

ORIGINAL

IN THE SUPREME COURT OF OHIO

Lawrence Boatwright,

Appellant

v.

Penn-Ohio Logistics, et al.,

Appellees

On Appeal from the  
Mahoning County Court of  
Appeals, Seventh Appellate  
District

Supreme Court Case No.  
2013-0237

Court of Appeals  
Case No. 12 MA 39

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Response to Motion for Reconsideration of Appellees  
American Steel City Industrial Leasing, Inc. and Bill Marsteller

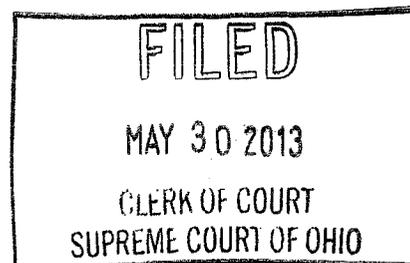
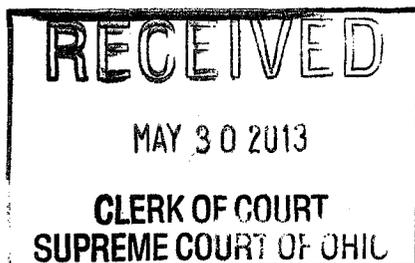
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This Court should once again decline to hear this case. When Appellant Lawrence Boatwright initially moved this Court to grant jurisdiction to hear this case, he presented seven propositions of law. Now he asks this Court to reconsider its denial on one specific point: whether a landlord out of possession may be civilly liable to its tenant's employees for not complying with an OSHA requirement. Other than disagreeing with the result, Boatwright does not give any reason why this Court made a mistake the first time it declined jurisdiction. (In reality, this Court has now refused to hear this case two times. The first was the companion case, *Currier v. Erie Ins. Exchange, et al.*, Supreme Court Case No. 2010-0398, involving Boatwright's co-worker's estate and the same set of issues.)

Boatwright's propositions ask this Court to disrupt generally accepted principles of interpreting common clauses in commercial leases. Boatwright specifically asks this Court to give meaning to the phrase in leases where the parties agree to comply "with all laws, orders, ordinances, and other public requirements \* \* \* affecting the Leased Premises." In particular, he contends that that should mean that a landlord's violation of an OSHA regulation results in the landlord's liability in negligence to a third-party to that lease, *i.e.*, the tenant's employee. As a third-party, Boatwright does not have enforceable rights under the lease unless this provision was entered into with the intent to benefit Boatwright or any other employee. *Doe v. Adkins*, 110 Ohio App.3d 427, 436 (1996). To the contrary, and as noted by the Eleventh District Court of Appeals in *Currier v. Penn-Ohio Logistics, Inc.*, 187 Ohio App.3d 32, 2010-Ohio-198, ¶40, this provision is so "broad and general [in its] nature" that "it does not bind the parties to any specific obligation." With such lack of specificity, it is difficult for Boatwright to say that, by agreeing to this provision, Appellee American Steel City Industrial Leasing, Inc. and Boatwright's employer, Penn-Ohio Logistics, intended to benefit him. While he may benefit from it, the "mere

conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract [is] insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary.” *Hill v. Sonitrol of Southwestern Ohio*, 36 Ohio St.3d 36, 40 (1988), quoting *Norfolk & W. Co. v. United States*, 641 F.2d 1201, 1208 (6th Cir. 1980). That Boatwright, like anyone else entering the building, may benefit by ASC following the law only makes him an incidental beneficiary of the contract with no rights of enforcement thereunder. He is trying to incorporate contract principles into tort liability.

As the *Currier* court noted (and the court below cited with approval), there is a difference between holding a landlord liable for a breach of a provision under which the landlord undertakes a specific obligation and holding the landlord liable in negligence for the breach of a provision to comply with all laws affecting the leased premises. To adopt Boatwright’s position would open the floodgates to tort liability for commercial landlords who, in a contract, merely agreed to comply with the law.

This Court has also held that the violation of an OSHA regulation does not constitute negligence per se because OSHA regulations are not intended to affect duties owed for the safety and protection of others. *Hernandez v. Martin Chevrolet, Inc.*, 72 Ohio St.3d 302, syllabus (1995). At best, this violation would be evidence of negligence. But, as discussed below, Boatwright’s negligence claim against ASC falls short on the other elements, so adding this additional piece of “evidence of negligence” would not change the outcome.

In the end, the landlord-out-of-possession rule exonerates ASC from any liability for damages resulting from the condition of the premises even in cases where the landlord agreed to make repairs.” *Hendrix v. Eighth and Walnut Corp.*, 1 Ohio St.3d 205, 207 (1982). See *Currier* at ¶43 (holding that, even if ASC had agreed to comply with the specific OSHA regulations cited

by Boatwright, as a landlord out of possession and control, ASC would not be liable for damages resulting from the leased premises' condition).

Boatwright also asserts that this case is an opportunity to “clarify and declare [] whether a condition on a premise constitutes a defects depends upon the intended and expected use of the premises.” But the overriding principles that control this case have been clear for over a century. In 1877, this Court held that a commercial lessor out of possession or control of the leased premises is not liable for injuries arising from a defective condition of the premises that arises during the lease term. *Shindelbeck v. Moon*, 32 Ohio St. 264 (1877), paragraph one of the syllabus. To hold the lessor responsible, the injured party must do more than allege that the lessor owned the property. *Id.*, paragraph three of the syllabus. *See also Hendrix v. Eighth and Walnut Corp.*, 1 Ohio St.3d 205, 207 (1982). Later cases have held that a commercial lessor is not liable for injuries to a third party unless the lessor had control of the premises and substantially exercised that right and power. *Simpson v. Big Bear Stores Co.*, 73 Ohio St.3d 130, 132 (1995).

The Seventh Appellate District below and the Eleventh Appellate District in *Currier* have uniformly held that ASC is not liable for an injury to its commercial tenant's employees while they were working at the leased premises, a warehouse now used for storing steel. That is not earth-shattering and, given the long-established caselaw, is to be expected. The court below did not err in applying these standards to the facts of this case. And, in fact, the facts do not support the proposed propositions of law.

To accept Boatwright's proposition would neuter the concept of caveat emptor in commercial lease situations, such as that between ASC and Penn-Ohio. *See Currier* at ¶16. It is the commercial lessee who has the duty to make the premises suitable for the purposes intended.

*Burdick v. Cheadle*, 26 Ohio St. 393, 397 (1875). The lessor has no duty to inspect the premises for latent defects. *Marshman v. Stanley*, 68 Ohio Law Abs. 417, 421 (1952). Boatwright's employer took the premises as it found them, with all existing defects of which it knew or could ascertain by reasonable inspection. See *Davis v. Eastwood Mall, Inc.*, 11th Dist. No. 90-T-4384, 1990 Ohio App. LEXIS 5541, at \*5-\*6 (Dec. 14, 1990).

Whether something is dangerous or not is best left to the lessee to decide. If a tenant has a question about whether the leased space would be appropriate for the proposed use for it, then it is incumbent on the tenant to ask. To hold otherwise would impose a significant burden on lessors to investigate the activities of potential commercial tenants. It would also run contrary to this Court's rejection of the proposition "that the landlord is now liable if he does not discover and disclose defects which he might have discovered by active investigation." *Shinkle*, 68 Ohio St. at 334.

This case is a good example. The basic point of Boatwright's case is that ASC and Marsteller knew that his employer was going to be stacking steel starting in one spot and would be moving toward the part of the floor that was over an area that did not have ground support. Because the initial condition of the premises was not defective but, according to Boatwright became so when Penn-Ohio starting stacking steel in this area, under his proposed proposition of law, commercial landlords would have a duty to periodically check their tenant's operations to see what was going on and to decide whether they needed to tell their tenants anything more. This ignores the doctrine of caveat emptor and the maxim that landlords are not responsible for defects in the premises that arise after the lease.<sup>1</sup> *Shindelbeck*, 32 Ohio St. 264, 275 (1877). It also shifts the burden of finding appropriate lease space from the tenant to the landlord, obviating

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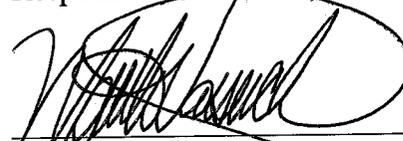
<sup>1</sup> In this case, the floor collapsed because of what Penn-Ohio was doing on it and not because of what was happening on or what existed below it.

the general rule that commercial tenants lease at their peril. It is the tenants who are in the best position to decide what spaces best suit their needs.

Even if this Court was inclined to agree with Boatwright, the facts in this case do not warrant such an extension of the law. Regardless of what ASC or Marsteller knew about the specific details of the kind of steel Penn-Ohio was going to store, such as its weight, it was Penn-Ohio's responsibility *to Boatwright* to make the final call. Boatwright's expert even opined that "the floor capacity should have been verified by a Professional Structural Engineer prior to stacking of any steel bundles on this elevated slab." There is no evidence that Penn-Ohio did so. Boatwright never explains why ASC or Marsteller should have had to do this when the law of commercial leases does not require that. He ignores this "buyer beware" relationship and the high burden that the law imposes on him to show before it will hold ASC liable.

For the aforementioned reasons, this Court should not decline Boatwright's invitation to reconsider its previous denial of jurisdiction.

Respectfully submitted,



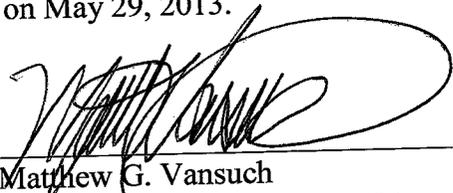
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**CERTIFICATE OF SERVICE**

I certify that a copy of this *Response to Motion for Reconsideration* was sent by ordinary U.S. mail to the counsel identified on the cover page on May 29, 2013.



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