

ORIGINAL

IN THE SUPREME COURT OF OHIO

KENNETH D. LILLIE,)	CASE NO.:	09-2021
)		
Plaintiff-Appellee,)	On Appeal from the Allen	
)	County Court of Appeals	
v.)	Third Appellate District	
)		
DONALD L. MEACHEM, et al.,)	Court of Appeals	
)	Case No. 01-09-009	
Defendants-Appellants.)		

**PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO
MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS
DONALD L. MEACHEM & DLM ENTERPRISES**

TIMOTHY A. SHIMKO (0006736)
TIMOTHY A. SHIMKO & ASSOCIATES
2010 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115
Phone: (216) 241-8300 // Fax: (216) 241-2702

ERIC GRIEBLING, ESQ.
Spurlock, Sears, Pry, Griebling & McBride, P.L.L.
120 N. Lane St.
Bucyrus, OH 44820
Counsel for Plaintiff-Appellee, Kenneth D. Lillie

BRUCE CURRY, ESQ.
LISA C. HAASE, ESQ.
Curry, Roby, Schoenling & Mulvey Co., LLC
8000 Ravine's Edge Ct.
Suite 103
Columbus, OH 43235
*Counsel for Defendants-Appellants, Donald Meachem and
DLM Enterprise*

FILED
DEC 03 2009
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
DEC 03 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
I. THIS CASE DOES NOT INVOLVE ISSUES OF GREAT PUBLIC INTEREST OR IMPORTANCE	1
II. STATEMENT OF FACTS	1
III. ARGUMENTS OF FACT AND LAW.....	2
A. Defendants DLM and Don Meachem owed Plaintiff the duty of providing a safe place to work and the duty to use due care not to cause injury to Plaintiff.....	2
B. Although OSHA regulations do not create a private right of action, they are relevant to the issues of the standard of care, the breach of that duty, foreseeability, and of proximate cause.....	4
C. Evidence of OSHA regulations and ANSI standards has been routinely admitted in negligence actions alleging injuries to independent contractors	10
IV. CONCLUSION.....	13
CERTIFICATE OF SERVICE.....	15

I. THIS CASE DOES NOT INVOLVE ISSUES OF GREAT PUBLIC INTEREST OR IMPORTANCE

Defendants-Appellants, Donald L. Meachem and DLM Enterprises, attempt to portray the litigation below as one involving legal issues heretofore unaddressed by this Court that will drastically alter the duties owed by a construction contractor to his independent subcontractors. In reality, this is a garden variety construction site accident case, where the negligent contractor supplied defective equipment to the Plaintiff-Appellee subcontractor, Kenneth D. Lillie, causing him to fall and sustain permanent disabling injuries. The legal principles that Appellants argue have been changed by the Third District's opinion have been well settled in Ohio and have been routinely and uniformly applied by appellate courts throughout the State. In fact, this Court has already addressed the issues that Appellants argue are novel in this appeal.

II. STATEMENT OF FACTS

The Plaintiff, Kenneth D. Lillie, is 34 years old, and he resides in Marion, Ohio. Mr. Lillie did not graduate from high school. He has earned a modest living doing mostly manual labor, including the installation of drywall, carpentry, plumbing, and trim work. Vocational testing reveals that Mr. Lillie has a below normal IQ and few, if any, transferrable skills.

Appellant DLM's function at the construction site¹ was not only to frame and dry wall under the contract it had with Monarch Construction. DLM had also agreed to supervise the day to day activities of all the other subs on the jobsite. **The contract between Monarch and DLM specified not only that DLM would observe and apply OSHA standards, but also that DLM would train and ensure compliance with OSHA standards for all subcontractors and independent contractors engaged on the job site.** On this job, Mr. Lillie had been hired as an

¹ The construction project involved was the build out of a CJ Banks retail establishment at the Lima Mall.

independent contractor by DLM to do framing and dry walling. Once enough of the framework was finished, Lillie then began dry walling. Lillie worked at this jobsite every day for almost two weeks before he received his injuries.

Mr. Lillie was injured while climbing on a ladder placed on a defective scaffold he had been instructed to use. The scaffold at issue in this case was one that DLM owned and brought to the jobsite. Prior to Mr. Lillie's accident, Meachem noticed that this particular scaffold was defective. Meachem testified that he decided to dismantle the scaffold and that he placed it next to the scrap pile. The scaffold on which Ken Lillie was injured was DLM's scaffold that had been previously dismantled by Meachem.

When Lillie climbed the stepladder set atop the scaffold, the weight of his body transmitted a horizontal component of force through the feet of the ladder to the platform of the scaffold. This force caused the scaffold to rotate counterclockwise about the defective caster, which did not swivel. The two casters on the other end piece were not locked. And, the caster on the defective end piece had no lock. Thus, the scaffold ended up rotating approximately 20 degrees away from the wall causing Lillie to fall.

III. ARGUMENTS OF FACT AND LAW

A. Defendants DLM and Don Meachem owed Plaintiff the duty of providing a safe place to work and the duty to use due care not to cause injury to Plaintiff.

Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care towards the plaintiff. *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217. This Court has previously decided a number of cases under which general contractors like Appellant, herein, were held to have owed statutory duties to independent contractors like Mr. Lillie under O.R.C.

§§ 4101.11 and 4101.12, commonly referred to as the *frequenter statutes*. The issues that Appellants have raised in their motion have already been addressed at one time or another by this Court. The Court's attention need be directed only to its prior opinion in *Michaels v. Ford Motor Co.* (1995) 72 OhioSt.3d 475 for a complete review of this Court's prior activities in the area of duties owed by General Contractors to independent subcontractors under the frequenter statutes.

In *Michaels*, this Court pointed out that it had previously decided that the references to frequenters in R.C. Chapter 4101 create a duty owed to frequenters who are independent contractors *ala* Mr. Lillie. *Hirschbach v. Cincinnati Gas & Elec. Co.* (1983), 6 Ohio St.3d 206; *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 600. In *Hirschbach*, this Court held that "One who engages the services of an independent contractor, and who actually participates in the job operation performed by such contractor and thereby fails to eliminate a hazard which he, in the exercise of ordinary care, could have eliminated, can be held responsible for the injury to the independent contractor." In *Hirschbach*, the owner was held liable for the death of an independent contractor's employee, because the owner interfered with the mode of the job operation, actually participating in the job operation by dictating the manner and mode in which the job was performed. And, this Court has already defined "actively participated" to mean that "the general contractor directed the activity which resulted in the injury and/or gave or denied permission for the critical acts that led to the employee's injury, rather than merely exercising a general supervisory role over the project." *Bond v. Howard Corp.* (1995), 72 Ohio St. 3d 332, 337

In this case, there is overwhelming evidence establishing that DLM directly participated in the critical acts that led to Plaintiff's injury. DLM was performing the same work Mr. Lillie

was doing at the time of his injury. Meachem was on the jobsite working on the day of the accident. It was Meachem and DLM that brought the defective scaffold to the jobsite and made it available to Plaintiff. It was Meachem that directed Lillie to follow the instructions given to him by Phil Brunet, Monarch's manager, and Brunet instructed Lillie to get on the ladder atop the scaffold, which was the act that led to Lillie's injury. Furthermore, it was Meachem that had shown Lillie to use a ladder on top of a scaffold, by employing the same method himself on this jobsite. Mr. Lillie had seen Meachem and his other employees using a scaffold and ladder in exactly the same manner as he had been instructed. Meachem failed to provide the necessary training and supervision, and failed to exercise ordinary care in making sure that he did not bring defective equipment to a worksite.

B. Although OSHA regulations do not create a private right of action, they are relevant to the issues of the standard of care, the breach of that duty, foreseeability, and of proximate cause.

The litany of misconduct set forth in the preceding paragraph was found by Plaintiff's expert to have been in violation of a number of OSHA regulations and ANSI standards. Plaintiff's expert also testified that these were the standards of care usually observed in the construction industry and the standards that were specified in DLM's contract. The purpose for introducing evidence of the OSHA regulations and ANSI standards was to demonstrate what the reasonably prudent construction site general contractor would do under like and similar circumstances to "foresee" and "eliminate a hazard which he, in the exercise of ordinary care, could have eliminated," not to provide a basis for an independent cause of action nor to enlarge any common law or statutory duties.

Appellee does not dispute that OSHA cannot be used to create a basis for an independent cause of action against either employers or third parties such as manufacturers, *Melerine v.*

Avondale Shipyards, Inc. (5th Cir. 1981), 659 F. 2d 706, nor can it be used to enlarge or diminish common law or statutory rights, duties, or liabilities. 29 U.S.C. § 653 (b)(4) (1976). However, OSHA regulations and ANSI standards have widely been held to constitute evidence of a minimum standard of care that Employers and Contractors commonly observe to ensure the safety of their employees and of frequenters including, but not limited to, independent contractors working on the jobsite.

In 1994, Ohio adopted Federal OSHA standards through the Public Employee Risk Reduction Act (O.R.C. § 4167.07).² Even prior to the adoption of this statute, courts across Ohio had routinely admitted evidence of OSHA violations as being relevant evidence on the issues of duty, breach of duty, proximate cause, and foreseeability. For example, in *Knitz v. Minster Mach. Co.* (Ohio Ct. App., Lucas County Feb. 9, 1987), 1987 Ohio App. LEXIS 5828, 100-101, the Court of Appeals began its analysis of this issue by noting that the general rule is that governmental and industry regulations, when relevant, are admissible. As *Knitz* points out, evidence of an OSHA violation is relevant to the issue of causation in a products liability suit, in much the same fashion as it would pertain to evidence of duty and proximate causation in a negligence action. Indeed, OSHA standards have been held to constitute evidence of industry customs or practices. (*Id.*) *Knitz* permitted the use of OSHA standards to prove misuse, or the

² O.R.C. § 4167.07 provides in relevant part: (A) The administrator of workers' compensation, with the advice and consent of the bureau of workers' compensation board of directors, shall adopt rules that establish employment risk reduction standards. Except as provided in division (B) of this section, in adopting these rules, the administrator shall do both of the following: (1) By no later than July 1, 1994, adopt as a rule and an Ohio employment risk reduction standard every federal occupational safety and health standard then adopted by the United States secretary of labor pursuant to the "Occupational Safety and Health Act of 1970," 84 Stat. 1590, 29 U.S.C.A. 651, as amended.

presence of a superseding cause;³ thereby breaking the chain of causation between the manufacturer and injured consumer.

Earlier in *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, this Court likewise held that it is generally accepted that administrative rules and regulations are admissible as bearing on the question of the lack of ordinary care. See also, *Zimmerman v. St. Peter's Catholic Church* (1993), 87 Ohio App.3d 752, 757. OSHA regulations are such administrative rules, and evidence of the violation of such regulations may be admissible to show lack of ordinary care. The 6th Circuit is also in accord with this position. In *Bailey v. V & O Press Co.* (6th Cir. Ohio 1985), 770 F.2d 601, 609 the court ruled that compliance or lack of compliance with OSHA standards may be probative in negligence actions.

Knitz, supra, cited with approval the ruling in *Minert v. Harsco Corporation* (Wa. App. 1980), 614 P. 2d 686. There, plaintiff was injured when a scaffolding column manufactured by the defendant fell. At trial, defendant introduced evidence of OSHA violations on the issue of proximate cause. The Court of Appeals affirmed. The *Minert* Court held that such evidence tended to establish the proximate cause of plaintiff's injury. Testimony by defendant's expert as to the standard of care necessary under OSHA was held to be proper. (*Id.*, at 690.)

Another case allowing OSHA standards to be used for the purpose of establishing the proximate cause of plaintiff's injuries is *McCormick v. Bucyrus-Erie Co.* (Ill. App., 1980), 400 N.E. 2d 1009. There, McCormick was injured when the crane he was operating collapsed. The appellate court affirmed the trial court's admission of evidence of OSHA regulations on the issue of proximate cause.

³ A superseding cause is nothing more than a subset within the larger set of proximate cause issues. Therefore, evidence of OSHA standards and their violation are admissible to show proximate cause, a duty that every Plaintiff bears.

Federal Courts and Ohio Courts, alike, have overwhelmingly allowed the admission of OSHA standards as long as the standards do not serve as the basis of the cause of action; i.e., using violations of OSHA to establish a claim for strict liability or for negligence per se. However, it is almost universally accepted that admitting evidence of the OSHA Regulations to prove an existing standard of care, a breach of that standard of care, foreseeability, and proximate cause appears entirely within the mandates set by Congress in 29 U.S.C. § 653 (b)(4). In *Prater v. Conrail* (N.D. Ohio 2003), 272 F.Supp.2d 706, 710-711, defendant sought to exclude testimony about ANSI voluntary standards and OSHA regulations. The Court held that a breach of an OSHA standard is evidence of negligence, but is not conclusive of the issue. Citing that other jurisdictions had held that OSHA violations constitute evidence of negligence (*Ries v. AMTRAK*, 960F.2d 1156 (3d Cir. 1992)), the Northern District in *Prater* held that evidence of otherwise pertinent regulations promulgated by OSHA are, accordingly, admissible on the issue of Defendant's negligence. In *Cross v. Hydracrete Pumping Co.* (Ohio Ct. App., Cuyahoga County 1999), 133 Ohio App. 3d 501, 507, the Eighth District Court of Appeals likewise held that an OSHA violation might present evidence of negligence.

In *Logan v. Birmingham Steel Corp.* (Ohio Ct. App., Cuyahoga County 2003), 2003 Ohio 5065, (an intentional tort action) the Court found that the evidence established that defendant had violated OSHA regulations by either not enforcing, properly training, or disciplining employees on proper ways to lock out machinery that could cycle and injure employees. The Court held that evidence of such OSHA violations was one of several factors to be considered in determining if the injury to plaintiff was foreseeable. Citing, *Taulbee v. Adience, Inc. BMI Div.* (1997), 120 Ohio App. 3d 11, 19-20, the *Logan* Court noted that in determining whether a defendant had knowledge that a dangerous procedure would be substantially certain to cause injury, the focus is

not how many prior accidents had occurred, but rather on the defendant's knowledge of the degree of risk involved, or in other words, his knowledge of the unsafe condition or of the foreseeable harm. *Taulbee*, 120 Ohio App. 3d at 21. The same rationale applies in negligence actions, where the degree of required foreseeability is nowhere near as stringent as that in an intentional tort case.

Most recently, in *Estate of Merrell v. M. Weingold & Co* (Ohio Ct. App., Cuyahoga County June 21, 2007), 2007 Ohio 3070, P60, the Eighth District again held that evidence of an employer's OSHA violation would be admissible as evidence of negligence. In *Durbin v. Kokosing Constr. Co.* (Ohio Ct. App., Licking County Feb. 5, 2007), 2007 Ohio 554, P11, the Court of Appeals held that an OSHA violation would be admissible as evidence in a negligence action, on such issues as duty, breach of duty, proximate cause, and foreseeability. See also, *Medina v. Harold J. Becker Co., Inc.*, 163 Ohio App.3d 832, (OSHA violations could be considered as factor in determining employer's intent; (i.e., the degree of foreseeability)); *Haldeman v. Cross Enterprises, Inc.* (2004), Delaware App. No. 04-CAE-02011, 2004 Ohio 4997, at P36 (OSHA citations are relevant to the issue of the degree of foreseeability); and *Neil v. Shook, Inc.* (Jan. 16, 1998), Montgomery App. No. 16422, 1998 Ohio App. LEXIS 106 (OSHA violations standing alone are "one of many factors to be considered.").

Consistent with these principles, it has also been generally held that violations of administrative rules, such as OSHA, may be considered by a jury as evidence of negligence. *Chambers v. St. Mary's School* (1998), 82 Ohio St. 3d 563, 568. See, also, *Durbin v. Kokosing Construction Co., Inc.* (5th Dis. 2007), 2007 Ohio App. LEXIS 511, at P11; *Reising v. Broshco Fabricated Products* (5th Dis. 2006), 2006 Ohio App. LEXIS 4376, at P58. In *Chambers v. St. Mary School, supra*, the Court addressed the admissibility of Administrative Rules within the

context of the Ohio Building Code, but went on to include a discussion on the treatment to be given by Courts confronted with evidence of a breach of any Administrative Rule (such as an OSHA Regulation). In so doing, the Court in *Chambers*, established that the distinction between negligence and “negligence per se” is the means and method of ascertainment. The first must be found by the jury from the facts, the conditions and circumstances disclosed by the evidence; the latter is a violation of a specific requirement of law or ordinance, the only fact for determination by the jury being the commission or omission of the specific act inhibited or required.

In other words, if a positive and definite standard of care has been established by legislative enactment whereby a jury may determine whether there has been a violation thereof by finding a single issue of fact, a violation is negligence per se; but where the jury must determine the negligence or lack of negligence of a party charged with the violation of a rule of conduct fixed by legislative enactment from a consideration and evaluation of multiple facts and circumstances by the process of applying, as the standard of care, the conduct of a reasonably prudent person, negligence per se is not involved. (*Id.*)

Negligence per se is tantamount to strict liability for purposes of proving that a defendant breached a duty. See *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St. 2d 227, 250.

The issue that the *Chambers* Court faced was whether an extension of negligence per se to violations of administrative rules was justified.

The specific issue before this court is whether a violation of the OBBC is negligence per se. However, our comparison of the legislative process and the rulemaking process dictates that we examine this issue in the broader context of whether violations of any administrative rules should require the application of negligence per se.

The Court determined that there were differences between statutes and administrative rules which would preclude it from extending the application of negligence per se to violations of administrative rules. In deciding not to extend the doctrine of negligence per se to violations of administrative rules, the Supreme Court in *Chambers* observed that administrative rules do not

dictate public policy, but rather expound upon public policy already established by the General Assembly in the Revised Code. (citations omitted)

The *Chambers* Court observed that Directors of administrative agencies are appointed by the Governor, pursuant to O.R.C. § 121.03. And, it is these directors and/or their employees who propose and adopt administrative rules. To be sure, these administrative agencies have the technical expertise to compose such rules. *Farrand v. State Med. Bd.* (1949), 151 Ohio St. 222. The Court then noted that administrative rulemaking is subject to the conditions set out in O.R.C. §§ 119.01 to 119.13. These conditions provide constraints in rulemaking. However, the Supreme Court held that despite these protections, the conditions provided in O.R.C. §§ 119.01 through 119.13 do not elevate rulemaking to the status of lawmaking for purposes of applying negligence per se to violations of administrative rules. For all the aforementioned reasons, the Supreme Court held that although the violation of an administrative rule does not constitute negligence per se, it nevertheless concluded that violations of administrative rules, (like OSHA) if relevant, are still admissible as evidence of negligence.

In sum, OSHA Regulations and ANSI Standards have been uniformly and routinely admitted to show duty, foreseeability, and proximate cause. The opinion of the Third District Court of Appeals plows no new ground here.

C. Evidence of OSHA regulations and ANSI standards has routinely been admitted in negligence actions alleging injuries to independent contractors.

Appellant's chief argument is that since Mr. Lillie was not an employee, violations of OSHA regulations and ANSI standards do not apply, and are, therefore, irrelevant. Nothing could be further from the truth, and Mr. Lillie is unaware of any judicial or statutory authority in support of Appellant's argument that OSHA and ANSI can have no application to him, and cannot be used to establish duty, foreseeability, or proximate cause. The Sixth Circuit Court of

Appeals came to the opposite conclusion in *Shanklin v. Norfolk S. Ry. Co.* (6th Cir. 2004), 369 F.3d 978, 997⁴, a case involving an injury to an independent contractor, where the Court was faced with the question of whether violations of a state administrative order relating to tree cutting procedures could be admitted as some evidence of negligence. Two considerations led the *Shanklin* Court to the conclusion that the answer to this question was “yes”. First, the Sixth Circuit noted that the Restatement of Torts would clearly answer the question “yes.” Comment “g” to the Restatement (Second) of Torts § 286 states:

The fact that a legislative enactment requires a particular act to be done for the protection of the interests of a particular class of individuals does not preclude the possibility that the failure to do such an act may be negligence at common law toward other classes of persons. It also does not preclude the possibility that, in a proper case, the requirements of the statute may be considered as evidence bearing on the reasonableness of the actor's conduct.

See also, Restatement (Second) of Torts § 286 cmt. “f” which provides: “The fact that a legislative enactment requires a particular act to be done for the protection of the interests of a particular class of individuals does not preclude the possibility that the doing of such an act may be negligence at common law toward other classes of persons.”

Second, it is consistent with general principles of American tort law to permit the jury to consider government regulations as some evidence of negligence. When a jury makes a negligence determination, its determination can be likened, using the famous “Hand formula,” to a balancing of the burden on the defendant in acting more carefully against the probability of harm multiplied by the magnitude of harm if the defendant does not so act. See *United States v. Carroll Towing Co.* (2d Cir. 1947), 159 F.2d 169, 173 (Hand, J.). “Thus it makes sense for the jury to be aware of legal requirements that directly affect the balance that the jury is conceptually

⁴ Though, the Sixth Circuit was analyzing Tennessee law in this opinion, the Court’s rationale in *Shanklin* was adopted by the 6th Circuit as the law in Ohio in the case of *Angel v. United States* (6th Cir. Ohio 1985), 775 F.2d 132, 144.

required to make in determining whether a defendant has been negligent.” *Shanklin, supra*. There is no logic that would not extend this reasoning to OSHA Regulations and ANSI standards.

Other jurisdictions have consistently held that OSHA Regulations are applicable in cases involving independent contractors. In *Sanna v. Nat'l Sponge Co.* (1986), 209 N.J. Super. 60, where an independent contractor plaintiff alleged that he was injured as a result of the use of improperly constructed scaffolding, the New Jersey Court held that OSHA regulations contain precise guidelines for the construction of scaffolding, and such regulations could be established as objective safety standards generally prevailing in the community if expert testimony indicated that they were accepted in such.

The Sixth Circuit has uniformly applied OSHA regulations to independent contractors. Besides *Shanklin, supra*, in *Ellis v. Chase Communications* (6th Cir. Tenn. 1995), 63 F.3d 473, 477-478, the Sixth Circuit likewise concluded that an OSHA violation may be evidence of negligence applicable to independent contractors. In *Teal v. E. I. Du Pont de Nemours & Co.* (6th Cir. Tenn. 1984), 728 F.2d 799, an employee of an independent contractor brought suit against the DuPont company to recover for injuries sustained as a result of an accident occurring at DuPont's plant. DuPont allegedly breached the specific duty imposed on employers by 29 U.S.C. § 654(a)(2), set forth at 29 C.F.R. § 1910.27(c)(4), governing ladder specifications. DuPont argued that the duty imposed on employers by OSHA was limited to its own employees, and did not extend to independent contractors. The Court in *Teal* held that even though OSHA's “general duty” clause, 29 U.S.C. § 654(a)(1), imposes a duty upon employers to protect the safety of its own employees, its “specific duty” clause, § 654(a)(2), imposes a duty to protect a broader class of employees. *Teal* at 803. In *Angel v. United States* (6th Cir. Ohio 1985), 775 F.2d 132, 144, the Sixth Circuit announced that its holding in *Teal* was also the law of Ohio.

Angel held that in Ohio an employer's duty under OSHA regulations enacted pursuant to the specific duty clause, 29 U.S.C. § 654(a) (2), extends to all employees frequenting an employer's workplace, including those of an independent contractor.

Accordingly, since DLM was already obligated to apply OSHA regulations for the protection of its own employees, so too, a jury could believe that it was obligated to apply OSHA regulations for the protection of their independent contractors on the jobsite as well. The failure to follow the OSHA regulations would therefore be relevant evidence of duty, standard of care, breach of the standard of care, foreseeability, and proximate cause.

IV. CONCLUSION

DLM was actively involved on the jobsite at the time Mr. Lillie received his injuries. Under the frequenter statute and under common law, DLM owed a duty to provide a safe place for Mr. Lillie to work. Evidence of OSHA regulations has routinely been admitted as being probative on the issues of duty, breach of duty, foreseeability, and proximate cause in cases where the injured party was an independent contractor. Appellant has failed to present any caselaw supporting its position that OSHA and ANSI are irrelevant to actions brought by independent contractors. To the contrary, the caselaw uniformly supports the application of OSHA and ANSI to actions brought by independent contractors for injuries sustained on a construction site.

The decision of the Third District Court of Appeals does not blaze any new trails in the law as Appellant would have this Court believe. The Appellate Court merely applied tried and true principles of law espoused by this Court and by other Appellate Courts throughout Ohio and elsewhere to the effect that evidence of OSHA Regulations and ANSI standards can be considered by a jury on the issues of negligence in a construction site accident case where an

independent contractor has been injured as the result of the direct negligence of a General Contractor. Accordingly, as this case does not involve issues of great public interest or importance, Appellant's motion to certify should be denied.

Respectfully submitted,



Timothy A. Shimko (0006736)
Timothy A. Shimko & Assocs. Co., L.P.A.
2010 Huntington Building
Cleveland, Ohio 44115
Tel. (216) 241-8300
Fax (216) 241-2702
tas@shimkolaw.com

ERIC GRIEBLING, ESQ.,
Spurlock, Sears, Pry, Griebeling & McBride, P.L.L.
120 N. Lane St.
Bucyrus Ohio 44820

*Counsel for Plaintiff-Appellee,
Kenneth D. Lillie*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. Mail to the following Counsel on this 2nd day of December 2009:

BRUCE CURRY, ESQ.
LISA C. HAASE, ESQ.
Curry, Roby, Schoenling & Mulvey Co., LLC
8000 Ravine's Edge Ct.
Suite 103
Columbus, Ohio 43235
*Counsel for Defendants, Donald Meachem and
DLM Enterprise*


TIMOTHY A. SHIMKO (0006736)
Counsel for Plaintiff-Appellee, Kenneth D. Lillie