IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

ALVIN D. JACKSON, M.D.,

Plaintiff,

vs. : Case No. 09CVH08-12197

BARTEC, INC., et al., : Judge Cain

Defendants. :

DECISION AND ENTRY DENYING PLAINTIFF'S REQUEST FOR PERMANENT INJUNCTION

DECISION AND ENTRY VACATING JUDGMENTS AGAINST DEFENDANTS

Rendered this 17th day of February 2010.

CAIN, J.

This matter was originally filed by Plaintiff, the Ohio Department of Health (hereinafter the "Department of Health"), to obtain a permanent injunction against Defendants prohibiting them from violating the Ohio SmokeFree Workplace Act (hereinafter the "SmokeFree Act"). Defendants own and operate a bar located in the Victorian Village area known as Zeno's. Defendants have been cited ten times for violating the SmokeFree Act since it took effect on May 3, 2007. In response to the Department of Health's request for a permanent injunction, Defendants filed Counterclaims asking the Court to declare the citations against them invalid and to declare the SmokeFree Act unconstitutional as applied to Defendants. Upon request of Defendants, the Court consolidated all of the claims in this matter into one bench trial held on November 23, 2009. The Court allowed the parties to file post-trial briefs, which they have now done. Pursuant to this trial, the briefs of the

parties, and the evidence, the Court is now ready to render its decision as to the Department of Health's original claims and as to Defendants' Counterclaims.

This is the fourth major case that has come before this Court concerning the SmokeFree Act. The first was a challenge to the validity of signatures on petitions that sought to place the SmokeFree Act on the ballet. The second was a challenge to the regulations that were made pursuant to the SmokeFree Act. The third was an administrative appeal that resulted in the Pour House decision cited heavily by Defendants in support of their arguments. And now this case comes along, and with it a legal situation that the Court is all too familiar with. As will be seen below, this case was decided long before it was ever filed.

The Court is not going to make an elaborate recitation of the facts of this case or the testimony elicited at trial. Suffice it to say that most of the facts and testimony are irrelevant to the Court's ultimate decision. The Court will instead make a short statement of the facts that are pertinent to its decision. At trial the following facts were brought forward: (1) The Department of Health has in the past implemented a policy of strict liability for violations of the SmokeFree Act in regards to property owners such as Defendants; (2) In the case of Defendants, the Department of Health implemented this policy and cited Defendants for violations of the SmokeFree Act without regard to whether Defendants were actually permitting smoking to occur on the premises of Zeno's; (3) If a complaint was filed and the Department of Health found someone smoking at Zeno's, Defendant's were fined; (4) The Department of Health has never once fined an individual for smoking in a public place; and (5) Defendants posted "no smoking" signs in Zeno's, removed all

ashtrays from Zeno's, and would regularly ask patrons who were smoking on the premises to put out their cigarette or take it outside. With all of the testimony given at trial it may seem odd that these are the only important facts, but this is just how it is sometimes.

Before the Court goes into the meat of its decision in this matter, it needs to address two gateway issues. The first is Defendants' request to have the SmokeFree Act declared unconstitutional as applied to them. It is traditional for Courts in Ohio to avoid questions of constitutionality when a matter can be resolved on other grounds. In this case other grounds exist. As will be seen below, it is the Court's opinion that the citations issued to Defendants were invalid at their inception and therefore, are unenforceable. Since this is so, there is no need to address the constitutionality of the SmokeFree Act.

This brings the Court to the second gateway issue. The Department of Health argues that Defendants cannot challenge the citations levied against them because Defendants never appealed such citations via R.C. 119.12. The Court does not agree with this stance. Again, as will be seen below, the Court feels that the citations issued to Defendants were invalid at there inception and are unenforceable. Since this is so, the citations issued to Defendants are void *ab initio*. As such, whether Defendants appealed the citations or whether they exhausted their administrative remedies is a non-issue. With these two issues decided, the Court can move on with its decision.

This case is all about authority; an issue that is not unfamiliar to the Court. In fact, the Court has addressed the issue of authority in regards to the SmokeFree

Act in the past. In the case of Ohio Licensed Beverage Association v. Ohio Department of Health, Case# 07CVH04-5103, this very Court dealt with the Ohio Department of Health's authority to change the definition of the word "employee" as found in the SmokeFree Act. The Court ruled that the Department of Health's interpretation of the word "employee" exceeded the authority given to it by the SmokeFree Act. This case is very similar, except the Court is not addressing the interpretation of a single word. Instead, the Court is addressing an entire enforcement policy. The question for the Court is: Does the implementation of a policy of strict liability as to property owners exceed the authority given to the Department of Health by the SmokeFree Act, most particularly R.C. 3794.02? It is the opinion of the Court that the only possible answer to this question is "Yes".

It is helpful to begin with a basic review of what the SmokeFree Act actually says. The pertinent part of the SmokeFree Act is R.C. 3794.02, which states:

> Smoking prohibitions
>
> (A) No proprietor of a public place or place of employment, except as permitted in section 3794.03 of this chapter, shall permit smoking in the public place or place of employment or in the areas directly or indirectly under the control of the proprietor immediately adjacent to locations of ingress or egress to the public place or place of employment.
>
> (B) A proprietor of a public place or place of employment shall ensure that tobacco smoke does not enter any area in which smoking is prohibited under this chapter through entrances, windows, ventilation systems, or other means.
>
> (C) No person or employer shall discharge, refuse to hire, or in any manner retaliate against an individual for exercising any right, including reporting a violation, or performing any obligation under this chapter.
>
> (D) No person shall refuse to immediately discontinue smoking in a

> public place, place of employment, or establishment, facility or outdoor area declared nonsmoking under section 3794.05 of this chapter when requested to do so by the proprietor or any employee of an employer of the public place, place of employment or establishment, facility or outdoor area.
>
> (E) Lack of intent to violate a provision of this chapter shall not be a defense to a violation.

In interpreting statutory enactments, administrative agencies, such as the Department of Health, are subject to restrictions. The law in this area is clear.

> It is well settled that an administrative agency has only such regulatory power as is delegated to it by the General Assembly. Authority that is conferred by the General Assembly cannot be extended by the administrative agency." *D.A.B.E.*,96 Ohio St. 3d at 259. Administrative rules may not formulate public policy, but rather are limited to developing and administering policy already established by the General Assembly. Id. "Implied power is only incidental or ancillary to an express power, and, if there be no express grant, it follows, as a matter of course, that there can be no implied grant." Id., quoting *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47, 117 N.E. 6. "An administrative agency may not legislate by enacting rules which are in excess of legislative policy, or which conflict with the enabling statute." *Taber v. Ohio Dep't of Human Servs.* (1998), 125 Ohio App. 3d 742, 750, 709 N.E.2d 574, quoting *P.H. English v. Koster* (1980), 61 Ohio St.2d 17, 19, 399 N.E.2d 72.

Pacella v. Ohio Dept. of Commerce, Div. Of Real Estate (Franklin, 2003), 2003-Ohio-3432, ¶27. "An administrative rule is not inconsistent with a statute unless the rule contravenes or is in derogation of some express provision of the statute." McAninch v. Crumbley (1981), 65 Ohio St. 2d 31, 34. "It is well established, however, that administrative rules, in general, may not add to or *subtract from* ... the legislative enactment." Central Ohio Joint Vocational School Dist. Bd. of Edu. v. Admr., Ohio Bureau of Employment Serv. (1986), 21 Ohio St. 3d 5, 10. "[A] rule is invalid where it clearly is in conflict with any statutory provision." Id. "An

administrative rule that would preclude the use of a statute must yield to the statute." DLZ Corp. v. Ohio Dept. of Admin. Servs. (Franklin, 1995), 102 Ohio App. 3d 777, 781. While the above case law speaks in terms of written administrative rules, it applies with equal force to situations were there is a department wide policy, even though that policy is not formally written down.

The question now becomes: Does the Department of Health's policy of strict liability add to or subtract from the statute it was made pursuant to, *i.e.* R.C. 3794.02? Recently, the Ohio Tenth District Court of Appeals gave some guidance as to when a property owner is in violation of the SmokeFree Act. In Pour House, Inc. v. Ohio Dep't of Health (Franklin, 2009), 2009 Ohio 5475, the Tenth District held:

> We reach the same conclusion in interpreting R.C. 3794.02(A). A proprietor violates R.C. 3794.02(A) only when the proprietor permits smoking. A proprietor permits smoking when the proprietor affirmatively allows smoking or implicitly allows smoking by failing to take reasonable measures to prevent patrons from smoking--such as by posting no smoking signs and notifying patrons who attempt to smoke that smoking is not permitted. *Traditions Tavern.*
>
> R.C. 3794.02(A) is a strict liability statute, but there is no liability unless there has been conduct that violates the statute. Strict liability addresses the mens rea element of a violation, not the conduct itself. *State v. Ferguson*, 10th Dist. No. 07AP-999, 2008 Ohio 6677, P 73; *State v. Squires* (1996), 108 Ohio App.3d 716, 718, 671 N.E.2d 627 (strict liability offense not concerned with actor's purpose, only conduct); *State v. Acevedo* (May 24, 1989), 9th Dist. No. 88CA004423, 1989 Ohio App. LEXIS 1888 (concept of strict liability founded on premise that the mere doing of the act constitutes the offense). Therefore, regardless of the proprietor's intent, a proprietor would be strictly liable under R.C. 3794.02(A) if the proprietor affirmatively allows smoking or implicitly allows smoking by failing to take reasonable measures to prevent it, such as posting no smoking signs and notifying patrons who attempt to smoke that smoking is not permitted. Without evidence that the proprietor permitted smoking, there is no basis for finding the

> proprietor violated the statute. Unless there is violative conduct, the strict liability nature of the statute is irrelevant.
>
> Appellee argues on appeal that R.C. 3794.02(A) contemplates a burden shifting analysis. Appellee contends that once it proves that smoking has occurred, the burden shifts to the proprietor to prove it did not permit smoking--much like an affirmative defense. We disagree. Appellee must prove each of the elements of a smoking violation. Ohio Adm.Code 3701-52-08(E) (requiring findings of smoking violations to be supported by preponderance of the evidence). Permitting smoking is an element of the smoking violation, not an affirmative defense.

Id. at ¶¶18-20. This decision clearly shows that a policy of strict liability for the mere act of an individual smoking on the premises is not supported by the wording of R.C. 3794.02. This Court agrees with the Tenth District's interpretation of R.C. 3794.02 and feels that it has direct application to this case.

In implementing a policy of strict liability, the Department of Health primarily relied upon R.C. 3794.02(E), which states: "Lack of intent to violate a provision of this chapter shall not be a defense to a violation." As stated in the Pour House decision, R.C. 3794.02(E) only goes to the issue of *mens rea* and does not dictate when a violation of the SmokeFree act has occurred. All R.C. 3794.02(E) is saying is that if there is a violation, then it does not matter whether such violation was an intended violation or whether it was an accident. Interpreting this section to make the mere presence of a lighted cigarette on the premises a violation of the SmokeFree Act exceeds the authority given to the Department of Health by R.C. 3794.02.

This conclusion can better be seen by looking at R.C. 3794.02(A). The SmokeFree Act states that: "No proprietor of a public place or place of employment... shall permit smoking in the public place ". As noted in Pour

House, the word "permit" entails more then just there being a lighted cigarette on the premises. In the testimony adduced at trial, it was made clear to the Court that in regards to Defendants the Department of Health never made an inquiry as to whether Defendants were permitting smoking at Zeno's. The Department of Health's agents instead saw smoking on the premises and cited Defendants. This policy of enforcement is stricter then the one authorized by R.C. 3794.02(A). By not inquiring as to whether Defendants actually permitted smoking at Zeno's, the Department of Health added to the number of situations when it was authorized to issue citations. The Department further subtracted from Defendants' rights under R.C. 3794.02. The Ohio Department of Health exceeded the authority given to it by R.C. 3794.02 by implementing a policy of strict liability and as such, the citations levied against Defendants pursuant to that policy are invalid.

Furthermore, when R.C. 3794.02(A) is read in conjunction with R.C. 3794.02(D), a limit to a property owner's liability can be seen. R.C. 3794.02(D) states, "No person shall refuse to immediately discontinue smoking in a public place, place of employment, or establishment, facility or outdoor area declared nonsmoking under section 3794.05 of this chapter when requested to do so by the proprietor..." This section shows that in an establishment whose policy is to not permit smoking; when an individual is asked to stop smoking but refuses, liability is transferred from the property owner to the individual. Asking a person to put out a cigarette or leave discharges the property owner's duty under the SmokeFree Act. As noted earlier, the Department of Health has never once cited

an individual for violation of R.C. 3794.02(D). This further demonstrates that the Department of Health's policy of strict liability against property owners exceeds the authority granted to it by R.C. 3794.02.

The Court would like to explain this decision under a simpler non-legal rational. The Ohio Department of Health has implemented a policy placing the burden of enforcing the SmokeFree Act against individuals on private property owners such as Defendants. One just has to look at the present situation to see this. A complaint is filed against Defendants because someone is smoking at Zeno's. An inspector goes out, sees someone smoking, and cites Defendants. The inspector does not care that "no smoking" signs are present or that no ashtrays are out. He/she does not care whether or not Defendants have asked the party smoking put it out or to take it outside. The inspector does not cite the individual smoking. Basically, the Defendants are being held liable for the decisions of a third-party that are out of Defendants' control. This is offensive to basic notions of justice and fair play.

The Court will give an example that helps to illustrate this point better. As many people know, public drunkenness is illegal. Let's say that an individual gets drunk and comes to this very courthouse. The courthouse in which this Court sits is owned by Franklin County. The individual in question decides that he is going to get a little rowdy and starts making trouble in a very sloppy fashion. He is promptly arrested. What happens? The individual is charged with public drunkenness. Franklin County is not fined because there is a drunk inside one of

its buildings. This is because Franklin County had no control over the actions of the drunk, it was just a place were the drunk went.

The Court will give another example that directly applies to the SmokeFree Act. This courthouse has a policy of no smoking on the premises. This policy was in effect long before the passage of the SmokeFree Act. There are numerous "no smoking" signs posted all over the courthouse. However, anyone who walks up or down the stairways will sometimes notice cigarette butts on the landings and the faint smell of cigarette smoke. Under the policy implanted by the Department of Health, it would cite Franklin County for violation of the SmokeFree Act. Is the County to have someone constantly walking up and down the steps making sure no one is smoking? Of course not! Requiring such a thing would be absurd. Though taking the Department of Health's strict liability policy to its logical limits would dictate that Franklin County must hire such a person. Not only does this show that the Department of Health's policy exceeds the authority given to it by the SmokeFree Act, it shows that it is completely unreasonable.

This all comes down to the fact that property owners can only do so much, especially in regards to third-parties. They can put up "no smoking" signs. They can take away ashtrays. They can ask patrons that are smoking to leave. Outside of these things, there is little property owners can do. Would the Department of Health require property owners to pat down visitors for cigarettes before they are allowed to enter? Would it have property owners remove people

via force from the premises at risk of personal injury?[1] Placing the onerous of enforcing the SmokeFree Act against individuals completely on property owners is ludicrous and defies basic notions of fairness.

The Court is aware of what the Department of Health will argue in response to this. It will argue that parties like Defendants are subject to numerous regulations, such as food and alcohol regulations, which they need to follow in order to operate. It would argue that the SmokeFree Act is no different. Contrary to the Department of Health's belief, the SmokeFree Act is very different. Property owners can determine who they give alcohol to on their premises; they can control how food it prepared. Property owners, however, have no control over whether someone rips out a cigarette and lights up. Again, the Department of Health's interpretation of the SmokeFree Act makes property owners liable for the actions of third parties upon which the property owner has little to no control.

In summation, the Court's ruling is as follows. Sufficient evidence has been presented to the Court to show that the Department of Health implemented a policy of strict liability against property owners for violations of the SmokeFree Act. If someone was smoking on the premises, the property owner was cited. The evidence shows that Defendants were cited pursuant to this policy and that there were never inquires made as to whether Defendants were actually "permitting" smoking to occur at Zeno's. The Department of Health's policy of strict liability was stricter then allowed by R.C. 3794.02. Since this is so, the

[1] This would hardly go along with the SmokeFree Act's stated purpose of creating a safer and more healthy work environment.

Department of Health exceeded its authority in implementing its strict liability policy. As such, the citations issued to Defendants via this policy are invalid and must be vacated. Since this matter has been resolved pursuant to these grounds, there is no need for the Court to address Defendants' constitutional challenge to the SmokeFree Act.

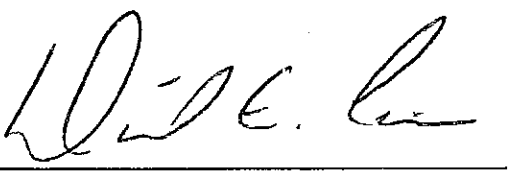
After review and consideration, the Court hereby rules as follows:

Plaintiff's request for a permanent injunction against Defendants is not well-taken, and is hereby DENIED.

The ten citations issued against Defendants for violations of the Ohio SmokeFree Workplace Act are hereby VACATED and are unenforceable.

This decision and entry shall constitute a final appealable order in this matter.

IT IS SO ORDERED.



David E. Cain, Judge

Copies to:

Angela M. Sullivan
Gregory T. Hartke
Stacy L. Hannan
Counsel for Plaintiff

Maurice A. Thompson
Counsel for Defendants