IN THE
SUPREME COURT OF OHIO

DOROTHY LANG, EXECUTRIX OF THE ESTATE OF ALBERT LANG,	:	**CONSOLIDATED CASE NOS. 2007-1222 AND 2007-1370**
Plaintiff-Appellant,	:	**ON APPEAL FROM THE JACKSON COUNTY COURT OF APPEALS, FOURTH APPELLATE DISTRICT**
v.	:	
HOLLY HILL MOTEL, et al.,	:	**COURT OF APPEALS CASE NO. 06CA18**
Defendants-Appellees.	:	

MERIT BRIEF OF APPELLANT DOROTHY LANG, EXECUTRIX OF THE ESTATE OF ALBERT LANG

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I. INTRODUCTION

This case illustrates how the failure of property owners to maintain their premises in compliance with applicable administrative safety codes can result in tragedy. Albert and Dorothy Lang were enjoying the golden years of their life together, just one year shy of their 50th wedding anniversary, when they decided to stop for the night at the Holly Hill Motel in Jackson, Ohio on their way home from their grandson's baptism in North Carolina. Mr. Lang tripped over a riser that exceeded the maximum height permitted by the Ohio Basic Building Code by several inches. Because there was no handrail in place, Mr. Lang was unable to steady himself and he fell to the ground, fracturing his hip. Mr. Lang died a few months later from complications precipitated by the hip fracture.

As the line of cases which precede this case demonstrate, noncompliance with administrative safety standards has resulted in needless injury and loss of life. In *Ahmad v. AK Steel Corp.* (Dec. 28, 2006), Butler App. No. CA2006-04-84, unreported, 2006-Ohio-7031, a 47 year old mother died. In *Kirchner v. Shooters on the Water, Inc.* (2006), 167 Ohio App.3d 708, 2006-Ohio-3583, a 20 year old drowned after falling into the Cuyahoga River. In *Souther v. Preble Cty. Library, West Elkton Branch* (April 17, 2006), Preble App. No. CA2005-04-006, 2006-Ohio-1893, an 83 year old grandfather who was taking his grandchildren on a trip to the library fell and died shortly later as a result of his injuries. In each case, there was evidence that the dangerous condition violated an administrative safety rule. And in each case, the property owner was not held responsible for failing to maintain their property in compliance with the *minimum* safety standards imposed by Ohio law.

The outcome of this case, therefore, will have an important impact on the way administrative safety rules are viewed and enforced. These rules are mandatory, not optional,

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under Ohio law, and property owners must be held to the standard that protects innocent parties from conditions which have been recognized as dangerous by the rule-making administrative body, which, in this case, is the Ohio Board of Building Standards. Anything less will render these standards meaningless and undermine the policy and intent expressed by the Ohio General Assembly.

II. STATEMENT OF THE CASE AND FACTS

A. Mr. and Mrs. Lang Visit the Holly Hill Motel Where Mr. Lang Trips on a Step and Breaks His Hip.

On April 4, 1999, at approximately 10:00 p.m., the Plaintiff-Appellant, Dorothy Lang, and her husband, Albert Lang, arrived at the Holly Hill Motel located in Jackson, Ohio. Mr. and Mrs. Lang were returning from their grandson's baptism in North Carolina to their home in Cincinnati. (D. Lang Dep. at 47; Lang Supp. at 5). At the time, Mr. Lang was 78 years of age. (D. Lang Dep. at 10; Lang Supp. at 1).

Upon arrival at the motel, Mrs. Lang requested a handicap accessible room. (D. Lang Dep. at 69; Lang Supp. at 8). Mrs. Lang made this request because her husband, Albert, suffered from pulmonary disease, which required him to use an oxygen tank. (D. Lang Dep. at 36; Supp. at 2). Given the late hour, Mrs. Lang wanted a room that was easily accessible. The receptionist, Pauline Hatfield, informed her that there were no handicap accessible rooms available, but offered the Langs a room that would only require Mr. Lang to traverse one step. (D. Lang Dep. at 69; Lang Supp. at 8).

After moving their car to a space in front of the assigned room, Mrs. Lang discovered that there were actually two steps from the parking lot to the room. Mrs. Lang was not concerned about the fact that there were two steps, however, because Mr. Lang was more

than capable of climbing stairs. In fact, the Langs had recently returned from a trip to their property in the Bahamas, which was only accessible by boat. (D. Lang Dep. at 41-42, Supp. at 3-4). Mr. Lang did not have any problems during their trip, including traveling through airports and climbing in and out of boats. *Id.* Given the late hour, however, Mrs. Lang decided to assist her husband from the car to the room by giving him her arm and carrying his oxygen tank. (D. Lang Dep. at 62; Lang Supp. at 7). As the Langs attempted to climb the second riser to the room, Mr. Lang suddenly pitched forward forcefully and fell onto the porch of the motel. (D. Lang Dep. at 75-76; Lang Supp. at 12-13). Mrs. Lang testified that "it wasn't an easy fall. It was a pitch when he tripped over that step." *Id.* There was no handrail in place at the time of Mr. Lang's fall. (D. Lang Dep. at 55; Supp. at 6).

B. Mr. Lang's Injury Complicates His Pulmonary Disease and Accelerates His Death.

After Mr. Lang fell, Mrs. Lang, with the assistance of the receptionist, moved him to the nearest room. (D. Lang Dep. at 70-72; Lang Supp. at 9-11). The following morning, Mrs. Lang drove him to University Hospital in Cincinnati, where he was diagnosed with a broken hip. (D. Lang Dep. at 81; Supp. at 14). Mr. Lang was admitted to the hospital and underwent surgery the following day. *Id.* He was subsequently discharged from University Hospital on April 9, 1999 and admitted to Drake Hospital for rehabilitation. *Id.* He remained at Drake until the middle of May, 1999. *Id.* However, on June 1, 1999, just two weeks after his discharge from Drake, Mr. Lang was readmitted to University Hospital for respiratory distress. He remained at University Hospital until his death on July 23, 1999. (Baughman Dep. at 18-20; Lang Supp. at 17).

Dr. Robert Baughman, Mr. Lang's pulmonologist, opined that Mr. Lang's death was hastened by his broken hip and resultant immobility. (Baughman Dep. at 22-24; Lang Supp. at 18). He explained that prior to the fall, Mr. Lang's pulmonary condition was managed, in part, due to the fact that he was mobile, which allowed him to keep his lungs clear. (Baughman Dep. at 12; 22; Lang Supp. at 15; 18). After the fall, however, Mr. Lang's movement was severally restricted, causing mucus to accumulate in his lungs. (Baughman Dep. at 22; Lang Supp. at 18). This developed into an irreversible and fatal pulmonary condition. (Baughman Dep. at 22-23; Lang Supp. at 18). Dr. Jonathan Ilowite, another pulmonologist retained by Mrs. Lang, testified to Mr. Lang's life expectancy, stating that the medical complications from the injury accelerated his death. (Affidavit of Jonathan Ilowite; Lang Supp. at 19-20).

C. The Height of the Riser and Absence of a Handrail Violate the Ohio Basic Building Code.

Shortly after the fall, Joseph N. Brashear, a licensed architect from the firm of Brashear Bolton, went to the site of Mr. Lang's fall to determine whether the motel stairs complied with the Ohio Basic Building Code (OBBC) and to evaluate the overall safety of the steps. (Brashear Dep. at 31; Lang Supp. at 21). Mr. Brashear determined that the riser over which Mr. Lang tripped was, at its lowest point, 2.375 inches higher than was permitted by the OBBC. (Affidavit of Joseph Brashear at Exhibits B and C; Lang Supp. at 27-33). Mr. Brashear determined that the riser height constituted a dangerous condition, and that the absence of the handrail contributed to this condition, as the high riser could precipitate a fall. *Id.*

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Mr. Brashear's opinion that the riser height violated the OBBC was not disputed by either Holly Hill or Rodney McCorkle ("McCorkle").[1] Mr. Larry Goodwin, the expert witness retained by McCorkle, did not dispute that the riser height exceeded the maximum height, and did not render an opinion as to whether the riser heights violated the 1982 OBBC.[2] (Goodwin Dep. at 39-40; Lang Supp. at 34-35). When asked about the riser height, Mr. Goodwin responded that while he did not review the OBBC provisions regarding riser height prior to his deposition, he admitted that, "I know that the measurements taken by Mr. Brashear exceeded [the maximum riser height], but I don't remember exactly what the Code required in 1982." *Id.*

D. After a Protracted Procedural History, the Trial Court Grants Summary Judgment to Holly Hill and McCorkle, Finding That the Riser Height and Lack of a Handrail Were Open and Obvious.

Dorothy Lang, individually and as the executrix of the Estate of Albert Lang, filed suit against Holly Hill Motel on March 30, 2001. Holly Hill, in turn, filed a third party complaint against McCorkle. In December 2002, both defendants filed motions for summary judgment. The trial court denied both motions. On April 8, 2003, on the eve of trial, the defendants filed motions *in limine* to exclude the expert testimony of Dr. Baughman as to the wrongful death claim. The following morning, prior to the commencement of trial, the trail court granted the motions, thus prohibiting the plaintiff from introducing any evidence that the fall accelerated Mr. Lang's death. Mrs. Lang was left with little choice but to dismiss her claims without prejudice.

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[1] Rodney McCorkle is the Third Party Defendant. Mr. McCorkle constructed the Holly Hill Motel.

[2] The Holly Hill Motel was constructed in 1982, and therefore the 1982 OBBC governs the minimum safety requirements for the building.

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Mrs. Lang re-filed her suit against Holly Hill on April 6, 2004, and Holly Hill again filed a third party complaint against McCorkle. Both defendants filed motions for summary judgment virtually identical to those filed in the previous case. On March 15, 2005, the trial court granted the motions for summary judgment on the grounds that Mrs. Lang could not identify the cause of her husband's fall.

On appeal, the Fourth District Court of Appeals reversed the trial court decision and remanded the case, holding that there was sufficient evidence in the record for a jury to find that Mr. Lang tripped over the riser. The Court of Appeals refused to uphold the decision on the alternative grounds that the condition was open and obvious, as requested by Holly Hill. On remand, both defendants again filed motions for summary judgment, arguing for the third time that the condition was open and obvious. On September 7, 2006, the trial court granted the defendants' motions.

E. The Court of Appeals Acknowledges a Conflict Among the Appellate Courts and Affirms the Trial Court's Decision.

Mrs. Lang again appealed to the Fourth District Court of Appeals, arguing that (1) the condition was not open and obvious; (2) attendant circumstances created a genuine issue of material fact; and (3) that the record contained evidence that the condition violated the OBBC, thus creating a genuine issue of material fact that precluded summary judgment.

The Court of Appeals acknowledged that there was a conflict among the Ohio appeals courts regarding the significance of an administrative safety rule violation which results in an injury in premises liability cases for purposes of summary judgment. The Court rejected the decisions of the First District and Tenth District courts and held that the fact that the

condition violated the OBBC did not preclude summary judgment under the open and obvious doctrine and affirmed the trial court decision.

III. LAW AND ARGUMENT

Proposition of Law of Plaintiff-Appellant:

In a premises liability case, evidence of a violation of an administrative safety regulation raises a genuine issue of material fact regarding the property owner's duty and breach of that duty, precluding summary judgment under the open and obvious doctrine.

A. Ohio Premises Liability and the Open and Obvious Doctrine.

In order to prevail on a negligence claim, a plaintiff must establish that the defendant owed the plaintiff a duty, that the defendant breached that duty, and the breach of the duty caused the plaintiff's injury. *Wallace v. Ohio Dept. of Commerce* (2002), 96 Ohio St.3d 266, 2002-Ohio-4210. In a premises liability case, the duty owed by landowner to persons entering the land is determined by their relationship between the owner and the injured party. *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315.

It is undisputed that Mr. and Mrs. Lang were business invitees of Holly Hill. An owner of land owes a duty to business invitees to exercise ordinary care and protect the invitees by maintaining the premises in a safe condition such that the invitees will not be unreasonably or unnecessarily exposed to danger. See *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. "This duty includes an obligation to inspect the premises, as well as the exterior walkways, for possible dangerous conditions that may be unknown, and to take reasonable precautions to protect business invitees for foreseeable dangers." *Wilson v. P.N.C. Bank* (May 5, 2000), Hamilton App. No C-990727, unreported at 6.

The trial court found that the defects in the walkways and risers at the Holly Hill Motel were open and obvious defects conditions. The open and obvious doctrine provides that

the owner or occupier of property has no duty to warn business invitees of open and obvious dangers on the premises. *See Paschal v. Rite Aid Pharmacy,* 18 Ohio St.3d at 203-204. When the open and obvious doctrine is applicable, it obviates the duty to warn and acts as a complete bar to recovery. *Armstrong v. Best Buy Co. Inc.* (2003), 99 Ohio St.3d 79, 2003-Ohio-2573. An open and obvious condition is such that the owner or occupier of the premises "may reasonably expect that persons entering the premises will discover the dangers and take appropriate measures to protect themselves." *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644. Because the open and obvious doctrine relates to the threshold determination of duty, it is typically a matter of law for the court to decide. See *Armstrong v. Best Buy Co. Inc.* (2003), 99 Ohio St.3d 79, 82-83.

This Court has distinguished cases in which the condition of the property that caused the injury violated a legislative enactment or an administrative rule enacted for the safety of others. See *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367; *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563. Where a legislative enactment proscribes a specific duty for the safety of others, the failure to perform that duty constitutes negligence per se. *Eisenhuth v. Moneyhon*, 161 Ohio St. at para. 2 of the syllabus. In contrast, the violation of an administrative rule does not constitute negligence per se, but is admissible as evidence of negligence. *Chambers v. St. Mary's School,* 82 Ohio St.3d at 568.

These cases, however, did not address the interplay between the violation of a legislative enactment or administrative rule and the application of the open and obvious doctrine. When faced with this issue as it pertained to a violation of an administrative regulation, namely the Ohio Basic Building Code, the Court of Appeals for the First District, citing *Chambers,* held that violations of the OBBC were evidence of negligence and thus, there was a genuine issue of

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material fact regarding the property owner's duty and breach of that duty. *Francis v. Showcase Cinema Eastgate* (2003), 155 Ohio App.3d 412, 2003-Ohio-6507; *Christen v. Don Vonderhaar Market and Catering, Inc.* (Feb. 17, 2006), Hamilton App. No. C-050125, unreported, 2006-Ohio 715. Specifically, the First District Court of Appeals held, "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." *Francis v. Showcase Cinema Eastgate,* 155 Ohio App.3d at 415-16.

The Tenth District Court of Appeals has also held that summary judgment is not appropriate under the open and obvious doctrine where the danger violates an administrative rule. *Uddin v. Embassy Suites Hotel* (2005), 165 Ohio App.3d 699, 2005-Ohio-6613. The Court found that the issue of whether the defendant violated an administrative code provision raised genuine issues of material fact as to the defendant's duty and breach of that duty owed to the decedent, a ten year old boy who drowned in the hotel's swimming pool. The Tenth District concluded that to ignore the violation was contrary to public safety. The court stated, "[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

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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."

In contrast to the First and Tenth District decisions, the Court of Appeals for the Second, Fifth, Eighth Districts, as well as the court below, have held that evidence that the danger constituted a violation of an administrative rule had no bearing on the application on the open and obvious doctrine. *Ahmad v. AK Steel Corp.* (Dec. 28, 2006), Butler App. No. CA2006-04-84, unreported, 2006-Ohio-7031; *Kirchner v. Shooters on the Water, Inc.* (2006), 167 Ohio App.3d 708, 2006-Ohio-3583; *Olivier v. Leaf & Vine* (April 15, 2005), Miami App. No. 2004 CA 35, unreported, 2005-Ohio-1910; *Ryan v. Guan* (Aug. 2, 2004), Licking App. No. 2003CA00110, unreported, 2004-Ohio-4032; *Lang v. Holly Hill Motel* (May 23, 2007), Jackson App. No. 06CA18, unreported, 2007-Ohio-3898.

Subsequently, this Court decided *Robinson v. Bates* (2006), 112 Ohio St.3d 17, 2006-Ohio-6362, and resolved the issue of the application of the open and obvious doctrine in a premises liability case wherein the plaintiff alleges that the defendant violated a duty created by legislative enactment. In *Robinson,* the plaintiff, a tenant, fell and injured her foot on her leased premises and sued her landlord. The plaintiff asserted that the landlord violated her statutory duty under R.C. §5321.04(A)(2) to repair the leased premises and maintain it in a fit and habitable condition. The trial court dismissed the complaint, finding that the danger was open and obvious. In reversing the lower court decisions, this Court held that the landlord owed the tenant a statutory duty, and as such, the violation of the statute constituted negligence *per se*. Negligence *per se* is a conclusive finding that there was a duty owed and a breach of that duty.

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The plaintiff is then left to establish proximate cause and damages. Therefore, the open and obvious doctrine, based on the common-law duty to warn invitees of latent dangers, was not appropriate, as there exists a material fact as to whether the statutory duty was breached. The Court stated, "[I]f the jury finds that Bates breached her duty to repair and keep the leased premises in a fit and habitable condition, the "open and obvious" doctrine will not protect her from liability. If the jury finds no statutory breach, however, it still must determine whether the danger was open and obvious to Robinson under common-law negligence principles." Therefore, under *Robinson,* where a duty is imposed by legislative enactment, the open and obvious doctrine is not applicable in determining whether a property owner violated that duty.

The question, therefore, is whether the open and obvious doctrine may be grounds for summary judgment in a case where there is evidence that the dangerous condition on the property violated an administrative safety rule, namely, in this case, the OBBC. The open and obvious doctrine abrogates a *common-law duty* to warn. Indeed, in *Robinson,* the Court specifies that if the jury does not find that there was a statutory breach, the jury may then consider "under common-law negligence principles" whether the danger was open and obvious. The fact that an administrative safety rule was violated constitutes "evidence of negligence" and therefore imposes a higher standard to be applied than just common-law negligence principles. Indeed, this Court has long held that "[r]ules issued by administrative agencies pursuant to statutory authority have the force and effect of law." *Parfitt v. Columbus Corr. Facil.* (1980), 62 Ohio St.2d 434, 436, citing *Kroger Grocery & Baking Co. v. Glander* (1948), 149 Ohio St. 120; *State ex rel. Kildow v. Indus. Commn.* (1934), 128 Ohio St. 573, 580. To simply ignore a violation of a safety rule that resulted in the injury or death of an individual diminishes the importance and vitality of the rule and is inconsistent with this Court's ruling in *Robinson.*

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Because the violation of a safety regulation is "evidence of negligence" the violation raises a genuine issue of material fact as to whether there was a duty, a breach, and whether that breach proximately caused the injury. It is therefore an issue for the jury to consider and summary judgment is inappropriate. By adopting this standard, this Court would not be abrogating the open and obvious doctrine. The open and obvious doctrine would still be applicable in cases where the property owner has breached a common-law duty to a business invitee.

B. The Legislative Scheme and Public Policy Principles Support a Determination that the Open and Obvious Doctrine is Inapplicable Where the Defendant's Act or Omission Constitutes a Violation of an Administrative Safety Rule.

The General Assembly properly delegated the task of determining the specific safety standards to a board with the prerequisite expertise in the area of building safety, the Ohio Board of Building Standards. The question is whether the rules promulgated by the Board, with the General Assembly's oversight, are entitled to deference and whether they establish a standard of care when landowners invite others onto their property.

The Ohio Revised Code establishing the OBBC, O.R.C. 3781.06(A)(1), provides, "[a]ny building that may be used as a place of resort, assembly, education, entertainment, lodging, dwelling, trade, manufacture, repair, storage, traffic, or occupancy by the public, any residential building, and all other buildings or parts and appurtenances of those buildings erected within this state, shall be so constructed, erected, equipped, and maintained that they shall be safe and sanitary for their intended use and occupancy." The General Assembly additionally created the Board of Building Standards and assigned it the task of formulating and adopting "standards relating to the *** safety and sanitation of buildings in O.R.C. §§3781.07 and

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3781.10(A)(1). In accordance with this legislative grant of power, the Board of Building Standards creates and maintains the Ohio Basic Building Code.

The will of the legislature should not have less force simply because it has designated the task of carrying out its policies to a board with the specific expertise in building safety. Indeed, this Court has held that administrative rules 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. Moreover, the General Assembly does not simply delegate this task without oversight; rather the legislature maintains a formal and continuing watchdog function over the rule-making process. R.C. 101.35 establishes a bipartisan Joint Committee on Agency Rule Review ("Joint Committee"), which consists of five members of the House of Representatives and five members of the Senate. The Board of Building Standards is required to notify and transmit to the Joint Committee the full text of any proposed rules, amendments or rescissions. The Joint Committee can recommend that the legislature adopt a resolution invalidating the proposal if it finds, *inter alia,* that it conflicts with the legislative intent in enacting the statute. R.C. 119.03(I)(1). If the House of Representatives and the Senate pass such a resolution, the rule-making agency may not adopt the proposed rule, amendment, or rescission. Under this statutory scheme, the degree of legislative control over the adoption of administrative rules ensures that the rules do, in fact, carry out the policy and intent of the General Assembly.

The ramifications when Building Code violations exist are more than just significant. In this case, the result was tragic. Indeed, a simple review of premises liability case law in this state reveals that many Ohioans are needlessly injured when property owners fail to maintain their property in compliance with the OBBC. In this case, it is undisputed that the riser in question exceeded the maximum height of a step by over two inches *at it lowest point.* While

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Mr. Lang carried an oxygen tank, he was by no means infirm. He was very active in his community and had only just recently traveled by plane and boat to his property in the Bahamas. This accident would have been avoided had Holly Hill complied with the Building Code.

There can be no doubt that building safety rules impose a duty on property owners by setting forth the *minimum* safety standards. There has been concern expressed by some commentators that it would be impossible for a property owner to comply with all OBBC provisions because they are so numerous, and therefore a violation of the OBBC should have less consequence. However, it is well within the province of the jury to determine that the violation of the rule did not constitute a breach of the duty owed by the property owner, as a violation of an administrative rule is not negligence *per se,* rather it is simply evidence of negligence. Therefore, violations that are deemed minor or insignificant by the jury can be disregarded and the jury may proceed with deciding the case under common-law negligence principles.

IV. CONCLUSION

For the reasons stated herein, the Appellant, Dorothy Lang, Executrix of the Estate of Albert Lang, respectfully requests that the Court reverse the decision of the trial court and remand the case for trial by jury.

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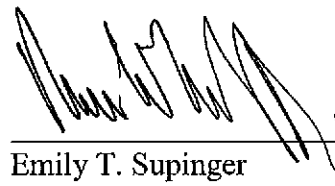
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Merit Brief of Appellant was sent to all counsel of record this 14th day of October, 2008 by regular U.S. Mail.

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APPENDIX

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COPY

IN THE
SUPREME COURT OF OHIO

07 - 1222

DOROTHY LANG, EXECUTRIX OF THE ESTATE OF ALBERT LANG	:	
Plaintiff-Appellant,	:	**On Appeal from the Jackson County Court of Appeals, Fourth Appellate District**
v.	:	
HOLLY HILL MOTEL, et al.	:	**Court of Appeals Case No. 06CA18**
Defendants-Appellees.	:	

NOTICE OF APPEAL OF APPELLANT DOROTHY LANG, EXECUTRIX OF THE ESTATE OF ALBERT LANG

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FILED
JUL 09 2007
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL
OF APPELLANT DOROTHY LANG

Appellant, Dorothy Lang, Executrix of the Estate of Albert Lang, gives notice of her discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule, II, Section 1(A)(3), from a decision of the Fourth District Court of Appeals, journalized in Case No. 06CA18 on May 23, 2007. A date-stamped copy of the Decision and Judgment Entry being appealed is attached to the accompanying memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

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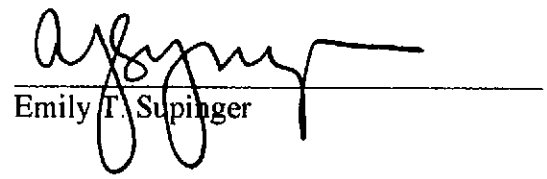
Attorneys for Appellant, Dorothy Lang, Executrix of the Estate of Albert Lang

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent to all counsel of record on this 5th day of July, 2007 by regular U.S. Mail.



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COPY

IN THE
SUPREME COURT OF OHIO

07 - 1222

DOROTHY LANG, EXECUTRIX OF THE ESTATE OF ALBERT LANG	:	
	:	**On Appeal from the Jackson County Court of Appeals, Fourth Appellate District**
Plaintiff-Appellant,	:	
v.	:	**Court of Appeals Case No. 06CA18**
HOLLY HILL MOTEL, et al.	:	
Defendants-Appellees.	:	

NOTICE THAT A MOTION TO CERTIFY A CONFLICT IS PENDING IN THE COURT OF APPEALS

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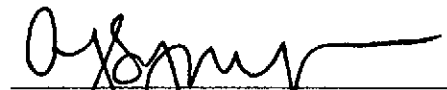
FILED
JUL 09 2007
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE THAT A MOTION TO CERTIFY A CONFLICT IS PENDING IN THE COURT OF APPEALS

Appellant, Dorothy Lang, Executrix of the Estate of Albert Lang, hereby gives notice that she has timely moved the Jackson County Court of Appeals, Fourth Appellate District, to certify a conflict under App. R. 25. Appellant's motion is currently pending in the Jackson County Court of Appeals, Fourth Appellate District, Court of Appeals Case No. 06CA18.

Respectfully submitted,



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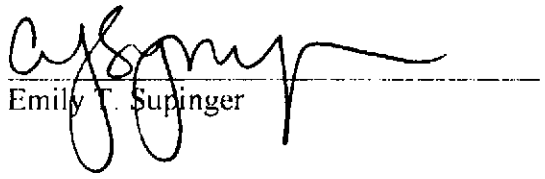
Attorneys for Appellant, Dorothy Lang, Executrix of the Estate of Albert Lang

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice that a Motion to Certify a Conflict is Pending in the Court of Appeals was sent to all counsel of record on this 5th day of July, 2007 by regular U.S. Mail.



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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

DOROTHY LANG,

Plaintiff-Appellant : Case No. 06CA18

vs.

FILED
COURT OF APPEALS
JACKSON CO. OHIO
JUL 16 2007

HOLLY HILL MOTEL, et al., : ENTRY ON MOTION TO CERTIFY CONFLICT

Defendants-Appellees. :

Appellant Dorothy Lang filed a Motion to Certify Conflict pursuant to App.R. 25. Appellant asserted that this court's Decision and Judgment Entry in Lang v. Holly Hill Motel, Jackson App. No. 06CA18, conflicts with Uddin v. Embassy Suites Hotel, 165 Ohio App.3d, 2005-Ohio-6613, appeal allowed, 109 Ohio St.3d 1455, 2006-Ohio-2226, 847 N.E.2d 5, appeal dismissed as improvidently allowed 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638; Christen v. Don Vonderhaar Market and Catering, Hamilton App. No. C-050125, 2006-Ohio-715; and Francis v. Showcase Cinema Eastgate, 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535.

Section 3(B)(4), Article IV of the Ohio Constitution permits an appellate court to certify an issue to the Ohio Supreme Court for review and final determination when "the judges of a court of appeals find that a judgment upon which they have agreed is in Conflict with a judgment pronounced upon the same question by any other court of appeals of the state."

In Whitelock v. Gilbane Bldg. Co. (1993), 66 Ohio St.3d 594, 596 613 N.E.2d 1032, 1034, the Ohio Supreme Court clarified the

requirements that an appellate court must find before certifying a judgment as being in Conflict.

> "First, the certifying court must find that its judgment is in Conflict with the judgment of a court of appeals of another district and the asserted Conflict must be 'upon the same question.' Second, the alleged Conflict must be on a rule of law--not facts. Third, the journal entry or opinion must clearly set forth that rule of law which the certifying court contends is in Conflict with the judgment on the same question by other district courts of appeals."

In the case sub judice, appellant asserts that our decision holding that an Ohio Basic Building Code violation does not negate application of the open and obvious doctrine conflicts with the holdings in Uddin, Christen, and Francis. We agree that our decision conflicts with Uddin, Christen, and Francis. We therefore certify the following question to the Ohio Supreme Court: "Whether a violation of an administrative building code provision prohibits the application of the open and obvious doctrine and precludes summary judgment on a negligence claim?"

MOTION GRANTED.

Harsha, J. & Kline, J.: Concur

For the Court

BY: Peter B. Abele, Judge

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

FILED
COURT OF APPEALS
JACKSON CO. OHIO

MAY 23 2007

ROBERT WALTON, CLERK
DEP

DOROTHY LANG, EXECUTRIX OF THE ESTATE OF ALBERT LANG,	:	
Plaintiff-Appellant,	:	Case No. 06CA18
vs.	:	
HOLLY HILL MOTEL, INC., et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

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COUNSEL FOR APPELLEE RODNEY MCCORKLE dba RODNEY MCCORKLE BUILDER:	Kevin R. Bush and Steven G. Carlino, 88 East Broad Street, Suite 1750, Columbus, Ohio 43215

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Jackson County Common Pleas Court summary judgment in favor of Holly Hill Motel, Inc. (Holly Hill) and Rodney McCorkle dba Rodney McCorkle Builder (McCorkle), defendants below and appellees herein.

Dorothy Lang, executrix of the estate of Albert Lang, plaintiff below and appellant herein, raises the following assignment of error for review:

> "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT HOLLY HILL MOTEL AND THIRD PARTY DEFENDANT ROD MCCORKLE BUILDERS."

On April 4, 1999, appellant and her husband, Albert Lang, stopped at the Holly Hill Motel. Appellant requested a handicap accessible room, but the motel advised that none was available. The motel assigned the Langs a room that required them to climb two steps to reach the motel room. Appellant assisted her husband, who suffered from emphysema and required an oxygen tank, up the steps. As they crossed the second step, her husband fell and suffered a broken hip. In July of 1999, Mr. Lang died from respiratory failure. Appellant alleges that her husband's limited mobility following his broken hip operation hastened his death.

On April 6, 2004, appellant filed a complaint against Holly Hill and alleged that her husband tripped at the Holly Hill motel while traversing unusually high steps that lacked a handrail. She further averred that he suffered a broken hip and that this injury subsequently caused respiratory failure and his ultimate demise.

Holly Hill filed a third-party complaint against McCorkle and alleged that McCorkle's negligent construction proximately resulted in Mr. Lang's injuries.

On November 5, 2004, McCorkle requested summary judgment and asserted that appellant could not identify the precise cause of her husband's fall. McCorkle further argued that any hazards associated with the step were open and obvious, which obviated him of a duty to warn. On January 19, 2005, Holly Hill also requested summary judgment and raised essentially the same arguments as McCorkle: (1) that the step presented an open and

obvious danger; and (2) that appellant could not identify what caused her husband to fall.

In response, appellant asserted that in her deposition she stated that her husband tripped on the step. She argued that she need not establish to an absolute certainty what caused the fall, but need only produce evidence so that a jury could reasonably infer that "the defect complained of caused the fall." Appellant further disputed appellees' arguments that the step presented an open and obvious danger. She contended that the riser height was not readily discoverable and that while the lack of a handrail was apparent, the need for one was not. Appellant argued that if a handrail had been in place, it may have prevented her husband's fall.

The trial court granted McCorkle and Holly Hill summary judgment. It determined that because appellant could not state with certainty what caused her husband to fall, she could not establish the cause of his fall.

On December 15, 2005, we reversed and remanded the trial court's judgment. See Lang v. Holly Hill, Jackson App. No. 05CA6, 2005-Ohio-6766. We determined that the trial court improperly concluded that appellant failed to identify the cause of her fall. We also declined, however, to address the open and obvious doctrine because the trial court did not consider it as a basis for granting summary judgment.

On remand, appellees requested summary judgment and argued that the open and obvious doctrine relieved them of the duty to warn. In particular, appellees that any defect in the stairs and

the lack of a handrail were easily observable conditions and, thus, constituted open and obvious hazards.

Appellant asserted that the condition of the stairs was not an open and obvious danger. She noted that her expert stated in an affidavit that the riser was 2.375 to 2.75 inches higher than permitted under the Ohio Basic Building Code (OBBC). She contended that the riser height was not easily discernible because (1) her husband "was an elderly gentleman who carried an oxygen tank"; (2) "the steps and sidewalk were all a uniform color"; and (3) the fall occurred in the evening. Appellant further argued that the lack of a handrail, while visually apparent, was not an open and obvious danger. She asserts that neither she nor her husband recognized the need for a handrail until her husband began climbing the step and encountered the non-compliant riser. She contends that if a handrail had been in place, her husband could have stopped his fall.

On September 7, 2006, the trial court determined that the stair presented an open and obvious danger and granted appellees summary judgment. The court explained:

> "[Appellant] and her husband had several feet in which to view the step before attempting to traverse the step. [Appellant] and her husband stepped from the parking lot up onto a sidewalk which led to the step in question, which was several feet in front of them. There is no allegation that the lighting was poor or that there was any reason that [appellant] and her husband were not able to discern the step. * * * * Defendant had a step which was higher than a normal step. However, at the approach it was only a single step which [appellant] and her husband would have had ample opportunity to view and decide whether to use the step or to take whatever appropriate measures would be necessary to protect themselves."

The court also rejected appellant's argument that the OBBC violation precluded summary judgment. This appeal followed.

In her sole assignment of error, appellant contends that the trial court overruled appellees' summary judgment. She asserts that the court erroneously concluded that the danger associated with the stairs was open and obvious and argues that the dangerous nature of the stairs was not easily discoverable due to the following circumstances: (1) her husband was an elderly man who carried an oxygen tank; (2) the steps and sidewalk were a uniform color; (3) the fall occurred in the evening; and (4) her husband was tired from traveling all day. Appellant contends that these circumstances constitute "attendant circumstances" that create a jury question as to whether the danger associated with the steps was open and obvious. Appellant further asserts that because the riser height and the absence of a handrail constitute violations of the OBBC, the violations create a genuine issue of material fact as to whether the danger was open and obvious.

Initially, we note that when reviewing a trial court summary judgment decisions, appellate courts must conducts a de novo review. See, e.g., Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, an appellate court must independently review the record to determine if summary judgment was appropriate and need not defer to the trial court's decision. See Brown v. Scioto Bd. of Commrs. (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; Morehead v. Conley (1991), 75 Ohio App.3d 409, 411-12, 599 N.E.2d 786. Thus, in determining

whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law.

Civ.R. 56(C) provides, in relevant part, as follows:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but 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 or stipulation construed most strongly in the party's favor.

Pursuant to that rule, a trial court may not award summary judgment unless the evidence demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and after viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. See, e.g., Vahila v. Hall (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164.

Under Civ.R. 56, the moving party bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a material fact. Vahila, supra; Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264, 273. The moving

party cannot discharge its initial burden under the rule with a conclusory assertion that the nonmoving party has no evidence to prove its case. See Kulch v. Structural Fibers, Inc. (1997), 78 Ohio St.3d 134, 147, 677 N.E.2d 308, 318; Dresher, supra. Rather, the moving party must specifically refer to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any," which affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); Dresher, supra.

"[U]nless a movant meets its initial burden of establishing that the nonmovant has either a complete lack of evidence or has an insufficient showing of evidence to establish the existence of an essential element of its case upon which the nonmovant will have the burden of proof at trial, a trial court shall not grant a summary judgment." Pennsylvania Lumbermans Ins. Corp. v. Landmark Elec., Inc. (1996), 110 Ohio App.3d 732, 742, 675 N.E.2d 65. Once the moving party satisfies its burden, the nonmoving party bears a corresponding duty to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); Dresher, supra. A trial court may grant a properly supported summary judgment motion if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that there is a genuine issue for trial. Id.; Jackson v. Alert Fire & Safety Equip., Inc. (1991), 58 Ohio St.3d 48, 52, 567 N.E.2d 1027.

A successful negligence action requires a plaintiff to establish that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached the duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. See, e.g., Texler v. D.O. Summers Cleaners (1998), 81 Ohio St.3d 677, 680, 693 N.E.2d 217; Jeffers v. Olexo (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614; Menifee v. Ohio Welding Products, Inc. (1984), 15 Ohio St.3d 75, 472 N.E.2d 707. If a defendant points to evidence illustrating that the plaintiff will be unable to prove any one of the foregoing elements and if the plaintiff fails to respond as Civ.R. 56 provides, the defendant is entitled to judgment as a matter of law. See Feichtner v. Cleveland (1994), 95 Ohio App.3d 388, 394, 642 N.E.2d 657; Keister v. Park Centre Lanes (1981), 3 Ohio App.3d 19, 443 N.E.2d 532-A-0015.

In a premises liability case, the relationship between the owner or occupier of the premises and the injured party determines the duty owed. See, e.g., Gladon v. Greater Cleveland Regional Transit Auth. (1996), 75 Ohio St.3d 312, 315, 662 N.E.2d 287; Shump v. First Continental-Robinwood Assocs. (1994), 71 Ohio St.3d 414, 417, 644 N.E.2d 291. In the case at bar, the parties do not dispute that appellant and her husband were business invitees.

A business premises owner or occupier possesses the duty to exercise ordinary care to maintain its premises in a reasonably safe condition, such that its business invitees will not unreasonably or unnecessarily be exposed to danger. Paschal v.

Rite Aid Pharmacy, Inc. (1985), 18 Ohio St.3d 203, 203, 480 N.E.2d 474. A premises owner or occupier is not, however, an insurer of its invitees' safety. See id. While the premises owner must warn its invitees of latent or concealed dangers if the owner knows or has reason to know of the hidden dangers, see Jackson v. Kings Island (1979), 58 Ohio St.2d 357, 358, 390 N.E.2d 810, invitees are expected to take reasonable precautions to avoid dangers that are patent or obvious. See Brinkman v. Ross (1993), 68 Ohio St.3d 82, 84, 623 N.E.2d 1175; Sidle v. Humphrey (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus.

Therefore, when a danger is open and obvious, a premises owner owes no duty of care to individuals lawfully on the premises. See Armstrong v. Best Buy Co., 99 Ohio St.3d 79, 788 N.E.2d 1088, 2003-Ohio-2573, at ¶5; Sidle v. Humphrey (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus. The underlying rationale is that "the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." Armstrong, at ¶5. "The fact that a 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." Id. at ¶13.

In most situations, whether a danger is open and obvious presents a question of law. See Hallowell v. Athens, Athens App. No. 03CA29, 2004-Ohio-4257, at ¶21; see, also, Nageotte v. Cafaro Co., Erie App. No. E-04-15, 2005-Ohio-2098. Under certain circumstances, however, disputed facts may exist regarding the openness and obviousness of a danger, thus rendering it a question of fact. As the court explained in Klauss v. Marc Glassman, Inc., Cuyahoga App. No. 84799, 2005-Ohio-1306, at ¶17-18:

> "Although the Supreme Court of Ohio has held that whether a duty exists is a question of law for the court to decide, the issue of whether a hazardous condition is open and obvious may present a genuine issue of fact for a jury to review.
>
> Where only one conclusion can be drawn from the established facts, the issue of whether a risk was open and obvious may be decided by the court as a matter of law. Anderson v. Hedstrom Corp. (S.D.N.Y.1999), 76 F.Supp.2d 422, 441; Vella v. Hyatt Corp. (S.D. MI 2001), 166 F.Supp.2d 1193, 1198; see, also, Parsons v. Lawson Co. (1989), 57 Ohio App.3d 49, 566 N.E.2d 698. However, where reasonable minds could differ with respect to whether a danger is open and obvious, the obviousness of the risk is an issue for the jury to determine. Carpenter v. Marc Glassman, Inc. (1997), 124 Ohio App.3d 236, 240, 705 N.E.2d 1281; Henry v. Dollar General Store, Greene App. No.2002-CA-47, 2003-Ohio-206; Bumgarner v. Wal-Mart Stores, Inc., Miami App. No.2002-CA-11, 2002-Ohio-6856."

See, also, Oliver v. Leaf and Vine, Miami App. No.2004CA35, 2005-Ohio-1910, at ¶31 ("'The determination of whether a hazard is latent or obvious depends upon the particular circumstances surrounding the hazard. In a given situation, factors may include lighting conditions, weather, time of day, traffic patterns, or activities engaged in at the time.'") (internal quotations omitted).

"Attendant circumstances" may also create a genuine issue of material fact as to whether a hazard is open and obvious. See Cummin v. Image Mart, Inc., Franklin App. No. 03AP-1284, 2004-Ohio-2840, at ¶8, citing McGuire v. Sears, Roebuck & Co. (1996), 118 Ohio App.3d 494, 498, 693 N.E.2d 807. An attendant circumstance is a factor that contributes to the fall and is beyond the injured person's control. See Backus v. Giant Eagle, Inc. (1996), 115 Ohio App.3d 155, 158, 684 N.E.2d 1273. "The phrase refers to all circumstances surrounding the event, such as time and place, the environment or background of the event, and the conditions normally existing that would unreasonably increase the normal risk of a harmful result of the event." Cummin, at ¶8, citing Cash v. Cincinnati (1981), 66 Ohio St.2d 319, 324, 421 N.E.2d 1275. An "attendant circumstance" has also been defined to include "any distraction that would come to the attention of a pedestrian in the same circumstances and reduce the degree of care an ordinary person would exercise at the time." McGuire, 118 Ohio App.3d at 499.

Attendant circumstances do not include the individual's activity at the moment of the fall, unless the individual's attention was diverted by an unusual circumstance of the property owner's making. See McGuire, 118 Ohio App.3d at 498. Moreover, an individual's particular sensibilities do not play a role in determining whether attendant circumstances make the individual unable to appreciate the open and obvious nature of the danger. As the court explained in Goode v. Mt. Gillion Baptist Church, Cuyahoga App. No. 87876, 2006-Ohio-6936, at ¶25: "The law uses

an objective, not subjective, standard when determining whether a danger is open and obvious. The fact that appellant herself was unaware of the hazard is not dispositive of the issue. It is the objective, reasonable person that must find that the danger is not obvious or apparent." Thus, we use an objective standard to determine whether the danger associated with the stairs was open and obvious.

In the case sub judice, we disagree with appellant that genuine issues of material fact remain as to whether the stairs presented an open and obvious danger. The height of the stairs and the lack of a handrail were readily observable. See Early v. Damon's Restaurant, Franklin App. No. 05AP-1342, 2006-Ohio-3311 (stating that the lack of a handrail was an open and obvious hazard); Nelson v. Sound Health Alternatives, Inc. (Sept. 6, 2001), Athens App. No. 01CA24 (holding that lack of handrail, uniformity of color between steps and landing, and dimly lit stairs presented open and obvious danger). Here, the landowner did nothing to conceal the height of the stairs or the lack of a handrail, or to render those conditions unnoticeable or to otherwise distract appellant and her husband.

Further, none of the facts appellant raises as "attendant circumstances" are conditions within the landowner's control. For example, the fact that her husband was tired and required an oxygen tank were not within the landowner's control. Cf. Isaacs v. Meijer, Inc., Clermont App. No. CA2005-10-98, 2006-Ohio-1439 (stating that the fact that appellant was carrying six boxes of frozen dinners was clearly her choice and within her control and

did not prevent her from looking where she was walking).

Although appellant claims that it was "evening," she does not claim that the area was poorly lit. Even if the area had been poorly lit, we note that "darkness is always a warning of danger, and may not be disregarded." McCoy v. Kroger Co., Franklin App. No. 05AP7, 2005-Ohio-6965, at ¶14; see, also, Chaparro-Delvalle v. TSH Real Estate Invest. Co., Inc., Lorain App. No. 05CA8712, 2006-Ohio-925; Storc v. Day Drive Assocs. Ltd., Cuyahoga App. No. 86284, 2006-Ohio-561.

Appellant nevertheless asserts that the riser height of the stairs and the lack of a handrail constituted violations of the OBBC and that such violations preclude summary judgment. Ohio appellate courts are split on this issue, however. The Second, Fifth, Eighth, and Twelfth, districts hold that OBBC violations do not preclude summary judgment. See Ahmad v. AK Steel Corp., Butler App. No. CA2006-04-84, 2006-Ohio-7031; Kirchner v. Shooters on the Water, Inc., 167 Ohio App.3d 708, 2006-Ohio-3583, 856 N.E.2d 1026; Olivier v. Leaf & Vine, Miami App. No.2004 CA 35, 2005-Ohio-1910; and Ryan v. Guan, Licking App. No.2003CA00110, 2004-Ohio-4032. The First and Tenth districts hold otherwise. See Christen v. Don Vonderhaar Market & Catering, Hamilton App. No. C-050125, 2006-Ohio-715; and Uddin v. Embassy Suites Hotel, 165 Ohio App.3d 699, 2005-Ohio-6613, 848 N.E.2d 519, appeal allowed, 109 Ohio St.3d 1455, 2006-Ohio-2226, 847 N.E.2d 5, and appeal dismissed as improvidently allowed 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638. The courts disagree on the interpretation of the Ohio Supreme Court's

holding in Chambers v. St. Mary's School (1998), 82 Ohio St.3d 563, 697 N.E.2d 198. In Chambers, the court held that while the violation of an administrative rule did not constitute negligence per se, it "may be admissible as evidence of negligence." Id. at syllabus.

In concluding that Chambers does not mean that an OBBC violation precludes summary judgment under the open and obvious doctrine, the Olivier court explained:

> "* * * * In Chambers v. St. Mary's School, 82 Ohio St.3d 563, 1998-Ohio-184, 697 N.E.2d 198, the supreme court addressed whether a violation of the OBBC may constitute negligence per se. The court explained the difference between negligence and negligence per se, stating: '"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, the 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 proving that a defendant breached a duty.' Id. at 565-66, 697 N.E.2d 198 (quoting Swoboda v. Brown (1935), 129 Ohio St. 512, 522, 245 Ind. 71, 196 N.E.2d 274). The supreme court held that violations of the OBBC do not constitute negligence per se, but that they may be admissible as evidence of negligence.
> * * * *
>
> The Chambers court was not asked to address the open and obvious doctrine, and it did not do so. Yet, the supreme court 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, 697 N.E.2d 198. In a footnote, the supreme court noted that it would be virtually impossible for a premise owner to strictly comply with the requirement mandating the removal of snow from steps without reference to exceptions or a reasonableness standard. In our view, the supreme court has implied that building code violations may be considered in light of

> the circumstances, including whether the condition was open and obvious to an invitee. The fact that a condition violates the building code may support the conclusions that the condition was dangerous and that the landowner had breached its duty to its invitee. However, such violations may be obvious and apparent to an invitee. In our judgment, if the violation were open and obvious, the open and obvious nature would 'obviate[] the duty to warn.' See Armstrong, 99 Ohio St.3d at 80, 788 N.E.2d 1088; see Ryan v. Guan, Licking App. No. 2003CA110, 2004-Ohio-4032 [2004 WL 1728519] (the open and obvious doctrine applied, despite the fact that 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); Duncan v. Capitol South Comm. Urban Redev. Corp., Franklin App. No. 02AP-653, 2003-Ohio-1273 (unreasonably high curb was an open and obvious danger); see also Quinn v. Montgomery Cty. Educ. Serv. Ctr., Montgomery App. No. 20596, 2005-Ohio-808 (open and obvious doctrine applied to defect in the sidewalk, which municipality had a duty to maintain under R.C. 2744.02(B)(3)).

Id. at ¶28.

In Francis v. Showcase Cinema Eastgate, 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535, the court determined that under Chambers, an OBBC violation raises a genuine issue of material fact as to the landowner's duty and prevents a defendant from asserting the "open and obvious" defense to eliminate the existence of a duty or breach of duty. The court explained:

> "[W]hile 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, [defendant] 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 [defendant's] duty and breach of duty, and that summary judgment was improperly granted."

Id. at ¶10.

In Uddin, the Tenth District explained its rationale as follows:

> "When 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."

As Judge Christley noted in her dissent in Uddin, the Chambers court did not explore the open and obvious doctrine. She noted:

> " * * * Chambers stands for the proposition that a violation of an administrative regulation is simply evidence that the premises owner breached his or her duty of care and that this evidence should be considered in light of the surrounding circumstances. Chambers, however, does not stand for the proposition that a possible administrative violation prohibits the application of the open-and-obvious doctrine."

Id. at ¶68. (Christley, J., concurring in part and dissenting in part).

We agree with those courts that hold an OBBC violation does not negate application of the open and obvious doctrine. As the Olivier court noted and as Judge Christley stated in her dissent, the Chambers court did not address the open and obvious doctrine. Thus, we do not believe that Chambers stands for the proposition that an OBBC violation always precludes summary judgment.

Accordingly, based upon the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Kline, J., Dissenting in part.

I concur in judgment and opinion as far as the majority's opinion relates to Holly Hill's motion for summary judgment. However, I respectfully dissent to the part of the opinion that addresses McCorkle's motion for summary judgment.

Although appellant (plaintiff below) appeals the trial court's grant of summary judgment in favor of McCorkle, in my view, we cannot address that decision because appellant never directly asserted any claim against McCorkle. McCorkle was a third-party defendant in this action by virtue of the third-party complaint filed by Holly Hill. Holly Hill, instead of appellant, alleged that McCorkle negligently constructed the stair at issue.

Ohio Civ.R. 14(A) states "[a]t any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." Ohio courts state that "[i]f the plaintiff chooses not to assert a claim against the third-party defendant, the third-party defendant may be liable *only* to the original defendant * * *. (Emphasis added.) See *Delano v. Ives*, 40 F. Supp. 672, 673 (E.D. Pa. 1941)." *Bruhl v. Crispen*, Lucas App. No. L-82-043, citing *In re Herman Cantor*

Corp. Bkrtcy. Ct. E.D. Va. (1982), 17 B.R. 612, 613. Because appellant in this case never asserted a cause of action against McCorkle, her "notice of appeal is not effective as to [him]." Id. As such, the only parties properly before this court on appeal are appellant and Holly Hill. Id.

In addition, assuming the parties were properly before the court, I would find that, because McCorkle did not own or control the property at issue (the stair), he is not entitled to the benefits of the open and obvious doctrine. See *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (stating one with no property interest in the subject premises such as an "[i]ndependent contractor who creates a dangerous condition on real property is not relieved of liability under the doctrine which exonerates an owner or occupier of land from the duty to warn those entering the property concerning open and obvious dangers on the property").

Thus, I dissent in part.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment Only
Kline, J.: Concurs in Judgment & Opinion and Dissents in Part with Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

3781.06 Exemption for building or structure used in agriculture.

(A)(1) Any building that may be used as a place of resort, assembly, education, entertainment, lodging, dwelling, trade, manufacture, repair, storage, traffic, or occupancy by the public, any residential building, and all other buildings or parts and appurtenances of those buildings erected within this state, shall be so constructed, erected, equipped, and maintained that they shall be safe and sanitary for their intended use and occupancy.

(2) Nothing in sections 3781.06 to 3781.18 and 3791.04 of the Revised Code shall be construed to limit the power of the public health council to adopt rules of uniform application governing manufactured home parks pursuant to section 3733.02 of the Revised Code.

(B) Sections 3781.06 to 3781.18 and 3791.04 of the Revised Code do not apply to either of the following:

(1) Buildings or structures that are incident to the use for agricultural purposes of the land on which the buildings or structures are located, provided those buildings or structures are not used in the business of retail trade. For purposes of this division, a building or structure is not considered used in the business of retail trade if fifty per cent or more of the gross income received from sales of products in the building or structure by the owner or operator is from sales of products produced or raised in a normal crop year on farms owned or operated by the seller.

(2) Existing single-family, two-family, and three-family detached dwelling houses for which applications have been submitted to the director of job and family services pursuant to section 5104.03 of the Revised Code for the purposes of operating type A family day-care homes as defined in section 5104.01 of the Revised Code.

(C) As used in sections 3781.06 to 3781.18 and 3791.04 of the Revised Code:

(1) "Agricultural purposes" include agriculture, farming, dairying, pasturage, apiculture, horticulture, floriculture, viticulture, ornamental horticulture, olericulture, pomiculture, and animal and poultry husbandry.

(2) "Building" means any structure consisting of foundations, walls, columns, girders, beams, floors, and roof, or a combination of any number of these parts, with or without other parts or appurtenances.

(3) "Industrialized unit" means a building unit or assembly of closed construction fabricated in an off-site facility, that is substantially self-sufficient as a unit or as part of a greater structure, and that requires transportation to the site of intended use. "Industrialized unit" includes units installed on the site as independent units, as part of a group of units, or incorporated with standard construction methods to form a completed structural entity. "Industrialized unit" does not include a manufactured home as defined by division (C)(4) of this section or a mobile home as defined by division (O) of section 4501.01 of the Revised Code.

(4) "Manufactured home" means a building unit or assembly of closed construction that is fabricated in an off-site facility and constructed in conformance with the federal construction and safety standards established by the secretary of housing and urban development pursuant to the "Manufactured Housing Construction and Safety Standards Act of 1974," 88 Stat. 700, 42 U.S.C.A. 5401, 5403, and that has a permanent label or tag affixed to it, as specified in 42 U.S.C.A. 5415, certifying compliance with all applicable federal construction and safety standards.

(5) "Permanent foundation" means permanent masonry, concrete, or a footing or foundation approved by the manufactured homes commission pursuant to Chapter 4781. of the Revised Code, to which a manufactured or mobile home may be affixed.

(6) "Permanently sited manufactured home" means a manufactured home that meets all of the following criteria:

(a) The structure is affixed to a permanent foundation and is connected to appropriate facilities;

(b) The structure, excluding any addition, has a width of at least twenty-two feet at one point, a length of at least twenty-two feet at one point, and a total living area, excluding garages, porches, or attachments, of at least nine hundred square feet;

(c) The structure has a minimum 3:12 residential roof pitch, conventional residential siding, and a six-inch minimum eave overhang, including appropriate guttering;

(d) The structure was manufactured after January 1, 1995;

(e) The structure is not located in a manufactured home park as defined by section 3733.01 of the Revised Code.

(7) "Safe," with respect to a building, means it is free from danger or hazard to the life, safety, health, or welfare of persons occupying or frequenting it, or of the public and from danger of settlement, movement, disintegration, or collapse, whether such danger arises from the methods or materials of its construction or from equipment installed therein, for the purpose of lighting, heating, the transmission or utilization of electric current, or from its location or otherwise.

(8) "Sanitary," with respect to a building, means it is free from danger or hazard to the health of persons occupying or frequenting it or to that of the public, if such danger arises from the method or materials of its construction or from any equipment installed therein, for the purpose of lighting, heating, ventilating, or plumbing.

(9) "Residential building" means a one-family, two-family, or three-family dwelling house, and any accessory structure incidental to that dwelling house. "Residential building" includes a one-family, two-family, or three-family dwelling house that is used as a model to promote the sale of a similar dwelling house. "Residential building" does not include an industrialized unit as defined by division (C)(3) of this section, a manufactured home as defined by division (C)(4) of this section, or a mobile home as defined by division (O) of section 4501.01 of the Revised Code.

(10) "Nonresidential building" means any building that is not a residential building or a manufactured or mobile home.

(11) "Accessory structure" means a structure that is attached to a residential building and serves the principal use of the residential building. "Accessory structure" includes, but is not limited to, a garage, porch, or screened-in patio.

Effective Date: 08-06-2004; 05-27-2005

3781.10 Board of building standards - powers and duties.

(A)(1) The board of building standards shall formulate and adopt rules governing the erection, construction, repair, alteration, and maintenance of all buildings or classes of buildings specified in section 3781.06 of the Revised Code, including land area incidental to those buildings, the construction of industrialized units, the installation of equipment, and the standards or requirements for materials used in connection with those buildings. The board shall incorporate those rules into separate residential and nonresidential building codes. The standards shall relate to the conservation of energy and the safety and sanitation of those buildings.

(2) The rules governing nonresidential buildings are the lawful minimum requirements specified for those buildings and industrialized units, except that no rule other than as provided in division (C) of section 3781.108 of the Revised Code that specifies a higher requirement than is imposed by any section of the Revised Code is enforceable. The rules governing residential buildings are uniform requirements for residential buildings in any area with a building department certified to enforce the state residential building code. In no case shall any local code or regulation differ from the state residential building code unless that code or regulation addresses subject matter not addressed by the state residential building code or is adopted pursuant to section 3781.01 of the Revised Code.

(3) The rules adopted pursuant to this section are complete, lawful alternatives to any requirements specified for buildings or industrialized units in any section of the Revised Code. The board shall, on its own motion or on application made under sections 3781.12 and 3781.13 of the Revised Code, formulate, propose, adopt, modify, amend, or repeal the rules to the extent necessary or desirable to effectuate the purposes of sections 3781.06 to 3781.18 of the Revised Code.

(B) The board shall report to the general assembly proposals for amendments to existing statutes relating to the purposes declared in section 3781.06 of the Revised Code that public health and safety and the development of the arts require and shall recommend any additional legislation to assist in carrying out fully, in statutory form, the purposes declared in that section. The board shall prepare and submit to the general assembly a summary report of the number, nature, and disposition of the petitions filed under sections 3781.13 and 3781.14 of the Revised Code.

(C) On its own motion or on application made under sections 3781.12 and 3781.13 of the Revised Code, and after thorough testing and evaluation, the board shall determine by rule that any particular fixture, device, material, process of manufacture, manufactured unit or component, method of manufacture, system, or method of construction complies with performance standards adopted pursuant to section 3781.11 of the Revised Code. The board shall make its determination with regard to adaptability for safe and sanitary erection, use, or construction, to that described in any section of the Revised Code, wherever the use of a fixture, device, material, method of manufacture, system, or method of construction described in that section of the Revised Code is permitted by law. The board shall amend or annul any rule or issue an authorization for the use of a new material or manufactured unit on any like application. No department, officer, board, or commission of the state other than the board of building standards or the board of building appeals shall permit the use of any fixture, device, material, method of manufacture, newly designed product, system, or method of construction at variance with what is described in any rule the board of building standards adopts or issues or that is authorized by any section of the Revised Code. Nothing in this section shall be construed as requiring approval, by rule, of

plans for an industrialized unit that conforms with the rules the board of building standards adopts pursuant to section 3781.11 of the Revised Code.

(D) The board shall recommend rules, codes, and standards to help carry out the purposes of section 3781.06 of the Revised Code and to help secure uniformity of state administrative rulings and local legislation and administrative action to the bureau of workers' compensation, the director of commerce, any other department, officer, board, or commission of the state, and to legislative authorities and building departments of counties, townships, and municipal corporations, and shall recommend that they audit those recommended rules, codes, and standards by any appropriate action that they are allowed pursuant to law or the constitution.

(E)(1) The board shall certify municipal, township, and county building departments and the personnel of those building departments, and persons and employees of individuals, firms, or corporations as described in division (E)(7) of this section to exercise enforcement authority, to accept and approve plans and specifications, and to make inspections, pursuant to sections 3781.03, 3791.04, and 4104.43 of the Revised Code.

(2) The board shall certify departments, personnel, and persons to enforce the state residential building code, to enforce the nonresidential building code, or to enforce both the residential and the nonresidential building codes. Any department, personnel, or person may enforce only the type of building code for which certified.

(3) The board shall not require a building department, its personnel, or any persons that it employs to be certified for residential building code enforcement if that building department does not enforce the state residential building code. The board shall specify, in rules adopted pursuant to Chapter 119. of the Revised Code, the requirements for certification for residential and nonresidential building code enforcement, which shall be consistent with this division. The requirements for residential and nonresidential certification may differ. Except as otherwise provided in this division, the requirements shall include, but are not limited to, the satisfactory completion of an initial examination and, to remain certified, the completion of a specified number of hours of continuing building code education within each three-year period following the date of certification which shall be not less than thirty hours. The rules shall provide that continuing education credits and certification issued by the council of American building officials, national model code organizations, and agencies or entities the board recognizes are acceptable for purposes of this division. The rules shall specify requirements that are compatible, to the extent possible, with requirements the council of American building officials and national model code organizations establish.

(4) The board shall establish and collect a certification and renewal fee for building department personnel, and persons and employees of persons, firms, or corporations as described in this section, who are certified pursuant to this division.

(5) Any individual certified pursuant to this division shall complete the number of hours of continuing building code education that the board requires or, for failure to do so, forfeit certification.

(6) This division does not require or authorize the board to certify personnel of municipal, township, and county building departments, and persons and employees of persons, firms, or corporations as described in this section, whose responsibilities do not include the exercise of enforcement authority, the approval

of plans and specifications, or making inspections under the state residential and nonresidential building codes.

(7) Enforcement authority for approval of plans and specifications and enforcement authority for inspections may be exercised, and plans and specifications may be approved and inspections may be made on behalf of a municipal corporation, township, or county, by any of the following who the board of building standards certifies:

(a) Officers or employees of the municipal corporation, township, or county;

(b) Persons, or employees of persons, firms, or corporations, pursuant to a contract to furnish architectural , engineering, or other services to the municipal corporation, township, or county;

(c) Officers or employees of, and persons under contract with, a municipal corporation, township, county, health district, or other political subdivision, pursuant to a contract to furnish architectural , engineering, or other services.

(8) Municipal, township, and county building departments have jurisdiction within the meaning of sections 3781.03, 3791.04, and 4104.43 of the Revised Code, only with respect to the types of buildings and subject matters for which they are certified under this section.

(9) Certification shall be granted upon application by the municipal corporation, the board of township trustees, or the board of county commissioners and approval of that application by the board of building standards. The application shall set forth:

(a) Whether the certification is requested for residential or nonresidential buildings, or both;

(b) The number and qualifications of the staff composing the building department;

(c) The names, addresses, and qualifications of persons, firms, or corporations contracting to furnish work or services pursuant to division (E)(7)(b) of this section;

(d) The names of any other municipal corporation, township, county, health district, or political subdivision under contract to furnish work or services pursuant to division (E)(7) of this section;

(e) The proposed budget for the operation of the building department.

(10) The board of building standards shall adopt rules governing all of the following:

(a) The certification of building department personnel and persons and employees of persons, firms, or corporations exercising authority pursuant to division (E)(7) of this section. The rules shall disqualify any employee of the department or person who contracts for services with the department from performing services for the department when that employee or person would have to pass upon, inspect, or otherwise exercise authority over any labor, material, or equipment the employee or person furnishes for the construction, alteration, or maintenance of a building or the preparation of working drawings or specifications for work within the jurisdictional area of the department. The department shall provide other similarly qualified personnel to enforce the residential and nonresidential building codes as they pertain to that work.

(b) The minimum services to be provided by a certified building department.

(11) The board of building standards may revoke or suspend certification to enforce the residential and nonresidential building codes, on petition to the board by any person affected by that enforcement or approval of plans, or by the board on its own motion. Hearings shall be held and appeals permitted on any proceedings for certification or revocation or suspension of certification in the same manner as provided in section 3781.101 of the Revised Code for other proceedings of the board of building standards.

(12) Upon certification, and until that authority is revoked, any county or township building department shall enforce the residential and nonresidential building codes for which it is certified without regard to limitation upon the authority of boards of county commissioners under Chapter 307. of the Revised Code or boards of township trustees under Chapter 505. of the Revised Code.

(F) In addition to hearings sections 3781.06 to 3781.18 and 3791.04 of the Revised Code require, the board of building standards shall make investigations and tests, and require from other state departments, officers, boards, and commissions information the board considers necessary or desirable to assist it in the discharge of any duty or the exercise of any power mentioned in this section or in sections 3781.06 to 3781.18, 3791.04, and 4104.43 of the Revised Code.

(G) The board shall adopt rules and establish reasonable fees for the review of all applications submitted where the applicant applies for authority to use a new material, assembly, or product of a manufacturing process. The fee shall bear some reasonable relationship to the cost of the review or testing of the materials, assembly, or products and for the notification of approval or disapproval as provided in section 3781.12 of the Revised Code.

(H) The residential construction advisory committee shall provide the board with a proposal for a state residential building code that the committee recommends pursuant to division (C)(1) of section 4740.14 of the Revised Code. Upon receiving a recommendation from the committee that is acceptable to the board, the board shall adopt rules establishing that code as the state residential building code.

(I) The board shall cooperate with the director of job and family services when the director promulgates rules pursuant to section 5104.05 of the Revised Code regarding safety and sanitation in type A family day-care homes.

(J) The board shall adopt rules to implement the requirements of section 3781.108 of the Revised Code.

Effective Date: 07-01-2000; 11-05-2004; 05-27-2005; 09-29-2005

101.35 Joint committee on agency rule review.

There is hereby created in the general assembly the joint committee on agency rule review. The committee shall consist of five members of the house of representatives and five members of the senate. Within fifteen days after the commencement of the first regular session of each general assembly, the speaker of the house of representatives shall appoint the members of the committee from the house of representatives, and the president of the senate shall appoint the members of the committee from the senate. Not more than three of the members from each house shall be of the same political party. In the first regular session of a general assembly, the chairperson of the committee shall be appointed by the speaker of the house from among the house members of the committee, and the vice-chairperson shall be appointed by the president of the senate from among the senate members of the committee. In the second regular session of a general assembly, the chairperson shall be appointed by the president of the senate from among the senate members of the committee, and the vice-chairperson shall be appointed by the speaker of the house from among the house members of the committee. The chairperson, vice-chairperson, and members of the committee shall serve until their respective successors are appointed or until they are no longer members of the general assembly. When a vacancy occurs among the officers or members of the committee, it shall be filled in the same manner as the original appointment.

Notwithstanding section 101.26 of the Revised Code, the members, when engaged in their duties as members of the committee on days when there is not a voting session of the member's house of the general assembly, shall be paid at the per diem rate of one hundred fifty dollars, and their necessary traveling expenses, which shall be paid from the funds appropriated for the payment of expenses of legislative committees.

The committee has the same powers as other standing or select committees of the general assembly. Six members constitute a quorum, and the concurrence of six members is required for the recommendation of a concurrent resolution invalidating a proposed or effective rule, amendment, rescission, or part thereof, or for the suspension of a rule, amendment, rescission, or part thereof, under division (I) of section 119.03 or section 119.031 of the Revised Code.

When a member of the committee is absent, the president or speaker, as the case may be, may designate a substitute from the same house and political party as the absent member. The substitute shall serve on the committee in the member's absence, and is entitled to perform the duties of a member of the committee. For serving on the committee, the substitute shall be paid the same per diem and necessary traveling expenses as the substitute would be entitled to receive if the substitute were a member of the committee.

The president or speaker shall inform the executive director of the committee of a substitution. If the executive director learns of a substitution sufficiently in advance of the meeting of the committee the substitute is to attend, the executive director shall publish notice of the substitution on the internet, make reasonable effort to inform of the substitution persons who are known to the executive director to be interested in rules that are scheduled for review at the meeting, and inform of the substitution persons who inquire of the executive director concerning the meeting.

The committee may meet during periods in which the general assembly has adjourned. At meetings of the committee, the committee may request a rule-making agency, as defined in section 119.01 of the

Revised Code, to provide information relative to the agency's implementation of its statutory authority.

A member of the committee, and the executive director and staff of the committee, are entitled in their official capacities to attend, but not in their official capacities to participate in, a public hearing conducted by a rule-making agency on a proposed rule, amendment, or rescission.

Effective Date: 09-15-1999

119.03 Procedure for adoption, amendment, or rescission of rules.

In the adoption, amendment, or rescission of any rule, an agency shall comply with the following procedure:

(A) Reasonable public notice shall be given in the register of Ohio at least thirty days prior to the date set for a hearing, in the form the agency determines. The agency shall file copies of the public notice under division (B) of this section. (The agency gives public notice in the register of Ohio when the public notice is published in the register under that division.)

The public notice shall include:

(1) A statement of the agency's intention to consider adopting, amending, or rescinding a rule;

(2) A synopsis of the proposed rule, amendment, or rule to be rescinded or a general statement of the subject matter to which the proposed rule, amendment, or rescission relates;

(3) A statement of the reason or purpose for adopting, amending, or rescinding the rule;

(4) The date, time, and place of a hearing on the proposed action, which shall be not earlier than the thirty-first nor later than the fortieth day after the proposed rule, amendment, or rescission is filed under division (B) of this section.

In addition to public notice given in the register of Ohio, the agency may give whatever other notice it reasonably considers necessary to ensure notice constructively is given to all persons who are subject to or affected by the proposed rule, amendment, or rescission.

The agency shall provide a copy of the public notice required under division (A) of this section to any person who requests it and pays a reasonable fee, not to exceed the cost of copying and mailing.

(B) The full text of the proposed rule, amendment, or rule to be rescinded, accompanied by the public notice required under division (A) of this section, shall be filed in electronic form with the secretary of state and with the director of the legislative service commission. (If in compliance with this division an agency files more than one proposed rule, amendment, or rescission at the same time, and has prepared a public notice under division (A) of this section that applies to more than one of the proposed rules, amendments, or rescissions, the agency shall file only one notice with the secretary of state and with the director for all of the proposed rules, amendments, or rescissions to which the notice applies.) The proposed rule, amendment, or rescission and public notice shall be filed as required by this division at least sixty-five days prior to the date on which the agency, in accordance with division (D) of this section, issues an order adopting the proposed rule, amendment, or rescission.

If the proposed rule, amendment, or rescission incorporates a text or other material by reference, the agency shall comply with sections 121.71 to 121.76 of the Revised Code.

The proposed rule, amendment, or rescission shall be available for at least thirty days prior to the date of the hearing at the office of the agency in printed or other legible form without charge to any person affected by the proposal. Failure to furnish such text to any person requesting it shall not invalidate any

action of the agency in connection therewith.

If the agency files a substantive revision in the text of the proposed rule, amendment, or rescission under division (H) of this section, it shall also promptly file the full text of the proposed rule, amendment, or rescission in its revised form in electronic form with the secretary of state and with the director of the legislative service commission.

The agency shall file the rule summary and fiscal analysis prepared under section 121.24 or 127.18 of the Revised Code, or both, in electronic form along with a proposed rule, amendment, or rescission or proposed rule, amendment, or rescission in revised form that is filed with the secretary of state or the director of the legislative service commission.

The director of the legislative service commission shall publish in the register of Ohio the full text of the original and each revised version of a proposed rule, amendment, or rescission; the full text of a public notice; and the full text of a rule summary and fiscal analysis that is filed with the director under this division.

(C) On the date and at the time and place designated in the notice, the agency shall conduct a public hearing at which any person affected by the proposed action of the agency may appear and be heard in person, by the person's attorney, or both, may present the person's position, arguments, or contentions, orally or in writing, offer and examine witnesses, and present evidence tending to show that the proposed rule, amendment, or rescission, if adopted or effectuated, will be unreasonable or unlawful. An agency may permit persons affected by the proposed rule, amendment, or rescission to present their positions, arguments, or contentions in writing, not only at the hearing, but also for a reasonable period before, after, or both before and after the hearing. A person who presents a position or arguments or contentions in writing before or after the hearing is not required to appear at the hearing.

At the hearing, the testimony shall be recorded. Such record shall be made at the expense of the agency. The agency is required to transcribe a record that is not sight readable only if a person requests transcription of all or part of the record and agrees to reimburse the agency for the costs of the transcription. An agency may require the person to pay in advance all or part of the cost of the transcription.

In any hearing under this section the agency may administer oaths or affirmations.

(D) After complying with divisions (A), (B), (C), and (H) of this section, and when the time for legislative review and invalidation under division (I) of this section has expired, the agency may issue an order adopting the proposed rule or the proposed amendment or rescission of the rule, consistent with the synopsis or general statement included in the public notice. At that time the agency shall designate the effective date of the rule, amendment, or rescission, which shall not be earlier than the tenth day after the rule, amendment, or rescission has been filed in its final form as provided in section 119.04 of the Revised Code.

(E) Prior to the effective date of a rule, amendment, or rescission, the agency shall make a reasonable effort to inform those affected by the rule, amendment, or rescission and to have available for distribution to those requesting it the full text of the rule as adopted or as amended.

(F) If the governor, upon the request of an agency, determines that an emergency requires the

immediate adoption, amendment, or rescission of a rule, the governor shall issue an order, the text of which shall be filed in electronic form with the agency, the secretary of state, the director of the legislative service commission, and the joint committee on agency rule review, that the procedure prescribed by this section with respect to the adoption, amendment, or rescission of a specified rule is suspended. The agency may then adopt immediately the emergency rule, amendment, or rescission and it becomes effective on the date the rule, amendment, or rescission, in final form and in compliance with division (A)(2) of section 119.04 of the Revised Code, are filed in electronic form with the secretary of state, the director of the legislative service commission, and the joint committee on agency rule review. If all filings are not completed on the same day, the emergency rule, amendment, or rescission shall be effective on the day on which the latest filing is completed. The director shall publish the full text of the emergency rule, amendment, or rescission in the register of Ohio.

The emergency rule, amendment, or rescission shall become invalid at the end of the ninetieth day it is in effect. Prior to that date the agency may adopt the emergency rule, amendment, or rescission as a nonemergency rule, amendment, or rescission by complying with the procedure prescribed by this section for the adoption, amendment, and rescission of nonemergency rules. The agency shall not use the procedure of this division to readopt the emergency rule, amendment, or rescission so that, upon the emergency rule, amendment, or rescission becoming invalid under this division, the emergency rule, amendment, or rescission will continue in effect without interruption for another ninety-day period, except when division (I)(2)(a) of this section prevents the agency from adopting the emergency rule, amendment, or rescission as a nonemergency rule, amendment, or rescission within the ninety-day period.

This division does not apply to the adoption of any emergency rule, amendment, or rescission by the tax commissioner under division (C)(2) of section 5117.02 of the Revised Code.

(G) Rules adopted by an authority within the department of job and family services for the administration or enforcement of Chapter 4141. of the Revised Code or of the department of taxation shall be effective without a hearing as provided by this section if the statutes pertaining to such agency specifically give a right of appeal to the board of tax appeals or to a higher authority within the agency or to a court, and also give the appellant a right to a hearing on such appeal. This division does not apply to the adoption of any rule, amendment, or rescission by the tax commissioner under division (C)(1) or (2) of section 5117.02 of the Revised Code, or deny the right to file an action for declaratory judgment as provided in Chapter 2721. of the Revised Code from the decision of the board of tax appeals or of the higher authority within such agency.

(H) When any agency files a proposed rule, amendment, or rescission under division (B) of this section, it shall also file in electronic form with the joint committee on agency rule review the full text of the proposed rule, amendment, or rule to be rescinded in the same form and the public notice required under division (A) of this section. (If in compliance with this division an agency files more than one proposed rule, amendment, or rescission at the same time, and has given a public notice under division (A) of this section that applies to more than one of the proposed rules, amendments, or rescissions, the agency shall file only one notice with the joint committee for all of the proposed rules, amendments, or rescissions to which the notice applies.) If the agency makes a substantive revision in a proposed rule, amendment, or rescission after it is filed with the joint committee, the agency shall promptly file the full text of the proposed rule, amendment, or rescission in its revised form in electronic form with the joint

committee. The latest version of a proposed rule, amendment, or rescission as filed with the joint committee supersedes each earlier version of the text of the same proposed rule, amendment, or rescission. An agency shall file the rule summary and fiscal analysis prepared under section 121.24 or 127.18 of the Revised Code, or both, in electronic form along with a proposed rule, amendment, or rescission, and along with a proposed rule, amendment, or rescission in revised form, that is filed under this division.

This division does not apply to:

(1) An emergency rule, amendment, or rescission;

(2) Any proposed rule, amendment, or rescission that must be adopted verbatim by an agency pursuant to federal law or rule, to become effective within sixty days of adoption, in order to continue the operation of a federally reimbursed program in this state, so long as the proposed rule contains both of the following:

(a) A statement that it is proposed for the purpose of complying with a federal law or rule;

(b) A citation to the federal law or rule that requires verbatim compliance.

If a rule or amendment is exempt from legislative review under division (H)(2) of this section, and if the federal law or rule pursuant to which the rule or amendment was adopted expires, is repealed or rescinded, or otherwise terminates, the rule or amendment, or its rescission, is thereafter subject to legislative review under division (H) of this section.

(I)(1) The joint committee on agency rule review may recommend the adoption of a concurrent resolution invalidating a proposed rule, amendment, rescission, or part thereof if it finds any of the following:

(a) That the rule-making agency has exceeded the scope of its statutory authority in proposing the rule, amendment, or rescission;

(b) That the proposed rule, amendment, or rescission conflicts with another rule, amendment, or rescission adopted by the same or a different rule-making agency;

(c) That the proposed rule, amendment, or rescission conflicts with the legislative intent in enacting the statute under which the rule-making agency proposed the rule, amendment, or rescission;

(d) That the rule-making agency has failed to prepare a complete and accurate rule summary and fiscal analysis of the proposed rule, amendment, or rescission as required by section 121.24 or 127.18 of the Revised Code, or both, or that the proposed rule, amendment, or rescission incorporates a text or other material by reference and either the rule-making agency has failed to file the text or other material incorporated by reference as required by section 121.73 of the Revised Code or, in the case of a proposed rule or amendment, the incorporation by reference fails to meet the standards stated in section 121.72, 121.75, or 121.76 of the Revised Code.

The joint committee shall not hold its public hearing on a proposed rule, amendment, or rescission earlier than the forty-first day after the original version of the proposed rule, amendment, or rescission was filed with the joint committee.

The house of representatives and senate may adopt a concurrent resolution invalidating a proposed rule, amendment, rescission, or part thereof. The concurrent resolution shall state which of the specific rules, amendments, rescissions, or parts thereof are invalidated. A concurrent resolution invalidating a proposed rule, amendment, or rescission shall be adopted not later than the sixty-fifth day after the original version of the text of the proposed rule, amendment, or rescission is filed with the joint committee, except that if more than thirty-five days after the original version is filed the rule-making agency either files a revised version of the text of the proposed rule, amendment, or rescission, or revises the rule summary and fiscal analysis in accordance with division (I)(4) of this section, a concurrent resolution invalidating the proposed rule, amendment, or rescission shall be adopted not later than the thirtieth day after the revised version of the proposed rule or rule summary and fiscal analysis is filed. If, after the joint committee on agency rule review recommends the adoption of a concurrent resolution invalidating a proposed rule, amendment, rescission, or part thereof, the house of representatives or senate does not, within the time remaining for adoption of the concurrent resolution, hold five floor sessions at which its journal records a roll call vote disclosing a sufficient number of members in attendance to pass a bill, the time within which that house may adopt the concurrent resolution is extended until it has held five such floor sessions.

Within five days after the adoption of a concurrent resolution invalidating a proposed rule, amendment, rescission, or part thereof, the clerk of the senate shall send the rule-making agency, the secretary of state, and the director of the legislative service commission in electronic form a certified text of the resolution together with a certification stating the date on which the resolution takes effect. The secretary of state and the director of the legislative service commission shall each note the invalidity of the proposed rule, amendment, rescission, or part thereof, and shall each remove the invalid proposed rule, amendment, rescission, or part thereof from the file of proposed rules. The rule-making agency shall not proceed to adopt in accordance with division (D) of this section, or to file in accordance with division (B)(1) of section 111.15 of the Revised Code, any version of a proposed rule, amendment, rescission, or part thereof that has been invalidated by concurrent resolution.

Unless the house of representatives and senate adopt a concurrent resolution invalidating a proposed rule, amendment, rescission, or part thereof within the time specified by this division, the rule-making agency may proceed to adopt in accordance with division (D) of this section, or to file in accordance with division (B)(1) of section 111.15 of the Revised Code, the latest version of the proposed rule, amendment, or rescission as filed with the joint committee. If by concurrent resolution certain of the rules, amendments, rescissions, or parts thereof are specifically invalidated, the rule-making agency may proceed to adopt, in accordance with division (D) of this section, or to file in accordance with division (B)(1) of section 111.15 of the Revised Code, the latest version of the proposed rules, amendments, rescissions, or parts thereof as filed with the joint committee that are not specifically invalidated. The rule-making agency may not revise or amend any proposed rule, amendment, rescission, or part thereof that has not been invalidated except as provided in this chapter or in section 111.15 of the Revised Code.

(2)(a) A proposed rule, amendment, or rescission that is filed with the joint committee under division (H) of this section or division (D) of section 111.15 of the Revised Code shall be carried over for legislative review to the next succeeding regular session of the general assembly if the original or any revised version of the proposed rule, amendment, or rescission is filed with the joint committee on or after the first day of December of any year.

(b) The latest version of any proposed rule, amendment, or rescission that is subject to division (I)(2)(a) of this section, as filed with the joint committee, is subject to legislative review and invalidation in the next succeeding regular session of the general assembly in the same manner as if it were the original version of a proposed rule, amendment, or rescission that had been filed with the joint committee for the first time on the first day of the session. A rule-making agency shall not adopt in accordance with division (D) of this section, or file in accordance with division (B)(1) of section 111.15 of the Revised Code, any version of a proposed rule, amendment, or rescission that is subject to division (I)(2)(a) of this section until the time for legislative review and invalidation, as contemplated by division (I)(2)(b) of this section, has expired.

(3) Invalidation of any version of a proposed rule, amendment, rescission, or part thereof by concurrent resolution shall prevent the rule-making agency from instituting or continuing proceedings to adopt any version of the same proposed rule, amendment, rescission, or part thereof for the duration of the general assembly that invalidated the proposed rule, amendment, rescission, or part thereof unless the same general assembly adopts a concurrent resolution permitting the rule-making agency to institute or continue such proceedings.

The failure of the general assembly to invalidate a proposed rule, amendment, rescission, or part thereof under this section shall not be construed as a ratification of the lawfulness or reasonableness of the proposed rule, amendment, rescission, or any part thereof or of the validity of the procedure by which the proposed rule, amendment, rescission, or any part thereof was proposed or adopted.

(4) In lieu of recommending a concurrent resolution to invalidate a proposed rule, amendment, rescission, or part thereof because the rule-making agency has failed to prepare a complete and accurate fiscal analysis, the joint committee on agency rule review may issue, on a one-time basis, for rules, amendments, rescissions, or parts thereof that have a fiscal effect on school districts, counties, townships, or municipal corporations, a finding that the rule summary and fiscal analysis is incomplete or inaccurate and order the rule-making agency to revise the rule summary and fiscal analysis and refile it with the proposed rule, amendment, rescission, or part thereof. If an emergency rule is filed as a nonemergency rule before the end of the ninetieth day of the emergency rule's effectiveness, and the joint committee issues a finding and orders the rule-making agency to refile under division (I)(4) of this section, the governor may also issue an order stating that the emergency rule shall remain in effect for an additional sixty days after the ninetieth day of the emergency rule's effectiveness. The governor's orders shall be filed in accordance with division (F) of this section. The joint committee shall send in electronic form to the rule-making agency, the secretary of state, and the director of the legislative service commission a certified text of the finding and order to revise the rule summary and fiscal analysis, which shall take immediate effect.

An order issued under division (I)(4) of this section shall prevent the rule-making agency from instituting or continuing proceedings to adopt any version of the proposed rule, amendment, rescission, or part thereof until the rule-making agency revises the rule summary and fiscal analysis and refiles it in electronic form with the joint committee along with the proposed rule, amendment, rescission, or part thereof. If the joint committee finds the rule summary and fiscal analysis to be complete and accurate, the joint committee shall issue a new order noting that the rule-making agency has revised and refiled a complete and accurate rule summary and fiscal analysis. The joint committee shall send in electronic form to the rule-making agency, the secretary of state, and the director of the legislative service

commission a certified text of this new order. The secretary of state and the director of the legislative service commission shall each link this order to the proposed rule, amendment, rescission, or part thereof. The rule-making agency may then proceed to adopt in accordance with division (D) of this section, or to file in accordance with division (B)(1) of section 111.15 of the Revised Code, the proposed rule, amendment, rescission, or part thereof that was subject to the finding and order under division (I)(4) of this section. If the joint committee determines that the revised rule summary and fiscal analysis is still inaccurate or incomplete, the joint committee shall recommend the adoption of a concurrent resolution in accordance with division (I)(1) of this section.

Effective Date: 09-17-2002