

TABLE OF CONTENTS

	<u>PAGE</u>
<u>TABLE OF CONTENTS</u>	i
<u>TABLE OF AUTHORTIES</u>	ii
I. STATEMENT OF THE CASE.....	1
II. LAW AND ARGUMENT.....	2
 <u>PROPOSITON OF LAW:</u> <i>Where an alleged administrative code regulation is open and obvious to a business invitee, a claim in negligence premised upon the open and obvious condition is subject to summary judgment.</i>	
A. Even from review of expert opinion testimony in this matter it is clear the alleged defect which caused Appellant's decedent to fall was an open and obvious condition.	3
B. Even if there was an OBBC violation, any alleged hazard was open and obvious, obviating the duty to the decedent and making summary judgment appropriate.	5
C. A small minority of Ohio appellate districts support Appellant's argument, but those decisions are an anomaly and should not guide this Court in its decision.	9
D. This Court's recent decision in <i>Robinson v. Bates</i> is not dispositive and further elucidates the distinction made in this Court's decision in <i>Chambers v. St. Mary's</i>.....	10
E. Good Public Policy necessitates upholding the Decision of the Fourth District Court of Appeals.....	13
III. CONCLUSION	15
CERTIFICATE OF SERVICE.....	16

TABLE OF AUTHORITIES

PAGE

Cases

<i>Ahmad v. AK Steel Corporation</i> (12 th Dist., 2006), 2006-Ohio-7031.....	7
<i>Armstrong v. Best Buy</i> (2003), 99 Ohio St.3d 79.....	6, 7
<i>Ault v. Provenza</i> (9 th Dist., 1996), 1996 Ohio App. LEXIS 1906.....	7
<i>Belden v. Union Cent. Life Ins. Co.</i> (1944), 143 Ohio St. 329.....	12
<i>Carroll v. Dept. of Adm. Serv.</i> (1983), 10 Ohio App.3d 108.....	12
<i>Chambers v. St. Mary's</i> (1998), 82 Ohio St.3d 563.....	7, 8, 10, 11, 12, 13, 14
<i>Doyle v. Ohio Bur. of Motor Vehicles</i> (1990), 51 Ohio St.3d 46.....	12
<i>Duncan v. Capitol South Community Urban Redevelopment Corp.</i> (10 th Dist., 2003), 2003-Ohio-1273.....	9, 10
<i>Francis v. Showcase Cinema Eastgate</i> (1 st Dist., 2003) 155 Ohio App.3d 412.....	10
<i>Kirchner v. Shooters on the Water, Inc.</i> (8 th Dist., 2006), 2006-Ohio-1490.....	7, 8
<i>Klostermeier v. In & Out Mart</i> (6 th Dist., 2001), Lucas App. No. L-00-1204.....	7
<i>Lang v. Holly Hill Motel</i> (4 th Dist., 2007), 2007-Ohio-3898.....	7
<i>Matz v. J.L. Curtis Cartage Co.</i> (1937), 132 Ohio St. 271.....	11

<i>Meniffee v. Ohio Welding Prods., Inc.</i> (1984), 15 Ohio St. 3d 75.....	5
<i>Olivier v. Leaf & Vine</i> (2 nd Dist., 2005), 2005-Ohio-1910.....	7, 8
<i>Paschal v. Rite Aid Pharmacy, Inc.</i> (1985), 18 Ohio St.3d 203.....	6
<i>Raflo v. Losantiville Country Club</i> (1973), 34 Ohio St. 2d 1.....	6, 7
<i>Robinson v. Bates</i> (2006), 112 Ohio St.3d 17.....	10, 11, 13
<i>Ryan v. Guan</i> (5 th Dist., 2004), 2004-Ohio-4032.....	7
<i>Sidle v. Humphrey</i> (1968), 13 Ohio St.3d 79.....	6
<i>Souther v. Preble Cty. Dist. Library</i> (12 th Dist., 2006), 2006-Ohio-1893.....	7, 8
<i>Uddin v. Embassy Suites Hotel</i> (10 th Dist., 2005), 2005-Ohio-6613.....	9
<i>Wichichowski v. Gladieux Enterprises, Inc.</i> (6 th Dist., 1988), 54 Ohio App.3d 177.....	7
<u>Statutes</u>	
Ohio Revised Code, §5321.04(A)(2).....	11

I. STATEMENT OF THE CASE

This case involves a trip and fall incident at the Holly Hill Motel located in Jackson, Ohio. Specifically, in April of 1999, the decedent, Albert Lang, fell on a step at the Holly Hill Motel. (D. Lang depo. at pp. 5, 8, 49,). Dorothy Lang, the wife of the decedent identified in her deposition testimony that Mr. Lang fell on “the second step, which took him onto the porch.” (D. Lang depo at p. 58). There was one step which led to an elevated sidewalk and a second step before the patio area which was in front of the door to the motel room. What Mrs. Lang was referring to was a second step which can be seen in photographic evidence attached to Mr. Goodwin’s deposition transcript which leads to the elevated porch area. (See Exhibits C-2 and C-9 attached to Mr. Goodwin’s deposition transcript which has been contemporaneously filed with this Court.). Mrs. Lang identified that at the time that Mr. Lang fell that she was helping him up the steps. She stated that not only was Mr. Lang hanging on to her to get up the steps, but that she was also carrying Mr. Lang’s portable oxygen. (D. Lang depo. at pp. 61, 75). Mrs. Lang stated “that’s what made him go down was this big step.” (D. Lang. depo. at p. 64).

Here, Appellant claims two steps at the subject premises violated the Ohio Basic Building Code (OBBC) because the riser heights were too high and the stairs lacked a handrail. As noted, Appellant's decedent fell on the steps, which led to a broken hip, which Appellant claims led to decedent's ultimate death.

This Appellee Rodney McCorkle dba McCorkle Builders contracted with the owners of the Holly Hill Motel to provide construction services for an addition onto the motel. (McCorkle depo. at pp. 15-16). The contract was entered into on October 20, 1982. The subject addition consisted of 11 motel rooms. (McCorkle depo. at p. 16). McCorkle's role in the construction included construction of the sidewalks, stairs, curbs and parking lot. (McCorkle depo. at p. 24).

The Pease Company supplied the blueprints and materials for McCorkle. (McCorkle depo. at p. 17). McCorkle testified the blueprints provided by Pease Company did not include landscaping, sidewalks or parking lots. (McCorkle depo. at p. 18). A separate site-plan contained the information for placement and construction of the parking lot, sidewalks and other non-building items on the site. (McCorkle depo. at p. 22). McCorkle stated the entire site was inspected and approved by the State after completion of construction. (McCorkle depo. at p. 26).

Procedurally, McCorkle became a party to this matter when Defendant Holly Hill Motel filed a Third Party Complaint against McCorkle. The Third Party Complaint was originally filed on May 1, 2001. Defendant McCorkle responded by filing an Answer on April 1, 2002. Ultimately the case was voluntarily dismissed by the Plaintiff on April 8, 2003 and subsequently re-filed on April 6, 2004 with Holly Hill re-filing its Third Party Complaint against McCorkle.

Herein, McCorkle argues in favor of upholding the recent summary judgment ruling in favor of Appellees, as dismissal of Appellant's claim against Holly Hill Motel will operate to therein eradicate Holly Hill Motel's Third Party Claims against McCorkle. Further, a ruling in favor of Appellee Holly Hill Motel would also act to protect builders and construction contractors in similar situations from being brought into suits on third party claims when the underlying negligence claim against the property owner is dismissed by operation of the open and obvious doctrine.

II. LAW AND ARGUMENT

Even assuming there was evidence that the absence of a handrail and a step riser that was too high, were in violation of a building code provision, the missing handrail and height of the step riser were "open and obvious" as a matter of law, and thus there was no duty to protect the decedent, a business invitee, against any danger posed by the lack of a handrail or the height of

the riser. This Court should follow strong Ohio precedent and public policy and declare, where an alleged danger is open and obvious to a business invitee, Ohio law will not hold landowners responsible for protecting invitees from these patent dangers. Even when administrative regulations, such as the OBC, may apply to the premises at issue, if alleged regulation violations are open and obvious, landowners must be permitted to rely upon invitees taking responsibility for their own safety. For this Court to hold otherwise, would reverse decades of precedent and clear case law on this issue. If this Court were to hold evidence of administrative violations could obviate application of the open and obvious doctrine, thereby precluding summary judgment to landowners based upon the open and obvious doctrine, it would in essence make the landowner the invitee's insurer of safety on the premises, something this Court has for years been unwilling to do. Landowners would become liable for dangers that were admittedly open and obvious, and open the "flood gates" to greater numbers of premises liability cases.

PROPOSITON OF LAW: Where an alleged administrative code regulation is open and obvious to a business invitee, a claim in negligence premised upon the open and obvious condition is subject to summary judgment.

CERTIFIED CONFLICT: Whether the violation of an administrative code regulation prohibits application of the open and obvious doctrine and precludes summary judgment on a negligence claim.

- A. Even from review of expert opinion testimony in this matter it is clear the alleged defect which caused Appellant's decedent to fall was an open and obvious condition.**

In their Merit Brief, Appellant asserts their expert Joseph N. Brashear was retained and performed a site inspection and investigation at the Holly Hill Motel. Mr. Brashear's scope of retention was to determine if the motel stairs complied with the Ohio Basic Building Code (OBBC) and to evaluate the overall safety of the steps. Mr. Brashear opined the riser over which Appellant's decedent tripped was, at its lowest point 2.375 inches higher than was permitted by

the OBBC. Further, Mr. Brashear determined the riser height constituted a dangerous condition, and the absence of a handrail contributed to the condition, as the high riser could precipitate a fall.

Appellant argues Mr. Brashear's opinion that the riser height violated the OBBC was not disputed by either Holly Hill or McCorkle. This is not accurate. The Appellees simply did not dispute Mr. Brashear's opinion for purposes of a ruling on summary judgment and subsequently for purposes of the Fourth District Appellate Court's review and decision. McCorkle has consistently argued, as is the crux of the entire issue before this Court, that even assuming arguendo the riser height violated the OBBC, such violation does not abrogate the application of the open and obvious doctrine.

Further, McCorkle's expert Larry Goodwin performed a site inspection and took photographs of the alleged defect on August 16, 2002. (Goodwin depo. at p. 7). Mr. Goodwin identified and authenticated seventeen (17) photographs in his deposition. (Goodwin depo. at p. 7). These photographs were marked as Goodwin deposition exhibits C-1 through C-17. (Goodwin depo. at p. 7). The photographs taken by Mr. Goodwin are attached as Exhibits C-1 through C-17, to his deposition transcript, which was filed with the Trial Court, and is part of the record. In general, this Court can refer to pages 26 through 29, of Mr. Goodwin's deposition transcript, for a description and explanation of what the photographic exhibits are demonstrating. In general, the series of photographs show the context of where the sidewalk was and what the general parking lot and motel addition looked like. (Goodwin depo. at p. 26, referencing photographic exhibit C-13). Photographic Exhibit C-11 of the deposition transcript is a closer photographic image showing the subject sidewalk as it existed on the date of Mr. Goodwin's inspection. (Goodwin depo. at p. 26). More specifically, Exhibits C-2 and C-9 show the step up

from the sidewalk to the porch area. (Goodwin depo. at p. 28). This is the area where Plaintiff's decedent allegedly fell. Clearly, the condition of the step and any defect that might exist are clearly evident to any invitee.

Mrs. Lang opined in her deposition testimony that the lack of a handrail, also contributed the fall. (D. Lang. depo. at p. 80). First, the absence of the handrail was easily observable to Mr. and Mrs. Lang so as to appreciate its danger. Both Mr. and Mrs. Lang could easily discern the lack of a handrail, simply by glancing at the steps, sidewalk and patio area that led to the hotel room door. A review of the deposition testimony of the decedent's wife clearly establishes that the step was an open and obvious condition, and therefore Appellees owed no duty to the Appellant's decedent. It is clear that decedent failed to see an open and obvious condition.

B. Even if there was an OBBC violation, any alleged hazard was open and obvious, obviating the duty to the decedent and making summary judgment appropriate.

We have a situation in this matter where Appellants have provided evidence of alleged OBBC violations at the subject premises, to wit, the lack of a handrail and riser height violations. For purposes of summary judgment at the Trial Court level, argument on Appeal to the Fourth District Court of Appeals, and now argument before this Honorable Court, we must assume the facts in favor of the Appellant. Even with the alleged violations, any resulting danger to the decedent was "open and obvious" and thus the premises owner owed no duty to the decedent. Ohio courts have made clear that when a danger is open and obvious to a business invitee, as it was to the decedent in this case, there can be no case of negligence against the premises owner. In such cases, the plaintiff, as a matter of law, cannot make out the duty element of their negligence claim, and summary judgment is appropriate.

In order to establish a claim of negligence a plaintiff must demonstrate the existence of a duty, a breach of that duty, and an injury proximately caused by the breach of duty. *Meniffee v. Ohio Welding Prods., Inc.* (1984), 15 Ohio St. 3d 75, 77. If the plaintiff fails to establish the defendant owed them a legal duty, they cannot make out a claim of negligence against the defendant as a matter of law. *See id.* In this matter, the decedent was an invitee at the Holly Hill Motel. Under Ohio law, an owner or occupier of a premises owes a business invitee a duty of ordinary care to maintain the premises in a reasonably safe condition so that invitees are not unreasonably exposed to danger. *See Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E. 2d 474. But, an owner or occupier is under no duty to protect a business invitee against dangers which are known to such invitee or are so obvious and apparent to such invitee that they should reasonably discover and protect themselves. *See Sidle v. Humphrey* (1968), 13 Ohio St.3d 79, 80, 2003-Ohio-2573, P14, 788 N.E.2d 1088. The open and obvious doctrine concerns the first element of negligence law, the existence of a duty; if an alleged danger is open and obvious, the defendant owes no legal duty to invitees encountering the alleged danger. *See id.* "The rationale behind the open-and-obvious doctrine is that the open-and-obvious nature of the hazard itself serves as a warning, [t]hus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." *See Armstrong v. Best Buy* (2003), 99 Ohio St.3d 79, 80.

Appellant in this case, asks the Court to reverse years of case law in the premises liability arena, and find that allegations supported by evidence of violations of administrative regulations will obviate the application of the open and obvious doctrine, even where the violation itself is open and obvious. What the open and obvious doctrine does is to remove the duty the premises

owner has to an invitee. A violation of an administrative regulation cannot constitute a breach of duty where the duty itself does not otherwise exist.

A review of prior Ohio Supreme Court decisions in the area of premises liability is germane at this time. In *Raflo v. Losantiville Country Club* (1973) 34 Ohio St. 2d 1, 4, 295 N.E.2d 202, this Court affirmed summary judgment in favor of a landowner when an invitee fell on a step that violated the OBC. The step in question in *Raflo*, was two inches higher than permitted by the OBC. In *Raflo*, the invitee traversed the step without injury on her way into the premises, but when exiting she fell and was injured. See *id.* at 1. Even though the step was in violation of the OBC, this Court upheld summary judgment because the step was a known danger. The Court in *Raflo* stated "the mere fact that [a violation exists] does not alter the rule that an invitee with knowledge of such a defect traverses it at his peril." *Id.* at 4.

In *Chambers v. St. Mary's* (1998), 82 Ohio St.3d 563, 568, 697 N.E. 2d 198, this Court was asked to determine the specific question of whether a violation of an administrative regulation constitutes negligence *per se*. This Court ruled that violation of an administrative code regulation could be considered evidence of negligence, but did not constitute negligence *per se*.

At the current time, the majority of Ohio appellate districts that have been asked to rule on the specific issue presented in this matter have determined that a violation of an administrative code regulation does not preclude application of the open and obvious doctrine where the violation itself is open and obvious. The Second, Fourth, Fifth, Sixth, Eighth and Ninth Districts have decided this very issue, and each appellate district has held that the open and obvious doctrine is not obviated in the face of evidence of a violation of an administrative regulation. See *Olivier v. Leaf & Vine* (2nd Dist., 2005), 2005-Ohio-1910; *Quinn v. Montgomery*

Cty. Educ. Ctr. (2nd Dist., 2005), 2005-Ohio-808; *Souther v. Preble Cty. Dist. Library* (12th Dist., 2006), 2006-Ohio-1893; *Ahmad v. AK Steel Corporation* (12th Dist., 2006), 2006-Ohio-7031; *Lang v. Holly Hill Motel* (4th Dist., 2007), 2007-Ohio-3898; *Ryan v. Guan* (5th Dist., 2004) 2004-Ohio-4032; *Klostermeier v. In & Out Mart* (6th Dist., 2001), Lucas App. No. L-00-1204; *Wichichowski v. Gladieux Enterprises, Inc.* (6th Dist., 1988), 54 Ohio App.3d 177, 561 N.E.2d 1012; *Kirchner v. Shooters on the Water, Inc.* (8th Dist., 2006), 2006-Ohio-1490; *Ault v. Provenza* (9th Dist., 1996), 1996 Ohio App. LEXIS 1906. In reaching this conclusion, these districts relied upon this Court's previous rulings in *Armstrong* and *Chambers*. In citing to *Chambers*, many of the above cases applied the rationale in *Chambers* that strict compliance with the multitude of administrative rules was virtually impossible. See e.g. *Olivier*, 2005-Ohio-1910, P28. A clear majority of Ohio's appellate districts have made its prior rulings based upon the further rationale that this Court implied building code violations could be considered in light of circumstances including whether the condition was open and obvious. *Id.* at P29.

In *Souther*, the Twelfth District Court of Appeals, provided an on point assessment of the subject situation:

[evidence of a violation of an administrative regulation] is one of many facts to be considered on summary judgment in a negligence claim. . . [Where the violation] was neither hidden nor concealed [but rather], it was observable and discoverable by an ordinary inspection....[t]he open and obvious nature of the [violation] alleviated the duty to warn visitors of its existence, precluding liability for negligence.

See *Souther*, 2006-Ohio-1893, P38.

Another case which needs to be specifically discussed is *Kirchner*, supra, 2006-Ohio-3583. In *Kirchner*, a business invitee fell into an unguarded entrance to the Cuyahoga River when on the patio of the premises. The invitee drowned and the decedent's estate brought suit claiming several OBBC violations. See *id.* at P27. The Eighth District held a premises owner

may reasonably expect invitees on its premises to "discover [open and obvious] dangers and take appropriate measures to protect themselves." *See id.* at P19. The Eighth District ruled the Court's decision in *Chambers* supported application of the open and obvious doctrine in favor of the premises owner regardless of any evidence of violations of the OBBC. *Id.* at P30.

In this case, both the Trial Court and the Fourth District followed the majority approach, ruling that even given evidence of an OBBC violation, the lack of the handrail and riser height were open and obvious, thus eliminating any duty owed by the premises owner to the decedent. The majority of this State's appellate districts have determined that evidence of a violation of an administrative code regulation does not preclude the proper application of the open and obvious doctrine where the violation itself is patent and observable. This Court should pronounce that the view held by the majority of Ohio appellate districts is correct and affirm the Fourth District's ruling in this matter.

C. A small minority of Ohio appellate districts support Appellant's argument, but those decisions are an anomaly and should not guide this Court in its decision.

There are two Ohio appellate districts which have ruled evidence of a violation of an administrative regulation should obviate the application of the open and obvious doctrine in a motion for summary judgment. The Tenth District Court of Appeals recently ruled where a ten year old child drowned in a swimming pool containing water that was cloudy and a violation of the Ohio Administrative Code, that summary judgment was improper. *See Uddin v. Embassy Suites Hotel* (10th Dist., 2005), 2005-Ohio-6613, 165 Ohio App.3d 669. In *Uddin*, the Tenth District held that a violation of an administrative rule is not an open and obvious condition "in every situation." *See id.* at P36. It can not be argued that *Uddin* stands for the proposition that every administrative code violation precludes summary judgment. The Tenth District simply

ruled in *Uddin* that situations exist where a violation of an administrative rule is not open and obvious. *Id.* at P36.

It must be noted the Tenth District has made inconsistent rulings with respect to whether administrative code regulations preclude the application of the open and obvious doctrine. In *Duncan v. Capitol South Community Urban Redevelopment Corp.* (10th Dist., 2003), 2003-Ohio-1273, the plaintiff fell on a curb, which she alleged violated various statutory provisions. The Tenth District affirmed the Trial Court's grant of summary judgment. The Tenth District in affirming the summary judgment, held that even if the curb was unusually high, the condition was open and obvious. *See id.* at P30-31. When considering *Uddin* in light of *Duncan*, it is clear the Tenth District has not determined that administrative code regulations will preclude summary judgment in every case. Rather, the Tenth District has merely determined that certain violations of administrative regulations are not open and obvious in specific situations. *See id.* at P36.

The First District is the only appellate district that has considered this issue and held that a violation of an OBBC provision preclude application of the open and obvious doctrine in every case. *See Francis v. Showcase Cinema Eastgate* (1st Dist., 2003) 155 Ohio App.3d 412, 2003-Ohio-6507. The *Francis* case contained an improper analysis of this Court's decision in *Chambers* and thus should not guide this Court's decision. As previously noted, *Chambers* held violations of the OBBC do not constitute negligence *per se* but "such violation may be admissible as evidence of negligence." *Chambers*, 82 Ohio St.3d 563, 1998-Ohio-184. The First District in *Francis*, wrongly interpreted the *Chambers* decision, holding that violations of the OBBC are evidence that the owner has breached a duty to the invitee. This is a clear misstatement of this Court's holding in *Chambers* as the open and obvious doctrine was neither

addressed, nor was there a ruling that an administrative code violation obviates application of the open and obvious doctrine.

D. This Court's recent decision in *Robinson v. Bates* is not dispositive and further elucidates the distinction made in this Court's decision in *Chambers v. St. Mary's*.

Appellant cites to this Court's recent decision in *Robinson v. Bates* (2006), 112 Ohio St.3d 17, 2006-Ohio-6362, for support of their position. While Appellant first states the appropriate holding of *Robinson*, they stretch the decision to provide an application not intended by this Court. Under, *Robinson*, as well as this Court's prior ruling in *Chambers*, the directive is clear that where a statutory duty is imposed by legislative enactment, the open and obvious doctrine is not applicable in determining whether a property owner violated that specific statutory duty. Appellant goes on to argue that the question becomes 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.

Therein lies the distinction. In *Robinson*, there was evidence presented by the Plaintiff that the Defendant Bates (the landlord) violated R.C. 5321.04(A)(2), which is a statutory duty under the Landlord-Tenant Act, as specifically entailed in the Ohio Revised Code. In *Chambers*, as in this matter, the Plaintiff is alleging a violation of an administrative code provision.

This Court first wrestled at length with the distinction between legislative enactments and administrative regulations in *Matz v. J.L. Curtis Cartage Co.* (1937), 132 Ohio St. 271, where the Court held that a violation of a safety regulation adopted by the Public Utilities Commission pursuant to authority conferred upon it by law did not constitute negligence *per se*, but that such a regulation was admissible in evidence as bearing on the question of the want of ordinary care.

Ultimately, in *Chambers*, this Court ruled violation of an administrative regulation is not negligence *per se*.

In *Chambers*, the Plaintiff was employed as a milk delivery person and was delivering milk to the St. Mary's School at the time of his injury. *Chambers*, supra at 563. As the plaintiff was delivering milk he slipped on a layer of ice on the school's service entrance. *Id.* Plaintiff filed suit against St. Mary's and alleged the school failed to maintain its premises in a safe manner. *Id.* The school filed a motion for summary judgment, and in opposition plaintiff asserted that his expert witness opined that St. Mary's violated several sections of the OBBC including Sections 805.2 (exterior stairways shall be kept free of ice and snow), 817.12 (exterior stairway shall be protected to prevent accumulation of ice and snow), 823.0 (means of egress lighting), and 817.7 (stairway handrails). *Id.* Plaintiff asserted violations of these sections were negligence *per se*. *Id.* Summary Judgment was granted in favor of St. Mary's; the summary judgment was upheld by the appellate court. *Id.*

In *Chambers*, this Court outlined its Decision by noting it must determine whether there are any material differences between statutes and administrative rules which would preclude the Court from extending the application of negligence *per se* to violations of administrative rules. *Id.* at 566. This Court provided a recitation of the legislative process involved with a statute becoming law and ultimately being contained within the Ohio Revised Code. See *Chambers*, generally at 566-567. This Court noted that in contrast, administrative rules do not dictate public policy, but rather expound upon public policy already established by the General Assembly in the Revised Code. *Id.* at 567. This Court went on to state, "[t]he purpose of administrative rulemaking is to facilitate an administrative agency's placing into effect a policy declared by the General Assembly in the statutes to be administered by the agency." *Id.*; citing to *Doyle v. Ohio*

Bur. of Motor Vehicles (1990), 51 Ohio St.3d 46, 47; quoting *Carroll v. Dept. of Adm. Serv.* (1983), 10 Ohio App.3d 108, 110. It was further noted "[a]dministrative agencies may make only 'subordinate' rules. *Id.*; citing to *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, 342-343. This Court directed, "[u]nlike the legislative process, rulemaking by administrative agencies does not involve the collaborative effort of elected officials. . . and [therefore] do not elevate rulemaking to the status of lawmaking for purposes of applying negligence *per se* to violations of administrative rules" *Id.*

This Court went on to note in *Chambers*, if it were to rule that a violation of the OBBC (an administrative rule) was negligence *per se*, it would in effect bestow upon administrative agencies the ability to propose and adopt rules which alter the proof requirements between litigants. *Id.* at 568. This Court stated, "[a]ltering proof requirements is a public policy determination more properly determined by the General Assembly because the General Assembly, as opposed to administrative agencies, has the authority and accountability to dictate public policy." *Id.* More important, this Court found "a finding that administrative rules establish negligence *per se* could open the floodgates to litigation." *Id.* Troubling to parties such as Holly Hill Motel and McCorkle is the realization by this Court that strict compliance with a multitude of rules would be virtually impossible and would if effect make those subject to those rules the insurer of third parties who are harmed by any such rule violation. *Id.*

Therein lies the distinction between *Chambers* and *Robinson*. In *Robinson*, evidence was presented by the plaintiff that the defendant landlord had violated a state statute being R.C. 5321.04(A)(2). This Court held a determination that the landlord breached a statutory duty would constitute negligence *per se*. *Robinson*, *supra* at 25. With respect to the open and obvious doctrine this Court only stated the doctrine did not dissolve the "statutory" duty to repair, and

further noted common law negligence principles did not apply because of the landlord's statutory duty to repair. *Id.* at 24-25. The distinction in the case sub judice, is that there is no statutory duty which would abrogate application of general common law principles inclusive of the application of the open and obvious doctrine, only application of an administrative regulation which can not itself abrogate application of common law negligence principles and act to change the proof requirements between litigants as clearly stated in *Chambers*.

E. Good Public Policy necessitates upholding the Decision of the Fourth District Court of Appeals.

For years, covering hundreds, possibly thousands of cases, Ohio courts have acknowledged and applied the open and obvious doctrine in premises liability cases. Ohio's long standing public policy favors application of the open and obvious doctrine in order to limit liability to premises owners as they are not the insurers of safety to invitees. If this Court were to find that evidence presented by a plaintiff of an administrative violation would obviate the application of the open and obvious doctrine, then every allegation supported by some evidence of an administrative regulation violation would turn the premises owner into the ultimate insurer of safety for invitees coming onto their premises. This becomes a slippery slope issue. Once you depart from the open and obvious doctrine and start accepting that any building code violation creates a question of fact for the jury, then summary judgment would never be appropriate.

This Court has already previously noted in *Chambers* that strict compliance with the multitude of administrative regulations facing landowners is "virtually impossible," and treating violations of these rules as per se negligence would make landowners the insurers of the safety of every invitee onto the premises. See *Chambers*, 82 Ohio St. 3d at 568. If this Court reverses the Fourth District Court of Appeals ruling in this matter, then in cases such as this, where the

alleged violations are obvious, and where the invitee failed to use reasonable care for their own safety, then every case involving some evidence of an alleged violation of an administrative regulation would be forced to go to a jury trial. This Court should consider the burden, not only placed upon the premises owner, who would now become the insurer of safety to the invitee, but also to the numerous trial courts throughout the state as all types of "garden variety" slip and fall and trip and fall cases would clog the docket as each and every one would necessitate a trial either to the bench or by jury.

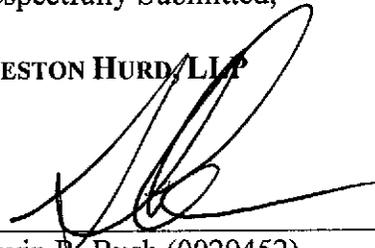
Application of the open and obvious doctrine in cases involving alleged violations of administrative regulations is based upon strong public policy and legal principles. The long-standing Ohio precedents involving application of the open and obvious doctrine and the sound public policy rationale behind the open and obvious doctrine mandate that this Court affirm the Trial Court and the Fourth District's decisions respectively granting and upholding summary judgment to the Appellees in this case.

III. CONCLUSION

For the reasons stated herein, this Appellee Rodney McCorkle dba McCorkle Builders, respectfully requests that the Court uphold the decision of the trial court and the Fourth District Court of Appeals.

Respectfully Submitted,

WESTON HURD/LLP



Kevin R. Bush (0029452)
Steven G. Carlino (0073734)
88 E. Broad Street, Suite 1750
Columbus, Ohio 43215-3506
Telephone: (614) 280-1121
Facsimile: (614) 280-0204

*Attorneys for Appellee Rodney McCorkle
dba McCorkle Builders*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served by ordinary U.S. Mail, postage-prepaid, this 12th day of November, 2008 to the following counsel of record herein:

Robert E. Manley, Esquire
W. Kelly Lundrigan, Esquire
Emily Gehlert Supinger, Esquire
MANLEY, BURKE & LIPSON
225 West Court Street
Cincinnati, Ohio 45202
Attorneys for Plaintiff Dorothy Lang,
Executor of the Estate of Albert Lang

Herman Carson, Esquire
SOWASH, CARSON & FERRIER
39 North College Street
P. O. Box 2629
Athens, Ohio 45701
Attorney for Holly Hill Motel, Inc.



Kevin R. Bush
Steven G. Carlino