№ 2007-1222 & 2007-1370

In the Supreme Court of Ohio

DOROTHY LANG, Extrx. of the Estate of Albert Lang,

Plaintiff-Appellant,

v.

HOLLY HILL MOTEL, et al.,

Defendants-Appellees.

CERTIFIED CONFLICT AND DISCRETIONARY APPEAL FROM THE COURT OF APPEALS, FOURTH APPELLATE DISTRICT
JACKSON COUNTY, OHIO
CASE № 06CA18

BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLEES

EMILY T. SUPINGER* (#0074006)
**Counsel of Record*
MATTHEW W. FELLERHOFF (#0064005)
MANLEY BURKE
A LEGAL PROFESSIONAL ASSOCIATION
225 West Court Street
Cincinnati, OH 45202-1098
Tel: (513) 721-5525
Fax: (513) 721-4268
E-mail: ets@manleyburke.com
mwf@manleyburke.com

Counsel for Plaintiff-Appellant, Dorothy Lang, Executrix of The Estate of Albert Lang

TIMOTHY J. FITZGERALD* (#0042734)
**Counsel of Record*
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Tel: (216) 241-5310
Fax: (216) 241-1608
E-mail: tfitzgerald@gallaghersharp.com

Counsel for Amicus Curiae Ohio Association of Civil Trial Attorneys

FILED
NOV 26 2008
CLERK OF COURT
SUPREME COURT OF OHIO

(Counsel continued on inside cover)

HERMAN A. CARSON* (#0002201)
*Counsel of Record
SOWASH, CARSON & FERRIER
39 N. College Street
P.O. Box 2629
Athens, OH 45701
Tel: (740) 594-8388
Fax: (740) 593-6490

Counsel for Defendant-Appellee Holly Hill Motel

KEVIN R. BUSH* (#029452)
*Counsel of Record
STEVEN G. CARLINO (#0073734)
WESTON, HURD, CURLEY, PATTERSON & BUSH, LLP
88 East Broad Street, Suite 1750
Columbus, OH 43215
Tel: (614) 280-0200
Fax: (614) 280-0204
E-mail: kbush@westonhurd.com
scarlino@westonhurd.com

Counsel for Defendant-Appellee Rodney McCorkle dba Rodney McCorkle Builder

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES i

I. STATEMENT OF INTEREST OF THE AMICUS CURIAE 1

II. STATEMENT OF THE CASE AND FACTS 3

III. ARGUMENT 4

Certified Conflict Question Presented:

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? 4

Proposition of Law No. 1:

In common law premises liability actions, the violation of an administrative code regulation that is part of the Ohio Building Code does not preclude the entry of summary judgment by application of the open and obvious doctrine where the condition on the property that is alleged to violate the Ohio Building Code is neither latent nor concealed and is discoverable by a reasonable person upon ordinary inspection. 4

A. The "Open and Obvious" Doctrine, Which is so Well-Established in Ohio's Common Law Premises Liability Jurisprudence, Should Not be Eradicated Unwittingly. 4

B. The Court's Previous Decisions in *Chambers* and *Robinson* Do Not Abrogate the Application of the Open and Obvious Doctrine When There Is an Administrative Code Violation in a Common Law Premises Liability Action. 7

C. Adoption of Appellant's Proposition of Law Will "Alter the Proof Requirements Between Litigants" and "Open the Floodgates to Litigation" Which Is What this Court Refused to Do in *Chambers*. 10

IV. CONCLUSION 14

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Page(s):

CASES:

Ahmad v. AK Steel Corp.,
12th Dist. No. CA2006-04-089, 2006-Ohio-7031, discr. appeal dismissed as improvidently allowed, 119 Ohio St.3d 1210, 2008-Ohio-4082 2

Armstrong v. Best Buy Co., Inc.,
99 Ohio St.3d 79, 2003-Ohio-2573 . . . . . 1, 5-7, 9, 13

Chambers v. St. Mary's School,
82 Ohio St.3d 563, 1998-Ohio-184 . . . . . 1, 2, 4, 7-12

Cleveland Bar Assn. v. CompManagement, Inc.,
111 Ohio St.3d 444, 2006-Ohio-6108 6

Francis v. Showcase Cinema Eastgate,
155 Ohio App.3d 412, 2003-Ohio-6507 . . . . . 2, 8

Franklin v. Peterson,
1999 Mich. App. LEXIS 836 (Ct. App. Mich., 1999) 14

Gladon v. Greater Cleveland Regional Transit Auth.,
75 Ohio St.3d 312, 1996-Ohio-137 4

Gliozzo v. Univ. Urologists of Cleveland, Inc.,
114 Ohio St.3d 141, 2007-Ohio-3762 6

Kennedy v. Great Atlantic & Pacific Tea Company,
2007 Mich. App. LEXIS 731 (Ct. App. Mich., 2007) 14

Kirchner v. Shooters on the Water, Inc.,
167 Ohio App.3d 708, 2006-Ohio-3583, discr. appeal allowed and stayed, 113 Ohio St.3d 1487, 2007-Ohio-1986, appeal stayed, 119 Ohio St.3d 1425, 2008-Ohio-4170 2

Light v. Ohio Univ.
(1986), 28 Ohio St.3d 66 4

Mid-American Fire & Cas. Co. v. Heasley,
113 Ohio St.3d 133, 2007-Ohio-1248 6

TABLE OF AUTHORITIES (cont'd.)

Page(s):

CASES (cont'd.):

Mussivand v. David
(1989), 45 Ohio St.3d 314 5

Olivier v. Leaf & Vine,
2nd Dist. No. 2004 CA 35, 2005-Ohio-1910 2

Paschal v. Rite Aid Pharmacy, Inc.
(1985), 18 Ohio St.3d 203 5

Raflo v. The Losantiville Country Club
(1973), 34 Ohio St.2d 1 9

Robinson v. Bates,
112 Ohio St.3d 17, 2006-Ohio-6362 . . . . . 9, 10

Ryan v. Guan,
5th Dist. No. 2003CA00110, 2004-Ohio-4032 2

Scheibel v. Lipton
(1951), 156 Ohio St. 308 5

Sessions v. Nonnenmann
(Ala. 2002), 842 So.2d 649 14

Shay v. Shay,
113 Ohio St.3d 172, 2007-Ohio-1384 6

Sidle v. Humphrey
(1968), 13 Ohio St.2d 45 . . . . . 5, 6, 9

Simmers v. Bentley Constr. Co.,
64 Ohio St.3d 642, 1992-Ohio-42 . . . . . 1, 5

Souther v. Preble Cty. Dist. Library, West Elkton Branch,
12th Dist. No. CA 2005-04-006, 2006-Ohio-1893 2

Stephens v. A-Able Rents Co.
(1995), 101 Ohio App.3d 20 8

TABLE OF AUTHORITIES (cont'd.)

Page(s):

CASES (cont'd.):

Stewart v. The Lake County Hist. Soc., Inc.,
Case No. 2006-2029 13

Texler v. D.O. Summers Cleaners & Shirt Laundry Co.,
81 Ohio St.3d 677, 1998-Ohio-602 4

Trans-Vaughn Dev. Corp. v. Cummings
(Ga. App. 2005), 273 Ga.App. 505, 615 S.E.2d 579 14

Uddin v. Embassy Suites Hotel,
165 Ohio App.3d, 2005-Ohio-6613, discr. appeal dismissed as improvidently allowed, 113 Ohio St.3d 1249, 2007-Ohio-1791 2

Westfield Ins. Co. v. Galatis,
100 Ohio St.3d 216, 2003-Ohio-5849 6

STATUTES AND ADMINISTRATIVE CODE PROVISIONS:

R.C. §5321.04 9

Ohio Admin. Code §4101:2-2-02 11

I.

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization whose 600+ members consist of attorneys, supervisory or managerial employees of insurance companies, and corporate executives of other corporations who devote a substantial portion of their time to the defense of civil damage suits and the management of claims brought against individuals, corporations and governmental entities. OACTA's mission is to provide a forum where its members can work together and with others on common problems to propose and develop solutions that will promote and improve the fair and equal administration of justice in Ohio. OACTA strives for stability, predictability and consistency in Ohio's case law and jurisprudence.

This case affords the Court with the perfect opportunity to provide much needed clarification for its holding in *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 1998-Ohio-184, which has been cited by lower courts as support for abandoning the open and obvious doctrine in cases involving violations of administrative code regulations. OACTA is appearing as amicus curiae in support of the Appellees in this case to thwart the current challenge to the well-established open and obvious doctrine. Despite repeated efforts to bring about the abolition of the open and obvious doctrine by way of direct frontal assault, this Court has been steadfast in holding that the open and obvious doctrine remains viable as the law in Ohio. See, *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, syllabus; *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42, footnote 2. Having been

unsuccessful in securing an outright and complete abandonment of the open and obvious doctrine, the focus and strategy for bringing about the demise of the open and obvious doctrine has now shifted in order to achieve the same result, albeit by way of a more surreptitious and stealthy attack.

As the Fourth Appellate District held in the case at bar, the Second, Fifth, Eighth and Twelfth Appellate Districts have all rejected the assertion that an administrative rule violation prohibits application of the open and obvious doctrine. See, e.g., *Ahmad v. AK Steel Corp.*, 12th Dist. No. CA2006-04-089, 2006-Ohio-7031, discr. appeal dismissed as improvidently allowed, 119 Ohio St.3d 1210, 2008-Ohio-4082; *Souther v. Preble Cty. Dist. Library, West Elkton Branch*, 12th Dist. No. CA 2005-04-006, 2006-Ohio-1893; *Kirchner v. Shooters on the Water, Inc.*, 167 Ohio App.3d 708, 2006-Ohio-3583, discr. appeal allowed and stayed, 113 Ohio St.3d 1487, 2007-Ohio-1986, appeal stayed, 119 Ohio St.3d 1425, 2008-Ohio-4170; *Olivier v. Leaf & Vine*, 2nd Dist. No. 2004 CA 35, 2005-Ohio-1910; *Ryan v. Guan*, 5th Dist. No. 2003CA00110, 2004-Ohio-4032. But, by misconstruing language found in the *Chambers* decision, some appellate courts have precluded application of the open and obvious doctrine in cases involving allegations of administrative rule violations. See, e.g., *Francis v. Showcase Cinema Eastgate*, 155 Ohio App.3d 412, 2003-Ohio-6507; *Uddin v. Embassy Suites Hotel*, 165 Ohio App.3d, 2005-Ohio-6613, discr. appeal dismissed as improvidently allowed, 113 Ohio St.3d 1249, 2007-Ohio-1791.

OACTA's appearance as amicus is premised upon the recognition that there is a glaring need for the Court to rectify the inconsistent lower court decisions on this important and recurring issue. For the reasons stated and developed more fully herein, OACTA submits that

the issue should be resolved with the Court holding that a violation of an administrative code regulation does not preclude application of the open and obvious doctrine in common law premises liability negligence actions. Adoption of Appellant's Proposition of Law will not only reduce the open and obvious doctrine to an obscure exception to the duty requirement in premises liability actions, it will eradicate the doctrine completely from Ohio jurisprudence. OACTA thus supports affirmance of the Third Appellate District's decision here.

II.

STATEMENT OF THE CASE AND FACTS

OACTA adopts the Statement of the Case and Facts appearing in the merit briefs of Defendant-Appellee Holly Hill Motel and Defendant-Appellee Rodney McCorkle dba Rodney McCorkle Builder. To the extent other facts are pertinent to OACTA's position, they are discussed in the context of the legal argument.

III.

ARGUMENT

Certified Conflict Question Presented:

> **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?**

Proposition of Law No. 1:

> **In common law premises liability actions, the violation of an administrative code regulation that is part of the Ohio Building Code does not preclude the entry of summary judgment by application of the open and obvious doctrine where the condition on the property that is alleged to violate the Ohio Building Code is neither latent nor concealed and is discoverable by a reasonable person upon ordinary inspection.**

A. The "Open and Obvious" Doctrine, Which is so Well-Established in Ohio's Common Law Premises Liability Jurisprudence, Should Not be Eradicated Unwittingly.

In order to succeed in a common law premises liability action predicated on negligence, a plaintiff must show the existence of a duty, a breach of that duty, and that the breach of that duty was the proximate cause of the plaintiff's injuries. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184; *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 1998-Ohio-602. The legal status of a person injured on real property determines the scope and extent of the owner's duty to the injured person. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137. Invitees are persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner or occupier. *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68;

Scheibel v. Lipton (1951), 156 Ohio St. 308, paragraph one of the syllabus. A property owner owes an invitee a duty of ordinary care to maintain the premises in a reasonably safe condition and to warn of hidden defects. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203.

Although a premises owner has a duty to exercise ordinary care in maintaining the premises, the open and obvious doctrine, when applicable, obviates the duty to warn and acts as a complete bar to any negligence claims. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, at ¶5. The open and obvious doctrine relates to the threshold issue of duty and provides that the owner of a premises owes no duty to those people entering the premises regarding those dangers that are open and obvious. Id. at ¶13. The question of whether a duty is owed in a negligence case is a legal issue. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318.

When hazardous conditions are open and obvious, property owners owe no duty to protect invitees from the dangers because they are "known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them." *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph one of the syllabus. The open and obvious doctrine "obviates the duty to warn and acts as a complete bar to any negligence claims" because " 'the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.' " *Armstrong*, supra, at ¶ 5, quoting *Simmers*, supra, 64 Ohio St.3d at 644.

In *Armstrong*, this Court reaffirmed that the open and obvious doctrine had not been abrogated by the Ohio General Assembly's enactment of the comparative-negligence statute. In doing so, the Court very clearly stated, "[W]hen courts apply the rule, they must focus on the fact that the doctrine relates to the threshold issue of duty." *Armstrong*, supra, at ¶ 13. The court went

on to hold that "[w]here a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." Id., syllabus, citing *Sidle*, supra.

In *Armstrong*, this Court made it very clear: the open and obvious doctrine remains viable in Ohio law. Nothing has changed since *Armstrong* was decided in 2003 to alter the continued viability of that doctrine. Not surprisingly, Appellant does not advocate for the outright abolishment of the open and obvious doctrine because to do so would necessitate the overruling of *Armstrong*. That being said, by advancing its arguments, Appellant is advocating for the adoption by this Court of a legal principle that would have the practical effect of bringing about the reversal of *Armstrong* and resulting death knell of the open and obvious doctrine without the need to engage in the stringent analysis mandated by the bright line rule for abandoning prior precedent established in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849.[1] The litigant advocating for a change in Supreme Court precedent carries the burden of establishing all three prongs.[2] *Cleveland Bar Assn. v. CompManagement, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6108, at ¶¶15-21.

---

[1] Per that test, a prior decision of the Supreme Court may be overruled only when all three of the following circumstances are found to exist:

(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision,
(2) the decision defies practical workability, and,
(3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Galatis, paragraph one of the syllabus.

[2] When each of the three prongs of the *Galatis* test have not been established, this Court has refused to overrule prior case law. See, e.g., *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, ¶14; *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, ¶27; *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, ¶14.

To be sure, as explained more fully herein, while Appellant does not argue blatantly for the abandonment of the open and obvious doctrine or the overruling of *Armstrong*, that would be the result if this Court were to accept the Proposition of Law put forth by Appellant.

B. The Court's Previous Decisions in *Chambers* and *Robinson* Do Not Abrogate the Application of the Open and Obvious Doctrine When There Is an Administrative Code Violation in a Common Law Premises Liability Action.

Appellant argues here that the height of the riser of the step where her decedent fell and the lack of a handrail are the type of violations of the Ohio Building Code ("OBC") that create a legal duty which precludes the courts from applying the open and obvious doctrine. Such an argument is at odds with this Court's precedent. The legal import of a building code violation in a premises liability negligence action was addressed by this Court in *Chambers*. The *Chambers* opinion, however, neither considered nor discussed the open and obvious doctrine. In *Chambers*, the specific issue addressed was whether a violation of the OBC amounts to negligence per se. The plaintiff in *Chambers* had sustained injuries to his back while delivering milk to St. Mary's School when he slipped on a natural accumulation of ice and snow on an outdoor staircase. 82 Ohio St.3d at 564. At issue were allegations of OBC violations including, like the case at bar, a handrail violation. This Court held that a violation of the OBC is not negligence per se, but that such a violation may be admissible as evidence of negligence. In reaching its decision, the *Chambers* Court was required to "determine whether there are any material differences between statutes and administrative rules." Id., at 566. Finding that there are "material differences," the Court observed that "[u]nlike the legislative process, rulemaking by administrative agencies does not involve the collaborative effort of elected officials." Id., at 567.

Ultimately, in refusing to elevate administrative rules to the stature capable of "alter[ing] the proof requirements between litigants," the *Chambers* Court observed as follows:

> If we were to rule that a violation of the OBBC (an administrative rule) was negligence per se, we would in effect bestow upon administrative agencies the ability to propose and adopt rules which alter the proof requirements between litigants. Altering 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. Giving administrative agencies the ability to adopt such rules would be tantamount to an unconstitutional delegation of legislative authority, since administrative agencies cannot dictate public policy.
>
> Further, scores of administrative agencies propose and adopt perhaps hundreds of rules each year. Considering the sheer number and complexity of administrative rules, a finding that administrative rules establish negligence per se could open the floodgates to litigation. Strict compliance with such a multitude of rules would be virtually impossible. In effect, it would make those subject to such rules the insurer of third parties who are harmed by any violation of such rules. Only those relatively few statutes which this court or the General Assembly has determined, or may determine, should merit application of negligence per se should receive such status.

Id., at 568 (footnote omitted).

Chambers has been misconstrued by appellate courts to preclude application of the open and obvious doctrine in cases involving administrative code violations. The First District Court of Appeals' decision in *Francis v. Showcase Cinema Eastgate*, 155 Ohio App.3d 412, 2003-Ohio-6507 is one such case. The appellate court in *Francis* interpreted *Chambers* to suggest that "violations of the [OBC] are evidence that the owner has breached a duty to the invitee." Id., at ¶ 9. While *Chambers* does stand for the proposition that administrative code violations may be admissible as evidence of negligence,[3] *Chambers* did not address the impact that evidence of such an administrative code violation would have on the open and obvious

---

[3] See, 82 Ohio St.3d at 568, citing *Stephens v. A-Able Rents Co.* (1995), 101 Ohio App.3d 20, 27-28.

doctrine.

Even though an administrative code violation may be considered as evidence of negligence, so too are "abnormally high" stairs,[4] a protruding shopping cart guardrail[5] and accumulations of ice and snow[6] examples of cases with some evidence of the property owner's negligence. But even with such evidence of negligence, the open and obvious doctrine has still applied to negate the owner's duty. If *Chambers* is interpreted by this Court to mean that the evidentiary value of an administrative code violation trumps the open and obvious doctrine, then the open and obvious doctrine will cease being an issue of law (i.e., defining the duty element) and will become an issue of fact.

This Court should clarify that, at most, what *Chambers* stands for is that, while a building code violation may be some evidence that a condition is hazardous, such a violation does not preclude application of the open and obvious doctrine where the particular condition is itself neither latent nor concealed and is discoverable upon ordinary inspection. Here, the step and the lack of a handrail were not latent or concealed. If there was an OBC violation here, it constituted an open and obvious hazard and therefore there was no duty to warn in this instance.

Appellant's reliance upon this Court's decision in *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362 is equally misplaced. Unlike the case at bar that is only a common law premises liability action, *Robinson* involved the statutory duty owed in the landlord/tenant relationship. A landlord who is a party to a rental agreement has a *statutory* duty under R.C.

---

[4] *Raflo v. The Losantiville Country Club* (1973), 34 Ohio St.2d 1.

[5] *Armstrong*, supra.

[6] *Sidle*, supra.

§5321.04 to repair and keep the premises in a fit and habitable condition. Thus, the issue addressed in *Robinson* was deliberately narrow: "whether a landlord's statutory duty under R.C. 5321.04(A)(2) is excused if a hazardous condition results from the landlord's efforts to comply with that statute." Id., at ¶5. The statutory violation in *Robinson* is simply one of "those relatively few statutes which this court * * * has determined * * * should merit application of negligence *per se*." *Chambers*, supra, 82 Ohio St.3d at 568. Indeed, this Court in *Robinson* again expressed its long-standing view that "[t]he 'open and obvious' doctrine is still viable in Ohio." *Robinson*, supra, at ¶21. In light of the narrowness of the issue in *Robinson*, the decision should not be extended to cases involving alleged administrative code violations in the context of the common law duty owed by a business owner to its invitees.

C. Adoption of Appellant's Proposition of Law Will "Alter the Proof Requirements Between Litigants" and "Open the Floodgates to Litigation" Which Is What this Court Refused to Do in *Chambers*.

In *Chambers*, this Court refused to put administrative code provisions found in the OBC on the same legal standing with legislative enactments. It refused to do so because if administrative codes and legislative statutes were treated the same in the context of establishing negligence in premises liability cases, it would "in effect bestow upon administrative agencies the ability to propose and adopt rules which [would] alter the proof requirements between litigants." *Chambers*, supra, 82 Ohio St.3d at 568. Considering the OBC, the Court was concerned that "the sheer number and complexity of administrative rules * * * could open the floodgates to litigation" and make "[s]trict compliance with such a multitude of rules * * * virtually impossible." Id. To emphasize its point, the *Chambers* Court made specific mention of Section 805.2 of the OBC which requires all exterior stairways to be kept free of ice and snow. Id.,

footnote 3. The absurdity and unreasonableness of Appellant's position in this case is demonstrated by a similar example should such an administrative provision be allowed to avoid the open and obvious doctrine. By application of such an administrative code provision to the Proposition of Law being advanced by Appellant here, if a property owner, like Appellee Holly Hill Motel, did not keep its exterior stairways free of ice and snow – requiring the property owner "to keep a worker on call twenty-four hours a day to remove snow at a moments notice" – no matter how open and obvious the snow and ice hazard might be, the property owner would be unable to escape liability by way of a summary judgment motion.

Indeed, the actual facts and evidence in this case clearly demonstrate just how unworkable Appellant's Proposition of Law would be and why its adoption would sound the death knell for the open and obvious doctrine in Ohio. Appellant's expert has opined that there are two conditions on the property of Appellee Holly Hill Motel that violate the OBC: the height of the riser of the one step and the absence of any handrail. (Supp. at p. 28) He arrives at this opinion based upon his conclusion that these two conditions are "unquestionably *serious hazards*." (Supp. at p. 28) Appellant's expert points out that a "serious hazard" is defined in Section 4101:2-2-02 of the OBC:

> **Serious Hazard**: A hazard of considerable consequence to safety or health through the design, location, construction, or equipment of a building, or the condition thereof, which hazard has been established through experience to be of certain or probable consequence, or which can be determined to be, or which is obviously such a hazard.

(Supp. at p. 28) Paraphrasing this rather amorphous definition: "A hazard, is a hazard, is a hazard." In other words, an expert hired by the plaintiff in a premises liability case will simply know a "serious hazard" when he or she sees it. As this Court noted in *Chambers*, avoidance of

civil liability of premises owners based upon alleged violations of the OBC would become "virtually impossible."

As a practical matter, an expert could be found in every premises liability case to opine that a particular hazard, no matter how glaringly open or obvious, is a "serious hazard" or a violation of a similarly nebulous standard. If the Court goes down that road and accepts that the open and obvious doctrine can be avoided by such vague standards, make no mistake, every violation of a building or safety code or law or regulation would come into play and eventually do away with the open and obvious doctrine entirely as a legal standard defining if and when a duty is owed. Once you depart from the open and obvious doctrine and start accepting any building code violation as creating a question of fact, summary judgment would never be appropriate as every case will have to go to the jury. The open and obvious doctrine would be completely swallowed up. The concerns expressed by this Court in *Chambers* that administrative code provisions should not be permitted to "alter the proof requirements between litigants" thereby "open[ing] the floodgates to litigation" will come to pass.

Adoption of Appellant's Proposition of Law allowing administrative regulations to trump the open and obvious doctrine would be unworkable. In *Chambers*, this Court was concerned with "the sheer number and complexity of administrative rules" making premises owners' compliance with all of them "virtually impossible." But the impossibility of compliance isn't just limited to the OBC. What about the multitude and varying building and safety codes adopted by individual cities, municipalities and other "local governing authorities" who are authorized to adopt administrative regulations under R.C. §3781.01? What about OSHA regulations? What about regulations adopted pursuant to the Americans with Disabilities Act of

1990, Section 12101, Title 42, U.S.Code, as amended?[7] How do these varying, inconsistent, at times irreconcilable and ever-changing regulations apply to a common law premises liability case where the open and obvious doctrine might otherwise apply? The answer to this rhetorical question is fairly simple and straightforward: the open and obvious doctrine will be no more, despite the proclamation by this Court in *Armstrong* and repeated more recently in *Robinson* that "[t]he 'open and obvious' doctrine is still viable in Ohio."

Ohio's public policy has supported limiting civil liability through the open and obvious doctrine. Obviating the open and obvious doctrine in each circumstance where there is an alleged administrative regulation violation would turn ordinary landowners into insurers of the safety of invitees coming onto their land. The rationale behind the open and obvious doctrine establishes that the invitee's knowledge of the condition removes the sting of unreasonableness from any danger and the obviousness of the hazard may be relied upon to supply the requisite knowledge or notice. To rule that landowners now have a duty to protect invitees against all dangers premised upon and administrative code or regulation, even those of which invitees are on notice because the condition is obvious, would create an impossible burden for landowners to overcome and would subject them to almost limitless liability. That has never been the law in

---

[7] There are other problems with the adoption of a standard that allows administrative codes and rules to abrogate the open and obvious doctrine. For example, there is the problem of whether the plaintiff is or is not within the class of persons the relevant code or rule provision was intended to protect. Here, Appellant relies not just on the OBC but also upon an alleged violation of the Americans with Disabilities Act. (Supp. at pp. 32-33) Yet, there is no evidence establishing that the decedent was "disabled" under the ADA at the time of his fall. While this is not an issue presented by this case, it is an issue ripe for disposition as it is raised and presented in the appeal already before the Court in *Stewart v. The Lake County Hist. Soc., Inc.*, Case No. 2006-2029. The appeal in *Stewart* has been stayed pending a decision in *Lang*. See, 119 Ohio St.3d 1425, 2008-Ohio-4170.

Ohio. It shouldn't become the law of the future.[8] OACTA urges the Court to reject Appellant's Proposition of Law and affirm the decision of the Fourth Appellate District.

IV.

CONCLUSION

The open and obvious doctrine is entrenched in Ohio law, and a majority of Ohio's appellate districts favor application of the open and obvious doctrine, even in light of violations of administrative code regulations that form the Ohio Building Code. For all of the reasons stated more fully above, public policy favors this Court adopting the overwhelming majority opinion in Ohio and following its own precedent.

WHEREFORE, OACTA respectfully seeks affirmance of the decision by the Fourth Appellate District upholding the continued viability of the "open and obvious" doctrine.

---

[8] Other jurisdictions have rejected the proposition which Appellant asks this Court to adopt as the law in Ohio. See, e.g., *Sessions v. Nonnenmann* (Ala. 2002), 842 So.2d 649; *Trans-Vaughn Dev. Corp. v. Cummings* (Ga. App. 2005), 273 Ga.App. 505, 615 S.E.2d 579; *Kennedy v. Great Atlantic & Pacific Tea Company*, 2007 Mich. App. LEXIS 731 (Ct. App. Mich., 2007); *Franklin v. Peterson*, 1999 Mich. App. LEXIS 836 (Ct. App. Mich., 1999).

Respectfully submitted,

TIMOTHY J. FITZGERALD* (#0042734)
*Counsel of Record
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Tel: (216) 241-5310
Fax: (216) 241-1608
E-mail: tfitzgerald@gallaghersharp.com

Counsel for Amicus Curiae Ohio Association of Civil Trial Attorneys

CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Appellees* has been served this **26th** day of November, 2008, via U.S. mail, postage prepaid, upon the following:

Emily T. Supinger, Esq.
Matthew W. Fellerhoff, Esq.
MANLEY BURKE
A LEGAL PROFESSIONAL ASSOCIATION
225 West Court Street
Cincinnati, Ohio 45202

Counsel for Appellant Dorothy Lang, Executrix of The Estate of Albert Lang

Kevin R. Bush, Esq.
Steven G. Carlino, Esq.
WESTON, HURD, CURLEY, PATTERSON & BUSH, LLP
88 East Broad Street, Suite 1750
Columbus, Ohio 43215

Counsel for Appellee Rodney McCorkle dba Rodney McCorkle Builder

Herman A. Carson, Esq.
SOWASH, CARSON & FERRIER
39 N. College Street
P.O. Box 2629
Athens, Ohio 45701

Counsel for Appellee Holly Hill Motel

TIMOTHY J. FITZGERALD* (#0042734)