[Cite as *Deer Park Inn v. Ohio Dept. of Health*, 2010-Ohio-1392.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Deer Park Inn,	:	
Appellant-Appellant,	:	No. 09AP-974 (C.P.C. No. 09CVF05-6630)
v.	:	
		(REGULAR CALENDAR)
Ohio Department of Health et al.,	:	
Appellees-Appellees.	:	

D E C I S I O N

Rendered on March 31, 2010

Sirkin, Kinsley & Nazzarine Co., LPA, H. Louis Sirkin, and *Scott Ryan Nazzarine,* for appellant.

Richard Cordray, Attorney General, and *Angela M. Sullivan*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Appellant, Deer Park Inn, appeals from a judgment of the Franklin County Court of Common Pleas upholding an administrative determination rendered by appellee, the Hamilton County General Health District. Deer Park is a public bar located in Hamilton County, Ohio, and the case began with reported violations of Ohio's Smoke Free Workplace Act, codified at R.C. Chapter 3794. The Act prohibits smoking in many public places and places of employment.

{¶2} Investigators from the health district, which acts as a designee of the Ohio Department of Health ("ODH"), reported two Smoke Free Act violations on the premises during an on-site visit on December 18, 2008: Smoking in a prohibited area, in violation of R.C. 3794.02(A) and Ohio Adm.Code 3701-52-02(A) and (B), and the presence of ashtrays in violation of R.C. 3794.06(B) and Ohio Adm.Code 3701-52-02(F). Because Deer Park had a prior violation in the preceding two years (addressed by this court in *Deer Park Inn v. Ohio Dept. of Health*, 10th Dist. No. 09AP-67, 2009-Ohio-6836, hereinafter "*Deer Park I*"), the proposed violations were referred for administrative review, pursuant to Ohio Adm.Code 3701-52-08(F)(2), at which Deer Park was given the opportunity to present its case and confront and cross-examine adverse witnesses. At the conclusion of this administrative review before an impartial decision-maker, Deer Park was found to have permitted smoking in a prohibited area in violation of R.C. 3794.02(A), and received a $100 fine.

{¶3} Deer Park then appealed to the Franklin County Court of Common Pleas under R.C. 119.12. Deer Park argued that there was insufficient evidence to find a violation of the Smoke Free Act because the Act requires that the proprietor of an establishment be found to have "permitted" smoking, which could not be demonstrated by the sole fact that certain patrons were smoking on the premises. In addition, Deer Park argued that the Act as written and applied is unconstitutional on a variety of grounds.

{¶4} The court of common pleas rejected all arguments and affirmed the order of the health district. Deer Park has timely appealed and brings the following assignments of error:

> [I.] THE COMMON PLEAS COURT ERRED IN FINDING THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A VIOLATION OF THE SMOKE-FREE LAW WHERE THE

> PROPRIETOR OF THE ESTABLISHMENT IN QUESTION HAD REMOVED ALL ASHTRAYS, POSTED THE REQUIRED NO-SMOKING SIGNS, AND AFFIRMATIVELY REQUESTED ALL PERSONS WHO WERE OBSERVED SMOKING TO EXTINGUISH THEIR CIGARETTES OR TAKE THEM OUTSIDE.
>
> [II.] THE COMMON PLEAS COURT ERRED IN OVERRULING APPELLANT'S CONSTITUTIONAL CHALLENGES TO THE SMOKE FREE WORKPLACE ACT.

{¶5} In an administrative appeal, pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. In applying this standard, the court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶6} The Ohio Supreme Court has defined reliable, probative, and substantial evidence as follows:

> * * * (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Our Place, Inc. v. Ohio Liquor Control Comm. (1992), 63 Ohio St.3d 570, 571. (Footnotes omitted.)

{¶7} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the court of common pleas' determination that the board's order was supported by reliable, probative, and substantial evidence, this court's role is

limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, on the question whether the board's order was in accordance with the law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶8} The gist of Deer Park's first assignment of error is that the mere occurrence of smoking in a prohibited area does not constitute a violation; a proprietor will only be liable if he/she "permits" smoking on the premises: "no proprietor * * * shall *permit* smoking in a public place or place of employment." R.C. 3794.02(A) (emphasis added). This court has addressed the language of this statute, finding that 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 * * * notifying patrons who attempt to smoke that smoking is not permitted." *Pour House, Inc. v. Ohio Dept. of Health*, 10th Dist. No. 09AP-157, 2009-Ohio-5475, ¶19. In an earlier case construing identical language in a municipal smoking ban, we relied on a dictionary definition and common legal usage to determine the ordinary meaning of the word "permit":

> The word "permit" is defined as "to suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." Black's Law Dictionary (5 Ed.Rev.1979) 1026. Other Ohio courts have held that this definition "connotes some affirmative act or omission." *Akron v. Meissner* (1993), 92 Ohio App.3d 1, 4, 633 N.E.2d 1201, 1203.

> Thus, the ban prohibits a proprietor to allow, consent, or expressly assent to smoking within his or her establishment. Likewise, a proprietor is forbidden to acquiesce in smoking by failing to take appropriate measures to prevent people from using tobacco on the premises, such as posting no-smoking signs or removing ashtrays.

Traditions Tavern v. Columbus, 171 Ohio App.3d 383, 2006-Ohio-6655, ¶24.

{¶9} At the administrative hearing, Deer Park's proprietor, Herman Tegenkamp, testified that he took all reasonable steps to prohibit smoking in his establishment and that he would ask any person smoking to extinguish smoking materials or go outside. He further testified that he instructed his employees to do the same if they observed smoking in prohibited areas. On the night in question, Tegenkamp testified, he had in fact asked a smoking patron to go outside to the smoking patio, and this incident occurred immediately before the investigators appeared on the premises.

{¶10} In contrast, health department investigator Mandy Bartel testified that, on the night in question, she observed roughly a quarter of the patrons smoking in the establishment. Many were seated at the bar area directly in front of the bartender and discarding their ashes in empty beer cans. Bartel testified that the investigators were on the premises for approximately ten minutes and, despite the prevalence of smoking throughout the bar, approximately ten smoking patrons out of 40 total on the premises, they did not observe Mr. Tegenkamp or his employees ask the patrons to cease smoking. When she and her fellow investigator attempted to discuss the situation with the bartender, Bartel testified, the bartender was unresponsive. When the investigators thereafter attempted to speak with Mr. Tegenkamp, he was not only unwilling to address the substance of the problem, but was crudely and aggressively uncooperative and

ordered the investigators out of his bar. When the investigators did leave, they observed many patrons still smoking.

{¶11} Our reasoning and decision in *Pour House* does implicitly acknowledge that, because the proprietor is essentially tributary to the conduct of his or her patrons, not every instance of surreptitious, unobserved smoking on the premises will give rise to liability for the proprietor. The definition of what may constitute "reasonable measures to prevent smoking" may be debated in some close cases in which a proprietor has diligently taken measures to train staff and personally intervene to suppress smoking in unauthorized areas, and yet some isolated instances of smoking occur despite these efforts. The appeal before us, however, does not present that close case. The testimony of the investigators, if believed, was sufficient to establish nothing less than willful blindness on the part of the proprietor and his agents, and some measure of contempt for, let alone non-compliance with, the Ohio Smoke Free Act. We accordingly find no error by the Franklin County Court of Common Pleas in upholding the finding of violation by ODH, and Deer Park's first assignment of error is overruled.

{¶12} Deer Park's second assignment of error raises numerous constitutional challenges to the validity of the Smoke Free Act itself. All of Deer Park's arguments were addressed and rejected in *Deer Park I*, addressing an earlier violation by the same establishment. Deer Park's second assignment of error is overruled.

{¶13} In summary, Deer Park's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.

_____