

IN THE SUPREME COURT OF OHIO

CASE NO. 07-0288

**ABBRA WALKER AHMAD, ADMINISTRATOR OF THE
ESTATE OF SHEILA WALKER, DECEASED**
Plaintiff-Appellant

-vs-

A.K. STEEL CORPORATION
Defendant-Appellee

On Appeal from the
Twelfth District Court of Appeals, Butler County
Case No. CA2006-04-089

**BRIEF OF AMICUS CURIAE,
OHIO ASSOCIATION FOR JUSTICE
IN SUPPORT OF PLAINTIFF-APPELLANT,
ABBRA WALKER AHMAD, ADMINISTRATOR**

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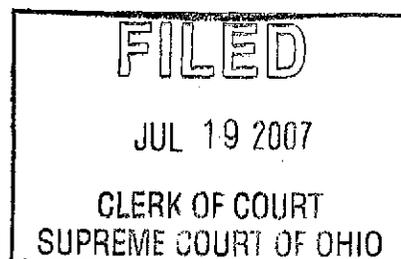


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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

This *Amicus Curiae* represents the interests of the Ohio Association for Justice (“OAJ”). The OAJ was formally known as the Ohio Academy of Trial Lawyers. The OAJ is comprised of approximately two thousand (2,000) attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and the promotion of public confidence in the legal system.

This *Amicus Curiae* is intervening in this appeal on behalf of Plaintiff-Appellant, Abbra Walker Ahmad, Administrator, in support of the issues of public and great general importance that have been raised. This Court’s resolution of the question of whether the “open-and-obvious” doctrine is a complete bar to liability even where a violation of a specific administrative safety regulation has been established will have profound implications for the citizens of Ohio. A property owner’s or occupant’s failure to furnish mandatory protective features, install safety devices, and maintain safe premises nearly always produces a danger which, in a technical sense, is “readily discernable”. The OAJ is deeply concerned that an overly aggressive and unrealistic expansion of the open-and-obvious doctrine will serve only to discourage compliance with agency regulations that have been established to protect the public from needless injuries and deaths.

ARGUMENT

PROPOSITION OF LAW: EVIDENCE OF A VIOLATION OF AN ADMINISTRATIVE SAFETY REGULATION RAISES A GENUINE ISSUE OF MATERIAL FACT REGARDING A PROPERTY OWNER'S DUTY AND BREACH OF THAT DUTY.

To be sure, the OAJ's purpose in this Brief is not to question the continued viability of *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088. That opinion continues to stand for the proposition that landowners and occupiers generally owe no duty to remedy open and obvious hazards on their premises. That principle is squarely rooted in the common law. But the General Assembly possesses the authority, within constitutional limitations, to modify the common law. *Johnson v. B.P. Chems., Inc.*, 85 Ohio St.3d 298, 303, 1999-Ohio-267, 707 N.E.2d 1107, 1111.

Plaintiff-Appellant, Abbra Walker Ahmad, Administrator, maintained in the proceedings below that Sheila Walker, Deceased, had fallen down a flight of stairs as a result of the failure of Defendant-Appellee, A.K. Steel Corporation, to comply with safety regulations requiring the installation of handrails. Administrative agencies have long been authorized to adopt rules as a means of accomplishing the authority conferred upon them by the legislature. *Doyle v. Ohio Bur. Of Motor Veh.* (1990), 51 Ohio St.3d 46, 47, 554 N.E.2d 97, 99; *Akron v. Public Util. Commn.* (1948), 149 Ohio St. 347, 359, 78 N.E.2d 890, 896-897. "Rules issued by administrative agencies pursuant to a statutory authority have the force and effect of law." *Parfitt v. Columbus Corr. Facil.* (1980), 62 Ohio St.2d 434, 436, 406 N.E.2d 528, 530, citing *Kroger Grocery & Baking Co. v. Glander* (1948), 149 Ohio St. 120, 125, 77 N.E.2d 921; *State ex rel. Kildow v. Indus. Commn.* (1934), 128 Ohio St. 573, 580, 192 N.E. 873; see also *Doyle*, 51 Ohio St.3d at 47. This Court has thus recognized that a violation of an administrative

regulation, such as the Ohio Basic Building Code, may be admissible as evidence of negligence. *Chambers v. St. Mary's Sch.*, 82 Ohio St.3d 563, 1998-Ohio-184, 697 N.E.2d 198, syllabus; see also *Christen v. Don Vonderhar Market & Catering, Inc.*, 1st Dist. No. C-050125, 2006-Ohio-715, 2006 W.L. 367107 ¶ 11; *McCue v. Frye* (June 30, 1999), 6th Dist. No. S-98-041, 1999 W.L. 435745 *4.

As far as the OAJ is aware, the defense has yet to establish in these proceedings that any of the applicable regulations contain exceptions for “open and obvious” defects. Their position nevertheless is, and the lower courts concluded, that there can be no recovery against those who flout such safety standards, as a matter of law, when the dangers they have created are “open and obvious”. *Ahmad v. A.K. Steel Corp.*, 12th Dist. No. CA2006-04-089, 2006-Ohio-7031, 2006 W.L. 3833873. Such logic fails to recognize that the administrative agency that has been charged by the General Assembly with promoting public safety has determined that certain precautions against injury must be taken regardless of whether the existing hazard is readily discernable. The better reasoned view is that a violation of a specific safety regulation may be introduced as proof of negligence and the open-and-obvious nature of the hazard is simply evidence of comparative fault.¹

¹ The OAJ is not suggesting that this Court needs to go so far in this instance as to hold that the administrative safety regulation, by itself, creates an actionable duty. Like all other individuals and business entities, the Defendant already owed a duty of due care to Plaintiff under the common law. *Mussivand v. David* (1989), 45 Ohio St. 3d 314, 318-319, 544 N.E. 2d 265, 269-271; *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St. 3d 96, 98, 543 N.E. 2d 1188; *Huston v. Konieczny* (1990), 52 Ohio St. 3d 214, 217, 556 N.E. 2d 505. This duty has been afforded legislative force through the Frequenter's Statute. *R.C. §4101.11*. While the open-and-obvious doctrine would typically bar a claim based upon an easily detectable hazard that the government has never seen fit to address, evidence that a specific safety regulation has been violated should serve in appropriate instances to create a genuine issues of material fact over whether the duty of due care has been breached. *Christen*, 2006-Ohio-715 ¶ 12; *McCue*, 1999 W.L. 435745 *4-5. Since the plaintiff must still prove liability and proximate cause by a preponderance of the evidence and the open-and-obvious nature of the hazard will be a defense

Ohio's appellate courts are sharply divided on this issue. In *Francis v. Showcase Cinema Eastgate* (1st Dist. 2003), 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535 ¶ 30-32, a cleaning woman had filed a lawsuit when she tripped and fell down a flight of stairs that lacked a handrail. The property owner, Showcase Cinema, moved for summary judgment on the grounds of the "open and obvious" defense. The cleaning woman responded with an affidavit from an engineer attesting that the lack of the handrail violated the Ohio Basic Building Code (OBBC) and created an unreasonably dangerous condition. *Id.* The First District observed that this Court had held in *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 697 N.E.2d 198, that a violation of such a regulation could be found by a jury to constitute negligence. *Id. at 415.* With regard to the open and obvious defense, the panel unanimously concluded that:

Thus, while the Supreme Court of Ohio has reaffirmed the principle that a landowner owes no duty to protect an invitee from open and obvious dangers, it has also held that violations of the OBBC are evidence that the owner has breached a duty to the invitee. In this case, Showcase suggests that this court should simply ignore the evidence of the OBBC violation, but we believe it would be improper to do so. To completely disregard the OBBC violation as a nullity under the open-and-obvious doctrine would be to ignore the holding in *Chambers* and to render the provisions of the OBBC without legal significance. We hold, then, that the evidence of the OBBC violation raised a genuine issue of material fact regarding Showcase's duty and breach of duty, and that summary judgment was improperly granted. [emphasis added, footnotes omitted]

Id. at 415-16. The cleaning woman was thus permitted to proceed with her lawsuit notwithstanding the fact that the absence of the handrail was supposedly "open and obvious."
Id.

The First District's reasoning was approved by the Tenth District in *Uddin v. Embassy*

for the jury to consider, the position advanced herein does not conflict with this Court's rejection of the negligence *per se* claim in *Chambers*, 82 Ohio St.3d 563.

Suites Hotel (December 13, 2005), 10th Dist. No. 04AP-754, 2005-Ohio-6613, 2005 W.L. 3416144. In that instance a ten year old child had drowned in a pool at a hotel. When the open and obvious defense was raised, the panel proceeded to examine the conflict between *Francis*, 155 Ohio App.3d 412, and *Oliver v. Leaf & Vine* (April 15, 2005), 2nd Dist. No. 2004 CA 35, 2005-Ohio-1910, 2005 W.L. 937928. *Uddin*, 2005-Ohio-6613 at ¶ 32-35. The majority then concluded that:

Although we agree with *Oliver* that the Supreme Court in *Chambers* was not asked to consider the open-and-obvious doctrine, we cannot agree in every situation with *Oliver's* conclusion that a violation of an administrative rule may constitute an open-and-obvious condition, thereby obviating a duty to warn.

Id. at ¶ 36. The Tenth District noted the incongruity of allowing those who have endangered public safety by ignoring safety regulations to be insulated from liability simply because the hazard they created “constituted an open-and-obvious condition.” *Id.*, ¶ 37.

Several courts have reached the contrary conclusion and have held that liability can never arise from an “open and obvious” hazard, as a matter of law, regardless of the circumstances. *Oliver v. Leaf & Vine*, 2nd Dist. No. 2004CA25, 2005-Ohio-1910; *Ryan v. Guan*, 5th Dist. No. 2003CA00110, 2004-Ohio-4032, 2004 W.L. 1728519; *Kirchner v. Shooters On The Water, Inc.* (8th Dist. 2006), 167 Ohio App.3d 708, 719-720, 2006-Ohio-3583, 856 N.E.2d 1026.² These opinions are founded upon the view that *Armstrong*, 99 Ohio St.3d 79, established the open-and-obvious doctrine as an absolute and universal defense against all claims. Little concern has been shown in these opinions for the rather obvious fact that *Armstrong* did not involve allegations of a violation of a specific administrative regulation.

² This Court accepted jurisdiction over the *Kirchner* ruling. *Sup.Ct. Case No. 2006-1682*. That proceeding has been consolidated with the instant appeal.

Cases involving the absence of mandatory stairway handrails illustrate how the open-and-obvious defense is being stretched to absurd lengths. The ordinary individual who is proceeding through a building typically would not notice, let alone appreciate the significance of, missing handrails. Even if he/she did recognize that the stairway posed a hazard, it may well be impossible for the danger to be avoided. Often times, an individual may have no choice but to proceed down the dangerous stairway in order to leave the structure or perform a required job duty. The protruding metal bracket in *Armstrong* was easily avoidable and, more significantly, had not been prohibited by an administrative regulation. Agencies charged with protecting public safety frequently require protective features, guarding, and devices precisely because the ordinary individual does not recognize, cannot fully understand, or is unable to avoid the danger posed.

In those jurisdiction that have adopted an overly harsh interpretation of *Armstrong*, building owners and business operators are now free to ignore safety rules while remaining secure in the knowledge that the “readily apparent” dangers they have created will not generate litigation. The only incentive that exists for ensuring that “open and obvious” holes in floors are repaired, “open and obvious” stairs are constructed at the appropriate heights, barriers are erected against “open and obvious” ledges and drop offs, “open and obvious” pools are properly maintained, and protection is furnished against “open and obvious” electrical hazards is the slight prospect that the agency promulgating the safety rule might discover the violation and impose a modest fine.

This Court had initially decided to review *Uddin*, 2005-Ohio-6613, but dismissed the appeal as improvidently allowed on May 2, 2007. *Case No. 2006-0189*. Justice O’Connor nevertheless issued a dissenting opinion which was joined by Chief Justice Moyer and Justice

Pfeiffer. *Uddin v. Embassy Suites Hotel*, 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638. As previously noted, that fatal drowning claim was based upon the hotel's alleged failure to comply with administrative regulations governing the installation and operation of swimming pools. *Id.*, ¶ 11. It was observed that:

The effect of the possible violation of the administrative rule governing the clarity of water in public pools is a critical issue in this case. We have held that the determination of Ohio's public policy remains the province of the General Assembly, *State ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cty.* (1929), 120 Ohio St. 464, 479, 166 N.E. 407, affirmed (1930), 281 U.S. 74, 50 S.Ct. 228, 74 L.Ed. 710, and that administrative rules are to reflect the public policy established by the General Assembly in the Revised Code, *Doyle v. Ohio Bur. of Motor Vehicles* (1990), 51 Ohio St.3d 46, 47, 554 N.E.2d 97, as well as the technical expertise of the administrative agencies that draft administrative rules. We have also held that although a violation of an administrative rule does not constitute negligence per se, such a violation may be admissible as evidence of negligence. *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 568, 697 N.E.2d 198. In cases in which reasonable minds could differ as to whether the act or omission that gives rise to the violation of the rule constitutes the proximate cause of the accident, the determination should be left to the jury. *Merchants Mut. Ins. Co. v. Baker* (1984), 15 Ohio St.3d 316, 318, 15 OBR 444, 473 N.E.2d 827. See, also, *Kerns*, 255 Kan. At 282, 875 P.2d 949.

Id., ¶ 13. Justice O'Connor reasoned in the dissent that:

Like the court of appeals, I would hold that if there is evidence that could support a finding that a defendant violated an administrative rule, and if that violation raises a genuine issue of material fact as to whether there was a duty, a breach, and proximate cause, summary judgment is inappropriate. That conclusion is based not only on the law of summary judgment, but also important public policies.

As the lead opinion of the court of appeals recognized, "[w]hen we are considering a motion for summary judgment, to ignore a party's purported violation of an administrative rule that is supported by some evidence would vitiate the legal significance of an administrative rule. For instance, in a case wherein summary judgment is sought and application of the open-and-

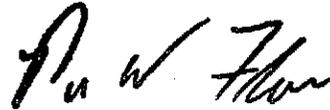
obvious rule is disputed, if a defendant's purported violation of the administrative code that was supported by some evidence were ignored, a party could violate an administrative rule, thereby possibly endangering public safety, yet be insulated from liability because such a violation constituted an open-and-obvious condition." 165 Ohio App.3d 699, 2005-Ohio-6613, 848 N.E.2d 519, ¶ 37. To hold otherwise, we would have to defy the legal significance of administrative rules and suspend common sense. The court of appeals properly recognized these inherent failings in the appellants' argument to the contrary, and its opinion should be affirmed.

Id., ¶ 15-16. The OAJ hereby urges this entire Court to adopt this sound dissenting opinion which not only embodies the spirit of existing precedent recognizing the importance of administrative regulations, but also is necessary to prevent countless injuries and fatalities by encouraging compliance with such safety rules.

CONCLUSION

For the foregoing reasons, this Ohio Association of Justice hereby supports the positions of Plaintiff-Appellant, Abbra Walker Ahmad, Administrator, and requests that this Court adopt the dissent in *Uddin*, 113 Ohio St.3d 1249, and reverse the ill-advised decision of the Twelfth District Court of Appeals.

Respectfully submitted,



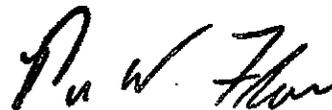
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