

IN THE  
SUPREME COURT OF OHIO

07-1222

DOROTHY LANG, et al. :  
: On Appeal from the Jackson County  
Appellant : Court of Appeals, Fourth Appellate  
: District  
vs. :  
: Case No. 06CA18  
HOLLY HILL MOTEL, et al. :  
: Trial Court Case No. 04PI020  
Appellee :

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**MEMORANDUM IN RESPONSE OF APPELLEE RODNEY MCCORKLE dba  
RODNEY MCCORKLE BUILDERS TO THE MEMORANDUM IN SUPPORT OF THE  
JURISDICTION OF APPELLANT DOROTHY LANG, EXECUTRIX OF THE ESTATE  
OF ALBERT LANG**

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**I. Explanation of Why This Case is not a Case of Public Or Great General Interest.**

Appellant argues this case involves the critical role administrative regulations play in public safety. As this Court is certainly aware, it was formerly unquestionable that a violation of the regulation within the Ohio Basic Building Code could not constitute negligence per se. It was elementary that a violation of the Administrative Code Regulation would simply be evidence a jury could consider when determining the issue of negligence. Ohio Courts have historically held a violation of administrative regulation was admissible in evidence only regarding the issue of the want of ordinary care. The position taken by the Appellants is one in which Ohio Courts would be precluded from granting summary judgment to a Defendant any time a Plaintiff made any type of claim or allegation of an Ohio Basic Building Code violation irregardless of substantiating evidence to support the violation.

The issue as presented by the Appellant is not one which is a case of public or great general interest as the law which can and is applied presently by Ohio Courts is sufficient to protect plaintiffs from injuries sustained while at an allegedly unsafe premises.

**II. Statement of the Case and Facts.**

This Appellee finds no issue with the statement of the case and facts as presented by the Appellant.

**III. Law and Argument.**

Proposition of Law: Evidence of a violation of an administrative safety regulation does not abrogate a Defendant's right to have a trial Court consider the defense under the open and obvious doctrine.

Appellants state this case presents the issue of whether evidence that an alleged defect violates and Administrative Code section, raises a genuine issue of material fact and thus

precludes summary judgment. This Appellee would argue the proposition of law is more properly stated as whether evidence of a violation of administrative safety regulation precludes a defendant's ability to obtain summary judgment from a trial court based upon the application of the open and obvious doctrine.

There exists no disputed facts in this case regarding the openness and obviousness of the danger which would thus render it a question of fact. Specifically, Mrs. Lang opined in her deposition testimony the lack of a handrail contributed to the fall. The absence of a hand rail was easily observable so as to appreciate its danger. Both Mr. and Mrs. Lang could easily discern the lack of a handrail simply by glancing at the steps, sidewalk and patio area that led to the hotel room door. Further review of the deposition testimony of decedent's wife, currently establishes the step was an open and obvious condition, and therefore Appellee had no duty which accrued to the Appellant. It is clear decedent in this case failed to see an open and obvious condition. In summary, the height of the stairs and the lack of a handrail were readily observable.

As this Court is aware, Appellant, nevertheless asserts the rise or height of the stairs and the lack of a handrail constitutes a violation of the OBBC, and such violations preclude summary judgment.

A violation of an Ohio Basic Building Code provision may be obvious and apparent to an invitee. In *Oliver v. Leaf & Vine*, it was ruled, that if an OBBC violation were open and obvious, the open and obvious nature would "obviate a duty to warrant". *Oliver v. Leaf & Vine* (April 15, 2005), Miami App. Case No. 2004CA35; *Ryan v. Guan*, Licking App. Case No. 2003CA110, 2004 Ohio 4032 (the open and obvious doctrine applied despite the fact the Plaintiff had lost her balance on a curb ramp flare that was one and one-half times steeper than allowed by the

applicable building codes). Whether a danger is open and obvious presents a question of law, that can be determined through summary judgment by the trial judge. *Hallowell v. Athens*, Athens App. Case No. 03CA29, 2004-Ohio-4257; see also *Nageotte v. Cafaro Co.*, Erie App. Case No. E-04-15, 2005-Ohio-2098.

This really comes down to an issue of between negligence and negligence per se. As this Court stated in *Chambers v. St. Mary's School*, 82 Ohio St. 3d 563, 1998-Ohio-184,

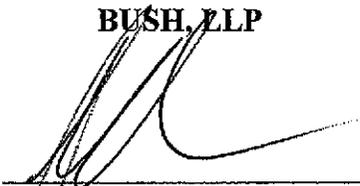
"The distinction between negligence and negligence per se is the means and method of ascertainment. The first must be found by the jury from the facts, conditions and circumstances disclosed by the evidence; the latter is a violation of a specific requirement of law or ordinance, the only fact for determination by the jury being the commission or omission of the specific act inhibited or required."

"\*\*\*negligence per se is tantamount to strict liability for purposes of providing a Defendant breached a duty." Id. at 565-66.

As noted previously, this Court has held that a violation of the OBBC does not constitute negligence per se, but it may be admissible as evidence of negligence. It should be clear that an OBBC violation does not negate application of the open and obvious doctrine. Certainly, this Court has ruled an allegation of an OBBC violation does not transform the case into one of negligence per se. Clearly, based upon *Chambers*, as quoted above, this Court has previously ruled in favor of the proposition that an OBBC violation does not preclude summary judgment based upon the open and obvious doctrine.

Respectfully submitted,

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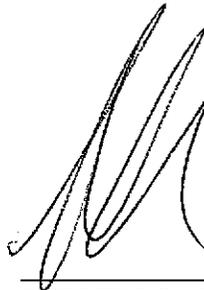
**CERTIFICATE OF SERVICE**

A copy of the foregoing was sent via regular U.S. mail, postage prepaid, this 24<sup>th</sup> day of

July, 2007 to the following:

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