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№ 2006-2029

In the Supreme Court of Ohio

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DONNA J. STEWART, et al.,

Plaintiffs-Appellees,

v.

THE LAKE COUNTY HISTORICAL SOCIETY, INC., et al.,

Defendant-Appellant.

DISCRETIONARY APPEAL FROM THE
COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO
CASE № 2004-L-164

REPLY BRIEF OF APPELLANT, THE LAKE COUNTY HISTORICAL SOCIETY, INC.

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I.

LAW AND ARGUMENT

A. The Stewarts Fail to Address the Narrow Issue in this Case of Whether a Plaintiff Who Is Not Disabled under the Americans with Disabilities Act Can Rely upon the ADA Accessibility Guidelines to Establish the Standard of Care in a Common Law Premises Liability Action.

1. The concept of foreseeability does not determine the standard of care.

In negligence cases, while the legal duty is always the same, *Berdyck v. Shinde*, 66 Ohio St.3d 573, 578, 1993-Ohio-183, how that duty is defined is not limited to a particular course of action or conduct. *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 98. What a defendant must do, or must not do, to satisfy the legal duty in any particular case is determined by the applicable standard of care. *Berdyck* at 578, citing Prosser & Keeton on Torts (5 Ed. 1984) 356, Section 53. That is why the precise parameters of a legal duty is an issue of law for the court to establish. *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶22, cert. denied, 543 U.S. 927.

Here, Plaintiffs-Appellees Donna and David Stewart ("the Stewarts") maintain that the applicable standard of care is found in the ADA Accessibility Guidelines ("ADAAG"). In their brief, the Stewarts have argued mistakenly that the legal duty owed in this premises liability case against the Defendant-Appellant, The Lake County Historical Society, Inc. ("Historical Society") can be established based simply upon one aspect of the duty element: the concept of foreseeability. (Brief of Appellees at pp. 4-5) The Stewarts argue that foreseeability and the incorporation of the ADAAG into the Ohio Basic Building Code ("OBBC") is enough to impose a duty in all premises liability

cases. (Brief of Appellees at p. 5) They set up this straw man argument in order to avoid the real legal issue in this case.

The duty element of a negligence action comprises two distinct inquiries. One is the relationship between the parties and the other is the foreseeability of injury. *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217. The issue in this case relates to the former; in their brief, however, the Stewarts have tried to misdirect the Court's attention to the latter. But, as this Court has recognized before, foreseeability of an injury, in and of itself, is not sufficient to establish the existence of a duty in all cases. *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St.3d 284, 293, 1997-Ohio-194. It is the specific relationship between the parties, not foreseeability alone, that will dictate the governing *standard of care* in any particular case. *Berdyck* at 578.

While duty is the legal concept at the heart of the two propositions of law before the Court, the critical question presented by the first proposition isn't whether non-disabled persons might use a ramp installed to facilitate access by disabled persons. The issue to be decided is more succinct and narrow – whether an administrative building code regulation, like the ADAAG, can be relied upon by a plaintiff who is not within the class of persons the regulation is intended to protect. This issue involves the more focused inquiry into the *standard of care* governing the defendant's conduct. Foreseeability does not apply to this inquiry. Inviting the Court to examine foreseeability is nothing more than a distraction from what must be resolved here, which is – does the ADAAG establish the *standard of care* in a common law premises liability action when the plaintiff is not disabled. The answer to this question can be

found in established Ohio case law cited in the Historical Society's brief – not disputed by the Stewarts. Before a standard of care can be imposed, "it must appear that the plaintiff falls within the class of persons to whom a duty of care was owing." *Gedeon v. The East Ohio Gas Co.* (1934), 128 Ohio St. 335, 338. The same is true with regard to a standard of care predicated upon an administrative rule or regulation. See, e.g., *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38, 41-42; 70 Ohio Jurisprudence 3d, (2004) 156-157, Negligence, Section 60.

It remains undisputed by the Stewarts that Ohio's incorporation of the ADAAG as part of the OBBC was intended expressly for the benefit of disabled persons, not the general public. One has to completely ignore R.C. 3781.111(A) and (B), to assert, as the Stewarts do at page 5 of their brief, that "[t]he OBBC does not profess to benefit any one particular class of individuals, disabled or otherwise, to the exclusion of another." The focus here is on the scope of the ADAAG in particular, not the OBBC in general. The case law cited by the Historical Society in its brief – which the Stewarts did not even address in their brief – recognizes this distinction in the holdings that the ADA and its regulations do not provide evidence of the standard of care to prove common law negligence[1] and certainly have no application to negligence cases brought by non-disabled persons like Mrs. Stewart here.[2] In *Manley v. Gwinnett Place Assocs., L.P.* (1995), 216 Ga. App. 379, 454 S.E.2d 577, overruled on other grounds by *Fluornoy*

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[1] See, e.g., *Levin v. Dollar Tree Stores, Inc.* (Dec. 6, 2006), E.D. Pa. No. 2:06cv605, 2006 U.S. Dist. Lexis 88595, at *10; *White v. NCL America, Inc.* (Mar. 8, 2006), S.D. Fla. No. 05-22030-CIV, 2006 U.S. Dist. Lexis 24756 at *16-17.

[2] See, *Runions v. Maury County* (Apr. 9, 2007), Court of Appeals of Tenn. No. M2006-00067-COA-R3-CV, 2007 Tenn. App. LEXIS 208, at *23-24; *Lettera v. The Retail Property Trust* (Jan. 24, 2006), E.D. NY No. 2:04cv4955, 2006 U.S. Dist. Lexis 4685 at *13.

v. Hospital Authority (1998), 232 Ga. App. 791, 504 S.E.2d 198, like Mrs. Stewart here, the plaintiff fell on a handicapped access ramp. The Georgia court held that the ADA did not define the standard of care, specifically because the plaintiff in *Manley* "was not in the class of persons for whose benefit the Americans With Disabilities Act was enacted, since she was not disabled." 216 Ga. App. at 381, 454 S.E.2d at 579.

2. ***The Chambers decision does not abrogate the well-established rule that a plaintiff must be within the class of persons for whom an administrative rule or regulation is intended to benefit.***

For the last century, the law in Ohio has been that a plaintiff must establish that he or she was a member of the class of persons for whose benefit the duty of care was imposed when liability is based upon the defendant's non-compliance with a statute or administrative regulation. See, *Hocking Valley Ry. Co. v. Phillips* (1910), 81 Ohio St. 453, 462. See also, 70 Ohio Jurisprudence 3d, (2004) 156-157, Negligence, Section 60 (and cases cited therein). The Stewarts argue that this century-old doctrine was abandoned by this Court's decision in *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 1998-Ohio-184. But the Stewarts acknowledge that this Court did not explicitly overrule prior precedent because they concede, as they must, that the Court in *Chambers* never "discuss[ed] or even briefly refer[red]" to the rule at issue in this case. (Brief of Appellees at p. 7). Because the precise issue was not before the Court in *Chambers*, one would not expect the *Chambers* Court to address the issue that is presented here. Had the *Chambers* Court done so, it would have amounted to an advisory opinion and this Court does not make it a practice to decide issues that are not presented by the record before it. *Allen v. totes/Isotoner Corp.*, Slip Opinion No. 2009-Ohio-4231, ¶9 (O'Donnell, J., concur).

In essence, what the Stewarts are arguing is that the *Chambers* Court took the unprecedented step of overruling the Court's prior precedent sub silentio. Yet, this Court does not discard established rules of law and its own precedent so easily. See, *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, paragraph one of the syllabus. In *Chambers* the specific issue was whether a violation of the OBBC constituted negligence per se. This Court did not consider the consequences of a violation of an administrative rule designed exclusively for the benefit of a specific class of persons, like the ADAAG here, because the OBBC sections at issue, in fact, applied to the plaintiff in that case. This distinction is important because, in this instance, Mrs. Stewart was not a member of a class of persons the ADA was enacted to benefit. The provisions of the OBBC, which were at issue in *Chambers,* apply generally to the population as a whole.[3] In contrast, the ADAAG expressly apply to a very specific class of persons – those who are disabled. Since *Chambers* is not on point with the precise issue in the case *sub judice*, it does not control the outcome here.

It is not the Historical Society that seeks a "radical departure" from established Ohio law, it is the Stewarts. The Historical Society's arguments and Proposition of Law No. I can and should be reconciled with *Chambers* because the law in Ohio should be that a violation of an administrative rule or regulation can be evidence of negligence when the plaintiff is within the class of persons to whom the duty in the rule or regulation was owed. Here the ADAAG does not apply to the Stewarts case because Mrs. Stewart is not disabled and thus any violation of the ADAAG cannot serve as

[3] The general provisions of the OBBC included Sections 805.2 (exterior stairways shall be kept free of ice), 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). 82 Ohio St.3d at 563.

evidence of negligence. The Eleventh District's opinion to the contrary should be reversed.

B. The Issue of Whether the Open-and-Obvious Doctrine Is Applicable to this Case Remains Viable and the Stewarts Concede that the Court's Decision in *Lang v. Holly Hill Motel* Sets Forth the Controlling Law.

The Stewarts allege that the Historical Society abandoned its position, set forth in Proposition of Law No. I, that ADAAG 4.8.2 protects only disabled persons. In support of this untrue allegation, the Stewarts rely on the Historical Society's acknowledgment that the Stewarts' claims arise from a violation of an OBBC provision. The OBBC provision at issue is ADAAG 4.8.2, as incorporated by reference into the OBBC. See, Ohio Adm. Code 4101:1-11-01, Section 1101.2 and Ohio Adm. Code 4101:1-35-01. (Merit Brief Apx. at 100-101).

Contrary to the Stewarts' assertion, the Historical Society did not abandon any position in acknowledging that ADAAG 4.8.2 is a provision of the OBBC. While ADAAG 4.8.2 is an OBBC provision, the adoption of this particular administrative rule as an OBBC provision was for the purpose of protecting disabled persons, not the general public. See, R.C. 3781.111 (A) and (B). By acknowledging that the Stewart's claim of liability arises from an alleged violation of the OBBC, the Historical Society does not in anyway concede that ADAAG 4.8.2 applies for the protection of the general public. It does not. See, Ohio Adm. Code 4101:1-11-01, Section 1101.1 providing that the scope of incorporation of the ADAAG into the OBBC is for "the design and construction of facilities *for accessibility to physically disabled persons*." (Emphasis added).

ADAAG 4.8.2 is a part of the OBBC and according to this Court, "the

open-and-obvious doctrine may be asserted as a defense to a claim of liability arising from a violation of the Ohio Basic Building Code." *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, syllabus. The Stewarts do not deny that ADAAG 4.8.2 is a provision of the OBBC and concede that the open-and-obvious doctrine is a defense that the Historical Society can raise in this case.

However, the Stewarts maintain that the appellate court did not preclude application of the open-and-obvious doctrine in this case as a matter of law. The Stewarts ask this Court to ignore the very language used by the appellate court and instead find that the Eleventh Appellate District would have applied the open-and-obvious doctrine if the facts had supported such a defense. However, this is not what the appellate court said.

The Eleventh Appellate District held that the open-and-obvious doctrine was *not applicable* because the violation of the OBBC provision requiring the ramp to comply with ADAAG standards was the cause of the hazard. See, *Stewart v. The Lake County Historical Society, Inc.*, 169 Ohio App.3d 1, 2006-Ohio-4822, ¶24 (Apx. 12; Supp. 84). Specifically, the Eleventh Appellate District determined:

> Here, the hazard created by the defective ramp could not be observed by Donna. *The defect and hazard was due to the slope of the ramp exceeding ADA standards.* Without knowledge of the maximum slope requirements, a business invitee would be unable to determine that the defective ramp's slope was potentially hazardous. *Accordingly, the open-and-obvious doctrine was not applicable.*

Stewart at ¶24 (Apx. 12; Supp. 84). (Emphasis added.) In other words, the appellate court determined that the violation of the OBBC, by virtue of its adoption of the ADAAG provisions, created a hazardous defect, precluding application of the open-and-obvious doctrine.

It bears repeating that just like in *Lang*, the Stewarts' claim of liability arises from an alleged violation of the OBBC. Thus, the appellate court's decision that the violation of ADAAG 4.8.2 created a hazard which prevented application of the open-and-obvious doctrine cannot be reconciled with this Court's ruling in *Lang*. As this Court held in *Lang*, "the open-and-obvious doctrine remains *applicable* in cases where the defendant violated the Ohio Basic Building Code." Id. at ¶2. (Emphasis added.) The Eleventh Appellate District found that once the violation of the OBBC existed, the open-and-obvious doctrine was inapplicable. This decision cannot stand.

Despite the Stewart's assertion to the contrary, the alleged danger of the ramp at issue was open-and-obvious to Mrs. Stewart. The Stewarts' contention that the ramp was not "so apparently unsafe on simple observation to constitute an open and obvious danger," is belied by the facts. (Brief of Appellees at p. 12.) A letter from a consultant hired by the Stewarts states that the consultant was able to determine the defect not by inspecting the ramp, but from visual examination *of copies* of photographs of the ramp. (See, Supp. 58). The Eleventh Appellate District noted that "[t]he letter further stated that a visual assessment, standing alone, revealed the defect." *Stewart* at ¶33 (Apx. 14; Supp. 86).

Prior to her fall, Mrs. Stewart had been using the ramp for about a year. (Supp. 32 - Tr. at pgs. 15-17; Supp. 33 - Tr. at pg. 21.) Mrs. Stewart was aware of the condition of the ramp before her fall because she had used the ramp to enter the schoolhouse on the day of her accident. (Supp. 36 - 37 – Tr. at pg. 33 - 34). Her fall took place as she exited the schoolhouse. (Supp. 38 – Tr. at pg. 39.) See, *Raflo v. Losantville Country Club* (1973), 34 Ohio St.2d 1 (invitee had prior knowledge of step because she entered

the premises using the same step used in exiting.)

Without evaluating Mrs. Stewart's own knowledge of the open-and-obvious danger presented by the ramp at issue, the Eleventh Appellate District found that the Stewarts established a genuine issue of material fact as to whether the ramp had a substantial defect simply because of the noncompliance with ADAAG 4.8.2. This holding should not be the law in the Eleventh Appellate District or anywhere in Ohio. Thus, reversal of the Eleventh Appellate District court's decision is warranted.

II.

CONCLUSION

WHEREFORE, Appellant The Lake County Historical Society, Inc. respectfully submits that the opinion and judgment of the Eleventh Appellate District should be reversed and the trial court's summary judgment should be reinstated.

Date: September 9, 2009.

Respectfully submitted,

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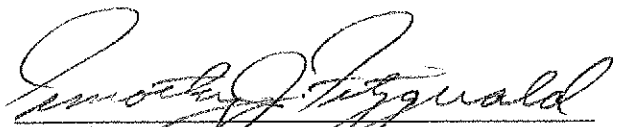

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