

IN THE SUPREME COURT OF OHIO

DONNA J. STEWART, *et al.*, :
 :
 Plaintiffs-Appellees, : On Appeal from the Lake County Court
 : of Appeals, Eleventh Appellate District
 : Case No. 2004-L-164
 :
 -vs- :
 :
 THE LAKE COUNTY HISTORICAL, :
 SOCIETY, : **CASE NO. 2006-2029**
 :
 Defendant-Appellant. :

APPELLEES' MEMORANDUM IN RESPONSE

Mark M. Simonelli, Esq. (#0065965) (COUNSEL OF RECORD)
Mark M. Simonelli, Co., L.P.A.
Post Office Box 319
Willoughby, Ohio 44096-0319
(440) 375-0420
(440) 943-1882 (facsimile)
Msimonel@aol.com

COUNSEL FOR APPELLEES
DAVID STEWARD 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, Ohio 44115-2108
(216) 241-5310
(216) 241-1608 (facsimile)
tfitzgerald@gallaghersharp.com

COUNSEL FOR DEFENDANT-APPELLANT
THE LAKE COUNTY HISTORICAL SOCIETY, INC.

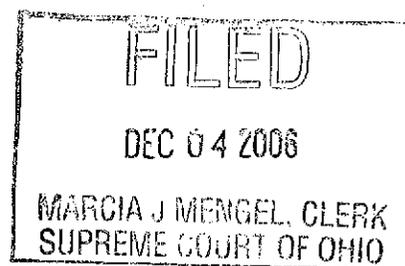


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EXPLANATION OF WHY THIS CASE IS A CASE
OF PUBLIC OR GREAT GENERAL INTEREST

Despite the contentions of Appellant, this matter does not concern issues for the future of civil litigation in the State of Ohio or the American with Disabilities Act. What this matter does involve is Appellees owning-up to their responsibilities to make their premises safe for all who are invited, not just those with disabilities. It is a ludicrous assertion that Appellees cannot recover damages for unreasonably safe conditions simply because she is not handicapped. Apparently, Appellant is wiping its metaphorical brow in relief that their victim was not disabled as defined by the American with Disabilities Act.

Appellant disingenuously argues that the “long-standing” principal of Ohio law that property owners are not the insurers of the safety and well-being of those persons whom come upon the property is in serious jeopardy. Clearly, an owner or occupier generally cannot be held to be an insurer against a tree falling on a guest, an unknown gunman assaulting a guest, or even a simply slip-and-fall on the natural accumulation of ice or snow. Yet, how can Appellant seriously argue that it cannot be held responsible for the safety of persons walking on the very ramp it caused to be designed, built, maintained, and operated?

Appellant further argues that owners and occupiers should not be held liable for “otherwise trivial and insignificant deviations” from the law. What an interesting argument that would make to the drafters of legislation who obviously determined that what finds it way into adopted legislation is neither trivial nor insignificant, but in fact necessary enough to be codified into law for the protection and well-being of the people.

This case does not involve a case of general or great public interest. Instead, this case involves a property owner who is unwilling to accept responsibility for the safety of those who are

permitted on its property, including those who have volunteered their time for the betterment of Appellant itself.

STATEMENT OF THE CASE AND FACTS

The main facts in the instant matter are quite straightforward and undisputed. In addition, despite the contentions of Appellant, the law is easily interpreted and applied to said facts. The result is that the Decision of the Eleventh District Court of Appeals must stand.

Appellee Donna J. Stewart (hereinafter referred to as "Appellee Stewart") was a volunteer worker for Appellant from Spring, 2001 until 6 June 2002. On this final day of volunteer work, Appellee Stewart was walking on a ramp, constructed by other volunteer workers, when her right leg slipped out from underneath her body proceeding down the ramp. Appellee Stewart landed on her right elbow causing a fracture and resulting injury and damages. In pertinent substance, these facts were not in dispute at the lower level courts.

On 13 November 2003, Appellees filed a Complaint with the Lake County Court of Common Pleas asserting negligence on the part of Appellant. Specifically, the Complaint alleged that Appellee failed to properly construct, inspect and maintain the ramp in question. As one component of the evidence of negligence, Appellees alleged that the ramp failed to comply with the Americans with Disabilities Act (hereinafter "ADA") and adopted into the Ohio building standards through Ohio Revised Code Section 3781.11(B). Again, Appellant admitted that the ramp failed to comply with the ADA requirements and Ohio Revised Code Section 3781.11(A).

In consideration of summary judgment filed by Appellant, the trial court found that a violation of the ADA could be used as one piece of evidence in establishing negligence,

notwithstanding the fact that Appellee Stewart was not “disabled” as defined therein. However, the trial court granted summary judgment on the determination that Appellee had neither knowledge nor notice of the defect and therefore, was not negligence.

Appellees timely appealed to the Eleventh District Court of Appeals. The appellate court overturned the trial courts summary judgment on Appellees’ sole assignment of error.

The appellate court correctly determined that Appellee Stewart was a business invitee (to wit: a volunteer worker) and therefore she was owed a particular duty of safety and care while on Appellant’s premises. The appellate court further properly found that genuine issues of material fact existed as to whether Appellant breached said duty.

In so finding, the appellate court concluded that, while Appellee Stewart was not “disabled”, evidence of failure to comply with the ADA requirements could be used as evidence of negligence in the construction, inspection, and/or maintenance of the ramp in question. With efficient reason and lucidity, the appellate court opined that the ADA was incorporated into the Ohio building standards. Thus, evidence of failure to comply therefore could be used as evidence of negligent construction, inspection and/or maintenance.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

Appellant’s Proposition of Law No. I: A plaintiff in a premises liability case who is not “disabled” under the ADA is not within the class of persons the ADA was intended to protect, and thus, noncompliance with an ADA regulation governing the slop 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.

This proposition of law addresses whether Appellees may offer into evidence a violation of the Ohio building standards, and specifically the ADA as adopted thereby, as proof of

negligent construction, design, maintenance, and/or operation of the ramp in question. Appellant would have this Court hold that a plaintiff may not. This argument is without merit and application in the instant matter.

The appellate court properly found that Appellees sought neither cause nor redress under the authority of the ADA. The Complaint alleged civil negligence as long recognized by the State of Ohio. One avenue to establishing negligence on the part of a business such as Appellant was failure to comply with the Ohio building standards. Appellant did so fail to comply and the evidence is both applicable and relevant.

It is undisputed that Appellee Stewart, as a seasonal volunteer, was a business invitee of Appellee. Appellant owed Appellee Stewart, as a business invitee, a duty of reasonable care in maintaining its premises in a safe condition. Kubiszak v. Rini's Supermarket (1991), 77 Ohio App.3d 679, 686; Hudspath v. The Cafaro Co., 11th Dist. No. 2004-A-0073, 2005-Ohio-6911, unreported, at ¶9. Thus, Appellant was under a duty to maintain its premises in a reasonably safe condition and warn business invitees of latent or concealed defects of which Appellant had knowledge **and/or** should have had knowledge. Id.

Ohio Revised Code Section 3781.111(B) requires that all the standards and rules adopted by the board of building standards must comply with the ADA. This section states in pertinent part:

Except as otherwise provided in this section, the standards and rules adopted by the board pursuant to this section shall be in accordance with the "Americans with Disabilities Act of 1990," 104 Stat. 327, 42 U.S.C.A. 12101, as amended, and the "Fair Housing Amendments Act of 1988," 102 Stat. 1619, 42 U.S.C.A. 3601, as amended.

As admitted by Appellant, the ramp in question was non-compliant with applicable building standards as established under Section 3781.111. The evidence shows the ramp was used generally, though not exclusively, for pedestrian and disabled access and egress. Appellant did not limit the use of said ramp to those designated “disabled” and invited all to navigate its path.

Appellant argues that it had neither knowledge of the defective ramp nor should be deemed to have possessed such knowledge, and thus was without notice. This is a outlandish argument given the fact that Appellant commissioned the construction and design of the ramp and “employed” the individuals who did so. Appellant, and only Appellant, had the authority to maintain and operate the ramp thereafter.

Appellees are not seeking redress under the ADA, nor do they allege Appellee Stewart was “disabled.” Appellees alleged violation of the building standards as promulgated pursuant Ohio Revised Code Section 3781.111(B). The appellate court held that once a property owner authorizes the construction of a ramp, it is responsible for inspections, and insuring the ramp's compliance with all applicable building codes and laws. Appellant cannot genuinely argue against this simple, lucid proposition. Appellant cannot seriously hope this Court would hold that a business can construct poorly-engineered ramps for its exits, in lieu of stairs, and escape liability because non-disabled persons use them.

Accordingly, the Decision of the Eleventh District Court of Appeals must stand.

Appellant's 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 ADA, governing the slop of ramps installed on the premises.

Appellant's Proposition of Law No. II is really the same as Proposition of Law No. III and merely splits hairs on the word "inspect." The appellate court did not hold that an owner must inspect the premises "in perpetuity," but only that the open and obvious doctrine does not apply. Thus, the resolution of this case turns on the issue of Appellant's notice and/or knowledge of the ramp's defects. However, since the Appellant's argument is the same as Proposition of Law No. III, for the sake of judicial economy Appellees set forth their response below as if incorporated herein.

As set forth below, Appellant had an affirmative duty to inspect its premises for defective or dangerous conditions which might involve an unreasonable risk of harm to an invitee. Appellant is charged with constructive knowledge of a defect or danger if a reasonable inspection of the premises would have revealed it. Yet, inspection is a superfluous inquiry when the condition was caused and/or created by the business in the first place.

Appellant's 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.

A long-standing principal of law in Ohio is that, in 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. Presley v. Norwood (1973), 36 Ohio St.2d 29, 31; Tiberi v. Fisher Bros. Co. (1953), 96 Ohio App. 302, 303. No party disputes this principal of law nor its application to the instant matter.

However, Appellant admits to commissioning the design and construction of the ramp. Moreover, Appellant is the only entity or person having control over the ramp for inspection and maintenance. Appellant further concedes that the ramp violated Ohio building standards which incorporate ADA requirements.

The appellate court found that Appellees' allege that the sole cause of Appellee Stewart's fall and injury was the defective condition of the ramp. The evidence presented upon summary judgment motion showed that the defective condition of the ramp was the proximate cause of her injury. There was no claim of an additional contributing factor, such as water or ice, which caused her injury.

Both the trial court and appellate court correctly found that the open-and-obvious doctrine was inapplicable in the instant matter. 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, unreported, at ¶13. A hazard is open and obvious if it is observable in that it is

known to the invitee or so obvious that he or she may reasonably be expected to discover it. Armstrong v. Best Buy Co., Inc. (2003), 99 Ohio St.3d 79, syllabus.

In the instant matter, the hazard created by the defective ramp could not be observed by Appellee Stewart. The defect and hazard was due to the slope of the ramp exceeding ADA standards and therefore, a business invitee would be unable to determine that the defective ramp's slope was potentially hazardous. Accordingly, the open-and-obvious doctrine is not applicable.

To establish a claim of negligence, Appellees were required to show the existence of a duty, a breach of that duty, and injury directly and proximately resulting from a breach of that duty. Menifee v. Ohio Welding Prods., Inc. (1984), 15 Ohio St.3d 75, 77. As stated by the trial court and appellate court, there was neither dispute nor doubt that Appellee Stewart was a business invitee for which a duty arises.

In Ohio, an owner owes a business invitee a duty of reasonable care to maintain the premises in a reasonably safe condition and to warn of unreasonably dangerous and latent conditions or remedy any unreasonable dangers that the owner actually knows about or that she should know about in the exercise of reasonable care. Armstrong v. Best Buy Co., Inc. (2003), 99 Ohio St.3d 79, syllabus; Paschal v. Rite Aid Pharmacy, Inc. (1985), 18 Ohio St.3d 203. In order for a plaintiff to prevail in a slip and fall case in Ohio, the plaintiff must demonstrate at least one of the following: (1) that the defendant through its officers or employees was responsible for the hazard complained of; or (2) that at least one of the such persons had actual knowledge of the hazard and neglected to give adequate notice of its presence or remove it promptly; or (3) that such danger had existed for a sufficient length of time reasonably to justify the inference that the failure to warn against it or remove it was attributable to a want of ordinary care. Johnson v. Wagner Provision Co. (1943), 141 Ohio St. 584, 589. Clearly, mere

speculation that there could have been an employee who knew about the condition or that business could have had a better means of reporting the condition is not enough. Braun v. Russo's Inc. (Jun. 1, 2000), 8th Dist. No. 76273, 2000 Ohio App. LEXIS 2339, at 9-10; Altomare v. Columbiana County Career Ctr. (Dec. 3, 1997), 7th Dist. No. 97-C0-04, 1997 Ohio App. LEXIS 5616, at 5-6.

However, in Union News Co. v. Freeborn (1924), 111 Ohio St. 105, 106, this Court held that a proprietor has a duty to warn an invitee of any unsafe condition which it has created either itself or through its employees or agents. Thus, a business operator will already have knowledge of his own actions and those of his employees (e.g. in mopping a floor and therefore rendering it slippery and unsafe by the employee's act). Id.; Ashley v. RHF, Inc. (Aug. 12, 1993), Pike App. No. 93CA501, unreported. The issue of actual or constructive notice of the condition will not arise in these types of cases. Id. A proprietor who caused the condition has impliedly assured said invitees that the condition is safe for them to pass over or through and may incur liability if a patron is proximately injured while attempting to navigate the premises. Id.

In Beair v. KFC National Management Co., Franklin App. No. 03AP-487, 2004-Ohio-1410, the Tenth District Court of Appeals found that genuine issues of material fact remained regarding a plaintiff's slip and fall claim when the plaintiff alleged that a restaurant employee recently mopped the area in which she fell. In Beair, the plaintiff did not see an employee put anything on the floor and she did not see an employee mopping the area, but she did notice an employee in the general area with a mop, a bucket, and cleaning supplies. Id. at 1. Again, the court determined that genuine issues of material fact existed, however, circumstantial the evidence might be.

Appellant cites Helms v. American Legion, Inc. (1996), 5 Ohio St. 2d 60, claiming that the appellate courts decision in this matter “runs afoul” of the Helms ruling. This, however, is not correct.

In Helms, this Court determined that, despite notice of a minor uneven sidewalk pavement variance, a defendant cannot be found liable for injuries caused by a slip and fall over a slight sidewalk height variation imperfection. Id. at 62. Maintaining such a slight disparate condition cannot constitute negligence and consequently, a plaintiff's claim must be denied without more (hence created the oft-cited “two-inch rule”). Id. The instant matter does not address minor erosion of the Earth underneath a public sidewalk, but the actual, intentional design and construction of a ramp for the sole purpose of, and the only means of, ingress and egress to Appellant's establishment. Appellee Stewart was not a pedestrian, but a business invitee – what's more a volunteer worker.

Appellant also cites the Sixth Appellate District's decision in Klostermeier v. In & Out Mart (Mar. 30, 2001), Lucas App. No. L-00-1204. The Klostermeier court held that an independent contractor may be liable for dangerous conditions he created on real property of another. Id. at 3. The appellate court held that a contractor is liable to all those who may foreseeably be injured by a dangerous condition if the contractor fails to disclose dangerous conditions known or when the work is negligently done. The Eleventh District Court of Appeal's Decision in this case clearly corresponds with this ruling as Appellant did in fact perform and/or cause to be performed the ramp in question.

Finally, Appellant cites two (2) sets of appellate court decisions which the Appellant attempts to argue are conflicting and therefore must be resolved by this Court. Again, Appellant's argument falls short of logic.

The cases cited (page 3 of Appellant's Memorandum) by Appellant for the proposition that administrative rule violations do not prohibit the application of the "open and obvious" doctrine simply do not so hold. These cases held, under the authority of this Court's decision in Chambers v. St. Mary's School (1998), 82 Ohio St.3d 563, syllabus, reconsideration denied 83 Ohio St.3d 1453, that a violation of an administrative rule does not constitute **negligence per se**. Instead, the Chambers decision holds, as do the lower court decisions which follow, that such a violation is **admissible as evidence of negligence**. Id. at 568.

Both the trial court and appellate court in this matter determined that the "open and obvious" doctrine did not apply. Neither opinion conflicts with the Chambers decision of the appellate court decisions cited by Appellant. Such are wholly inapplicable to the instant matter. Appellees' case did not, and does not, rest solely upon a claim of negligence *per se*.

Accordingly, construing the evidence of this case in a manner that is most favorable to Appellees, reasonable minds could have reached different conclusions as to whether Appellant either created or had constructive notice of the hazardous conditions as set forth above. As genuine issues of material fact remained, the appellate court's reversal was correct.

Finally, the issue of whether a hazardous condition is open and obvious presents a genuine issue of fact for a jury to review. The obviousness of a risk is an issue for the jury to determine. Carpenter v. Marc Glassman, Inc. (1997), 124 Ohio App.3d 236, 240; Henry v. Dollar General Store, Greene App. No.2002-CA- 47, 2003-Ohio-206, unreported; Bumgarner v. Wal-Mart Stores, Inc., Miami App. No.2002-CA-11, 2002-Ohio-6856, unreported.

Accordingly, as shown herein, Ohio law in this matter is clear and unambiguous and the appellate court properly interpreted and applied the same. There is no issue of public or great general interest to be addressed by this Court.

CONCLUSION

For the foregoing reasons, this case neither involves a matter of public nor of great general interest. The Appellees respectfully request that this Court deny jurisdiction in this matter.

Respectfully submitted,

MARK M. SIMONELLI, CO., L.P.A.

MARK M. SIMONELLI, ESQ. (#0065965)

COUNSEL FOR APPELLEES
DAVID AND DONNA J. STEWART

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum in Response was sent this 30th day of November, 2006, via ordinary U.S. mail, postage prepaid, to counsel for Appellants, Timothy J. Fitzgerald and Colleen A. Mountcastle, Gallagher Sharp, Bulkley Building, Sixth Floor, 1501 Euclid Avenue, Cleveland, Ohio 44115-2108.

MARK M. SIMONELLI, ESQ. (#0065965)

COUNSEL FOR APPELLEES
DAVID AND DONNA J. STEWART