

ORIGINAL

IN THE SUPREME COURT OF OHIO

Kenneth D. Lillie

Appellee,

vs.

Donald L. Meachem, et al.,

Appellants.

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Case No.

09-2021

On Appeal from the
Third Appellate District,
Allen County

App. No. 1-09-09

MEMORANDUM OF *AMICUS CURIAE* MONARCH RETAIL LLC
IN SUPPORT OF JURISDICTION

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST	3
ARGUMENT AND PROPOSITION OF LAW IN SUPPORT OF APPELLANT	4
OSHA regulations and other published, but uncodified, safety standards are inadmissible to establish that an employer breached a duty of care to an independent contractor.	4
CONCLUSION.....	8
CERTIFICATE OF SERVICE	9

INTRODUCTION

Donald Meachem and DLM Enterprise (together, “Meachem”) appeal from a decision of the Third District Court of Appeals that reversed summary judgment entered in Meachem’s favor on a negligence claim brought by an independent contractor, Kenneth Lillie, who broke his ankle after falling from a scaffold. The central issue raised on this appeal is whether OSHA regulations and uncodified industry safety standards are admissible as evidence that Meachem breached a duty to Lillie.

Amicus curiae Monarch urges this Court to accept discretionary jurisdiction over this issue and to review the appellate court’s holding that OSHA regulations and related safety standards are admissible to show that an employer breached a duty owed to an independent contractor. As a result of this holding, these regulations and standards may be used in a way that was not intended by their drafters, that disrupts the common-law duties between employers and independent contractors, that inappropriately shifts litigants’ burdens with respect to proving a breach of a duty, and that is not necessary to further any legislative goals or public policy. The Third District’s decision will have important and far-reaching effects on construction litigation throughout the state, and thus it deserves this Court’s careful consideration.

STATEMENT OF THE CASE AND FACTS

Monarch Retail LLC is a general contractor that hired Meachem to build the interior of a CJ Banks retail store at the Lima Mall. Meachem, in turn, hired Kenneth Lillie as a subcontractor to install drywall. While working on a ladder that he had placed on top of a defective scaffold, Lillie fell and fractured his ankle. Thus, Lillie filed this action and claimed, among other things, that Meachem was negligent with respect to providing the scaffold. *Lillie v. Meachem*, Allen Cty. App. No. 1-09-09, 2009-Ohio-4934, ¶¶ 2-4.

In support of his negligence claim, Lillie proffered regulations promulgated by the Occupational Safety and Health Administration (OSHA), uncodified safety standards published by the American National Standards Institute (ANSI) and the Scaffolding, Shoring and Forming Institute (SSFI), and expert testimony that Meachem had not complied with these various standards. *Id.* at ¶¶ 6-7. Meachem filed a motion in limine to preclude this evidence, and the trial court granted it, ruling that the proffered regulations, standards, and expert opinions were inadmissible to show that Meachem breached a duty to Lillie. *Id.* The court subsequently entered partial summary judgment on Lillie's negligence claim against Meachem, determining that while an issue of fact exists with respect to whether Meacham owed Lillie a duty of care, there was no admissible evidence that Meachem had breached that duty.¹ *Id.* at ¶ 8.

Lillie appealed to the Third District Court of Appeals, contending in relevant part that the trial court abused its discretion by refusing to admit evidence of OSHA regulations and other published safety standards. The appellate court agreed, holding that an independent contractor who claims negligence against another contractor may establish a breach of duty by introducing evidence of regulations and standards promulgated by OSHA and other safety organizations. *Id.* at ¶¶ 14-20. The court of appeals further held that an issue of fact exists with respect to whether Meachem assumed a duty of care to Lillie by actively participating in the events that led to Lillie's injury. *Id.* at ¶¶ 32.

Meachem now appeals to this Court and argues that the court of appeals should have held that OSHA regulations and other similar standards are inadmissible to prove that an employer

¹ Admittedly, the procedural history of this case is far more convoluted than might be suggested by this summary, but the various twists and turns are not important to the Court's consideration of this appeal.

breached a duty of care to an independent contractor. For the following reasons, Monarch urges the Court to accept review of this appeal.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The employment of independent contractors on construction projects is ubiquitous. Accidents on construction sites are an unfortunate reality given the inherently dangerous nature of the work, and as a result, negligence actions by independent contractors are frequent in all parts of the state. The common law of Ohio requires those claimants to prove that the alleged tortfeasor failed to use ordinary care under the circumstances, but admitting OSHA regulations and similar safety protocols as *evidence* of the standard care creates the very real danger that they will be treated erroneously as *establishing* the standard of care.

Under the Third District's holding in this case, an independent contractor may prove the breach-of-duty element of a negligence claim, not by proving the defendant failed to exercise ordinary care, but rather by demonstrating that the defendant failed to comply with the relevant safety regulations or publications. Presenting the factfinder with a ready-made standard of care eases the claimant's burden of proof and at the same time puts the defendant in the untenable position of having to argue that the published standard, which has the weight of the government or a safety organization behind it, is improper, inaccurate, or inapplicable.

OSHA regulations, in particular, were never intended to alter the common-law duties, standards, burdens, and liabilities that pertain to independent contractors, nor were they meant to serve as the basis for private actions against parties that deviate from those regulations. But these are the practical consequences of admitting OSHA regulations and related safety standards into evidence in a common-law negligence case. Accordingly, this Court should accept jurisdiction over this appeal and review the holding of the Third District.

ARGUMENT

PROPOSITION OF LAW: OSHA regulations and other published, but uncodified, safety standards are inadmissible to establish that an employer breached a duty of care to an independent contractor.

I. The common-law duty and standard of care in an independent contractor's negligence action is well-established.

As general rule, independent contractors are expected to protect themselves. See *Eicher v. United States Steel Corp.* (1987), 32 Ohio St.3d 248, 512 N.E.2d 1165. An employer, general contractor, or landowner, does not owe a duty of care to an independent contractor who is injured while engaged in inherently dangerous work, like construction, unless the employer actively participates in that contractor's work. See, e.g., *Hirschbach v. Cincinnati Gas & Elec. Co.* (1983), 6 Ohio St.3d 206, 6 O.B.R. 259, 452 N.E.2d 326; *Cafferkey v. Turner Constr. Co.* (1986), 21 Ohio St.3d 110, 21 O.B.R. 416, 488 N.E.2d 189; *Bond v. Howard Corp.* (1995), 72 Ohio St.3d 332, 650 N.E.2d 189; *Sopkovich v. Ohio Edison Co.* (1998), 81 Ohio St.3d 628, 693 N.E.2d 233. The standard, of course, is "ordinary care" under the circumstances. *Id.* Thus, it is well-established that an independent contractor who sues his or her employer for common-law negligence is required to prove that the employer both actively participated and failed to use ordinary care under the circumstances.

II. Admitting OSHA regulations into evidence affects the common law rights, duties, or liabilities of employers and thus is contrary to Congressional intent.

While ordinary care is the standard that applies under the common-law, there are countless, specific safety and health standards that have been promulgated by the Occupational Safety and Health Administration. See generally Title 29 C.F.R. In the legislation that authorizes OSHA to promulgate these regulations, however, 29 U.S.C. §651, et seq., Congress plainly stated that "Nothing in this chapter shall be construed ... to enlarge or diminish or affect

in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.” (Emphases added.) 29 U.S.C. § 653(b)(4).

Based on this statutory language, courts have recognized that there is no private right of action for violations of OSHA regulations. For example, in *State ex rel. Goodyear Tire & Rubber Co. v. Tracey* (1st Dist. 1990), 66 Ohio App.3d 71, 583 N.E.2d 426, the court noted that “OSHA violations are enforced either by criminal sanctions, by civil penalties, or by injunctive relief. Nowhere in the [Occupational Safety and Health] Act or in the record of the Congressional debate is there any mention of a private civil remedy by employees for violation of the Act. Instead, the Congressional intent of Section 653(b)(4), Title 29, U.S.Code, is expressly to the contrary.” *Id.* at 76, citing *Corcoran v. Chicago Park Dist.* (C.A.7, 1989), 875 F.2d 609; *Taylor v. Brighton Corp.* (C.A.6, 1980), 616 F.2d 256, 263; *Jeter v. St. Regis Paper Co.* (C.A.5, 1975), 507 F.2d 973.

This Congressional intent was also the reason why this Court, in *Hernandez v. Martin Chevrolet, Inc.* (1995), 72 Ohio St.3d 302, 649 N.E.2d 1215, held that a violation of OSHA regulations does not constitute negligence per se. As the Court explained, “a plaintiff’s case is significantly aided if negligence per se is established. If we held that a violation of OSHA constitutes negligence per se, we would allow OSHA to affect the duties owed by individuals to those injured in the course of their employment. Such a holding would be contrary to the intent of the legislation.” *Id.* at 304, citing *Ries v. Natl. RR. Passenger Corp.* (C.A.3, 1992), 960 F.2d 1156, 1162.

For precisely the same reasons, OSHA regulations should not be admissible in a common-law negligence action. As explained above, admitting OSHA regulations into evidence

significantly helps the claimant because the regulations do far more than *suggest* the proper standard of care; rather, they are too easily, and erroneously, viewed as *defining* the standard of care. These regulations, which have the weight and authority of the government behind them, are powerful evidence of negligence – indeed, they are difficult to refute and essentially make the claimant’s case. In this way, the admission of OSHA regulations into evidence substantially affects not only the common-law standard of care but also the litigants’ respective burdens of proof under the common law. That is not what Congress intended.

To be sure, Congress enacted OSHA “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources ***.” 29 U.S.C. § 651(b). But those goals are adequately protected by the government, which may investigate violations of OSHA standards and seek criminal and civil penalties against violators. There is no need to buttress these statutory procedures and remedies by judicially adopting a rule that alters the standards, duties, and burdens that apply to a private party’s common-law action for negligence. The common law of Ohio should not be altered in this fashion without either this Court’s consideration or the express will of the Ohio General Assembly. See *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 439, 2009-Ohio-1222, 905 N.E.2d 172, citing *State ex rel. Hunt v. Fronizer* (1907), 77 Ohio St. 7, 16, 82 N.E. 518, 5 Ohio L. Rep. 452.

III. Uncodified safety standards cannot serve as a private right of action and should not be admissible affect common-law standards, duties, and liabilities.

The American National Standards Institute (ANSI) has been described as “a private, non-profit organization that administers and coordinates the U.S. voluntary standardization and conformity assessment system.” (Citation omitted.) *Thompson v. Park River Corp.* (1st Dist. 2005), 161 Ohio App.3d 502, 509, 2005-Ohio-2855, 830 N.E.2d 1252. Similarly, the Steel

Scaffolding and Shoring Institute (SSSI) publishes recommended safety rules for the use of scaffolding. See *Briere v. Lathrop Co.* (1970), 22 Ohio St.2d 166, 175, 51 O.O.2d 232, 258 N.E.2d 597.

Certain ANSI standards have been incorporated into Ohio's administrative code,² but they have never been found to have independent authority or force of law, nor is there any authority to suggest these voluntary standards were meant to govern common-law duties owed to independent contractors. Even the expert proffered by Lillic in this case testified that SSSI standards "are illustrative and suggestive only" and that none of the ANSI standards at issue here have been codified by any Ohio or federal agency. (Harkness Dep. at 4, 51.) Yet their admission as evidence of negligence significantly affects common-law duties, burdens, and liabilities in the very same ways as the admission of OSHA regulations. This should not be the rule in Ohio.³

IV. At the very least, this Court should hold that trial courts have discretion to admit or exclude OSHA and other safety standards in common-law negligence actions.

Even if this Court concludes that evidence of OSHA regulation and other published safety standards are admissible as evidence of negligence, it should not hold that they are admissible as a matter of law. Rather, the question of admissibility should be left to the discretion of the trial courts. The Court has already indicated as much in *Briere*, where it held that the trial court did not abuse its discretion by excluding evidence of SSSI standards in a

² For example, Ohio Adm. Code 3701-31-04 codifies certain ANSI standards for pool construction and design. *Thompson*, 161 Ohio App.3d at 514.

³ This case is distinguishable from, and does not implicate, decisions regarding the admissibility of ANSI and other related standards in product liability actions. See, e.g., *Volter v. C. Schmidt Co.* (1st Dist. 1991), 74 Ohio App.3d 36, 598 N.E.2d 35 (holding that OSHA documents are admissible to prove that the employer, rather than the manufacturer, proximately caused the injury).

negligence case, and there is no authority that suggests that such uncodified, voluntary standards are admissible as a matter of law. 22 Ohio St.2d at 176, 258 N.E.2d 597.

The Third District, however, never recognized the trial court's ruling in this case that the evidence of OSHA regulations and ANSI and SSSI standards were prejudicial and therefore inadmissible. The appellate court did not analyze the issue of prejudice, and while it paid lip service to the trial court's discretion to admit or exclude evidence, the import of the holding is that the proffered OSHA regulations and other standards were admissible as a matter of law. At the very least, this Court should reverse that decision and reinstate the ruling of the trial court, which is in the best position to determine the prejudicial nature of any evidence. See *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, 781 N.E.2d 121, ¶ 193.

CONCLUSION

Undoubtedly, the Third District's holding is consistent with a majority of jurisdictions. See, e.g., 58 A.L.R.3d 148; Rothstein, *Occupational Safety and Health Law* (2005) 664-668, Section 21:13.⁴ But the current majority view is not the best rule for Ohio, and this Court has always weighed issues on their own merits rather than blindly following the trends in foreign jurisdictions. See, e.g., *Olympic Holding Co., L.L.C. v. ACE Ltd.*, 122 Ohio St.3d 89, 2009-Ohio-2057, 909 N.E.2d 933 (adopting the vast minority position on the question of whether promissory estoppel may preclude a party from invoking the statute of frauds defense in a breach of contract action).

The minority view should prevail in Ohio. Admitting safety regulations and standards as evidence of common-law negligence disrupts the duties between employers and independent

⁴ Notably, a majority of courts formerly held that OSHA regulations and other published safety standards are inadmissible. See, e.g., *Hackley v. Waldorf-Hoerner Paper Products Co.* (Mont. 1967), 425 P.2d 712, 717, citing 75 A.L.R.2d 778, 780.

contractors and inappropriately shifts litigants' burdens with respect to proving a breach of a duty. There is no expression of legislative intent that supports the appellate court's holding in this case, and in fact, Congress has expressly stated that OSHA provisions may not be construed to affect the common law. Accordingly, this Court should accept jurisdiction over this appeal and review the issue presented.

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CERTIFICATE OF SERVICE

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