[Cite as *Dixon v. Miami Univ.*, 2005-Ohio-6499.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joseph B. Dixon, Sr. et al.,	:	
Plaintiffs-Appellees,	:	
		No. 04AP-1132
v.	:	(C.C. No. 2002-01381)
Miami University,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on December 8, 2005

Casper & Casper, *Margaret H. McCollum* and *William P. Allen*, for appellees.

Jim Petro, Attorney General, *Tracy M. Greuel* and *Karl W. Schedler*, for appellant.

APPEAL from the Ohio Court of Claims.

SADLER, J.

{¶1} Defendant-appellant, Miami University ("Miami"), appeals from a judgment of the Ohio Court of Claims, rendered in favor of plaintiffs-appellees, Joseph B. Dixon, Sr. ("Dixon"), and his wife, Pamela B. Dixon, on their claims for injuries stemming from Miami's alleged negligence in failing to protect Dixon from a hazardous condition on its premises.

{¶2} The following facts are taken from the pleadings and the testimony adduced at the trial. On February 24, 2001, Dixon was working for WKNO-TV ("WKNO"), a

company based in Memphis, Tennessee. WKNO had entered into a contract with ESPN Regional Television ("ESPN"), based in Huntington, West Virginia, pursuant to which WKNO provided a mobile production unit ("the mobile unit"), for use in connection with ESPN's television coverage of a Miami women's basketball game.

{¶3} Dixon was WKNO's mobile operations manager. In that capacity, on February 23, 2001, he traveled by air from his home in Memphis to Dayton, Ohio, along with Andy Duty ("Duty"), an engineer also employed by WKNO. The next morning, the two proceeded by car to Oxford, Ohio, and arrived at Millett Hall on the Miami campus at approximately 5:30 a.m. Dixon had never before been to Millett Hall or to the Miami campus.

{¶4} According to both men, it was still dark outside when they arrived for the "park and power" procedure that takes place roughly six hours prior to the start of the broadcast of a sporting event. Dixon testified that, pursuant to the standard manner of conducting such a procedure, he made contact with a Miami representative to confirm whether the mobile unit (which had earlier been driven to Oxford by an independent driver) was parked in the appropriate place, and to inquire where the power cables needed to be placed when let out from the unit so that venue personnel could connect them to the venue's power source. Dixon testified that it would be against standard operating procedure for him to connect the cables to the power source himself. His job was to place the cables so that they would be accessible to those connecting them to the power source.

{¶5} Dixon testified that he did not know the name of the Miami representative with whom he spoke that morning, and that he was the only person involved in the conversation with that representative. Upon Dixon's arrival, he approached that individual because the person was the only one in the area that was not from WKNO or ESPN. He stated that his conversation with the representative was brief and lasted no more than five minutes.

{¶6} According to Dixon, the Miami representative told him "you can run those cables on the other side of those air conditioners." (Tr., 34.) The air conditioners to which Dixon referred were two large air conditioning units that were housed inside a brick enclosure located along the back wall of Millett Hall. The brick enclosure was located next to a set of metal roll-up doors, over which was an illuminated light. The only source of light in the vicinity was the light over the roll-up doors.

{¶7} Dixon testified that, because of the instructions given to him by Miami's representative, he "felt that the power was on the other side of the enclosure, absolutely on the other side of the enclosure." (Id. at 45.) Because he felt that the power source was on the side of the brick enclosure that was furthest from him, Dixon proceeded to pick up "with both hands the portion or amount of cable that I need[ed] to toss the cable over [the] wall and over [one of the] air conditioner[s]." (Id. at 43.)

{¶8} After throwing the cable over the enclosure wall, the cable "landed short of where I thought the cable should be." (Ibid.) It landed "on top of the air conditioners." (Ibid.) Therefore, "believing that it was necessary to traverse the entire enclosure and that the power source was located on the other side of the enclosure," (Id. at 36-37)

Dixon walked around "the part of the wall * * * that's perpendicular to Millett [Hall]" and found that the gate was open. (Id. at 43.) This gate covered an opening in the brick enclosure and, according to Dixon, was unlocked.

{¶9} According to Duty, the light over the roll-up doors lit up the back and one side of the mobile unit, which was parked in front of the roll-up doors, but there was "not much light beyond a wall [that was part of the brick enclosure] that came out beside the truck [the mobile unit]." (Duty Depo., 10-11.) With this light it was possible for Dixon to see the roll-up doors, the mobile unit, "the part of the [brick] wall that extended out from the ledge," and the gate. (Tr., 47-48.) As for the inside of the enclosure, Dixon testified that he could see the first of the two air conditioning units, but "after that, the light dropped off." (Ibid.)

{¶10} Dixon "entered through the gate to pick up the portion of the cable that was laying on top of [the] air conditioner * * * to complete the traverse across the enclosure to where I thought the shore power was on the other side." (Id. at 43.) When he went through the gate he could "see that the area was dark and * * * believed that everything that lay in front of me was firm * * * flat ground." (Id. at 48.) When he got inside the enclosure his intention was to "continue to traverse across the enclosure so that I could supply the cable to where I believe[d] the power source was on the other side of those air conditioners." (Id. at 50.)

{¶11} When he walked into the enclosure he saw "a plane of black" and thought that what was in this black plane was "terra firma, solid ground." (Id. at 51.) He could see the top of the air conditioning unit located to his right because it was partially illuminated,

but "anything at floor level" was totally dark. (Id. at 55.) Dixon took "no more than two steps" (Id. at 60) into the enclosure when he fell into a large pit, sustaining serious injuries.

{¶12} He testified that he was not warned of the existence of this pit before he entered the enclosure. He stated that, based upon the instructions he was given by the Miami representative, going into the enclosure "was the most expeditious manner" in which he could get the cable to the power source. (Id. at 52.) He could have gone around the enclosure instead of going into it, but he chose the "shortest path," which was to throw the cable over the wall. This way, he could use less cable, and could avoid interfering with existing telephone and data cables over which he would have had to lay his cable if he had chosen to go around the enclosure. Dixon later learned that the power source was located underground, inside the pit.

{¶13} Dixon had a flashlight available, but, in his view, "a flashlight wasn't necessary" because "it had already been indicated to me where the power cables needed to go. There was enough illumination to do the job as instructed." (Id. at 48-49.) He explained, "the area at the back of the truck and where the power cables are paid out from * * * was illuminated." (Id. at 49.) On cross-examination, when Dixon was asked why he failed to further consult with Miami personnel upon seeing blackness in front of him at the entrance to the enclosure, he explained, "there was no reason to believe that there was anything other than flat ground there." (Id. at 64.)

{¶14} Although he did not speak with the Miami representative, nor did he hear Dixon's conversation with him, Duty testified that the individual was wearing a uniform

with a logo and a name on it. After Dixon was finished speaking with the representative, he told Duty that "the cable was to be run next to the building over the low brick wall that went around the air conditioning enclosure, that it was to go to the middle of that area." (Duty Depo., 51.) Duty explained that the top of each air conditioning unit was approximately even with the top of the brick wall over which Dixon threw the cables. The units were located within the enclosure, about two feet back from the gated entrance thereto.

{¶15} According to Duty, it was "pitch-black" outside at the time. (Ibid.) He stated that before Dixon fell one could not see anything past the air conditioning units. Duty saw Dixon throw the cables over the first air conditioning unit and saw that they landed about halfway past the unit. He testified that the cables weigh three to five pounds per foot, and Dixon was working with two such cables, each 100 feet in length.

{¶16} Howard Miller ("Miller"), was the independent contractor hired by ESPN to produce the broadcast of Miami's women's basketball game on the day in question. He arrived at Millett Hall at approximately 5:30 a.m., after Dixon had arrived. Miller did not enter the brick enclosure, but was able to recall its lighting conditions prior to Dixon's fall. Miller testified that, while standing outside of the pit area one could see only that "there was a dark area" behind the gate. (Miller Depo., 63.) If one was standing ten feet back from the pit area, one could see that there was a wall "but you couldn’t see that there was a hole in the pit." (Ibid.) He further explained that the air conditioning units were visible, but the right-hand unit of the two cast a shadow over the pit area "so you wouldn't be able to even see that there was a pit there." (Id. at 64.)

{¶17} Upon his arrival, Miller went inside Millett Hall to look around. Dixon fell into the pit while Miller was inside the building. Miller testified that he had never seen a power hookup that was located in a pit such as the one at Millett Hall.

{¶18} Robert Derryberry ("Derryberry"), owns Jones Mobile Television, and was at Millett Hall on the day in question as a freelance director hired by ESPN. By the time he arrived at Millett Hall, Dixon had already been injured and was being attended by emergency personnel, though it was still dark. Derryberry testified that the location where Dixon was injured was "really dark." He also testified that there was no warning device, sign, railing or a lock on the gate that would announce the danger presented by the open pit inside the brick enclosure.

{¶19} After Dixon was taken by ambulance for medical treatment, Duty finished the "park and power" procedure. To do so, he entered the brick enclosure through the wooden gate, which was missing a board and part of a hasp. By this time the sun had risen. As soon as he walked through the gate he noticed the pit into which Dixon had fallen. There were no signs warning of the existence of the pit, nor were there any barricades or chains surrounding it. Duty retrieved the cables by walking to the right of the entrance and around the air conditioning units. He dropped the cables into the pit, then climbed down an iron ladder affixed to the inside of the pit, whereupon he finished pulling the cables down to the power source. Duty testified that a curb surrounded the outside of the pit and that someone could trip on the curb. Duty described the curb variously as being six inches high (Id. at 22-23) and two to three inches high. (Id. at 36.)

{¶20} Duty testified that, over a two-year period, he had encountered approximately three venues, including Miami, that had a power hookup located down a set of stairs and underneath a building. Miami was the only such hookup at a college or university venue. He stated, though, that he had never before been required to run cables into an open, uncovered pit.

{¶21} Derryberry testified that he has been involved in "park and power" procedures and that the power source is typically located on a wall adjacent to the area designated for mobile unit parking. Normally, according to Derryberry, the power source is very easily accessible, located either inside the venue or, if outside, it is in a well-lit area. Derryberry testified that he has never seen another power hook-up like the one at Millett Hall. He has never encountered a power source located in an unguarded pit, and never in a dark area. Finally, he testified that it is unusual to get injured on the job in the business of sports production and also stated that Dixon is "meticulous" and Derryberry has never known him to be reckless in the performance of his work.

{¶22} Bobby Bennet ("Bennet"), is the events manager at Millett Hall. He arrived on campus on the morning of February 24, 2001, at about 5:15 a.m. He unlocked the back door, turned on the lights inside the venue and checked on the progress of the night crew. He testified that no other Miami representatives were present at the time. When he walked back outside with a member of the television crew he found Dixon in the pit. It was dark but he could see something moving in the pit and at first thought it was an animal. He testified that the gate on the brick enclosure would normally be closed and locked with a key. He explained that the power source is located in a return air tunnel

beneath the floor of Millett Hall. Bennet stated that, after Dixon was transported to the hospital, Bennet himself hooked up the cables to the power source by draping the cables over the wall and then feeding them down into the pit.

{¶23} Dixon testified regarding his injuries and the treatment he received. Specifically, his fall caused a head laceration, a concussion, a chip fracture in the right wrist and a shattered elbow. He initially sought treatment at the emergency department of McCullough-Hyde Hospital in Oxford, Ohio. There, doctors advised him that his elbow required surgery, and he elected to have the surgery performed in his hometown. Accordingly, he traveled by car to Dayton, and then by plane to Memphis, Tennessee, where he went immediately to the emergency department at Methodist Hospital.

{¶24} Three days after his injury, on February 27, 2001, Dixon underwent surgery, during which his doctors inserted plates, screws and wires in order to repair and stabilize his right arm and elbow. This surgery was followed by several weeks in a hard cast and then a brace, along with four months of physical therapy. Dixon progressively developed heterotopic ossification, which restricted his therapeutic progress. This condition necessitated a second surgery, which was performed in September 2001. During this second surgery, doctors removed most of the pins, as well as the plates and wires that had been implanted during the first surgery. Following his return home after the second surgery he developed an infection at the surgical site, which persisted for approximately one month.

{¶25} Dixon then underwent radiation treatment and treatment with a "constant passive motion" device which he used 12 hours per day until December 2001. He also

continued with physical therapy through March 2002. He continued to suffer from ulnar neuropathy and motor and sensory deficits in his right arm, but made progress in that he increased the range of extension and flexion in his elbow.

{¶26} In October 2002, following six months of relatively normal use of his arm and elbow, Dixon developed a staph infection at the surgical site. This infection required surgical irrigation and debridement, hospital admittance for intravenous antibiotic therapy, and the insertion of a catheter that continuously administered antibiotic medication directly into Dixon's heart for several weeks.

{¶27} Thomas Russell, M.D. ("Dr. Russell"), is a board-certified orthopedic surgeon with Memphis Orthopaedic Group, and a professor at University of Tennessee Medical School. Dr. Russell testified regarding the treatment that he and his partners, Drs. Waggoner and Sokoloff, rendered to Dixon. Dr. Waggoner performed Dixon's first surgery and Dr. Russell performed the surgery to remedy Dixon's heterotopic ossification.

{¶28} Drs. Waggoner and Sokoloff treated Dixon for the staph infection that occurred in October 2002, but did not testify at trial. On direct examination, Dr. Russell was asked whether a staph infection such as the one Dixon had can occur as a complication of the heterotopic ossification surgery that Dr. Russell performed. Dr. Russell replied:

> We have seen people before that have surgical sites that go along for a long time and they're okay and then something happens and they get infection in that area. * * * It could be from the old surgery. You know, that injury, the area doesn't have normal tissues. He's had radiation there that lowers his resistance to infection potentially. So you can make an

> argument theoretically that that's related to the previous trauma he's had.

(Russell Video Depo., 66-67.) Dr. Russell did not express an opinion, to a reasonable degree of medical certainty, regarding the causal connection between Dixon's fall and his staph infection. The record suggests that Dr. Russell felt he could not do so because he did not personally treat Dixon for the infection. (See Russell Video Depo, at 10 and 65.)

{¶29} The trial of this action was bifurcated, and the liability phase was tried over two days in February 2004. The court found that Miami had breached its duty of non-negligence and that the breach caused Dixon's fall into the pit. The damages phase was tried over two days in August 2004. On September 13, 2004, the trial court journalized a judgment entry awarding damages to Dixon in the amount of $155,000 and to Mrs. Dixon, on her claim for loss of consortium, in the amount of $25,000. In its judgment entry the court found, inter alia, that all three of Dixon's surgeries were proximately caused by Miami's negligence.

{¶30} Miami timely appealed, and asserts the following two assignments of error for our review:

> First Assignment of Error:
>
> The Court of Claims erred as a matter of law by awarding damages for injuries about which there was no medical testimony regarding those injuries' proximate cause.
>
> Second Assignment of Error:
>
> The Court of Claims erred as a matter of law by not finding contributory negligence on the part of Joseph Dixon.

{¶31} In support of its first assignment of error, Miami points out that Dixon's staph infection, for which he was treated in October 2002, did not occur until some 20 months after the incident at Millett Hall and 12 months after the surgery to remediate his heterotopic ossification. Further, Dixon's arm was healed and virtually fully functional beginning in March 2002; the staph infection developed eight months later. Miami argues that, on these facts, expert medical testimony was necessary to prove the requisite causal connection between Dixon's original injuries and the staph infection that required additional treatment, including Dixon's third surgery.

{¶32} For support of this argument, Miami directs our attention to the case of *Darnell v. Eastman* (1970), 23 Ohio St.2d 13, 52 O.O.2d 76, 261 N.E.2d 114. In that case, the Supreme Court of Ohio held:

> Except as to questions of cause and effect which are so apparent as to be matters of common knowledge, the issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry and must be established by the opinion of medical witnesses competent to express such opinion. * * *

Id. at syllabus.

{¶33} In that case, as in the present case, one of the plaintiff's treating physicians testified regarding treatment for the plaintiff's original injuries sustained in a car accident, and also for surgery performed eight months later. The testifying doctor performed the surgery but did not treat the plaintiff immediately following the accident. The plaintiff had told his original doctor that he hit his nose on the steering wheel of his car, but X-rays taken at the time revealed no fractures. The plaintiff developed persistent nosebleeds,

which, in the opinion of the testifying physician, were caused by a deviated septum, which that doctor repaired surgically. The testifying doctor stated that the persistent nosebleeds were due to the deviated septum, and the deviated septum was caused by a fracture of the nose, but because he had not treated the plaintiff for his original injuries, he would not opine as to the causal relationship between the car accident and the nose fracture.

{¶34} The Supreme Court of Ohio explained:

> the only evidence herein is the testimony of Dr. Sparks that "the deviated septum was from fracture." When this is coupled with the evidence to the effect that after the accident X-rays showed no fracture, and when considered along with the passage of time between the accident and the first diagnosis of 'deviated septum' by Dr. Sparks * * * it is clear that expert medical opinion was required to establish the issue of causal connection between the existence of the deviated septum and the accident * * *.

Id. at 17.

{¶35} In our view, *Darnell* is not applicable to the present case because the medical evidence demonstrated that the *direct cause* of the condition that required surgical intervention – fracture of the nose – *was not present* immediately after the accident upon which the plaintiff's claims were based. This, coupled with the passage of time, left open to far too much speculation whether it was the defendant's negligence, or some wholly unrelated event or mechanism, that proximately caused the plaintiff's deviated septum. In fact, the evidence that the fracture was not present immediately after the car accident tended to show that the defendant's negligence was *not* the proximate cause of the deviated septum that required surgery.

{¶36} Unlike the situation confronting the court in *Darnell*, in the present case, there is no evidence of record that, coupled with the passage of time, required the trier of fact to speculate on matters peculiarly within the knowledge of medical experts. Thus, if we apply the *Darnell* holding in the manner urged by Miami, we would have to do so on the theory that *passage of time alone* is enough to require expert testimony as to the causal link between Dixon's elbow fractures (which Miami does not dispute were caused by its negligence) and the staph infection that developed at the site of the surgery to repair those fractures.

{¶37} But if we did so we would violate the very precedent that Miami urges us to apply. The *Darnell* syllabus divides causation questions into two categories: those that are within common knowledge and those that involve a scientific inquiry not within the common knowledge of persons. The Eleventh Appellate District has developed a helpful line of cases based upon this common knowledge/scientific inquiry dichotomy, beginning with the case of *Gibbs v. General Motors Corp.* (Mar. 27, 1987), 11th Dist. No. 3625.

{¶38} In *Gibbs*, the employee sought the right to participate in the workers' compensation system for a strain/sprain of the low back allegedly caused one day by the employee's duties of lifting and carrying a 15- to 20-pound automobile part. He was the only one to testify on the subject of his injury, and stated that while he was lifting the automobile part he "felt a pain in his back, running down his legs." Id., 1987 Ohio App. LEXIS 6288, at *1.

{¶39} The court of appeals determined that expert medical testimony was required in order for the employee to prove the requisite causal link between his

employment and his injury. In so holding, the *Gibbs* court characterized the low back sprain/strain as "internal and elusive in nature, unaccompanied by any observable external evidence." Id. at *4. The court went on to explain:

> It is when the internal complexities of the body are at issue, that we generally initiate the metamorphasis [sic] in the evidential progression where medical testimony moves from the pale of common knowledge matters and within layman competency where expert testimony is not required, to those areas where such testimony is more appropriate and indeed most necessary for the trier of fact to understand the nature and cause of the injuries alleged.

Ibid.

{¶40} The court contrasted the injury in *Gibbs* to a bruised patella in the case of *White Motor Corp. v. Moore* (1976), 48 Ohio St.2d 156, 2 O.O.3d 338, 357 N.E.2d 1069, a case in which the Supreme Court of Ohio determined that the bruised knee, allegedly occasioned when a truck frame fell from a dolly and landed on the employee, involved "little if any medical complexity * * *." Id. at 160. The court in *Gibbs* went on to explain, " '[t]here are occasions when such direct or proximate causal relationships may be so apparent as to be within the realm of common or lay knowledge eliminating the requirement of expert medical testimony.' " *Gibbs*, supra, at *5, quoting *Hickman v. Ford Motor Co.* (1977), 52 Ohio App.2d 327, 331, 6 O.O.3d 365, 370 N.E.2d 494.

{¶41} Later, in the case of *Davis v. Morton Thiokol, Inc.* (Nov. 1, 1991), 11th Dist. No. 90-L-15-083, the court held that expert testimony was required to prove the requisite causal connection between an employee's fall and his claimed "low back strain." More recently, in *Canterbury v. Skulina* (Dec. 7, 2001), 11th Dist. No. 2000-P-0060, the plaintiff

slipped on wet grass and fell in her own yard while running from the defendant's dogs. The plaintiff sustained a fracture to her right distal fibula, which required surgery to install a plate and screws. Her case consisted of her testimony, her medical records documenting her original injury and subsequent surgery, the testimony of the dog warden and cross-examination of the defendant.

{¶42} On appeal, the defendant argued that the trial court erred in denying the defendant's motion for directed verdict after the plaintiff produced no expert medical testimony to prove that her injuries were proximately caused by his negligence. The defendant cited *Darnell* in support of his argument. The court of appeals, relying on *Davis*, *Gibbs* and *White Motor*, held that "a broken ankle [is] a sufficiently understandable, observable, and comprehensible injury, within the scope of common knowledge, and * * * an expert witness [is] not required." *Canterbury*, supra, 2001 Ohio App. LEXIS 5442, at *13. Citing the language in *Davis*, the court noted that the broken ankle was " 'readily observable or understandable' " and was not " 'internal and elusive in nature, unaccompanied by any observable external evidence.' " Id. at *12.

{¶43} This court has analyzed at least one case in a similar manner. In the case of *Maney v. Jernejcic* (Nov. 16, 2000), 10th Dist. No. 00AP-483, the plaintiff claimed that he sustained soft tissue injuries to his neck, back and shoulder when the defendant's vehicle crashed into the rear-end of the plaintiff's vehicle. The defendant admitted negligence but denied causing the claimed injuries.

{¶44} The record revealed the following facts: there was no visible damage to either vehicle involved in the collision; the plaintiff did not seek immediate medical care,

but waited at least 12 hours; the treating physician at the hospital took X-rays but sent the plaintiff home without a prescription for pain medications, instead referring the plaintiff to his family doctor; and the plaintiff's family doctor sent the plaintiff to a physical therapist. With these facts, and taking particular note of the fact that "[s]oft tissue injuries are internal injuries that do not usually produce any observable external injuries[,]" this court determined that, taken as a whole, the facts of record "remove[d] the issue of causation from the common knowledge exception [articulated in *Darnell*] and require some expert medical testimony to establish the causal relationship." Id. at *5.

{¶45} In the present case, we reject the contention that the passage of time alone takes the question of the causal link between Dixon's injuries and his infected injury site outside the realm of common knowledge and into the domain reserved for professional medical scientists. In our view, more determinative than the passage of time between Dixon's injury and the manifestation of his staph infection are the facts regarding the location and nature of the infection itself, as described by Dixon, his wife and one of his treating physicians.

{¶46} Specifically, the infection was located precisely in the area of Dixon's arm that was shattered by his fall into the pit and twice required surgical repair. Moreover, Dr. Russell explained that such infections are observed in patients who have undergone orthopedic surgery and radiation therapy because those treatments traumatize the affected tissue, lowering its resistance to bacterial infections. Dr. Russell explained that such infections do occur even when the surgical site has been free of infection for a long time following surgery.

{¶47} Given all of the evidence adduced, Dixon's staph infection was not internal and elusive, and was sufficiently observable, understandable and comprehensible by the trier of fact, such that the question of the causal connection between the infection and Miami's negligence was not peculiarly within the scope of expert scientific inquiry.

{¶48} Accordingly, the trial court did not err in finding that Miami's negligence was the proximate cause of Dixon's staph infection and in awarding damages therefor. As such, Miami's first assignment of error is overruled.

{¶49} In support of its second assignment of error, Miami argues that Dixon's act of stepping into the brick enclosure constitutes contributory negligence as a matter of law, and the trial court erred in making no finding of contributory negligence. Miami places particular emphasis on the following facts: it was completely dark at 5:30 a.m. on the date of the accident; Dixon was unfamiliar with the area; he opened the broken gate and saw only darkness beyond the partially-lit air conditioner; he had a flashlight readily available but chose not to use it; and Dixon had no knowledge or information about what lay beyond him in the darkness, except that he did know that air conditioning equipment and other cables were inside the brick enclosure.

{¶50} Contributory negligence is an affirmative defense for which defendant bears the burden of proof. *Valencic v. The Akron & Barberton Belt Rd. Co.* (1938), 133 Ohio St. 287, 289, 13 N.E.2d 240. Here, contributory negligence means "any want of ordinary care on the part of the person injured, which combined and concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred." *Brinkmoeller v. Wilson*

(1975), 41 Ohio St.2d 223, 226, 70 O.O.2d 424, 325 N.E.2d 233. Contributory negligence generally involves "some fault or departure from the standard of conduct of the reasonable [person] * * *." *Self v. American Legion* (1972), 29 Ohio App.2d 189, 193, 58 O.O.2d 328, 279 N.E.2d 889.

{¶51} Miami relies upon the "step-in-the-dark" rule, developed through a line of Ohio cases beginning with the case of *Flury v. Central Publishing House* (1928), 118 Ohio St. 154, 6 Ohio Law Abs. 158, 160 N.E. 679. In *Flury*, the Supreme Court of Ohio held:

> The testimony of a plaintiff invitee, in an action for negligence, that from a lighted room he opened a closed metalcovered sliding door, was confronted with total darkness beyond the door, that he then stepped into such total darkness, to his injury, without any knowledge, information or investigation as to what such darkness might conceal, raises an inference of negligence on his part which, *in the absence of any evidence tending to refute such inference*, will require a directed verdict for the defendant.

Id. at paragraph three of the syllabus. (Emphasis added.) In *Flury*, the evidence was uncontroverted that the plaintiff had, voluntarily and under the influence of no emergency or duress, and without knowledge or sensory investigation as to what might be concealed by the darkness, stepped from a lighted area into total darkness. These facts raised the inference of the plaintiff's lack of ordinary care.

{¶52} The Supreme Court of Ohio applied the "step-in-the-dark" rule in the case of *Rothfuss v. Hamilton Masonic Temple Co.* (1973), 34 Ohio St.2d 176, 63 O.O.2d 270, 297 N.E.2d 176. There, the court held:

> Where the evidence, in the trial of an action brought for the maintenance of a qualified nuisance, * * * is conflicting on the issue of the plaintiff's alleged contributory negligence, or a combination of circumstances exists relative to the question of plaintiff's contributory negligence so as to require a resolution of what are the true facts, such situation lends itself to an inference that plaintiff exercised ordinary care and the ultimate determination of this issue is solely within the province of the [trier of fact] * * * .

Id. at paragraph two of the syllabus.

{¶53} In *Rothfuss*, the plaintiff fell into an unguarded window well that was located along the back wall of a building that abutted the painted lines on the adjacent parking lot. There was conflicting testimony as to the lighting conditions in the area where the plaintiff fell, and other testimony "lends itself to an inference that the appellant [who had never parked in that particular lot before] may have been deceived and lulled into a false sense of safety by the appearances of the parking lot, and by the failure of her companions to warn her of the existence of the window wells." Id. at 186.

{¶54} The trial court denied the defendant's motion for directed verdict, which was based on the step-in-the-dark rule, and the court of appeals reversed. The Supreme Court reversed the court of appeals and reinstated the trial court's decision:

> Viewing the evidence most favorably toward appellants for the purpose of appellee's motion for directed verdict, we find that sufficient doubt existed with respect to the witnesses' testimony to the effect of the conditions and circumstances associated with appellant's injury as to lend an inference that appellant exercised ordinary care in the instant case. This inference is all that is necessary * * * to bring this case within the province of the jury for ultimate resolution as to the weight to be given the conflicting evidence.

Ibid.

{¶55} Three years later, in *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 74 O.O.2d 427, 344 N.E.2d 334, the court, citing *Flury* and *Rothfuss*, held:

> In Ohio, the step-in-the-dark rule of contributory negligence merely raises an inference of the lack of prudence and ordinary care on the part of a plaintiff; and, where evidence is conflicting as to the intentional nature of the step in the dark, the lighting conditions and degree of darkness, the nature and appearance of the premises, or other circumstances tending to disprove a voluntary, deliberate step into unknown darkness, then a factual question arises requiring a determination by the jury, and a motion for a directed verdict is properly overruled by the trial court.

Id. at paragraph one of the syllabus.

{¶56} Upon an exhaustive review of the record, it is our view that there was conflicting evidence as to whether, as in *Rothfuss*, the Miami representative lulled Dixon into a false sense of safety by directing him to furnish the cables to the power source located at the back of the brick enclosure, without warning him of the danger of the pit, when the Miami representative would have or should have known that the pit was concealed by total darkness. See, also, *Childers v. Belclair Steel Structures, Inc.* (Dec. 5, 1978), 7th Dist. No. 1279; *Chardon Lakes Inn Co. v. MacBride* (1937), 56 Ohio App.40, 24 Ohio Law Abs. 504, 9 O.O. 206, 10 N.E.2d 9.

{¶57} Moreover, though Dixon indisputably observed the existence of air conditioning and other equipment in the enclosure, which might have put him on notice of tripping hazards, there was testimony from two other witnesses experienced in the industry that tended to show that Dixon was wholly justified in not anticipating that a hazard of the type he ultimately encountered – a deep pit – would be concealed by the

darkness within the enclosure. Contributory negligence is found in situations where the ultimate danger producing the injury was a danger that could reasonably be anticipated. See, e.g., *Flury* and *Rothfuss*, supra. See, also, *Chardon Lakes Inn Co.*, supra; *Hastings v. Hight* (Mar. 24, 1977), 3rd Dist. No. 9-76-33. However, according to the testimony of Derryberry, Duty and Dixon, a reasonable person in Dixon's position would not have reasonably anticipated having to contend with an open pit in completing the "park and power" procedure.

{¶58} In our view, the combination of circumstances in this case presented a question of fact as to whether Dixon acted with the requisite degree of care, such that any inference of contributory negligence that might have initially arisen fell away, and the contrary inference – that Dixon was not negligent – arose. See *Rothfuss,* supra, at paragraph two of the syllabus. On the state of the record, we cannot say that Dixon was contributorily negligent as a matter of law, as Miami urges us to do. Accordingly, Miami's second assignment of error is overruled.

{¶59} Having overruled both of Miami's assignments of error, we affirm the judgment of the Ohio Court of Claims.

Judgment affirmed.

KLATT and CHRISTLEY, JJ., concur.

CHRISTLEY, J., retired of the Eleventh Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

_____