

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
:
-vs- : OF APPEALS, FOURTH
:
: APPELLATE DISTRICT
HOLLY HILL MOTEL, et al. :
:
: COURT OF APPEALS
Defendants-Appellees : CASE NO. 06CA18

MERIT BRIEF OF APPELLEE HOLLY HILL MOTEL

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I. STATEMENT OF FACTS

This case arises from a trip and fall incident that occurred almost ten years ago. Appellee Holly Hill Motel, Inc. (“Holly Hill”) owned and operated the Knight’s Inn motel in Jackson County, Ohio. On April 4, 1999, decedent Albert Lang and Appellant Dorothy Lang, Executrix of the Estate of Albert Lang, accepted a room at the motel. While walking with the assistance of his wife from their car to their room at the motel, Albert Lang fell and was injured.

To access the motel room from the parking area, a patron must approach the walkway, step up a single step onto a walkway, proceed several feet along the walkway, and step up a second single step onto the patio area where the motel room doors are located. Mr. Lang fell at the second step which went onto the patio area in front of the motel room doors. (D. Lang Depo. at 58).

Mrs. Lang acknowledges that she was informed at check-in there was a step that needed to be “climbed” in order to reach the motel room. (D. Lang Supp. at 8). After moving their car to a space in front of the assigned room, and prior to assisting Mr. Lang to the motel room door, Mrs. Lang discovered that there were actually two steps. Mrs. Lang was not concerned because Mr. Lang was capable of climbing stairs, and had done so without problem on a recent trip. (Appellant’s Merit Brief at 3; D. Lang Supp. at 3). At the time that Mr. Lang fell, Mrs. Lang was assisting him by holding on to his arm for support while carrying Mr. Lang’s portable oxygen tank, which was connected to Mr. Lang. (D. Lang Depo. at 61; Appellant’s Merit Brief at 3).

It is undisputed that the area in which the fall occurred was adequately lit. It is also undisputed that there was no handrail next to either of the single steps. Mrs. Lang claims that, at the time of Mr. Lang’s fall, Holly Hill’s motel premises was in violation of the 1982 Ohio Basic Building Code (OBBC) provisions (the year in which the addition to the motel where the steps

were located was constructed) because there was no handrail on the steps in question, and, according to her retained expert, the riser heights on the steps exceeded the applicable OBBC provisions. (Appellant's Brief at 4-5). Mrs. Lang claims that Mr. Lang's fall on the steps resulted in a broken hip, and medical complications from the injury accelerated and ultimately resulted in his death several months later. (Appellant's Brief at 3-4).

Appellee Holly Hill was not the owner of the motel at the time the subject addition (site of the steps where Mr. Lang fell and was injured) was constructed in 1982. Ruthann and Lawrence Neer were the owners in 1982, and the parties who contracted with Appellee McCorkle to provide construction services for the addition onto the motel. (McCorkle Depo. at 15-16). The Neers subsequently sold the corporation that operated the motel property to the Stockmeisters, the owners of the motel at the time of Mr. Lang's injury in 1999. (Lawrence Neer Depo. at 9; filed with trial court below and part of the transmitted record).

This Court has accepted the case on both a discretionary appeal and as a certified conflict among the Ohio appeals courts.

II. LAW AND ARGUMENT

Proposition of Law: A negligence claim which is based on an alleged violation of an administrative building code neither prohibits the application of the open and obvious doctrine nor precludes summary judgment.

A. **The Open and Obvious Doctrine Was Correctly Applied by the Courts Below.**

An appellate court reviewing a summary judgment motion stands in the shoes of the trial court and reviews summary judgment on the same standards and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

To establish a negligence claim, a plaintiff must prove the existence of a duty, a breach of that duty, and an injury that resulted proximately from the breach of that duty. *Meniffee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 472 N.E.2d 707. If there is no legal duty owed to the plaintiff by the defendant, there can be no negligence claim as a matter of law. *Id.*

It is well settled Ohio law that an owner or occupier of land owes no duty to invitees to warn of open and obvious dangers. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus. The open and obvious nature of the condition itself serves as a warning to a reasonable person who may encounter it. *Id.*

This Court reaffirmed the continued viability of the open and obvious doctrine in Ohio, even after the enactment of Ohio's comparative negligence statute, in *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, wherein this Court held that when a danger is open and obvious, a premises owner owes no duty of care to individuals lawfully on the premises. *Id.* at syllabus.

In applying the open and obvious doctrine, a court must focus on the duty prong of negligence and determine whether the dangerous condition was so open and obvious that it absolved the property owner from taking any additional action to protect an invitee. *Id.* at 82. Since it relates to the element of duty owed in a negligence action, the determination of whether the open and obvious doctrine applies is a matter of law. *Id.* If the property owner owed no legal duty to the invitee, the invitee cannot establish negligence as a matter of law.

This Court has held that a business owner owes a business invitee a duty of ordinary care in maintaining its premises in a reasonably safe condition, so that the business invitee is not unreasonably or unnecessarily exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E.2d 474, 475. A business owner is not an insurer of its invitees' safety.

Id. Business invitees are expected to take reasonable precautions to avoid dangers that are patent or obvious. See *Sidle*, supra.

Appellate courts considering the issue of what constitutes an open and obvious danger or hazard have found the following conditions to constitute open and obvious dangers which should have heightened the awareness of the business invitee: steps which were dimly lit, steps that were abnormally high, uniform color between a step and the floor, and the lack of a handrail on steps. *Nelson v. Sound Health Alternatives, Inc.* (Sept. 6, 2001), 4th Dist. N. 01CA24 (lack of handrail, uniformity of color between steps and landing, and dimly lit stairs presented open and obvious danger); *Orens v. Ricardo's Restaurant* (1996), 8th App. Dist. No. 70403 (a single “abnormally high” and dimly lit step in the restaurant was an open and obvious condition); *Early v. Damon's Restaurant*, 10th Dist. No. 05AP-1342, 2006-Ohio-3311 (lack of a handrail was an open and obvious hazard).

This case is similar in all pertinent respects to those cited above, and the trial court and court of appeals correctly determined that summary judgment was warranted. The height of the step in question and an invitee's need to step upon it were conditions readily observable by a reasonable person. Neither party disputes the existence of the step or its height, or the absence of a handrail. There is no dispute that the area was well lit. In fact, Appellant acknowledges in her Brief that she observed that there were two steps—one on each end of the walkway leading to the porch area—that she and Mr. Lang would have to “climb” in order to reach the motel room. (Appellant's Merit Brief at 2-3). She made this observation prior to departing the car with Mr. Lang.

In analyzing whether a danger is open and obvious, a court uses an objective rather than subjective standard. *Goode v. Mt. Gillion Baptist Church*, 8th Dist. No. 87876, 2006-Ohio-6936,

at ¶25. It is not whether a particular person has noticed the open and obvious condition, but whether the condition was observable by a reasonable person. Here, the stairs and lack of a handrail were easily observable to any business invitee.

Appellant further argued below that the step height could not be open and obvious because the step height and the permitted height difference was merely a “matter of inches.” This Court has already rejected this type of have-my-cake-and-eat-it-too proposition. In *Raflo v. Losantiville Country Club* (1973), 34 Ohio St. 2d 1, 295 N.E.2d 202, this Court rejected the plaintiff’s claim that the defect in a step—which exceeded code limits by two inches—was insubstantial such that plaintiff could not have noticed it upon entering, but was so substantial that it constituted a hidden hazard upon exiting.

Similarly, here, Appellant not only knew beforehand of the step’s existence, but also used a substantially similar step prior to using the second step upon which it is claimed Mr. Lang fell and was injured. Appellant wishes the Court to determine that the asserted defect in the step was so insubstantial that it could not be comprehended by a reasonable person as it was approached, but substantial enough that it constituted a hidden hazard which was not open and obvious. She cannot have it both ways.

Appellant additionally argued below on appeal that the dangerous nature of the stairs was not easily discoverable, and therefore was not open and obvious, 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 argued that these conditions constituted attendant circumstances that created a jury question as to whether the danger associated with the steps was open and obvious.

Attendant circumstances is a narrow exception to the open and obvious doctrine. See *Louderback v McDonald's Restaurant*, 4th Dist. No. 04CA2981, 2005-Ohio-3926. 'Attendant circumstances' of a slip and fall may create a material issue of fact as to whether the danger was open and obvious. *Id.* at ¶19. "Attendant circumstances include any distraction that would divert the attention of a pedestrian in the same circumstances and thereby reduce the amount of care an ordinary person would exercise." *Porter v. Cafaro*, 11th Dist. No. 2008-T-0026, 2008-Ohio-5533, ¶25.

As is true with the general rule, the existence of an attendant circumstances exception hinges not on the subjective behavior of the party but an objective analysis of the open and obvious condition and the circumstances it exists within. See *Aycock v. Sandy Valley Church of God*, 5th Dist. No. 2006 AP-09-0054, 2008-Ohio-105, ¶23. The reviewing court's inquiry must focus on whether a reasonable person would have found the danger or condition of the property open and obvious, not whether the danger or hazard was actually observed by the injured party.

Appellant points to no attendant circumstances existing in the record that would provide an exception to the open and obvious condition of the steps and lack of a handrail. Appellant argues that the steps were higher than the standard contained in the building code, that steps and walkway were a uniform color, that the fall occurred in the evening, that patrons would often carry luggage when using the walkway, and that there was no handrail. These facts are undisputed and relate to the underlying status of the step as open and obvious.

The step height and color was not only observable, but was observed by Ms. Lang who stated she was aware she would have to "climb" two steps. Furthermore, there has never been a contention that the step was unlit or poorly lit. The absence of the handrail is, itself, an open and

obvious condition, and there has never been a contention that the absence of a handrail caused the fall in question.

Finally, while patrons may carry luggage while using the walkway, certainly the ordinary person would not do so in a way that obstructed their view. As has been made clear, the question when considering attendant circumstances is a question of what common circumstances exist that would “reduce the degree of care an ordinary person would exercise at the time.” See *Godwin v. Erb* (2006), 167 Ohio App. 3d 645, 2006-Ohio 3638.

Appellant next argues that she and Mr. Lang were elderly, tired, and burdened by Mr. Lang’s oxygen tank. However, these undisputed facts do not affect the issue of open and obviousness, or create attendant circumstances. Rather they were subjective facts that were peculiar to Mr. and Mrs. Lang, who were in the best position to understand how such facts or conditions might impact their mobility. Such facts were not within Appellee Holly Hill’s control.

Despite being informed that there were no handicap rooms available, Appellant still requested and accepted the room that was offered. Appellant acknowledges that she was informed that a step would have to be negotiated in reaching that room. Upon seeing the step to the walkway and the step to the porch, Appellant and Mr. Lang chose to use them while carrying an oxygen cylinder. After using the first step and walking towards the second step, Appellant and Mr. Lang chose to continue. The step height was not only readily observable, but it was, in fact, observed by Appellant and Mr. Lang who then proceeded to negotiate it anyway, and in an arguably unreasonable manner (while carrying an oxygen cylinder). Under these circumstances, Appellant must bear the responsibility for observing and appreciating the open and obvious

condition she and Mr. Lang were aware of and the peculiar circumstances they brought to the situation. The liability for their failure to do so cannot be shifted to Appellee Holly Hill.

Certified Conflict Question: *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?*

B. Summary Judgment Was Properly Granted and Affirmed by the Courts Below.

Even if the step height and lack of handrail would otherwise be an open and obvious condition, Appellant asserts that riser height of the stairs and lack of a handrail constituted violations of the OBBC and such violations should preclude both the application of the open and obvious doctrine and summary judgment. Ohio's courts of appeals which have considered this issue are split, with six districts holding that such violations do not preclude application of the open and obvious doctrine and summary judgment and two districts holding that administrative regulation violations do preclude application of the open and obvious doctrine and summary judgment. See *Olivier v. Leaf & Vine*, 2nd Dist. No. 2004 CA 35, 2005-Ohio 1910; *Lang v. Holly Hill Motel*, 4th Dist. No. 06CA18, 2007-Ohio-3898; *Klostermeier v. In and Out Mart (March 30, 2001)*, 6th Dist. App. No. L-00-1204; *Kirchner v. Shooters on the Water, Inc. (8th Dist.)*, 167 Ohio App.3d 708, 2006-Ohio-3583; *Ault v. Provenza (May 15, 1996)*, 9th Dist. No. 95CA006210; *Ahmad v. AK Steel Corp.*, 12th Dist. No. CA2006-04-84, 2006-Ohio-7031; *Francis v. Showcase Cinema Eastgate (1st Dist.)*, 155 Ohio App.3d 412, 2003-Ohio-6507; *Uddin v. Embassy Suites Hotel (12th Dist.)*, 165 Ohio App.3d 699, 2005-Ohio-6613.

In reaching their decisions on cases involving violations of administrative regulations, the above-cited courts of appeals all relied upon and interpreted this Court's holding in *Chambers v. St. Mary's School (1998)*, 82 Ohio St.3d 563, 697 N.E. 198. In *Chambers*, this 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. *Chambers* did not involve the application of the open and obvious doctrine, but rather the distinction between negligence per se and evidence of negligence where an administrative regulation violation was alleged. In *Chambers*, this Court specifically noted that strict compliance with all administrative safety rules would be “virtually impossible” and, therefore, such violations should not constitute negligence per se. *Id.* at 568.

The Second District’s analysis of *Chambers* in *Olivier v. Leaf & Vine*, *supra*, is particularly helpful in analyzing whether the open and obvious doctrine applies in situations where an administrative regulation has been violated. In *Olivier*, the Second District held that an OBBC violation does not preclude summary judgment under the open and obvious doctrine. The court determined that OBBC violations may be admissible as evidence of negligence to prove the premises owner breached its duty to its invitee. However, if the OBBC violation was obvious and apparent to an invitee, application of the open and obvious doctrine would remove the premises owner’s duty to warn the invitee of the danger, thereby barring a negligence claim for injuries related to the OBBC violation. *Id.* at ¶28. The determination of whether the OBBC violation was open and obvious requires a fact-intensive inquiry, which may involve genuine issues of material fact to be resolved at trial. *Id.* at ¶31. In the absence of genuine issues of material fact, the determination of whether the OBBC violation was open and obvious may be determined on summary judgment.

The court in *Olivier* also analyzed the First District’s contrary holding in *Francis v. Showcase Cinema Eastgate*, *supra*, which held that the open and obvious doctrine does not apply when building code violations are present. The First District concluded in *Francis* that to ignore

building code violations under the open and obvious doctrine would render the provisions of the OBBC without legal significance. *Id.* at ¶10. The Second District rejected this reasoning, instead finding that in *Chambers* this Court recognized a distinction between legislative enactments and rulemaking by administrative agencies, and determined that building code violations could be “considered in light of the circumstances, including whether the condition was open and obvious to an invitee.” *Olivier*, *supra* at ¶28.

The Tenth District’s decision in *Uddin v. Embassy Suites Hotel*, 165 Ohio App.3d 699, 2005-Ohio-6613, which reached a similar holding to *Francis*, was reviewed by this Court in *Uddin v. Embassy Suites Hotel*, 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638, and dismissed as having been improvidently accepted. The issue of building code violations under the open and obvious doctrine is now properly before this Court on a certified conflict question from the Fourth District.

This discretionary appeal and certified conflict question raises important issues of public policy and judicial economy. The open and obvious doctrine limits the liability of premises owners by establishing as a matter of law that there is no duty owed to invitees where the danger or hazard is open and obvious. The doctrine recognizes the long standing public policy that premises owners should not be insurers of safety of invitees. Invitees must take reasonable steps to protect their own safety and must recognize and protect themselves against open and obvious hazards or dangers. Application of the doctrine limits the number of cases that proceed to a jury to those cases whether there are genuine issues of material fact as to negligence. This Court has reaffirmed the application of the open and obvious doctrine following the enactment of Ohio’s comparative negligence statute, thereby confirming the granting of summary judgment by trial

courts in those cases where no genuine issues of material fact as to whether the danger or hazard was open and obvious remained to be tried by the jury.

Appellee Holly Hill does not dispute the importance or necessity of the OBBC and its value in protecting Ohio's citizens from unsafe or poorly constructed buildings. However, a close examination of the facts of this case demonstrates how the position urged by Appellant herein would create an undue burden on premises owners and the court system. The only evidence presented by Appellant as to the purported violation by Appellee Holly Hill was that the step in question exceeded a building code riser height by between two and three inches and there was no handrail. Appellee McCorkle testified that the premises was inspected and approved by the State after construction of the addition was completed for the prior owners of the motel. Appellee Holly Hill had no knowledge of any purported building code violation until this action was commenced. Appellee McCorkle likewise had no knowledge of any purported building code violation. Neither party had any superior knowledge to Appellant regarding the step in question. Both the riser height and lack of handrail were clearly open and obvious to Appellant.

The position urged by Appellant in this case would result in every case in which some evidence of a building code violation was presented going to trial to the bench or a jury for determination, instead of a number of the cases being resolved through summary judgment. This would result in a huge backlog of cases and an overload on the judicial system. Many of these cases would likely involve minor building code violations that the trial court or jury would ultimately determine did not proximately cause the claimed injuries. Judicial economy and public policy support the application of the open and obvious doctrine to eliminate such cases on

summary judgment where there are no genuine issues of material fact as to the open and obvious nature of purported building code violation.

In addition, given the constantly changing nature of the OBBC itself, public policy argues against the treatment of such administrative regulations as statutory duties, the violation of which results in liability to invitees. Courts and litigants would have significant difficulty in discerning and applying each of the various OBBC regulations to buildings which were likely constructed many years prior to the alleged injuries. Construction contractors and builders would unnecessarily be joined as third parties in litigation many years following the original construction, only to later be dismissed.

Such a holding might also have a chilling effect on the Board of Building Standards, and result in fewer new regulations being adopted to the OBBC. The Board may be hesitant in proposing new rules which would increase the potential liability of property owners. Such an unintended effect of giving more recognition to OBBC violations could negatively impact public safety rather than promote it, as Appellant argues.

III. CONCLUSION

The record is devoid of genuine issues of material fact as to whether the stairs presented an open and obvious danger. Both the height of the stairs and the lack of a handrail were readily observable by any reasonable pedestrian using the walkway, including Appellant and Mr. Lang. Appellant was made aware that she and Mr. Lang would have to negotiate a step to access the motel room and accepted that condition.

There are no genuine issues of material fact or attendant circumstances that prevent the legal determination that Appellee Holly Hill owed no duty to inspect, discover, or warn

Appellant and Mr. Lang about the open and obvious step she was aware of and traversed. None of the attendant circumstances raised by Appellant in the court of appeals below were within the control of Appellee Holly Hill. Therefore, affirmation of the application of the open and obvious doctrine by the court of appeals was proper.

Even assuming the riser height of the stairs and the lack of a handrail constituted violations of the OBBC, such minor violations of an administrative building code should neither prohibit application of the open and obvious doctrine nor preclude summary judgment. The majority of courts of appeals considering the issue have held that OBBC violations should not preclude summary judgment. This Court should confirm the long standing public policy behind the application of the open and obvious doctrine to business invitees and answer the question certified by the court of appeals in the negative.

For the reasons stated herein, Appellee Holly Hill respectfully requests that the Court affirm the judgment of the court of appeals affirming the granting of summary judgment in favor of Appellee Holly Hill.

Respectfully Submitted,



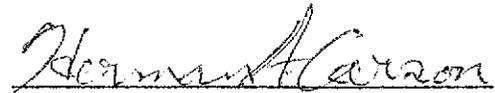
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CERTIFICATE OF SERVICE

A true copy of the foregoing Merit Brief of Appellee Holly Hill Motel was served this 26th day of November, 2008 via regular First Class U.S. Mail, postage prepaid, upon the following:

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