№ 2006-_____

In the Supreme Court of Ohio

DONNA J. STEWART, et al., 06-2029

Plaintiff-Appellee

v.

THE LAKE COUNTY HISTORICAL SOCIETY,

Defendant-Appellant.

ON DISCRETIONARY APPEAL FROM THE
COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO
CASE № 2004-L-164

FILED
NOV 02 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF JURISDICTION

MARK M. SIMONELLI (0065965)
MARK M. SIMONELLI CO., L.P.A.
P.O. Box 319
Willoughby, OH 44096-0319
Tel: (440) 375-0420

Counsel for Plaintiffs-Appellees,
David and Donna J. Stewart

TIMOTHY J. FITZGERALD (0042734)
(Counsel of Record)
COLLEEN A. MOUNTCASTLE (0069588)
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Tel: (216) 241-5310
Fax: (216) 241-1608
E-mail: tfitzgerald@gallaghersharp.com
cmountcastle@gallaghersharp.com

Counsel for Defendant-Appellant
The Lake County Historical Society, Inc.

TABLE OF CONTENTS

Page:

EXPLANATION OF WHY THE ISSUES RAISED IN THIS CASE ARE OF PUBLIC OR GREAT GENERAL INTEREST. 1

STATEMENT OF THE CASE AND FACTS 4

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 6

Proposition of Law No. I: A plaintiff in a premises liability case who is not "disabled" under the Americans with Disabilities Act of 1990, Section 12101, Title 42, U.S. Code, as amended, is not within the class of persons the ADA was intended to protect and, thus, noncompliance with an ADA regulation governing the slope of ramps installed on the premises cannot be relied upon by that plaintiff as evidence of an unreasonably unsafe condition in order to establish negligence. 6

Proposition of Law No. II: Whereas the duty to inspect extends only to latent and/or concealed defects or dangerous conditions on the premises that pose an unreasonable risk of harm or injury to an invitee, the owner or occupier of premises owes no duty to inspect for an insubstantial defect that is not unreasonably hazardous although it is a deviation from a regulation, based upon the Americans with Disabilities Act of 1990, Section 12101, Title 42, U.S. Code, as amended, governing the slope of ramps installed on the premises. 10

Proposition of Law No. III: A violation of an administrative regulation does not preclude application of the open and obvious doctrine in a premises liability action. 13

CONCLUSION 15

CERTIFICATE OF SERVICE 17

TABLE OF CONTENTS (continued)

APPENDIX

Opinion of the Eleventh Appellate District, dated September 18, 2006 ..... Apx. p. 01

Journal Entry of the Eleventh Appellate District, dated September 18, 2006 .. Apx. p. 16

Journal Entry of the Lake County Court of Common Pleas, dated September 10, 2004, granting Lake County Historical Society's motion for summary judgment ..... Apx. p. 17

EXPLANATION OF WHY THE ISSUES RAISED IN THIS CASE ARE OF PUBLIC OR GREAT GENERAL INTEREST

In Ohio, owners and occupiers of property have never been held to be insurers of the safety and well-being of those persons who come upon the property as invitees. That long-standing and well-established legal principle is in jeopardy and sure to change if the decision of the Eleventh Appellate District in the case at bar is permitted to stand.

Stewart v. The Lake County Historical Society, Inc., 11th Dist. No. 2004-L-164, 2006-Ohio-4822, raises three important issues of public and great general interest. First, in its 2-1 decision, the appellate court held that a plaintiff in a premises liability case who is not "disabled" under the Americans with Disabilities Act of 1990 ("the ADA") can rely upon an ADA administrative regulation to establish negligence. Second, the appellate court determined that a duty is imposed upon owners or occupiers of premises to inspect the premises for any and all deviations from ADA regulations, no matter how insubstantial the defect may be, and to protect those persons on the property from conditions that are not unreasonably hazardous. Lastly, the Eleventh Appellate District stated that because there was a violation of an administrative rule, the open and obvious doctrine was inapplicable to the premises liability action.

For the reasons set forth herein, the *Stewart* decision should not be the law in the Eleventh Appellate District or any other appellate district in Ohio.

In reversing the trial court's summary judgment decision in favor of Appellant, The Lake County Historical Society ("Historical Society"), the Eleventh Appellate District has held that a premises owner's technical noncompliance with an ADA regulation governing the slope of ramps is sufficient evidence to overcome summary judgment in a premises liability action brought by a non-disabled individual. The appellate court's decision counters the basic tort law

principal that for an administrative rule to create a standard of conduct, the violation of which may serve as evidence of negligence, the injured person must be a member of the class that the rule was designed to protect. The scope of the ADA's applicability in premises liability cases is an issue which this Court has not yet addressed. However, in light of the Eleventh Appellate District's unprecedented expansion of the ADA to cover the liability of a premises owner or occupier to a case involving a non-disabled person, the time has come for this Court to address this specific issue and provide much needed guidance to the public, bar and lower courts regarding the legal scope of the ADA in this developing area of the law.

The law established by the Eleventh Appellate District's decision also will expand the civil liability of property owners, occupiers and managers, for otherwise trivial and insignificant deviations, whether based upon ADA guidelines or other administrative building codes. In addition to conflicting with the Sixth Appellate District's decision in *Klostermeier v. In & Out Mart* (Mar. 30, 2001), 6th Dist. No. L-00-1204, the Eleventh Appellate District's decision runs afoul of this Court's ruling in *Helms v. American Legion, Inc.* (1966), 5 Ohio St.2d 60. The Eleventh Appellate District's decision expands the duty of property owners from a requirement of warning of latent hazardous defects that expose invitees to unreasonable risks of harm or injury, to performing inspections for the most minute and insubstantial building code infractions. Instead, the law in Ohio regarding the violation of ADA regulations should comport with the long standing rule in Ohio that a premises owner's duty to inspect extends only to latent and/or concealed hazardous defects or dangerous conditions on the premises that pose an unreasonable risk of harm or injury to an invitee.

This is an issue that is of vital interest to all persons, insurers, premises owners and occupiers of public buildings throughout the State of Ohio. The appellate court's holding that an

insignificant deviation from an ADA building code can be evidence of negligence will have a sweeping impact on property owners, managers and their insurers not just in the Eleventh Appellate District but also in other parts of the state if the *Stewart* decision is adopted elsewhere. As such, this Court should accept this case to clarify that the law in Ohio regarding a premises owner or occupier's duty to inspect does not extend to insubstantial deviations that are not unreasonably hazardous, even when it is a deviation from an ADA-mandated regulation governing the slope of ramps installed on the premises.

Finally, the Eleventh District also held that the open and obvious doctrine was not applicable because the hazard created was due to the slope of the ramp exceeding ADA standards. This Court has not expressly addressed this issue, however, courts of appeal that have directly addressed the issue have reached different conclusions regarding whether an alleged violation of an administrative rule prohibits application of the open and obvious doctrine and precludes summary judgment on a negligence claim. Like the Eleventh Appellate District, the First and Tenth Appellate Districts have held that the open and obvious doctrine does not apply in the face of a purported agency rule violation. See, e.g., *Francis v. Showcase Cinema Eastgate,* 155 Ohio App. 3d 412, 2003-Ohio-6507; *Uddin v. Embassy Suites Hotel,* 165 Ohio App. 3d 699, 2005- Ohio-6613. However, the Second, Fifth, Eighth and Twelfth Appellate Districts have all held that an alleged administrative rule violation does not prohibit application of the open and obvious doctrine. See, e.g., *Souther v. Preble Cty. Dist. Library, West Elkton Branch,* 12th Dist. No. CA 2005-04-006, 2006-Ohio-1893; *Olivier v. Leaf & Vine,* 2nd Dist. No. 2004 CA 35, 2005-Ohio-1910; *Ryan v. Guan,* 5th Dist. No. 2003CA00110, 2004-Ohio-4032. See also, *Clements v. First Choice Haircutters* (Dec. 17, 1992), 8th Dist. No. 63714 and *Orens v. Ricardo's Restaurant* (Nov. 14, 1996), 8th Dist. No. 70403. In accepting jurisdiction over this case, the Court will be

able to harmonize the inconsistent lower court decisions on this issue by determining, as set forth in Proposition of Law III, that a violation of an administrative regulation does not preclude application of the open and obvious doctrine.

STATEMENT OF THE CASE AND FACTS

On November 13, 2003, Appellees, Donna and David Stewart ("the Stewarts"), commenced the instant action. Donna Stewart ("Mrs. Stewart"), performed seasonal volunteer work for the Historical Society. On June 6, 2002, Mrs. Stewart was injured when she slipped and fell while traversing a ramp located at the entrance of the Historical Society's one room schoolhouse. A set of stairs were also located at the entrance of the schoolhouse. The ramp at issue was constructed by volunteers on behalf of the Historical Society.

The Stewarts allege that Mrs. Stewart, who was not disabled as defined under the ADA, sustained injuries because the Historical Society failed to properly construct and maintain the ramp, as required by the ADA. The Lake County Court of Common Pleas granted summary judgment in favor of the Historical Society, determining that the ramp's failure to comply with ADA standards could be considered as evidence of negligence, but that the Historical Society had neither notice nor knowledge of the defect and, thus, was not negligent. The Stewarts appealed from the trial court's decision, and the Eleventh District Appellate Court reversed the trial court's summary judgment decision.

Judge Colleen Mary O'Toole, wrote the opinion of the appellate court and Judge Cynthia Westcott Rice concurred in judgment only. The appellate court determined that property owners have a duty to construct handicapped accessible ramps in compliance with the ADA and the applicable building standards. The court further determined that once a property owner authorizes the construction of a ramp, it must inspect the ramp to make sure that it complies with

all applicable building codes and laws. The court held that the Historical Society's admission that the ramp violated ADA requirements presented evidence establishing a genuine issue of material fact as to whether the ramp had a substantial defect and whether the Historical Society was negligent in constructing or maintaining the ramp. The appellate court found that the evidence that the ramp failed to meet ADA criteria, while not negligence per se, is evidence of general negligence, which should have been construed in the Stewarts' favor.

Although the appellate court found that Mrs. Stewart testified that she had traversed the ramp on many previous occasions without incident, and that her testimony further established that hundreds of school children had also used the ramp without incident, the court determined that because members of the general public would be without knowledge of the ADA's maximum slope requirements, a business invitee would be unable to determine that the ramp's slope was potentially hazardous. Accordingly, it held that the open-and-obvious doctrine was not applicable. Thus, the court determined that the resolution of this case turned on the issue of the Historical Society's notice or knowledge of the ramp's defects.

The appellate court determined that once the evidence establishes that a dangerous condition exists on the premises (which in this case was the ADA violation), and that it is a condition about which the owner should have known, evidence of actual knowledge on the owner's part is unnecessary. The appellate court thus held that the Historical Society had an affirmative duty to inspect its premises for defective or dangerous conditions which might involve an unreasonable risk of harm to an invitee.

In her dissenting opinion, Judge Diane Grendell found that the ADA violation at issue could only be evidence of general negligence if Mrs. Stewart was a protected person under the ADA. In other words, while the slope of the ramp could have been a potential hazard to a

disabled person, it was not dangerous to Mrs. Stewart. The dissent also found that summary judgment was appropriate because Mrs. Stewart would have already been aware of the alleged hazards of the ramp due to her frequent prior use of it. Judge Grendell noted that in order for premises liability to attach in a negligence case, the condition of the premises must be unreasonably hazardous, not a mere trivial imperfection. Here, referring to pictures made part of the record, the dissent found that the slope was not unreasonably high. Thus, while the slope of the ramp was not ADA-compliant, Judge Grendell, citing to this Court's decision in *Raflo v. Losantiville Country Club* (1973), 34 Ohio St.2d 1, found that it was "an insubstantial defect, not an unreasonably dangerous condition."

Nonetheless, the Eleventh Appellate District concluded that genuine issues of material fact remain with respect to the Historical Society's constructive knowledge of the ramp's allegedly defective condition, its potential negligence and breach of duty in constructing and/or inspecting the ramp, and whether the ramp's defect caused Mrs. Stewart's fall and injuries. Without addressing Mrs. Stewart's own knowledge of the condition of the ramp from her prior use, the appellate court reversed the judgment of the trial court and remanded the matter for further proceedings consistent with the appellate court's opinion.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A plaintiff in a premises liability case who is not "disabled" under the Americans with Disabilities Act of 1990, Section 12101, Title 42, U.S.Code, as amended, is not within the class of persons the ADA was intended to protect and, thus, noncompliance with an ADA regulation governing the slope of ramps installed on the premises cannot be relied upon by that plaintiff as evidence of an unreasonably unsafe condition in order to establish negligence.

The ADA defines unlawful discrimination to include the failure "to design and construct facilities" that are "readily accessible to and usable *by individuals with disabilities*." (Emphasis

added.) Section 12183(a)(1), Title 42, U.S. Code. The ADA charges the Attorney General of the United States with promulgating standards for the accessible design of buildings and facilities governed by the statute. Section 12186(b), Title 42, U.S. Code. In exercising this authority, the Department of Justice has promulgated regulations requiring that new construction and alterations of facilities governed by Title III comply with the standards for accessible design contained in the Americans with Disabilities Act Guidelines for Buildings and Facilities (ADAAG). The Stewarts maintain that the slope of the ramp at issue failed to comply with ADAAG 4.82.

In *Chambers v. St. Mary School*, 82 Ohio St.3d 563, 1998 Ohio 184, this Court held that a violation of an administrative rule may be admissible as evidence of general negligence. Id. at 568. However, in *Chambers* the specific issue before this Court was whether a violation of Ohio's Basic Building Code ("OBBC") constituted negligence. This Court did not consider the consequences of a violation of an ADA regulation or any other administrative rule designed to protect a specific class of persons. This distinction is important because in this instance Mrs. Stewart was not a member of a class of persons protected under the ADA. The provisions of the OBBC, which were at issue in *Chambers,* apply to the general population. In contrast, the ADA applies to a very specific class of persons. By applying the holding in *Chambers* to the instant action, the scope of this Court's ruling has been expanded well beyond what was intended in *Chambers*.

Under the basic principles of tort law, for an administrative rule to create a standard of conduct, the violation of which is evidence of negligence, the injured person must be a member of the class that the rule was designed to protect. See, 70 O.Jur.3d, Negligence, §60 at 156-157 ("The violation of a statute or ordinance, to constitute negligence, requires the showing that the

obligation imposed was for the benefit of the person alleging injury."); Restatement of the Law, Second, Torts, § 286(a). As stated in the dissenting opinion in *Stewart*, the violation of the ADA regulation in this case is not evidence of general negligence. *Stewart*, at ¶42. The standards of the ADA are designed for the protection of disabled persons.[1] Id. The fact that the slope of the ramp exceeds ADA standards would be some evidence of negligence if, and only if, Mrs. Stewart was a disabled person. Id.

In *Souther*, supra, the plaintiff in a premises liability action argued that the county was negligent because its library was not handicapped accessible. The appellate court dismissed outright the plaintiff's claim for premises liability premised on the violation of the ADA because the plaintiff was not a protected person under the ADA. The *Souther* court simply stated that this was not evidence of per se negligence, it did not make a ruling with respect to a general negligence claim. Likewise, in *Scheetz v. Kentwood, Inc.*, 123 Ohio App.3d 20, 2003-Ohio-1209, the Eleventh Appellate District found that for an individual to recover on a claim of breach of statutory duty, he must be within the class for whose benefit the statute was enacted. Therefore, persons who do not suffer from a covered disability cannot recover for a violation of the ADA. The court did not analyze whether an allegedly defective ramp created a duty of care owed to a non-disabled individual.

---

[1] The *Stewart* majority opinion cited to R.C. 3781.111 as support for the decision that the ADA guidelines create a duty owed to the plaintiff, a non-disabled person. However, R.C. 3781.111, like the ADA, applies exclusively to the creation of "standards and rules to facilitate the reasonable access and use by all persons ***with a disability***." R.C. 3781.111(A) (emphasis added). Revised Code 3781.111's reference to "disability" has the same meaning as in R.C. 4112.01(A)(13)("'Disability' means a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment."). See, R.C. 3781.111(D).

In *Smith v. Wal-Mart Stores, Inc.* (C.A., 1999), 167 F.3d 286, the Sixth Circuit Court of Appeals noted, while analyzing Georgia law, that the "ADA could be the basis for a breach of duty" claim as long as the person claiming the breach was within the class for whose benefit the statute was enacted. See, id. at 293. In reaching this conclusion, the Sixth Circuit cited *Manley v. Gwinnett Place Assocs., L.P.* (1995), 216 Ga. App. 379, 454 S.E.2d 577, overruled on other grounds, *Fluornoy v. Hospital Authority* (1998), 232 Ga. App. 791, 504 S.E.2d 198, in which the plaintiff fell on a handicapped access ramp leading from a parking lot to a shopping mall. The Georgia court held that the ADA did not apply for determining the standard of care, specifically because the plaintiff in *Manley* "was not in the class of persons for whose benefit the Americans With Disabilities Act was enacted, since she was not disabled." *Manley*, 216 Ga. App. at 381, 454 S.E.2d at 579. The Sixth Circuit read *Manley* as implying that if the plaintiff had been within the protected class, the ADA could form the basis for a negligence action under Georgia law.

The Eleventh Appellate District erred in finding that a violation of a building code implemented pursuant to the ADA could be considered as general negligence in an action brought by a non-disabled individual, as such, its decision should not be the law in the Eleventh District or in any other district in Ohio. The fact that little case law exists on this issue heightens the likelihood that other Ohio courts will rely on the Eleventh District's erroneous decision. This Court should accept this case for review so that this misapplication of the *Chambers* decision is not perpetuated in the Eleventh District or other Ohio courts.

Proposition of Law No. II: Whereas the duty to inspect extends only to latent and/or concealed defects or dangerous conditions on the premises that pose an unreasonable risk of harm or injury to an invitee, the owner or occupier of premises owes no duty to inspect for an insubstantial defect that is not unreasonably hazardous although it is a deviation from a regulation, based upon the Americans with Disabilities Act of 1990, Section 12101, Title 42, U.S. Code as amended, governing the slope of ramps installed on the premises.

In *Stewart*, the Eleventh Appellate District determined that once a property owner authorizes the construction of a ramp, it must inspect the ramp to make sure that it complies with all applicable building codes and laws. *Stewart* at ¶19. Its decision contradicts the position of the Sixth Appellate District in *Klostermeier*, supra. The plaintiff in *Klostermeier* was a protected person under the ADA. She fell after her slipper caught in an automatic door which closed faster than permitted under the ADA regulations. The appellate court affirmed summary judgment in favor of the premises owner. The court in *Klostermeier* relying on *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77, held in order to impose a duty upon the premises owner, the plaintiff must show that the premises owner had knowledge or should have known that the door was not calibrated correctly and that injury was likely to result from the defect. *Klostermeier,* 2001 Ohio App. Lexis 1499 at *10-11. The Sixth Appellate District found that the facts, even when construed in a light most favorable to plaintiff did not support such finding. Id. No other accidents or complaints occurred involving the door and the plaintiff used it numerous times without incident. The premises owner had the door repaired by a third party and had no notice that the repair may not have been within ADA standards. Thus, the premises owner had no notice of any hazardous condition, and not duty arose. Unlike the Eleventh Appellate District's position, there was no continuing duty on the part of the premises owner to inspect and insure that the work complied with all applicable building codes and laws.

Essentially, the Eleventh Appellate District's decision expands the duty of property

owners from a requirement of warning of latent defects that expose invitees to an unreasonable risk of harm or injury, to performing inspections in perpetuity for the most minute and insubstantial building code infractions, even those that do not expose invitees to an unreasonable risk of harm or injury. This is a clear deviation from the long-standing law applicable to premises liability actions. This Court has held that "[t]he owners or occupiers of private premises are not insurers of the safety of pedestrians traversing those premises, and minor or trivial imperfections therein, which are not unreasonably dangerous and which are commonly encountered and to be expected, as a matter of law do not create liability on the part of such owners or occupiers toward a pedestrian who, on account of such minor imperfection, falls and is injured." *Helms v. American Legion, Inc.*, 5 Ohio St.2d at syllabus. Otherwise, such owner or occupier would be placed in the position of an insurer, and the law does not go that far." See, id. at 62.

In *Raflo*, supra, the plaintiff was injured upon descending from a step that was two inches greater than the height requirement set forth in the Ohio Building Code. Although this Court did not make a determination of whether the deviation from the building code was an insubstantial defect, it stated that "injuries occasioned by insubstantial defects should not be actionable unless circumstances render them 'unreasonably dangerous.'" Id. at 4. The holding in *Raflo*, which is applicable herein, states that a plaintiff who encountered a building code violation can not maintain that the defect was insubstantial upon entry of a building, but was an unreasonably dangerous hazard upon leaving the building. See, id. at syllabus.

Ohio appellate courts have held that trivial building code violations do not create a duty to a business invitee. In *Kornowski v. Chester Properties, Inc.*, (Jun. 30, 2000), 11th Dist. No. 99-G-2221, 2000 Ohio App. LEXIS 3001, a restaurant patron fell while stepping down from a

riser that did not comply with the height requirements set forth in the OBBC or the ADA. However, the building at issue in *Kornowski* did not have to comply with the OBBC or the ADA because it was existing at the time the code became effective. See Ohio Adm. Code 4101:2-1-9. Nonetheless, the court still analyzed whether the step which was 3/4 of an inch higher than permitted under the OBBC was a serious hazard. The court held that a two-inch riser does not constitute a substantial defect imposing liability on a restaurant owner, especially in light of the open and obvious nature of the step-down. Id at *12.

Relying on *Helms*, the Eighth Appellate District in *Clements* found that the building code violation at issue was a trivial defect, and thus held that a premises owner owed no duty to a business invitee. The appellate court reasoned that the business invitee was previously on the premises two or three timess and saw and safely used the defective step on those occasions. Id.

"Premises are not unreasonably dangerous where the defect in the premises is insubstantial and of the type that passersby commonly encounter." *Baldauf v. Kent State Univ.* (1988), 49 Ohio App.3d 46, paragraph three of the syllabus. "In a case where a defect in the premises is so trivial or minor and is of the type routinely encountered as not to give rise to the landowner's liability, the question of the landowner's notice is irrelevant." Id. There is no reason why this basic tenet of premises liability law should not apply in cases involving trivial violations of ADA-mandated building codes. To hold otherwise puts premises owners in the position of having to strictly comply with a multitude of administrative rules which this Court has deemed a virtually impossible task. See, *Chambers*, at 568. Accordingly, a review of the Eleventh Appellate District's decision is warranted so that this Court can establish the proposition that an owner or occupier of a premises owes no duty to inspect for an insubstantial defect that is not unreasonably hazardous even though it is a deviation from an ADA-mandated

regulation governing the slope of ramps installed on the premises.

> **Proposition of Law No. III:** A violation of an administrative regulation does not preclude application of the open and obvious doctrine in a premises liability action.

Whether a duty exits is a question of law for a court to determine. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318. The open-and-obvious doctrine, concerns the first element of negligence law, the existence of a duty. *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573 at ¶8. In *Armstrong*, this Court held that the open-and-obvious doctrine remains viable in Ohio. Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises. Id. at ¶14.

The Eleventh Appellate District held that the open and obvious doctrine was not applicable because the hazard created was due to the slope of the ramp exceeding ADA standards. In other words, the violation of the ADA regulations alone created a hazardous defect. Ohio courts of appeal that have directly addressed this issue have cited to this Court's decision in *Chambers*, but have reached different conclusions regarding whether an alleged violation of administrative rules prohibits application of the open and obvious doctrine and precludes summary judgment on a negligence claim. In holding that the violation of an administrative regulation does not constitute negligence per se, this Court in *Chambers* did not address the applicability of the open and obvious doctrine under such circumstances.

Like the Eleventh Appellate District, the First and Tenth Appellate Districts have refused to apply the open and obvious doctrine in the face of a purported agency rule violation, reasoning that such a violation raises a genuine issue of material fact regarding the property owner's duty and breach thereof. See, e.g., *Francis* and *Uddin*, supra. However, the Second, Fifth, Eighth and Twelfth Appellate Districts have held that an alleged administrative rule violation does not

prohibit application of the open and obvious doctrine. These courts reason that, although such a violation may serve as evidence of negligence, this evidence should be considered in conjunction with surrounding circumstances, including whether the condition was open and obvious. See, *Souther*, *Olivier*, and *Ryan*, supra. See also, *Orens v. Ricardo's Restaurant* (Nov. 14, 1996), 8th Dist. No. 70403, 1996 Ohio App. Lexis 4944, which did not rely on *Chambers,* but found that a restaurant's failure to comply with the OBBC of no consequence. The Eighth Appellate District stated that "the resolution of the question does not turn on whether the step could have been made perfect or foolproof. The issue is whether the conditions that did exist were open and obvious to any person exercising reasonable care and watching where she was going." Id. at *15. The appellate court upheld summary judgment in favor of the restaurant-defendant.

Similar to Mrs. Stewart herein, the plaintiff in *Ryan*, maintained that a curb ramp with a slope that was one and a half times steeper than required by the applicable code was a latent hazard. The plaintiff asserted that although the curb ramp itself was open and obvious, the hazard presented by the steep slope was not reasonably discernible. In upholding summary judgment in favor of the property owner, the appellate court found that the hazard presented by the slope was open and obvious, even though the exact degree of the slope was unknown. Id. at ¶12. Business invitees entering the premises could ascertain the ramp was sloped; therefore, the danger was open and obvious. Id.

In contrast, the Eleventh Appellate District determined that "the hazard created by the defective ramp could not be observed by Mrs. Stewart. The defect and hazard was due to the slope of the ramp exceeding ADA standards. Without knowledge of the maximum slope requirements, a business invitee would be unable to determine that the defective ramp's slope was potentially hazardous." *Stewart* at ¶24.

This Court in *Chambers*, recognized that strict compliance with a multitude of administrative rules was "virtually impossible" and that treating violations as negligence per se would, in effect, make those subject to such rules the insurer of third parties who are harmed by any violation of such rules. *Chambers,* 82 Ohio St.3d at 568. This Court was concerned with requiring a premises owner to strictly comply with building code requirements without reference to exceptions or a reasonableness standard. See, id. Relying on this reasoning, the Second Appellate District found that this Court implied that building code violations may be considered in light of the circumstances, including whether the condition was open and obvious to an invitee. *Olivier*, at ¶28.

As this Court has acknowledged, scores of administrative agencies propose and adopt hundreds of rules each year. *Chambers*, at 568. Considering the sheer number and complexity of administrative rules, a finding that the open and obvious doctrine is inapplicable whenever an administrative rule is violated, even when the violation is trivial in nature, could open the floodgates to litigation and cause cases to needlessly linger on the already overburdened dockets of Ohio courts. Building code violations may be obvious and apparent to an invitee. If the violation is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises. See *Armstrong,* 99 Ohio St.3d 79, 2003 Ohio 2573, ¶14, citing, *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45. Accordingly, a violation of an administrative regulation should not preclude application of the open and obvious doctrine in premises liability actions.

CONCLUSION

WHEREFORE, Appellant, The Lake County Historical Society, Inc., respectfully requests and moves the Supreme Court of Ohio to accept jurisdiction over this appeal because the issues present in this case are of public or great general interest.

Respectfully submitted,

TIMOTHY J. FITZGERALD (0042734)
(Counsel of Record)
COLLEEN A. MOUNTCASTLE (0069588)
GALLAGHER SHARP
Bulkley Building - Sixth Floor
1501 Euclid Avenue
Cleveland, Ohio 44115
Phone: (216) 241-5310
Facsimile: (216) 241-1608
E-mail: tfitzgerald@gallaghersharp.com
cmountcastle@gallaghersharp.com

Counsel for Appellant
The Lake County Historical Society

CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction* was sent by regular U.S. Mail postage pre-paid this 1st day of November, 2006 to the following:

Mark M. Simonelli, Esq.
MARK M. SIMONELLI CO., L.P.A.
P.O. Box 319
Willoughby, OH 44096-0319

Counsel for Plaintiff-Appellee,
David and Donna J. Stewart

TIMOTHY J. FITZGERALD (0042734)
COLLEEN A. MOUNTCASTLE (0069588)

APPENDIX

VOL 0066 PAGE 0332

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

DONNA J STEWART, et al ,	:	OPINION
Plaintiffs-Appellants,	:	
		CASE NO. 2004-L-164
- vs -		
THE LAKE COUNTY HISTORICAL SOCIETY, INC , et al ,	:	
Defendant-Appellee	:	

FILED
COURT OF APPEALS
SEP 18 2006
LYNNE L. MAZEIKA
CLERK OF COURT
LAKE COUNTY, OHIO
DOCKETED

Civil Appeal from the Court of Common Pleas, Case No 03 CV 002246

Judgment Reversed and remanded

Mark M Simonelli, Mark M Simonelli Co , L P A , 1501 Madison Avenue, Painesville, OH 44077 (For Plaintiffs-Appellants)

Kathleen M Sweeney and *Robert P Lynch, Jr*, Law Offices of William M Kovach & Associates, 480 Skylight Office Tower, 1660 West Second Street, Cleveland, OH 44113-1454 (For Defendant-Appellee)

COLLEEN MARY O'TOOLE, J

{¶1} Appellants, Donna J Stewart ("Donna") and David M Stewart ("David"), appeal from a judgment entry of the Lake County Court of Common Pleas, granting summary judgment in favor of appellee, Lake County Historical Society, Inc For the following reasons, we reverse and remand

{¶2} On November 13, 2003, appellants filed a complaint with the Lake County Court of Common Pleas The complaint named appellee as a defendant party and asserted that Donna was injured due to appellee's negligence. Specifically, it alleged that appellee failed to properly construct and maintain a ramp on its premises, as required by the Americans with Disabilities Act ("ADA") The complaint concluded that the defective ramp caused Donna to slip and fall while traversing the ramp, causing an injury to her arm Appellants requested damages predicated upon negligence and loss of consortium

{¶3} Appellee timely answered, contending that appellants had failed to state a claim for relief Thereafter, appellee moved for summary judgment Appellee's motion for summary judgment maintained that Donna was not disabled as defined under the ADA and that appellee had no notice/knowledge of the defect

{¶4} Attached to appellee's motion for summary judgment was Donna's deposition testimony and photographic exhibits of the outdoor ramp Donna's testimony established that she was a seasonal volunteer for appellee from the spring of 2001 until the accident occurred on June 6, 2002 The evidence showed that appellee, as a non-profit organization, used volunteer carpenters to construct the ramp during the year 2001 Donna stated that she had traversed the ramp on many previous occasions without incident Her testimony further established that hundreds of school children had also used the ramp without incident

{¶5} Donna testified that on June 6, 2002, her right leg slipped out from underneath her body as she began to walk down the ramp She proceeded to land on her right elbow causing a fracture

VOL 0066 PAGE 0331

{¶6} Appellants' brief in opposition maintained appellee had admitted that the ramp did not comply with ADA standards Attached to appellants' brief in opposition was a letter from a consultant acknowledging that the ramp exceeded the maximum slope allowed by the ADA Also, attached to appellants' brief in opposition was appellee's admission that the ramp did not conform to ADA standards

{¶7} After reviewing the parties' submissions, the trial court granted summary judgment in favor of appellee The court found that although Donna did not qualify as disabled under the ADA, the ramp's failure to comply with ADA standards could be considered as evidence of negligence The trial court did not consider the violation of the ADA as negligence per se The trial court's judgement entry focused on the duty owed to disabled persons under the ADA The court determined that this matter turned solely upon whether appellee had knowledge of the defect in the ramp, and that the open-and-obvious doctrine was irrelevant.

{¶8} Ultimately, the trial court found there was no genuine issue of material fact regarding causation It determined that appellee had neither notice nor knowledge of the defect and was not negligent From this judgment, appellants filed a timely appeal setting forth the following assignment of error

{¶9} "Defendant's motion for summary judgment was granted in error, as there was a material question of fact and therefore, Defendant was not entitled to judgment as a matter of law "

{¶10} An appellate court reviews a trial court's decision on a motion for summary judgment de novo *Grafton v Ohio Edison Co*, 77 Ohio St 3d 102, 105, 1996-Ohio-336 Summary judgment is proper when (1) there is no genuine issue as to any

VOL 0096 PAGE 0332

material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come but to one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence construed most strongly in his favor Civ R 56(C), *Leibreich v A J Refrigeration, Inc*, 67 Ohio St 3d 266, 268, 1993-Ohio-12 Summary judgment is not a case management tool It should be used cautiously and with due regard to the facts in evidence, as it permanently settles the claims and liabilities of the parties without affording the litigants the benefit of trial by their peers

{¶11} Material facts are those facts that might affect the outcome of the suit under the governing law of the case *Turner v Turner*, 67 Ohio St 3d 337, 340, 1993-Ohio-176, citing *Anderson v Liberty Lobby, Inc* (1986), 477 U S 242, 248 To determine what constitutes a genuine issue, the court must decide whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law *Turner* at 340

{¶12} The party seeking summary judgment on the ground that the nonmoving party cannot prove its case bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a genuine issue of material fact on an essential element of the nonmoving party's claim *Dresher v Burt*, 75 Ohio St 3d 280, 292, 1996-Ohio-107 The moving party must be able to point to some evidence of the type listed in Civ R 56(C), affirmatively demonstrating that the nonmoving party has no evidence to support its claim *Dresher* at 293

VOL 0086 PAGE 0333

{¶13} If the moving party fails to satisfy this initial burden, summary judgment should be denied *Dresher* at 293 However, if this initial burden is met, the nonmoving party has a reciprocal burden to respond, by affidavit or as otherwise provided in the rule, in an effort to demonstrate that there is a genuine issue of fact suitable for trial. Id

{¶14} Under their sole assignment of error, appellants argue that the trial court erred by granting summary judgment in favor of appellee Specifically, they contend that sufficient evidence was produced to establish a genuine issue of material fact as to their claims

{¶15} At the outset, we note that despite a pre-existing hand injury, Donna does not qualify as a disabled individual under the ADA See, e g , *House v Kirtland Capital Partners*, 158 Ohio App 3d 68, at ¶34-37, 2004-Ohio-3688 To establish a claim of negligence, appellants must prove the following "(1) that appellee owed a duty to appellants, (2) that appellee breached that duty, (3) that appellee's breach of duty directly and proximately caused appellants' injury, and (4) damages " *Komowski v Chester Properties, Inc* (June 30, 2000), 11th Dist No 99-G-2221, 2000 Ohio App LEXIS 3001, at 7

{¶16} With that in mind, it is undisputed that Donna, as a seasonal volunteer, was a business invitee of appellee A business invitee is defined as "a person who comes upon the property by express or implied invitation for some purpose which is beneficial to the owner " *Owens v Taco Bell Corp* (June 21, 1996), 11th Dist No 95-L-180, 1996 Ohio App LEXIS 2579, at 6, citing *Provencher v Ohio Dept of Transp* (1990), 49 Ohio St 3d 265, 265-266.

Vol 0086 page 0334

{¶17} Appellee owed its business invitees a duty of reasonable care in maintaining its premises in a safe condition *Hudspath v The Cafaro Co*, 11th Dist No 2004-A-0073, 2005-Ohio-6911, at ¶9 This means that appellee is under a duty to maintain its premises in a reasonably safe condition and warn business invitees of latent or concealed defects of which appellee has knowledge or should have knowledge *Kubiszak v Rini's Supermarket* (1991), 77 Ohio App 3d 679, 686 Appellee is not, however, an insurer of a business invitee's safety *Paschal v Rite Aid Pharmacy, Inc* (1985), 18 Ohio St 3d 203

{¶18} Ohio Revised Code 3781 111(B) requires all the standards and rules adopted by the board of building standards to comply with the ADA The ramp at issue was non-compliant with applicable building standards as established under R C 3781 111, potentially subjecting appellee to penalties pursuant to R C 3781 99 The evidence shows the ramp was used generally, though not exclusively, for pedestrian and disabled access and egress Appellee argues that it either had no knowledge of the defective ramp, or should not be deemed to have possessed such knowledge, and thus was without notice Furthermore, appellee argues that appellants are not entitled to rely on the potential defect in the ramp because Donna was not disabled

{¶19} Appellees are not seeking redress under the ADA, nor do they allege Donna was disabled They allege violation of the building standards promulgated under the ADA and adopted by reference in R C 3781 111(B) The legislature has imposed a duty on property owners to construct handicapped accessible ramps in compliance with the ADA and applicable building standards Once a property owner authorizes the construction of a ramp, it is responsible for inspections, and insuring the ramp's

VOL 0066 PAGE 0335

compliance with all applicable building codes and laws It is unimaginable that a non-residential property owner, holding its premises open to the public, could construct poorly engineered ramps for its exits, in lieu of stairs, and escape liability because non-disabled persons use them

{¶20} "**** [I]n order to impose liability for injury to an invitee because of a dangerous condition of the premises ***, the condition must have been known to the owner or occupant, or have existed for such a time that it was the duty of the owner or occupant to know of it " *Tiberi v Fisher Bros Co* (1953), 96 Ohio App 302, 303 See, also, *Presley v Norwood* (1973), 36 Ohio St 2d 29, 31

{¶21} Appellee's admission concedes that the ramp violated ADA requirements. Specifically, the slope of the ramp exceeded the maximum slope allowed by the ADA Here, appellants presented evidence establishing a genuine issue of material fact as to whether the ramp had a substantial defect and whether appellee was negligent in constructing or maintaining the ramp

{¶22} Moreover, appellee failed to present evidence demonstrating that there was no genuine issue of material fact relating to the element of proximate cause Appellees' complaint states that the sole cause of *Donna's* fall and injury was the defective condition of the ramp Her deposition testimony demonstrates the defective condition of the ramp was the proximate cause of her injury Donna did not testify that there was an additional contributing factor, i.e., water or ice, that caused her injury Violation of a statute or the Administrative Code does not necessarily establish strict liability in negligence or negligence per se However, in these summary judgment

VOL 0066 PAGE 0336

proceedings, the evidence that the ramp failed to meet ADA criteria is evidence of negligence, which should have been construed in appellants' favor

{¶23} The trial court correctly found that the open-and-obvious doctrine was irrelevant in this case The open-and-obvious doctrine relates to the threshold duty element in a negligence action Costilla v. LeMC Enterprises, 11th Dist No 2003-P-0116, 2004-Ohio-6944, at ¶13 That is, if a hazard is open-and-obvious, then a landowner owes no duty to take further action to protect an injured party Id "*** [A] hazard is open and obvious if it is observable, i e , it is known to the invitee or so obvious that he or she may reasonably be expected to discover it " Fink v Gully Brook, Inc , 11th Dist No 2004-L-109, 2005-Ohio-6567, at ¶16 See, also, Armstrong v Best Buy Co , Inc , 99 Ohio St 3d 79, 2003-Ohio-2573, at ¶95

{¶24} Here, the hazard created by the defective ramp could not be observed by Donna The defect and hazard was due to the slope of the ramp exceeding ADA standards Without knowledge of the maximum slope requirements, a business invitee would be unable to determine that the defective ramp's slope was potentially hazardous Accordingly, the open-and-obvious doctrine was not applicable

{¶25} We agree with the trial court that, at trial, the resolution of this case will turn on the issue of appellee's notice or knowledge of the ramp's defects In premises liability cases, when proceeding via summary judgment, the Ohio Supreme Court has held

{¶26} "'We disagree with [the] contention that an invitee must demonstrate that a peril was actually known to the owner of [the] premises The better view is that once the evidence establishes that a dangerous condition existed, and that it is a condition about

VOL 0066 PAGE 0337

which the owner should have known, evidence of actual knowledge on [the owner's] part is unnecessary

{¶27} """*** [T]he obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm The occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier knows, *but he must also inspect the premises to discover possible dangerous conditions of which he does not know*, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use ***""" (Emphasis sic) *Ferguson v Eastwood Mall, Inc* (Dec 4, 1998), 11th Dist No 97-T-0215, 1998 Ohio App LEXIS 5823, at 3-4, quoting *Perry v Eastgreen Realty Co* (1978), 53 Ohio St 2d 51, 52

{¶28} Accordingly, appellee had an affirmative duty to inspect its premises for defective or dangerous conditions which might involve an unreasonable risk of harm to an invitee *Perry* at 52, *Ferguson* at 5 See, also, *Davis v Tell Realty* (Mar 9, 2001), 11th Dist Nos 2000-P-0006 and 2000-P-0007, 2001 Ohio App LEXIS 1124, at 8 Appellee is charged with constructive knowledge of a defect or danger if a reasonable inspection of the premises would have revealed it *Ferguson* at 5

{¶29} In this case, the evidence demonstrated that the defective ramp had been in use for approximately one year Donna testified that she had never slipped on the ramp previously and was unaware of any prior accidents involving the ramp and a third party However, she did take precautions, i e , sweeping leaves off the ramp, to safeguard against any accidents

VOL 0066 PAGE 0338

{¶30} Although this evidence tends to show that appellee had no actual knowledge of the ramp's defect, it did not relieve appellee from its duty to adequately inspect the ramp Again, if a reasonable inspection would have revealed the defect or danger, appellee will be charged with constructive knowledge of the defect or danger *Perry* at 52

{¶31} In *Ferguson* the plaintiff was injured due to a defective bench located in a mall concourse Plaintiff, a business invitee, filed a claim for negligence against the mall Ultimately, the trial court granted summary judgment in favor of the mall

{¶32} On appeal, this court reversed the judgment of the trial court and remanded the matter We held that plaintiff's inability to perceive the defective condition of the mall benches and the absence of any prior accidents involving the mall benches did not relieve the defendant of its duty to perform reasonable inspections Id at 3-6 Therefore, the mall's failure to inspect the benches would result in the mall's constructive knowledge of the defective bench Id at 6-7

{¶33} Appellee failed to present evidence that any inspection of the ramp was made prior to the accident, to determine whether the ramp failed to comply with the ADA or posed a foreseeable danger to invitees Appellants submitted the consultant's letter which established that the slope of the ramp was more than two times the maximum slope allowed by the ADA. The letter further stated that a visual assessment, standing alone, revealed the defect Moreover, the letter noted that a simple measurement of the height and length of the ramp would have verified this defect

{¶34} Construing this evidence most strongly in favor of appellants, we conclude that genuine issues of material fact remain with respect to appellee's constructive

VOL 0066 PAGE 0339

knowledge of the ramp's defect, its potential negligence and breach of duty in constructing or inspecting the ramp, and whether the ramp's defect caused appellants' damages The trial court erred in granting summary judgment in favor of appellee based upon appellee's lack of actual knowledge regarding the ramp's defective condition

{¶35} Based upon the foregoing analysis, appellants' sole assignment of error is with merit We hereby reverse the judgment of the trial court and remand this matter for further proceedings consistent with our opinion

CYNTHIA WESTCOTT RICE, J , concurs in judgment only,

DIANE V GRENDELL, J , dissents with a Dissenting Opinion

DIANE V GRENDELL, J , dissents with a Dissenting Opinion

{¶36} I respectfully dissent from the majority's opinion overturning the grant of summary judgment to the Lake County Historical Society ("the Society") in this "slip and fall" case

{¶37} The Society's duty toward Stewart was to maintain its premises in a reasonably safe condition and to provide her warnings of latent or concealed hazards of which the Society had, or should have had, knowledge *Armstrong v Best Buy Co* , 99 Ohio St 3d 79, 2003-Ohio-2573, at ¶5 (citations omitted) "In order to establish actionable negligence, the plaintiff must show the existence of a duty, a breach of the

VOL 0066 PAGE 0340

duty, and an injury proximately resulting therefrom " *Texler v D O Summers Cleaners & Shirt Laundry, Co* , 81 Ohio St 3d 677, 680, 1998 Ohio 602, (citation omitted)

{¶38} In the present case, there is no hazard or defect or unreasonably unsafe condition upon which to premise liability

{¶39} The sole basis for the majority's reversal is the fact that the slope of the ramp leading up to the school house has a steeper grade than is allowed by the Americans with Disabilities Act It is undisputed that Stewart is not disabled and not entitled to the protections afforded by the ADA Accordingly, Stewart's negligence claim cannot be based on a violation of the ADA *Scheetz v Kentwood, Inc* (11th Dist), 152 Ohio App 3d 20, 2003-Ohio-1209, at ¶11 ("appellants cannot recover for a violation of the ADA since Mrs Scheetz has made no showing that she suffers from a covered disability"), *Souther v Preble Cty Dist Library*, 12th Dist No CA2005-04-006, 2006-Ohio-1893, at ¶30

{¶40} The majority avoids this difficultly by taking the position that, although a violation of the ADA does not establish "strict liability" or "negligence per se," "the evidence that the ramp failed to meet ADA criteria is evidence of negligence, which should have been construed in appellant's favor " Therefore, "the resolution of this case will turn on the issue of appellee's notice or knowledge of the ramp's defects " The majority's position is fatally flawed

{¶41} In order to have a valid premises liability case, it must be shown that the slope of the ramp constituted an unreasonably hazardous condition The only "evidence" in the record that the slope of the ramp is such a hazard is the fact that it violates the ADA standards To hold that the violation of ADA standards creates an

VOL 0066 PAGE 0341

issue of genuine material fact, in effect, is to hold that the violation is evidence of negligence per se

{¶42} This court has held that the violation of an administrative rule "may be admissible as evidence of general negligence" *Scheetz*, 2003-Ohio-1209, at ¶12 (citation omitted) In this case, the violation is not evidence of general negligence because the violated rule does not have a general application The standards of the ADA are designed for the protection of "disabled" persons The fact that the slope of the ramp exceeds ADA standards would be some evidence of negligence if, and only if, Stewart was a disabled person In other words, the slope of the Society's ramp could be considered potentially dangerous to a disabled person, but not to Stewart

{¶43} In Stewart's case, the standard to be applied is one of reasonableness, i e whether the slope of the ramp is so high as to render the ramp unreasonably hazardous The majority does not address this critical issue In the majority's opinion, the only thing defective or dangerous about the ramp is that its slope exceeds ADA standards

{¶44} Beyond the ADA violation, there is nothing to suggest that the slope of the ramp is unreasonably steep The pictures of the ramp in the record do not reveal a particularly steep grade to the ramp Stewart had used the ramp "a lot" for about a year prior to her accident and at no time prior to the accident was she concerned by the slope of the ramp Stewart testified that children used the ramp to access and exit the school house, observing that "a lot of times the kids will use the ramp and they run down it" However, there is no evidence that, prior to Stewart's fall, anyone is known to have been injured using the ramp or to have complained about its slope

VOL 0066 PAGE 0342

{¶45} Most notably, Stewart does not claim that the ramp was unreasonably steep Rather, in her deposition, Stewart testified that the only problem she had traversing the ramp was that it became slippery when wet Stewart testified that she often swept the ramp when it was wet to remove leaves and other debris and that she thought it could have been made of a different, less slippery material Neither of these concerns involve the grade of the ramp The ADA standards for the slope of the ramp are not relevant under the facts of this case

{¶46} The only reasonable interpretation of the evidence is that the slope of the ramp constituted, if anything, an insubstantial defect, not an unreasonably dangerous condition *Raflo v Losantiville County Club* (1973), 34 Ohio St 2d 1, 4, *Komowski v Chester Properties, Inc* (June 30, 2000), 11th Dist No 99-G-2221, 2000 Ohio App LEXIS 3001, at *12 ("[a] premise is not considered unreasonably dangerous where the defect is insubstantial and of the type that a passerby commonly encounters") (citation omitted)

{¶47} Assuming, arguendo, that the slope was unreasonably high or that the ramp was otherwise negligently constructed (although there is no evidence of this), summary judgment would still be appropriate because Stewart would have been aware of these hazards As the Ohio Supreme Court has held, "[o]ne who enters a building by traversing a step described as 'abnormally high,' is charged with knowledge of the presence of that abnormality upon exiting " *Raflo*, 34 Ohio St 2d 1, at paragraph two of the syllabus In regards to the slope of the ramp, Stewart had traversed the allegedly hazardously steep ramp repeatedly over the course of the year She must be charged with knowledge of the condition *Stein v Honeybaked Ham Co*, 9th Dist No 22904,

VOL 0066 PAGE 0343

2006-Ohio-1490, at ¶17 ("the slope of a wheelchair accessibility ramp poses an open and obvious danger that an invitee may reasonably be expected to protect against any attendant danger"), *Ryan v Guan*, 5th Dist No 2003CA00110, 2004-Ohio-4032, at ¶12 ("[b]usiness invitees entering the premises could ascertain the ramp was sloped, therefore, the danger was open and obvious")

{¶48} Likewise, in regards to the ramp being slippery when wet, not only had Stewart repeatedly traversed the ramp while wet, she testified that she knew it was slippery when wet, as it was on the day that she fell Again, she must be charged with knowledge [1]

{¶49} For the foregoing reasons I would affirm the grant of summary judgment in favor of the Lake County Historical Society

1 Regarding Stewart's knowledge, the majority advances the peculiar argument that "without knowledge of the maximum slope requirements, a business invitee would be unable to determine that the defective ramp's slope was potentially hazardous " With all due respect to the majority, the potentially hazardous condition of the ramp is best gauged by looking at it or, perhaps, walking it, not by measuring it *Ryan*, 2004-Ohio-4032, at ¶12 ("the hazard presented by the slope was open and obvious, even though the exact degree of the slope was unknown") Moreover, the unreasonableness of the condition must flow from the condition itself, not from governmental regulation of the condition "Proof of negligence in the air," or, in this case, in the statutes, "will not do " *Palsgraf v Long Island RR Co* (N Y 1928), 248 N Y 339, 341

STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

DONNA J STEWART, et al ,

Plaintiffs-Appellants,

- vs -

THE LAKE COUNTY HISTORICAL SOCIETY, INC , et al ,

Defendant-Appellee

JUDGMENT ENTRY

CASE NO. 2004-L-164

FILED
COURT OF APPEALS
SEP 18 2006
LYNNE L. MAZEFIKA
CLERK OF COURT
LAKE COUNTY, OHIO
DOCKETED

For the reasons stated in the opinion of this court, the assignment of error is with merit It is the judgment and order of this court that the judgment of the trial court is reversed and the matter is remand for further proceedings consistent with this opinion

Colleen Mary O'Toole
JUDGE COLLEEN MARY O'TOOLE

CYNTHIA WESTCOTT RICE, J , concurs in judgment only,

DIANE V GRENDELL, J , dissents with Dissenting Opinion

VOL 0068 PAGE 0045

FILED

2004 SEP 10 A 9:23

LYNNE L. MAZEIKA
LAKE CO CLERK OF COURT

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO
CASE NO. 03CV002246

DONNA J. STEWART, et al.,	)	
Plaintiffs	)	
vs.	DOCKETED	**JUDGMENT ENTRY**
THE LAKE COUNTY HISTORICAL SOCIETY, INC., et. al.	)	
Defendants.	)	

This matter comes before the Court for consideration of the following: the Motion for Summary Judgment of Defendant, Lake County Historical Society, Inc.; the Brief in Opposition to Defendants' Motion for Summary Judgment; and the Reply Brief Lake County Historical Society, Inc.

STATEMENT OF THE CASE

Plaintiffs Donna J. Stewart and David M. Stewart initiated this action against the Lake County Historical Society, Inc., Inc. and John Does I through IV after Plaintiff Donna Stewart slipped and fell on a wet handicap ramp at the property of the Lake County Historical Society on June 6, 2002. Plaintiffs fall occurred as she was performing volunteer duties at the Lake County Historical Society. Plaintiff Donna Stewart claims that she was injured as a result of her fall and that her injuries were proximately caused by Defendants' negligence. Specifically, Plaintiffs contend that Defendant was negligent in its construction and maintenance of said ramp and that the ramp was in an unsafe condition on June 6, 2002. Plaintiff David M. Stewart is the husband of Plaintiff Donna Stewart and his cause of action is for loss of consortium.

At this time Defendant Lake County Historical Society, Inc. moves for summary judgment in its favor and against Plaintiffs pursuant to Civ. R. 56. Defendant believes that it is entitled to

judgment as a matter of law because Plaintiffs have no evidence to show that the Lake County Historical Society was negligent. Specifically, it is Defendant's position that it is entitled to judgment as a matter of law because the alleged defect was open and obvious. Defendant further contends that no matter how one characterizes the ramp or its construction, Plaintiff has no evidence to show that the Lake County Historical Society had notice of any defective condition of the handicap ramp.

As to Plaintiffs' allegations that ramp was improperly constructed per the ADA, Defendant argues that it is entitled to judgment as a matter of law for two reasons. First, Defendant claims that the ADA does not apply to the historical schoolhouse in the woods in Lake County operated by the nonprofit Lake County Historical Society. Second, Defendant claims that Plaintiff Donna Stewart is not a member of a protected class[1] under the ADA even if the ramp was not constructed in accordance with the American with Disabilities Act (ADA), 42 U.S.C. §§ 12101, *et. seq.*, standards[2]. Defendant relies on the case of Scheetz v. Kentwood (2003), 152 Ohio App. 3d 20. In that case, plaintiff claimed that the construction of a handicapped ramp violated various provisions of the ADA. The Eleventh District Court of Appeals held that plaintiff, a restaurant patron who slipped and fell on the handicapped ramp, could not recover for a violation of the ADA because she had made no showing that she suffered from a covered disability.

Plaintiffs oppose Defendant's motion. It is Plaintiffs position that the condition of the handicap ramp was not open and obvious. Further, Plaintiffs argue that because the handicap ramp was not constructed pursuant to ADA guidelines[3], Defendant the Lake County Historical Society, Inc. is negligent in its construction of the ramp. Plaintiffs also assert that Defendant the Lake County Historical Society had or should have had knowledge of the defective condition of the handicap ramp

---

[1] In their brief, Plaintiffs admit that Plaintiff Donna Stewart is not a member of a protected class under the ADA.

[2] As part of its Response to Requests for Admissions Propounded to Defendant, the Lake County Historical Society admits that the handicap ramp at issue was not built in accordance with ADA standards.

[3] Plaintiffs' expert indicates that the ramp does not comply with ADA Accessibility Guidelines for Buildings and Facilities (ADAAG), amended 2002, for slope requirements, § 4.8.2.

Historical Society had or should have had knowledge of the defective condition of the handicap ramp and that it was foreseeable that Plaintiff or any other individual would utilize the ramp. As such, Plaintiffs contend that summary judgment in favor of the Defendant the Lake County Historical Society, Inc. should be denied.

SUMMARY JUDGMENT STANDARD

Pursuant to Civ. R. 56, summary judgment is proper, when, after construing the evidence in a light most favorable to the nonmoving party, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. Dresher v. Burt (1996), 75 Ohio St.3d 280. If the moving party satisfies this burden, then the nonmoving party has the burden pursuant to Civ. R. 56(E) to provide evidence demonstrating a genuine issue of material fact. Id. If the nonmoving party does not satisfy this burden then summary judgment is appropriate. Id.

COURT'S ANALYSIS

Americans with Disabilities Act

The ADA was enacted to eliminate discrimination against individuals with disabilities. Title III of the ADA requires that public business establishments remove architectural barriers or offer alternative methods of providing disabled persons with access to goods, services and facilities. *See* 42 U.S.C. §§ 12181(a) and (b)(2).

Pursuant to 42 U.S.C. §12102(A)-(C), a person is considered disabled under the ADA if that individual:

1) has a physical or mental impairment that substantially limits one or more major life activities;

2) has a record of such impairment; or

3) is regarded as having such an impairment.

In this case, Plaintiffs appear to claim that Defendant Lake County Historical Society's violation of the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) §4.8.2[4] in constructing the handicap ramp indicates that said Defendant was negligent.

A plaintiff cannot recover on a claim of breach of a statutory duty unless he or she is within the class for whose benefit the statute was enacted. Smith v. Wal-Mart Stores, Inc. (C.A.6), 167 F.3d 286. In this case, Plaintiff Donna Stewart admits that she is not a disabled person pursuant to the ADA definition of disabled. As such, the Court holds in accordance with Scheetz (2003), 152 Ohio App. 3d 20, that Plaintiff Donna Stewart is not entitled to recover for a violation of the ADA because she is not a disabled person. However, the Court notes that the Sheetz court held that the fact that a defendant violated an administrative rule may be admissible as evidence of general negligence. Id. at 23. As such, the Court finds that Defendant's admitted violation of the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) §4.8.2 will be considered as evidence of general negligence.

Negligence

Actionable negligence requires the showing of a duty, breach of that duty and an injury proximately resulting therefrom. Menifee v. Ohio Welding Products, Inc. (1984), 15 Ohio St. 3d 75.

It is uncontroverted that Plaintiff Donna Stewart fell and was injured at the Lake County Historical Society. At the time of her fall, Plaintiff Donna Stewart was volunteering as a school marm at the Lake County Historical Society's one room school house. As such, Defendant the Lake County Historical Society admits that Plaintiff Donna Stewart was a business invitee on June 6, 2002. Having established the classification of the Plaintiff, the Court next must determine Defendant's duty towards Plaintiff in this case. The existence of a duty in a negligence action is generally a question of law for the court to determine. Mussivand v. David (1989), 45 Ohio St. 3d

---

[4] The ADAAG 4.8.2 provides that ramp slopes are to be constructed with the least possible slope and are to be applied during the design, construction, and alteration of buildings and facilities covered by titles II and III of the ADA to the extent required by regulations issued by Federal agencies, including the Department of Justice and the Department of Transportation, under the ADA.

314. The classification of Plaintiff as an invitee determines Defendant's duty of care. Holdshoe v. Whinery (1968), 14 Ohio St. 3d 134. A business owner owes an invitee a duty of ordinary care and must maintain the business premises in a reasonably safe condition so that the invitees are not unnecessarily and unreasonably exposed to danger. Campbell v. Hughs Provision Co. (1950), 153 Ohio St. 9. It has long been held that owner-occupiers are ordinarily liable to an invitee, who although using due care for his own safety, is injured by reason of an unsafe condition on the premises which is known to the owner-occupier but not to the invitee and which the owner-occupier has negligently allowed to exist. Englehardt v. Phillips (1939), 136 Ohio St. 73. The basis of the owner-occupiers liability in such cases is his superior knowledge of the dangers or perils on the property. Id.

However, an owner or occupier of property owes no duty to warn invitees entering on the property of open and obvious dangers on the property. Sidle v. Humphrey (1968), 13 Ohio St. 2d 45. If a hazard is open and obvious, the plaintiff will be unable to demonstrate the existence of a duty on the part of the defendant and the issues of breach and proximate cause are never reached. Ward v. Wal-Mart Stores (December 28, 2001), 11th Dist. App. No. 2000-L-171, 2002 WL 5315, unreported.

The Ohio Supreme Court has held:

> When Courts apply the open and obvious doctrine, they must focus on the fact that the doctrine relates to the threshold issue of duty. By focusing on the duty prong of negligence, the rule properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it. The fact that the plaintiff was unreasonable in choosing to encounter the danger is not what relieves the property owner of liability. Rather, it is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the plaintiff

Armstrong v. Best Buy Co. (2003), 99 Ohio St. 3d 79.

In the instant case, it is the position of Defendant the Lake County Historical Society that the slippery condition of the handicap ramp was open and obvious such that said Defendant owed no duty of care to Plaintiff Donna Stewart. Defendant refers to Plaintiff Donna Stewart deposition where she testified that she knew that the ramp became slippery when it was wet and covered with maple "whirligigs." In this case, however, the relevant issue is not whether or not Plaintiff Donna

the ramp was negligently constructed and whether or not said negligent construction proximately caused Plaintiff Donna Stewart's injuries. Plaintiffs' Complaint alleges that the cause of Donna Stewart's fall was not the wet, slippery condition of the ramp, but rather the negligently constructed handicap ramp itself. Defendant the Lake County Historical Society admits that the construction of the handicap ramp did not comply with ADA guidelines. Non-compliance of ADA guidelines is proof of negligence. The open and obvious doctrine has no bearing on this case with regards to the wet and/or slippery condition on the handicap ramp.

Defendant also argues that regardless of how one characterizes the ramp or its construction, Plaintiff has no evidence to show that the Lake County Historical Society had notice of any defective condition of the handicap ramp. This argument has merit.

In Klostermeier v. In & Out Mart (March 30, 2001), 6th Dist. No. L-00-1204, 2001 WL 305827, unreported, the Sixth District Court of Appeals dealt with a similar situation where a store's automatic doors did not comply with ADA minimum closing time standard. The court held that to impose a duty on the store, the plaintiff had to show that the store had knowledge or should have had knowledge that the door was not properly calibrated to shut properly per the ADA guidelines. Further, the plaintiff had to show that injury was likely to result from the defect. The court held that even construing the evidence in a light most favorable to the nonmoving plaintiff, summary judgment was proper because there was no evidence of other complaints about the door or accidents involving the door. The court further found that summary judgment was proper because plaintiff herself had used the door numerous times without incident.

In this case, Plaintiff Donna Stewart testified that children often ran up and down the handicap ramp without incident and that she had no knowledge of any person slipping or falling on the ramp. Plaintiff also testified that on the morning of her fall, she traversed the handicap ramp without incident. In fact, children ran off the ramp on the day of Plaintiff's fall without incident. Plaintiff Donna Stewart has failed to prove that Defendant the Lake County Historical Society had notice of any defective condition of the handicap ramp and that the handicap ramp's defective condition was likely to cause injury. Even construing the evidence in a light most favorable to Plaintiffs, it is clear that Defendant the Lake County Historical Society did not owe a duty to Plaintiff

Donna Stewart based on any superior knowledge of the condition of the premises. In a negligence case where there is no duty found, summary judgment is proper in favor of the Defendant.

ACCORDINGLY, Defendant's Motion for Summary Judgment is well taken and hereby granted. Costs to the Plaintiffs.

IT IS SO ORDERED.

VINCENT A. CULOTTA
Judge of the Court of Common Pleas

Copies:

Mark M. Simonelli, Esq.
Kathleen M. Sweeney, Esq.

FINAL
APPEALABLE
ORDER