[Cite as *Miller v. Wayman*, 2012-Ohio-5598.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

DAVID MILLER, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2012-G-3057**
- vs -	:	
SUZETTE WAYMAN, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 11M000944.

Judgment: Reversed and remanded.

Gregg A. Rossi, Rossi & Rossi, 26 Market Street, 8th Floor, P.O. Box 6045, Youngstown, OH 44501-6045 (For Plaintiffs-Appellants).

Timothy P. Roth, *Holly Olarczuk-Smith*, and *Justin L. Monday*, Gallagher Sharp, Sixth Floor – Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, David and Vicki Miller, appeal the judgment of the Geauga County Court of Common Pleas granting appellees', Suzette Wayman and Coffee Corners Antiques & Coffee House ("Coffee Corners"), motion for summary judgment. For the reasons that follow, the judgment is reversed and remanded.

{¶2} On September 28, 2007, Mr. Miller went to Coffee Corners with his wife and daughter for a cup of coffee. Mr. Miller had never visited Coffee Corners before.

His daughter was a part-time employee of the restaurant, though not on duty during that visit. The trio approached the store counter and waited in line to place their order. While standing in line, Mr. Miller asked his daughter where the restroom was located. She replied that the restroom was in the back of the shop. Mr. Miller, asking for no further direction, went to the back of the shop in search of the restroom. Mr. Miller began opening unmarked doors in the back of the restaurant, believing the restroom would simply be one room. As Mr. Miller opened the first of two unmarked doors, enough light from the hallway illuminated the dark room such that a filing cabinet could be recognized. Mr. Miller proceeded to the adjacent, unmarked door. Mr. Miller opened the door a portion of the way, about two feet. The door opened inward, revealing another dark room. Using the hallway light in an effort to find a light switch, Mr. Miller walked through the doorway as he opened the door. As Mr. Miller took a step into the room hoping to find a restroom, he instead found a staircase. Mr. Miller fell down the flight of stairs and sustained multiple injuries.

{¶3} The restroom, in actuality, was located directly across the hall from the first door. There is a factual question concerning whether the restroom passage was marked with a sign on the day of the accident, and, if so, where that sign was situated.

{¶4} Mr. Miller explained at his deposition how he essentially opened the door and stepped in simultaneously:

{¶5} Q: When [the door] was open two feet, did you reach into the room, or what did you do?

{¶6} A: I was taking a step and using the light from the hallway and reaching for a light switch.

{¶7} Q: So as the door was open two feet, you started walking, stepping into the room through that doorway?

{¶8} A: I stepped, took one step looking down and using the light from the hallway, and I assumed that the floor was right there, but it ended up not being.

{¶9} Mr. Miller later testified at his deposition that there was enough light from the hallway to know the floor was actually a step; however, though he glanced down, he did not realize at that time the surface was, in fact, a step:

{¶10} Q: When you opened the door two feet, did you look down to see what was on the floor?

{¶11} A: I looked down.

{¶12} Q: What did you see?

{¶13} A: I thought it was the floor.

{¶14} Q: Okay. Was it dark, or was it lit?

{¶15} A: It wasn't well lit…but I didn't see.

{¶16} Q: So there was not enough lighting for you to determine whether that was a floor or a step, correct?

{¶17} A: I would say there was enough light to know it was a step.

{¶18} Q: You didn't know it was a step obviously?

{¶19} A: Obviously.

{¶20} Q: Okay, had you known it was a step, this probably doesn't happen?

{¶21} A: Correct.

{¶22} Mr. Miller filed a complaint seeking damages for negligence. Mrs. Miller was also listed as a plaintiff, seeking damages for loss of consortium. The complaint was subsequently re-filed and appellees soon thereafter moved for summary judgment on two grounds: first, appellees owed appellants no duty because the danger (the darkness, or, in the event there was enough light to see, the stairwell) was open and obvious; and second, appellants were precluded from recovery due to the "step in the dark" rule; i.e., Mr. Miller intentionally stepped from a lighted area into an unknown dark area, and therefore, his own negligence caused the injury. In support, appellees attached portions of Mr. Miller's deposition testimony, as well as photographs taken in Coffee Corners of the doorway, staircase, hallway, and a restroom sign—which, again, may or may not have been added or moved after the accident. The Millers opposed the motion, arguing that genuine issues of material fact remained. No evidence was attached to the response in opposition.

{¶23} The trial court found that appellees owed appellants no duty as a matter of law because the danger—i.e., the darkness—was open and obvious, acting itself as a warning. The trial court also concluded that Mr. Miller's actions precluded recovery, according to the "step in the dark" rule, because his own negligence caused the fall when he intentionally walked into an unlit area and also because he offered no evidence that there was any negligence on the part of appellees. This appeal timely followed.

{¶24} Appellants assert one assignment of error for consideration by this court:

{¶25} "The trial court erred in granting Defendants' Motion for Summary Judgment as genuine issues of material fact exist, and reasonable minds could reach different conclusions, thereby presenting a jury issue."

{¶26} Pursuant to Civil Rule 56(C), summary judgment is proper if:

{¶27} (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc*., 50 Ohio St.2d 317, 327 (1977).

{¶28} To prevail on a motion for summary judgment, the moving party has the initial burden to affirmatively demonstrate that there is no genuine issue of material fact to be resolved in the case, relying on evidence in the record pursuant to Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If this initial burden is met, the nonmoving party then bears the reciprocal burden to set forth specific facts which prove there remains a genuine issue to be litigated, pursuant to Civ.R. 56(E). *Id*.

{¶29} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105 (1996). Thus, the court of appeals applies "the same standard as the trial court, viewing the facts in the case in a light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Viock v. Stowe-Woodward Co*., 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶30} It is well founded that in order to establish a case for negligence, the plaintiff must show the existence of a duty, a breach of the duty, and injury resulting proximately therefrom. *Menifee v. Ohio Welding Prod. Inc.*, 15 Ohio St.3d 75, 77

(1984). The question of whether a duty exists is generally a matter of law for the trial court's consideration. *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989).

{¶31} The duty of care owed to a person depends on that person's status. "A business invitee is a person who comes 'upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner.'" (Emphasis deleted.) *Bodnar v. Hawthorn of Aurora L.P.*, 11th Dist. No. 2006-P-0002, 2006-Ohio-6874, ¶39, quoting *Light v. Ohio University*, 28 Ohio St.3d 66, 68 (1986). Here, Mr. Miller, a customer patronizing Coffee Corners, was a business invitee.

{¶32} Generally, an owner owes a business invitee a duty of ordinary care in maintaining the premises in a reasonably safe condition so that those invitees on the premises are not "unnecessarily and unreasonably exposed to danger." *Paschal v. Rite Aid Pharmacy, Inc*., 18 Ohio St.3d 203 (1985), citing *Campbell v. Hughes Provision Co*., 153 Ohio St. 9 (1950). In this case, however, the trial court concluded appellees owed *no* duty to warn appellants of the danger because it was "open and obvious."

{¶33} The open-and-obvious doctrine, when applicable, obviates the duty to warn and acts as a complete bar to a negligence claim. The doctrine states that an owner owes no duty to warn individuals lawfully on the premises of open and obvious dangers on the property. *Sidle v. Humphrey*, 13 Ohio St.2d 45 (1968), paragraph one of the syllabus; *Simmers v. Bentley Constr. Co*., 64 Ohio St.3d 642, 645 (1992); *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573.

{¶34} The rationale behind the doctrine is that the hazard itself acts as a warning such that those approaching will discover the clear danger and take appropriate measures to avoid it. *Armstrong*, 99 Ohio St.3d at 80. That is, "[a] property owner has

no duty to protect an invitee from dangers '[that] are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them.'" *Jaronovic v. Iacofano*, 11th Dist. No. 2011-L-070, 2012-Ohio-1581, ¶28, quoting *Sidle v. Humphrey*, 13 Ohio St.2d at paragraph one of the syllabus. The Ohio Supreme Court has held that, as the doctrine applies to the threshold question of duty, it has not been abrogated by Ohio's comparative negligence statute and remains viable. *Armstrong* at ¶14.

{¶35} "An open and obvious danger or hazard is, by definition, neither latent nor concealed and is discoverable upon ordinary inspection. But such a danger or hazard does not need to have been observed by the injured party in order to be obvious." (Citation omitted.) *Ahmad v. AK Steel Corp.*, 119 Ohio St.3d 1210, 2008-Ohio-4082, ¶25 (O'Donnell, J., dissenting). "The question presented is whether a reasonable person would have found the danger or condition of the property open and obvious." *Id*. Thus, Mr. Miller's repeated arguments that his actions were "reasonable" in encountering the danger are inherently flawed as the open-and-obvious inquiry is not focused on the injured person's actions in encountering the danger but rather the danger itself: i.e., whether the danger would be objectively open and obvious to a reasonable person.

{¶36} In this case, appellants contend there are two dangers: if the stairwell could not be seen, the danger is the darkness; if the stairwell could be seen by the hallway light, the danger is the stairwell. Appellees argue that, in either circumstance, the open-and-obvious doctrine precludes recovery on the "duty" element of appellants' negligence claim. In support, appellees rely on *Leonard v. Modene & Assoc., Inc*., 6th

Dist. No. WD-05-085, 2006-Ohio-5471, where a real estate agent, attempting to negotiate his way through a darkened hallway of an old house, suddenly fell into a six-foot drop-off leading to a coal bin. The Sixth District affirmed summary judgment finding that the open and obvious dangers (either the darkness or the drop-off) precluded recovery. Similarly, appellees rely on *McDonald v. Marbella Restaurant*, 8th Dist. No. 89810, 2008-Ohio-3667, where a bar patron, knowingly approaching an impending stairwell in the dark, fractured her ankle when she misconstrued the landing. The Eighth Appellate District found the darkness to be open and obvious, thereby affirming summary judgment.

{¶37} However, these cases are distinguishable from the present case in that the parties in *Leonard* and *McDonald* were immersed in darkness, yet nonetheless disregarded it and proceeded down their respective paths, only to eventually sustain injury. That is, in both cases the injured parties unsuccessfully attempted to navigate a darkened path such that the darkness truly was open and obvious. In *Leonard*, ¶33-38, the injured party admitted he continued down the hall though he could not see what he was stepping on. *McDonald*, ¶38, is especially distinguishable because the injured party, *knowing at some point she would have to descend from the bar via stairs*, encountered the stairwell in total darkness.

{¶38} Instead, we find *Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961 (2d Dist.), relied upon by appellants, to be strikingly analogous to the instant case. There, the injured party sustained injuries by falling down a flight of stairs after walking into what she thought was a restroom in a footwear store, following directions from a clerk. The injured party opened the door inward about a foot and a half. *Id*. at ¶14. As

the door opened, she walked in and reached for a light switch, only then to fall down a flight of stairs. *Id*. The Second Appellate District concluded the danger was not open and obvious, noting that "[o]ne could think that a door, particularly one that opens inward like the door here, hides the danger." *Id*. at ¶35. In reaching this result, the Second District cited an Illinois appellate court case, involving nearly identical facts, which held that a jury could find "'[a] steep staircase without any landing or with one beginning before the end of the edge of the door when it is opened onto the stair'" to be a concealed danger because the hazard would be "'hidden by the door until it was opened'"; and further, the fact that a reasonable observer could see the top stair for a split second does "'not necessarily remove it from the realm of hidden dangers.'" *Id.*, quoting *Allgauer v. Le Bastille, Inc*., 101 Ill.App.3d 978, 981-982 (1981).

{¶39} Similarly here, reasonable minds could differ as to whether the dangers in this case were open and obvious. It cannot be concluded that a reasonable person would find the danger of darkness in this case to be open and obvious, especially when the darkness is not revealed until the doorway is opened, and at that point, absent an awkward halt, one foot may already be in the room. Moreover, one could conclude the darkness is not necessarily dangerous, but common or expected because many public establishments do not keep a light on in a restroom at all times, just as one would not find a staircase in an unlit restroom. That is, a jury may conclude the hazard itself (darkness) may *not* act as a warning in this setting to a reasonable observer, upsetting the rationale of the doctrine.

{¶40} Further, the unmarked door opened inward, and those invitees unfamiliar with the passage would find themselves instantaneously atop a stairwell. One could

similarly conclude that the doorway concealed the stairwell. Even a well-lit passage could lead to injury on stairs that are not noticeable until the door swings open, and as the Second District opined, whether it is reasonable for a person to look down when entering what they might reasonably believe to be a bathroom is a factual question for a jury. *Id.* That is, the hazard (the stairwell) may *not* have been apparent to a reasonable person in the ordinary course.

{¶41} In either respect, these are matters for a jury to decide. We cannot conclude that, as a matter of law, the open-and-obvious doctrine precludes recovery with regard to the duty element of appellants' negligence claim.

{¶42} We must now address the second basis for summary judgment. The trial court also concluded that appellees prevailed under the "step in the dark" rule, and thus, summary judgment was also appropriate on this ground.

{¶43} Historically, the "step in the dark" rule has been couched in terms of contributory negligence, holding that, as a general matter, "one who, from a lighted area, intentionally steps into total darkness, without knowledge, information, or investigation as to what the darkness might conceal, is guilty of contributory negligence as a matter of law." (Citations omitted.) *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 276 (1976). Though the doctrine of contributory negligence has been superseded by comparative negligence in Ohio, summary judgment is not necessarily a precluded option. *Mender v. Alvis*, 4th Dist. No. 11CA16, 2012-Ohio-2113, ¶13. The inquiry is merely shifted to whether the plaintiff's own negligence is greater than the negligence of the defendant. *Id.*

{¶44} Regardless of what label the rule is characterized under, the Ohio Supreme Court in *Posin* recognized its underlying principle, explaining that the rule "merely raises an inference of the lack of prudence and ordinary care on the part of the plaintiff." *Posin*, 45 Ohio St.2d. at paragraph one of the syllabus. As such, unlike the above-framed open-and-obvious doctrine analysis, the action of the plaintiff in encountering the hazard is the central consideration in addressing whether he or she exercised ordinary care when stepping into the darkness.

{¶45} Certainly, it must be recognized that darkness has been cited as "nature's warning": a potential hazard that begs one to proceed with caution and reluctance. *See Jeswald v. Hutt*, 15 Ohio St.2d 224 (1968), paragraph three of the syllabus ("'Darkness' is always a warning of danger, and for one's protection it may not be disregarded"); *McCoy v. Kroger Co.*, 10th Dist. No. 05AP-7, 2005-Ohio-6965, ¶13 ("The darkness increases rather than reduces the degree of care an ordinary person would exercise").

{¶46} However, an inference of lack of ordinary care does not arise "[i]f conflicting evidence exists as to the intentional nature of the step into the dark, the lighting conditions and degree of darkness, the nature and appearance of the premises, or other circumstances exist tending to disprove a voluntary, deliberate step into unknown darkness[.]" *Posin*, *supra*, 339. That is, a person's step into darkness may be reasonable based on the facts and circumstances of the case: "In some places one expects to find darkness, so darkness is not always unusual and not always a warning of danger." *Hissong*, 2010-Ohio-961, ¶39. "A person does not act negligently by failing to look for danger where she has no reason to expect it, or where she has reason *not* to expect it." (Emphasis sic.) *Id*.

{¶47} Here, it cannot be concluded as a matter of law that Mr. Miller's conduct departed from what an ordinary, reasonably prudent person would have done under the same circumstances. The evidentiary material in the record established that Mr. Miller was not familiar with the premises as this was his first visit to Coffee Corners. Mr. Miller went to this area of the shop acting on the instruction, albeit unspecific, of his daughter, known to him to be a Coffee Corners off-duty employee. Mr. Miller did not see the passageway with a sign marked "restrooms," but as explained above, a factual question remains as to whether this sign even existed at the time of accident and, if it did, where it was situated. Having already opened an office door, Mr. Miller moved to the adjacent door, genuinely believing, as the record indicates, a restroom would exist. He did so acting, in part, on a continuing process of elimination. The fact that the door was unmarked, or that there was only one door was of little consequence as Mr. Miller explained he was under the impression that in a small coffee shop, there would only be one public restroom, which is not an untenable belief. If he was reasonable in assuming the doorway would lead to a restroom, Mr. Miller would have no reason to believe there would be any obstruction or significant drop-off such as a descending staircase. This is compounded by the possibility that, as noted above, darkness may not be a sign of danger as it is not unusual for restrooms to be unlit at times. Based on the facts in the record, Mr. Miller's step into the darkness may be considered reasonable by a jury based on the circumstances of this case, including his subjective belief that this room would likely be the restroom.

{¶48} Therefore, the "step in the dark" rule does not warrant judgment in favor of appellees as a matter of law.

{¶49} As such, appellants' sole assignment of error has merit.

{¶50} The judgment of the Geauga County Court of Common Pleas is reversed and remanded for further proceedings.

MARY JANE TRAPP, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶51} In the present case, plaintiff, David Miller, took a step from a hallway into an unmarked and unlit room, thinking it was a bathroom when it fact it was a stairwell, and fell. Miller knew the space he was entering was unmarked and unlit. Miller admitted that there was sufficient light from the hallway to discern the steps on which he fell. Miller testified that he thought he saw the floor and assumed he was entering the bathroom. These facts fairly demonstrate the "open and obvious" hazard doctrine and/or that Miller, as a matter of law, failed to exercise reasonable care so that he is responsible for his own injuries. Either conclusion precludes the plaintiffs' recovery in the present case.

{¶52} The majority, however, finds the existence of a jury question in whether Miller's mistaken sense impression renders his step into the darkness reasonable, thereby precluding the grant of summary judgment. I respectfully dissent.

{¶53} "Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d

79, 2003-Ohio-2573, 788 N.E.2d 1088, syllabus. "The rationale underlying this doctrine is 'that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.'" *Id.* at ¶ 5, citing *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (1992). "When applicable * * *, the open-and-obvious doctrine * * * acts as a complete bar to any negligence claims." *Id.*

{¶54} Darkness is recognized as an open and obvious hazard. "'Darkness' is always a warning of danger, and for one's own protection it may not be disregarded." *Jeswald v. Hutt*, 15 Ohio St.2d 224, 239 N.E.2d 37 (1968), paragraph three of the syllabus. "Since darkness itself constitutes a sign of danger, the person who disregards a dark condition does so at his or her own peril." *Swonger v. Middlefield Village Apts.*, 11th Dist. No. 2003-G-2547, 2005-Ohio-941, ¶ 13.

{¶55} In the present case, Miller entered an unlit room and was aware that the room was unlit when he entered it ("I was taking a step and using the light from the hallway and reaching for a light switch"). Under *Armstrong*, then, the defendants owed no duty to Miller and his claims are completely barred.

{¶56} The majority concludes that reasonable minds could differ as to whether the darkness was open and obvious. The majority argues that "the darkness is not necessarily dangerous, but common or expected because many public establishments do not keep a light on in a restroom at all times." *Supra* at ¶ 39. The issue, however, is not whether the darkness is "necessarily dangerous" (strictly speaking, darkness is not dangerous at all), but whether the darkness was open and obvious, i.e., serving as a

warning of a potentially hazardous condition, such as stairs. Here, Miller was not directed to this particular door, acknowledged that the door was unmarked, and had just opened another unmarked door that did not lead to the bathroom. Miller admitted that he neither believed nor was told that this door opened on the bathroom, but just assumed that it did so.

{¶57} The majority further argues that the darkness in the present case might not have been open and obvious because it was not revealed until the door was opened (somewhat inconsistent with the notion that dark bathrooms are "common or expected"). However, Miller testified that he knew the space he was entering was unlit. Whether obvious or not, Miller was aware of the adverse condition. In fact, Miller testified that he passed through the door "looking down" and "using the light from the hallway" to guide his steps. Miller testified "there was enough light to know it was a step," but, for whatever reason, he "thought it was the floor" and "assumed that the floor was right there, but it ended up not being [there]."

{¶58} The majority spends much effort speculating about the reasonableness of Miller's belief that he was entering the bathroom, but too little effort identifying how the defendants breached their duty of care toward Miller.[1]

{¶59} The case of *Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961 (2nd Dist.), relied upon by the majority, demonstrates the appropriateness of summary judgment in the present case. In *Hissong*, the trial court framed the issue with respect to the applicability of the open and obvious doctrine as follows: "whether the stairs were

1. The majority suggests that a genuine issue of material fact exists as to whether there was a sign indicating the location of the bathroom at Coffee Corners. In fact, it is a nonissue. Miller testified that he did not see a sign, but could not testify as to whether the sign was there or not. There was no other evidence indicating that a bathroom sign was, or was not, posted at the time of his injury.

objectively observable, that is, whether a person in Hissong's situation exercising reasonable care would have seen them." *Id.* at ¶ 13. "When Hissong reached the door to what she believed was the restroom, she opened it inward only about a foot-and-a-half. She saw a light switch inside and as she reached for the switch she stepped through the doorway. Hissong admitted that she did not look down before stepping through the doorway." *Id.* at ¶ 14. In contrast, Miller was not told that this door opened or led to the bathroom, did not see a light switch or even a wall in the darkness before him, and was looking down as he stepped through the doorway. The *Hissong* court concluded that a genuine issue of material fact existed as to whether Hissong should have been looking down as she entered the doorway. *Id.* at ¶ 35. In the present case, Miller was looking down but, as noted above, his effort to exercise ordinary care failed. In no way is this failure attributable to a breach of duty on the defendants' part.

{¶60} In sum, the space Miller entered was unmarked and unlit and, therefore, constituted an open and obvious hazard of which the defendants were under no duty to warn Miller. Assuming, arguendo, the darkness did not constitute an open and obvious hazard, Miller was fully aware of the adverse conditions and tried, albeit unsuccessfully, to exercise reasonable care while entering. His mistaken belief that he was stepping onto a level floor does not, as a matter of law, constitute basis for a negligence claim against the defendants. The judgment of the trial court should be affirmed.