

[Cite as *Target Industries v. Stubbs*, 2011-Ohio-1563.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 95101

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**TARGET INDUSTRIES**

PLAINTIFF-APPELLANT

vs.

**PAUL STUBBS, FIRE CHIEF**

DEFENDANT-APPELLEE

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**JUDGMENT:  
REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-712178

**BEFORE:** Jones, J., Kilbane, A.J., and Rocco, J.

**RELEASED AND JOURNALIZED:** March 31, 2011

## **ATTORNEYS FOR APPELLANT**

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LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, Target Industries, appeals the trial court's judgment finding the decision of the Ohio Board of Building Appeals was supported by reliable, probative, and substantial evidence and, thus, denying Target's appeal. We reverse and remand.

I. Procedural History and Facts

{¶ 2} Target filed this administrative appeal with the court of common pleas in January 2010. It argued that the Board of Building Appeals erred in finding Target was a “responsible party” under R.C. 3737.01(F) and upholding civil penalties against it for violations of the Ohio Fire Code. The trial court considered the matter on the record of proceedings from the Board and the briefs of the parties, and issued the judgment from which Target now appeals.

{¶ 3} The record demonstrates the following facts. Target was the owner-lessor of a Merwin Avenue, Cleveland, Ohio piece of property. Under a verbal agreement, starting in 2000, Target leased the property to Spotlight Entertainment, which operated a nightclub at the property.

{¶ 4} In July 2009, the city of Cleveland fire inspector did a routine inspection of the property and found it to be in violation of several provisions of the Ohio Fire Code. The inspector issued a citation to both Target and Spotlight.<sup>1</sup>

{¶ 5} At the administrative hearing, Target’s president, Lewis Zipkin, testified that the understanding between Target and Spotlight was that the lease was a “triple net lease. [ ] [T]he tenant rents the space as is \* \* \* and they \* \* \* must comply with City Code and State Code,

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<sup>1</sup>The record demonstrates that fire code violations were also found on the property in 2007. Target was made aware of the violations and contacted the city, stating that it believed the violations were being corrected by the tenant, but if they were not, it would become involved. The city, however, worked solely with the tenant to correct the violations. During the course of their work, the city and the tenant created a plan for abatement of the violations, which included educational training for the nightclub’s employees on fire safety.

all governmental regulations [are] their responsibility.”<sup>2</sup>

{¶ 6} During the administrative hearing, one of the Board members inquired “how do we get at the tenant and not at the owner?” The only response by the city to that question was made by the city’s counsel, who stated, “we must cite the owner, who is ultimately responsible.

When people die in a fire, he will be sued. He is ultimately responsible as well as the people in direct control.”

{¶ 7} In deciding the appeal, the Board members expressed their concern about the serious nature of the violations and referred to recent tragedies in nightclub fires. The only explanation of why the Board was upholding the citation and fines against Target came from one Board member, who stated to Zipkin, “I am disappointed that you didn’t take more action in 2007 when you had similar violations in your building. And I’m somewhat surprised at, [you’re] obviously a very successful business person, that you’ve gone the length that you have without a [written] lease for the tenant in this building, particularly after 2007, to make the tenant aware of their responsibility. \* \* \* So as much as I respect your business acumen, and I think you took action appropriately, \* \* \* my vote, quite frankly, is to uphold all of the fines. Because to the extent we don’t uphold one, we’re valuing these things that deal with life safety.”

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<sup>2</sup>Zipkin testified that, since the inception of the landlord-tenant relationship between Target and Spotlight in 2000, the parties never entered into a written lease agreement because Spotlight had been an “ideal tenant in that any time there’s ever been an issue [a Spotlight representative] resolved it.”

**{¶ 8}** The tenant did not appeal the citation or fines to the Board, and no representative of Spotlight testified before the Board. Thus, the only evidence in the record about the responsibilities of the parties was from Zipkin, Target’s president, who testified that Spotlight had the responsibility for the maintenance of the property, including complying with all city codes, state codes, and governmental regulations, and that in the nine years that Target rented to Spotlight, Spotlight fulfilled its responsibilities.

**{¶ 9}** Target has assigned the following three assignments of error for our review:

**{¶ 10}** “[I.] The trial court abused its discretion in holding that it was reasonable to issue a Fire Code citation against a landlord out of possession of the premises.

**{¶ 11}** “[II.] The trial court abused its discretion in holding that the citation was issued in accordance with the law when the landlord is not the proper responsible person as the evidence shows that the tenant is the proper responsible person under R.C. 3737.01.

**{¶ 12}** “[III.] The trial court abused its discretion in holding the amount of the civil penalties was proper specifically that the penalties to be supported by reliable, probative and substantial evidence and in accordance with the law, when the evidence shows that the violations were corrected immediately and the history of the violations being corrected without input from the landlord.”

## II. Law and Analysis

### A. Standard of Review

**{¶ 13}** Target brought this appeal under R.C. 119.12. Under that statute, when a

common pleas court reviews an order of an administrative agency, it must consider the entire record to determine whether the agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-111, 407 N.E.2d 1265; see, also, *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280, 131 N.E.2d 390; *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, 589 N.E.2d 1303 (defining reliable, probative, and substantial evidence).

**{¶ 14}** The common pleas court's "review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.'" *Lies v. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, 441 N.E.2d 584, quoting *Andrews* at 280. In its review, the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but the findings of the agency are not conclusive. *Conrad* at 111.

**{¶ 15}** An appellate court's review of an administrative decision is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 1993-Ohio-122, 614 N.E.2d 748. In *Pons*, the Supreme Court of Ohio explained:

**{¶ 16}** "While it is incumbent on the trial court to examine the evidence, this is not a function of the appellate court. The appellate court is to determine only if the trial court has abused its discretion, i.e., being not merely an error of judgment, but perversity of will, passion,

prejudice, partiality, or moral delinquency. Absent an abuse of discretion on the part of the trial court, a court of appeals may not substitute its judgment for [that of an administrative agency] or a trial court. Instead, the appellate court must affirm the trial court’s judgment.”  
Id. at 621.

{¶ 17} An appellate court does, however, have plenary review of questions of law. *Chirila v. Ohio State Chiropractic Bd.* (2001), 145 Ohio App.3d 589, 592, 763 N.E.2d 1192, citing *Steinfels v. Ohio Dept. of Commerce* (1998), 129 Ohio App.3d 800, 803, 719 N.E.2d 76.

#### B. Issues Appealed

{¶ 18} At the trial court level, Target contended, as it does here, that it was a landlord “out of possession of the premises” and was not the proper “responsible person” under R.C. 3737.01. The city contends that these issues were not properly before the trial court and, therefore, not properly before this court, because Target only appealed to the Board the imposition of penalties, not the merits of the citation itself. We disagree.

{¶ 19} The record before the hearing at the Board establishes that at issue were both the citation itself and the penalties. In particular, Target’s counsel stated that “[w]hat we’re here today about is the fact that the owner and the tenant were both cited for this.” Counsel for city stated to the Board that “I think it was important for us to be able to give the information to the Board to show that it was appropriate for us to issue the citation as is and ask for penalties as is.” Moreover, the Board’s order stated that Target “appealed the citation[,]” and found that “[b]ased upon the evidence submitted and testimony, the Board upholds the citation.

Also, as the citation states the civil penalties [they] are upheld.”

{¶ 20} On this record, the Board considered both the imposition of the citation and penalties against Target, and the issue was properly before the trial court and is now properly before this court.

### C. Citation against Target

{¶ 21} In its first assignment of error, Target contends that it should not have been cited because it was a landlord “out of possession of the premises.” In its second assignment of error, Target contends that it was not the responsible party under R.C. 3737.01.

{¶ 22} Target cites *Hendrix v. Eighth & Walnut Corp.* (1982), 1 Ohio St.3d 205, 438 N.E.2d 1149, in support of its contention that liability should not attach to it. In *Hendrix*, the Supreme Court of Ohio held:

{¶ 23} “[T]he commercial lessor’s liability is governed by traditional common law principles. Under the common law, one having neither possession nor control of premises is ordinarily not liable for damages resulting from the condition of the premises. The lessor who does not retain the right to admit or exclude others from the premises has generally not reserved the degree of possession or control necessary to impose liability for the condition of the premises.” (Citations omitted.) *Id.* at 207.

{¶ 24} The Court reaffirmed this principle in *Simpson v. Big Bear Stores Co.* (1995), 73 Ohio St.3d 130, 652 N.E.2d 702, in which it held:

{¶ 25} “It is fundamental that to have a duty to keep premises safe for others one must

be in possession and control of the premises. \* \* \* The test to be applied in determining control has been expressed as ‘the power and right to admit people to the premises and to exclude people from it, and involves a substantial exercise of that right and power.’” (Citation omitted.) *Id.* at 132, quoting *Wills v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118.

{¶ 26} In *Davis v. Eastwood Mall, Inc.* (Dec.14, 1990), Trumbull App. No. 90-T-4384, the Eleventh Appellate District held: “In a commercial setting, the lessee is in [a] position to bargain with the lessor and the terms in a commercial lease are left to the parties to negotiate between themselves. Thus, the relationship between the commercial lessor and lessee is not regulated by any statutory regulation such as the Ohio Landlord-Tenant Act. Instead, the commercial tenant takes the premises as he finds them with all existing defects of which he knows or can ascertain by reasonable inspection.”<sup>3</sup>

{¶ 27} Under R.C. 3737.42, “the fire marshal, assistant fire marshal, or certified safety inspector shall, with reasonable promptness, issue a citation to the responsible person.” “Responsible person” is defined as “the person responsible for compliance with the state fire code, including, but not limited to, the owner, lessee, agent, operator, or occupant of a building,

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<sup>3</sup>See, also, this court’s decision in *Sabitov v. Graines*, 177 Ohio App.3d 451, 2008-Ohio-3795, 849 N.E.2d 1310, ¶50, finding no landlord-owner liability for an alleged wrongful death where the tenant leased the premises in an “as is condition” and assumed the responsibility for complying with all governmental laws and regulations; *Monahan v. Duke Realty Corp.*, Hamilton App. No. C-070318, 2008-Ohio-1113, ¶24 (“there is no common-law duty imposed on a commercial landlord to inspect premises that are out of the landlord’s possession and control.”)

premises, or vehicle.” R.C. 3737.01(F).

{¶ 28} Zipkin, Target’s president, testified that the agreement between Target and the lessee was a “triple net lease. [ ] [T]he tenant rents the space as is \* \* \* and they \* \* \* must comply with City Code and State Code, all governmental regulations [are] their responsibility.”

Zipkin explained that the reason the agreement was never reduced to writing was because Spotlight was an “ideal” tenant, promptly handling issues as they arose. In fact, the record demonstrates that when the 2007 citation was issued, the matter was resolved without intervention from Target.

{¶ 29} The city cites Zipkin’s testimony that he was aware of the citations (after they were issued) and the serious nature of the violations as reliable, probative, and substantial evidence to support the Board’s decision. But Zipkin never denied the violations or that they were serious. Rather, he contended that he was not involved in the maintenance of the property because, per his agreement with the lessee, maintenance, as well as remedying violations of city, state, or other governmental regulations, was the lessee’s responsibility, and in the past (2007), the lessee had fulfilled its responsibility.

{¶ 30} The city also contends that the cases Target relies on in support of its contention that it cannot be cited for the violations are distinguishable from this case because they are personal injury cases. That argument is not persuasive, however, in light of the Ohio Supreme Court’s ruling in another “public safety” case, where no specific injury had occurred. In particular, in *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Public Utilities* (1972), 31

Ohio St.2d 81, 285 N.E.2d 371, the Ohio Supreme Court considered an order from the Public Utilities Commission to a railroad company in an attempt to remedy a rodent, maggot, and “undue dust” problem. The Court held that, because the railroad company was an “owner out of control of the premises” and it did not conduct any activities that were the cause of the problem, the order was unreasonable and unlawful. Id. at 85.

{¶ 31} Thus, the law governing landlord liability in commercial leases is not limited to personal injury cases, and is that a landlord who is out of possession and control of a premises is generally not liable for damages or violations resulting from the condition of the premises. The record here demonstrates that the landlord, Target, was out of possession and control of the premises; no evidence was presented to refute that.

{¶ 32} In imposing liability on Target, the Board relied on the seriousness of the violations and recent tragedies in other nightclub fires. The Board made no finding that Target was an owner in possession of the premises, and the evidence would not have supported such a finding. Thus, the Board abused its discretion in upholding the citation and the trial court abused its discretion in upholding the Board’s decision.

{¶ 33} In light of the above, the first and second assignments of error are sustained.

#### D. Fines

{¶ 34} In its third assignment of error, Target contends that the trial court abused its discretion in upholding the amount of fines assessed against Target. Because we find that Target should not have been charged with the violations, we necessarily find that it should not

have been assessed penalties. Accordingly, the third assignment of error is sustained.

### III. Conclusion

{¶ 35} The trial court abused its discretion in upholding the Board's decision because the Board's decision was not supported by reliable, probative, and substantial evidence and was not in accordance with law. The trial court's judgment is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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LARRY A. JONES, JUDGE

KENNETH A. ROCCO, J., CONCURS;

MARY EILEEN KILBANE, A.J., DISSENTS  
WITH SEPARATE OPINION

MARY EILEEN KILBANE, A.J., DISSENTING:

{¶ 36} I respectfully dissent from the majority opinion and would affirm the trial court’s judgment finding that the Board’s decision was supported by reliable, probative, and substantial evidence.

{¶ 37} I would find that Target cannot argue that it is not the “responsible person” because it failed to raise this issue to the Board. “Generally, a party waives the right to appeal an issue that could have been but was not raised in earlier proceedings. This principle has been applied in appeals from administrative agencies.” (Citations omitted.) *MacConnell v. Ohio Dept. of Commerce*, Franklin App. No. 04AP-433, 2005-Ohio-1960, ¶121.

{¶ 38} In the instant case, Target listed “[a]ll civil penalties imposed” as the items it appealed to the Board. Target sought an abatement of fines because “there was no chance [for it] to correct these violations before the citation was issued[.]” At no time, did Target assert that it was appealing the merits of the violations or that it should not be the cited “responsible party.” As a result, I would find that Target waived these issues on appeal.

{¶ 39} Moreover, if I were to consider the merits of Target’s claim, I would find that the citation was properly issued to it as the titled owner of the property. The majority relies on personal injury cases and concludes that “a landlord who is out of possession and control of a premises is generally not liable for damages or violations resulting from the condition of the

premises.” However, these cases are distinguishable as they do not contemplate the statutory requirements mandating compliance with the Ohio Fire Code. The purpose and intent of the Ohio Fire Code is to provide life safety and property protection from fire hazards.

{¶ 40} Ohio Fire Code Section 109.1.1 provides that “[i]f upon inspection or investigation, the fire marshal, an assistant fire marshal, or a certified fire safety inspector believes that the state fire code has been violated, the fire marshal, an assistant fire marshal, or a certified fire safety inspector shall issue a citation to the responsible person in accordance with [R.C. 3737.42.]” (Emphasis added.)

{¶ 41} R.C. 3737.42(A) provides that *the fire marshal, an assistant fire marshal, or a fire safety inspector has the authority to issue a citation to the responsible person for a fire code violation.* (Emphasis added.) R.C. 3737.01(F) defines “responsible person” as “the person responsible for compliance with the state fire code, including, but not limited to, the owner, lessee, agent, operator, or occupant of a building [or ] premises[.]”

{¶ 42} Words used in a statute must be taken in their usual, normal, or customary meaning. R.C. 1.42; *Indep. Ins. Agents of Ohio, Inc. v. Fabe* (1992), 63 Ohio St.3d 310, 314, 587 N.E.2d 814. Here, the clear language of the fire code and statute provide that the **fire marshal, an assistant fire marshal, or a certified fire safety inspector** has the discretion to issue a citation to the responsible person. As the owner of the premises, Target is a “responsible person” and must comply with the fire code.

{¶ 43} Moreover, it would be against public policy to find that Target is not a “responsible person.” The record indicates that there is no written lease between Target and Spotlight indicating who is responsible for correcting code violations on the property. In 2007 and 2009, Target and Spotlight were both cited for fire code violations. With regard to the 2007 violations, Zipkin advised the fire department that Spotlight was correcting the violations and “if there is a problem, I will take a more active role in making sure the violations are corrected.” With regard to the 2009 violations, Zipkin admitted that these violations existed, and Zipkin’s counsel stated that Zipkin took an active role in resolving these violations. In both instances, Target was aware and actively involved with the violations.

{¶ 44} Thus, I would find that the trial court did not abuse its discretion when it affirmed the Board’s decision.

{¶ 45} Accordingly, I would affirm the trial court’s judgment.