IN THE
SUPREME COURT OF OHIO

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

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

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INTRODUCTION

In asking this Court to uphold the decision of the Fourth District Court of Appeals, the Appellees, Holly Hill Motel and McCorkle Builders have distorted the facts of the case and dangled the threat of "opening the floodgates" before this Court. In doing so, the Appellees suggest that the violation of the Ohio Basic Building Code ("OBBC") that results in the death of injury of an invitee is of no legal significance.

For the first time in this litigation, Appellees hedge on whether the height of the step in question violates the OBBC. To be clear, the record is devoid of any evidence to suggest that the riser height complied with the OBBC. Even the expert witness retained by McCorkle, Larry Goodwin, did not dispute Mr. Brashear's opinion that the height of the riser that Mr. Lang tripped over exceeded what is permitted by the OBBC by 2.375 inches, at its lowest point.

Both McCorkle and Holly Hill cite to the deposition testimony of Rodney McCorkle, stating that the sidewalk and risers had passed inspection when the addition was built. However, a closer reading of Mr. McCorkle's testimony indicates that Mr. McCorkle only had a vague recollection of the project, and could only recall three inspections: one for the footers of the building, an electrical and plumbing inspection, and a fire inspection. The fact that the building passed these inspections does not establish that the riser Mr. Lang tripped over complied with the OBBC.

Even more misleading to the Court is McCorkle's description of the inspection conducted by its expert witness, Larry Goodwin. To be clear, Mr. Goodwin's inspection of the site took place *after* the steps in question had been completely torn out and replaced by Holly Hill. The steps viewed by Mr. Goodwin *were not* the same as when Mr. Lang fell, and the photographs

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that McCorkle urges the Court to view *do not* depict the site as it existed on the day the Langs visited the motel.

McCorkle also argues that the Court should affirm the lower court's decision in order to protect builders and construction contractors from being named as third party defendants in cases such as this one. However, the Ohio legislature has already created protections for such entities through its statute of repose, R.C. 2305.131, which provides that no cause of action to recover damages for bodily injury may accrue later than ten years after the improvement or construction was completed. While the statute does not completely exonerate builders and those who participate in making improvements to real property, it does strike a balance to ensure that claims against builders do not exist in perpetuity.

Much of the Appellees' briefs address issues that are not relevant or which pertain to matters not before the Court: for purposes of this appeal, Appellant is not arguing that attendant circumstances created a question of fact regarding the openness and obviousness of the danger, nor is Mrs. Lang arguing that the danger was hidden or not clearly visible. Rather, the issue to be determined on this appeal is whether the violation of an administrative code provision, namely the OBBC, which results in the death or injury of an invitee precludes summary judgment under the open and obvious doctrine.

ARGUMENT

Ohio has clearly established case law regarding common law and statutory premises liability. In *Armstrong v. Best Buy* (2003), 99 Ohio St.3d 79, 2003-Ohio-2573, this Court clarified that where a danger is open and obvious, a landowner owes no duty to warn invitees of the danger, as the openness and obviousness of the danger itself serves as adequate notice, and

invitees must protect themselves accordingly. Therefore, if a danger is open and obvious, summary judgment is appropriate because the plaintiff will be unable to establish a prima facie case of negligence.

Subsequently, in *Robinson v. Bates* (2006), 112 Ohio St.3d 17, 2006-Ohio-6362, the Court distinguished between cases in which the plaintiff alleges common law negligence and cases where there is an allegation of a statutory violation. Citing *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, the Court held that the open and obvious doctrine is not applicable where the plaintiff establishes a statutory violation, as the violation constitutes negligence per se, thereby conclusively demonstrating a breach of a duty owed to the plaintiff.

Based upon the holdings in *Armstrong*, *Chambers*, and *Bates*, the violation of an administrative code provision, which constitutes "evidence of negligence," is not subject to the open and obvious doctrine because the administrative safety regulation imposes a heightened standard of care, and is not simply decided under the common law duty to warn. To hold otherwise would make the classification "evidence of negligence," established by *Chambers,* a nullity, and would negate the importance of the safety regulations.

McCorkle characterizes the appellate decisions of the First and Tenth District Court of Appeals as anomalies, and argues further that the Tenth District's decision in *Uddin v. Embassy Suites Hotel* (2005), 165 Ohio App.3d 699, 2005-Ohio-6613 is inconsistent with its prior decision in *Duncan v. Capital South Community Urban Redevelopment Corp.* (March 18, 2003), Franklin App. No. 02AP-653, unreported, 2003-Ohio-1273. *Duncan* is clearly distinguishable from *Uddin*, as (1) in *Duncan* there was no allegation that the alleged hazard violated an administrative code provision, and (2) *Duncan* was decided based upon the plaintiff's failure to establish proximate cause, not the open and obvious doctrine. Both the First District and Tenth

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District reasoned that to grant summary judgment under the open and obvious doctrine in cases where there is evidence that the hazard constituted a violation of an administrative safety regulation would constitute bad public policy and render the regulation meaningless.

The OBBC is a particularly important administrative regulation, as it sets forth the minimum safety requirements for buildings in Ohio. From a practical standpoint, it should be noted that many Ohio municipalities have passed legislation adopting the OBBC by reference as their local building code. In such instances, any violation of the OBBC resulting in injury would amount to negligence per se, as the violation of "a specific requirement of law or ordinance" constitutes negligence per se. *Swoboda v. Brown* (1935), 129 Ohio St. 512, 522. Indeed, even the City of Jackson, where Holly Hill Motel is located, has such a provision. The City of Jackson Code of Ordinances provides that "the details and regulations of all construction methods, materials and proceedings within the corporate limits of the City, other than administrative, shall be accomplished by reference to the Ohio Building Code except where any item heretofore mentioned might be in conflict." §1315.03 of the City of Jackson, Ohio Code of Ordinances. Because the OBBC sets forth the minimum safety requirements for construction in Ohio, and because it is adopted by reference as the law in many Ohio jurisdictions, it certainly sets forth Ohio public policy and should be given deferential treatment by the Courts.

The Appellees allege that if the Court adopts the Appellant's proposition of law, the court system will become overrun with "garden-variety" slip and fall cases. While a reversal of the decision below may allow more plaintiffs to avoid summary judgment when they are injured due to a building code or other administrative violation, it certainly will not bring the Ohio court system to a screeching halt. While summary judgment is often an effective tool, to apply it in a manner that simply aims to eliminate otherwise meritorious claims would deny litigants equal

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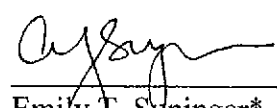
access to the courts and prevent them from having the opportunity to have their case heard by a jury. Indeed, the way to have fewer cases brought in court is to have fewer injuries to invitees, such as the Langs, and a rule of law that encourages landowners to maintain their properties in compliance with the minimum safety standards in certainly in the public interest.

CONCLUSION

For the reasons stated in Appellant's merit brief and herein, Appellant Dorothy Lang, Executrix of the Estate of Albert Lang, respectfully requests that the Court reverse the decision of the Fourth District Court of Appeals and adopt the Proposition of Law set forth herein.

Respectfully submitted,



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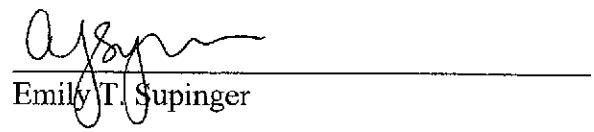
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Reply Brief of Appellant Dorothy Lang, Executrix of the Estate of Albert Lang, was served on all counsel of record this 17th day of December, 2008 by regular U.S. Mail.



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APPENDIX

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1315.03 STATE BUILDING CODE TO APPLY.

The details and regulations of all construction methods, materials and proceedings within the corporate limits of the City, other than administrative, shall be accomplished by reference to the Ohio Building Code except where any item heretofore mentioned might be in conflict.

1315.04 ZONING ORDINANCE TO GOVERN TYPE AND OCCUPANCY OF CONSTRUCTION.

The Zoning Ordinance of the City shall govern the type and occupancy of all building construction.

(Ord. 3-61. Passed 1-23-61.)

1315.05 QUALITY OF BUILDING DESIGNS.

(a) The design of buildings, both residential and commercial, shall be compatible with good taste and in accordance with the zoning regulations for that zone in which the building is to be situated.

(b) No shoddy or ill conceived building designs will be tolerated. High building standards are demanded. A registered engineer or architect is required in designing all new construction, except residential buildings.

(Ord. 3-61. Passed 1-23-61.)

1315.06 COMMERCIAL CONSTRUCTION.

All new building construction for commercial purposes in the business district of the City shall provide off-street parking to such extent as the building official may require. The drawings required with the application for a building permit as stated in Section 1311.05 hereof shall indicate the space set off for such.

(Ord. 3-61. Passed 1-23-61.)

1315.99 PENALTY.

(EDITOR'S NOTE: See Section 1301.99 for the general Building Code penalty if no other penalty is provided.)