability created by the [statutory] exception [to landlord immunity], the landlord owes a duty of reasonable care to perform his contract to repair to both invitees and licensees," rendering the status of the injured parties immaterial. *Id.* at 798.

In *Humbert*, the Oregon Supreme Court found "[m]inimum standards of safety and fitness for human habitation *have not been left to* private ordering and *the inventiveness of common-law courts*; they have long been imposed by state and local lawmakers." 708 P.2d at 346 (emphasis added). The *Humbert* court relied on the tradition of housing codes and other states' landlord-tenant acts, all of which are "enforceable by public officials or by special civil remedies accorded the tenant." *Id.* (citing Jean C. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability*, 1975 WIS. L. REV. 19, 42-8 (1975)).

132. *See* Becker v. IRM Corp., 698 P.2d 116 (Cal. 1985); Mansur v. Eubanks, 401 So. 2d 1328 (Fla. 1981); Stephens v. Stearns, 678 P.2d 41 (Idaho 1984); Young v. Garwacki, 402 N.E.2d 1045 (Mass. 1980);

consideration of landlord liability the issue classifying guests as invitees, licensees, or trespassers, as well as additional issues, such as control, hidden defects, and common and public use.[133] Instead, the statutes impose general tort liability upon negligent landlords.[134] While the *Shump* court shifted the focus of landlord liability to a standard of reasonable care, landlords still may avoid responsibility for the condition of their rented premises by implementing these common law distinctions, since neither the Ohio Supreme Court nor the General Assembly has extinguished them. Accordingly, either the Ohio Supreme Court or the General Assembly must ensure uniformity of premises liability law by ridding the law of these potentially confusing distinctions.

The Ohio Supreme Court or the General Assembly could easily remedy the defects and fill the gaps in the existing law by declaring all violations of the Act negligence per se. For nearly a century, the Ohio Supreme Court has favored this approach for statutes intended to protect the public.[135] Such a change to the law should prevent landlords from escaping liability by claiming an exemption from the Act's coverage based upon some combination of a lack of notice, statutory exception, or common law distinction.

IV. CONCLUSION

Ohio has made significant progress in its strides away from the traditional immunity that landlords enjoyed under the common law. At one time, Ohio landlords were virtually free from all responsibility to their tenants and others on their rental premises. Ohio now has become a somewhat vigilant protector of the rights of injured parties on leased property. The Act reinforced and codified the exceptions that had developed to common law landlord immunity, thus affording some protection to tenants and guests, but the Act's scope was unclear for twenty years. In *Shump*, the Ohio Supreme Court only partially closed the holes that the lower courts had carved into the Act's imposition of

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Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973); Corrigan v. Janney, 626 P.2d 838 (Mont. 1981); Turpel v. Sayles, 692 P.2d 1290 (Nev. 1985); Sargent v. Ross, 308 A.2d 528 (N.H. 1973); Favreau v. Miller, 591 A.2d 68 (Vt. 1991); Pagelsdorf v. Safeco Ins. Co., 284 N.W.2d 55 (Wis. 1979).

133. *See Mounsey*, 297 N.E.2d at 52 ("[T]his 'reasonable care in all the circumstances' standard will provide the most effective way to achieve an allocation of the costs of human injury which conforms to present community values."); *Sargent*, 308 A.2d at 535 ("[O]ur decision will shift the primary focus of inquiry for judge and jury from the traditional question of 'Who had control?' to a determination of whether the landlord . . . exercised due care under all the circumstances.").

134. *Id.*

135. *See* Schell v. DuBois, 113 N.E. 664, 667 (Ohio 1916). The *Schell* court declared a violation of an ordinance that was "passed in the proper exercise of the police power for the protection of the public," is negligence per se. *Id.* Further, that court stated that a defendant whose violation of such a statute is the proximate cause of an injury to a plaintiff is liable for the injury. *Id.* The Ohio Supreme Court has followed that logic in many subsequent cases, reaffirming that "[a]s a general rule of statutory construction, a statute enacted for the safety and protection of the public can impose a specific requirement to do or not to do a particular act," and a violation of that type of statute constitutes negligence per se. Becker v. Shaull, 584 N.E.2d 684, 685 (Ohio 1992); *see also* Ornella v. Robertson, 237 N.E.2d 140 (Ohio 1968); Eisenhuth v. Moneyhon, 119 N.E.2d 440 (Ohio 1954); Koppelman v. Springer, 104 N.E.2d 695 (Ohio 1952).

an affirmative duty on landlords by clarifying and restating that duty to act reasonably.

The Ohio General Assembly's purpose in promulgating the Act was to ensure tenants and other parties injured on leased property a remedy against negligent landlords. Although the *Shump* court aptly noted this admirable intent, the court did not go far enough to ensure the Act's effectiveness. By leaving unanswered the questions of the applicability of both the notice requirement of the Act and the common law distinctions of invitee, licensee and trespasser, the Ohio Supreme Court left open the possibility that courts may still excuse landlords from liability under the Act. To complete the state's journey toward reliable protection of injured parties on rental premises, either the court or the General Assembly must address these issues. Only when the notice requirement and the common law distinctions are abolished and the Act is interpreted and applied properly will injured parties have an avenue of relief against negligent landlords.

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