[Cite as *Lozitsky v. Heritage Companies*, 2002-Ohio-500.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 79103

OKSANA LOZITSKY, ET AL.	:	
	:	JOURNAL ENTRY
PLAINTIFFS-APPELLANTS	:	
	:	AND
v.	:	
	:	OPINION
HERITAGE COMPANIES, ET AL.	:	
	:	
DEFENDANTS-APPELLEES	:	

DATE OF ANNOUNCEMENT
OF DECISION: FEBRUARY 7, 2002

CHARACTER OF PROCEEDING: Civil appeal from
Common Pleas Court,
Case No. CV-378511.

JUDGMENT: AFFIRMED.

DATE OF JOURNALIZATION:

APPEARANCES:

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[Cite as *Lozitsky v. Heritage Companies*, 2002-Ohio-500.]
TIMOTHY E. McMONAGLE, J.:

Plaintiffs-appellants, Oksana and Piotr Lozitsky, appeal the decision of the Cuyahoga County Common Pleas Court granting summary judgment to defendant-appellee, Heritage Companies, Inc., on their complaint for negligence. For the reasons that follow, we affirm.

A review of the record reveals that Oksana Lozitsky ("appellant") was employed as a cleaning person for Janitorial Services, Inc., a company that provides cleaning services to an office complex owned and/or managed by Zaremba Management Company ("Zaremba") and Shawnee Office Associates ("Shawnee"). Appellee-Heritage Companies, Inc. ("Heritage") was leasing office space at this complex, when, on February 18, 1998, appellant sustained injury. In particular, appellant alleges that a piece of metal, six feet high and thirty inches wide, described as a metal bookcase end cap, fell on her while she was retrieving supplies from a storage closet located on Heritage's premises. She subsequently instituted the within negligence lawsuit against Heritage, Zaremba and Shawnee.[1] Included in the complaint was a claim for loss of consortium by her husband, Piotr Lozitsky.

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[1]Appellants originally filed suit on March 1, 1999 as case number 378511 but voluntarily dismissed that action on December 1, 1999. The case was refiled as case number 400663 on January 24, 2000. Several documents, however, have been filed in the refiled

action under the original case number. This court, by journal entry dated April 5, 2001, ordered that the record from both cases become the record on appeal.

Heritage moved for summary judgment[2] seeking judgment in its favor on the basis that location of the metal shelf was open and obvious and therefore it owed no duty to appellant. Alternatively, it argued that even if a duty was owed to appellant, her own negligence outweighed that of Heritage, justifying the grant of summary in its favor. The trial court subsequently granted Heritage's motion without opinion.

Appellant and her husband are now before this court and assert in their sole assignment of error that the trial court improperly granted summary judgment to Heritage.[3]

An appellate court reviews a trial court's decision on a motion for summary judgment *de novo*. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law;

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[2]Zaremba and Shawnee likewise moved for summary judgment, which appellant did not oppose. Nor does appellant appeal the decision granting summary judgment to these defendants and, as such, they are not parties to this appeal.

[3]As a result, Zaremba Management Company and Shawnee Office Associates are not parties to this appeal.

and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-370, citing *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, paragraph three of the syllabus; see, also, Civ.R. 56(C).

In order to defeat a motion for summary judgment on a negligence claim, a plaintiff must establish that a genuine issue of material fact remains as to whether (1) a defendant owed a duty of care; (2) the defendant breached this duty; and (3) the breach was the proximate cause of plaintiff's injury causing damage. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 680; *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142; *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75. An owner or occupier of property owes a duty of ordinary care to invitees to maintain the premises in a reasonably safe condition so that an invitee is not unreasonably or unnecessarily exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc,* (1985), 18 Ohio St.3d 203. While a premises owner is not an insurer of its invitees' safety, the premises owner must warn its invitees of latent or concealed dangers if the owner knows or has reason to know of the hidden dangers. *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 358. Invitees likewise have a duty in that they are expected to take reasonable precautions to avoid dangers that are patent or obvious. See *Brinkman v. Ross* (1993), 68 Ohio St.3d 82, 84; *Sidle*

v. Humphrey (1968), 13 Ohio St.2d 45, paragraph one of the syllabus. Whether a duty exists is a question of law for the court to determine. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318.

Under the open and obvious doctrine, an owner or occupier of property owes no duty to warn invitees of hazardous conditions that are open and obvious. *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644. The rationale behind 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. *Simmers*, 64 Ohio St.3d at 644.

The continued viability of the open and obvious doctrine was recently discussed by this court in *Schindler v. Gale's Supermarket, Inc.* (Apr. 6, 2001), Cuyahoga App. No. 78421, unreported, 2001 Ohio App. Lexis 1614.

> Because the *Texler* decision is the most recent pronouncement from the supreme court on this issue, its admonitions should not be lightly taken. Indeed, when analyzed in terms of the duty owed, I find the doctrine questionable because it rests on a legal fiction in that it relieves the premises owner of the duty to warn. See *Basar v. Steel Service Plus* (Apr. 27, 2000), Cuyahoga App. No. 77091, unreported at 12 (McMonagle, J., concurring). To say that a claim is barred because the defendant owed the plaintiff no duty to warn him of the danger is to disregard an express duty on the part of the premises owner to maintain the premises in a reasonably safe condition. *Id.* at 22. With this in mind, this court is of

> the opinion that the time has come to analyze the openness and obviousness of a hazard not in terms of the duty owed but rather in terms of causation.

This analysis necessitates the application of comparative negligence principles, which requires the factfinder to apportion the percentage of each party's negligence that proximately caused the plaintiff's damages. See R.C. 2315.19(A)(2). Ordinarily this is an issue best determined by the jury unless the evidence is so compelling that reasonable minds can reach but one conclusion. *Simmers*, 64 Ohio St.3d at 646. In such a case, summary judgment is appropriate if the only conclusion a reasonable trier of fact could reach is that the plaintiff was over fifty percent negligent so as to bar recovery under comparative negligence principles. *Schindler v. Gale's Supermarket, Inc.* (Apr. 6, 2001), Cuyahoga App. No. 78421, unreported, 2001 Ohio App. Lexis 1614; see, also, *Arsham v. Cheung-Thi Corp.* (May 31, 2001), Cuyahoga App. No. 78280, unreported, 2001 Ohio App. Lexis 2444; *Basar v. Steel Serv. Plus* (Apr. 27, 2000), Cuyahoga App. No. 77091, unreported, 2000 Ohio App. Lexis 1842 (McMonagle, J., concurring); *Wilson v. PNC Bank, N.A.* (May 5, 2000), Hamilton App. No. C-990727, unreported, 2000 Ohio App. Lexis 1902 (Painter, J., concurring in judgment only); *Hayes v. Wendy's Internatl., Inc.* (Feb. 16, 1999), Warren App. No. CA98-07-074, unreported, 1999 Ohio App. Lexis 485.

We find such compelling evidence in this case. Steven Popelsky, the field claim manager for Heritage, testified in

deposition that Heritage used the storage closet for its own use but allowed the owners and/or managers of the complex to store cleaning supplies there. The metal shelving unit in question belonged to Heritage and was stored against the wall in that room. A box of toilet tissue was stored directly in front of the shelf. According to appellant's deposition testimony, the storage room was dark when she entered but she did not look for or turn on the light that was against the wall. In order to see the contents of the box, she pulled the box towards the light and it was at that moment that the shelving unit fell on her head.

Contrary to the assertions of appellant's counsel that sufficient light was emanating from the adjacent garage, appellant's testimony repeatedly supports that the room was dark and without sufficient light. Heritage urges this court to rely on the step-in-the-dark rule enunciated in *Flury v. Central Publishing House* (1928), 118 Ohio St. 154, which provides that an individual is guilty of contributory negligence as a matter of law when that individual, "from a lighted area, intentionally steps into total darkness, without knowledge, information, or investigation as to what the darkness might conceal." See *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 276; see, also, *Manofsky v. Goodyear Tire and Rubber Co.* (1990), 69 Ohio App.3d 663, 666. With the adoption of comparative negligence principles, application of

this rule can no longer completely bar recovery. See R.C. 2315.19. Comparative negligence analysis, however, does not necessarily preclude an award of summary judgment. See *Gabel v. Apcoa* (Oct. 21, 1999), Cuyahoga App. No. 74794, unreported, 1999 Ohio App. Lexis 4912. It merely requires comparing the negligence of a plaintiff who sustains injury upon entering a darkened room to that of the premises' owner and/or occupant who maintains that room.

Darkness is always a warning of danger and for one's own protection such a condition may not be disregarded. *Zaslov v. May Dept. Stores* (Oct. 1, 1998), Cuyahoga app. No. 74030, unreported at 5, 1998 Ohio App. Lexis 4654. In this case, appellant had been cleaning this complex for approximately one year. She was aware that cleaning supplies were stored in that closet and, in fact, retrieved supplies from that room on several occasions. While she testified that she "didn't pay attention that there [was] a light there," she also testified that had she looked she would have seen the light switch. Indeed, she testified that the light switch was not concealed in any way. If she was unaware that the storage closet was equipped with a light switch, how would she know whether that same switch was concealed? Even so, had she looked for the light and turned it on, not only would she have been able to observe the contents of the box without moving it, but she would have seen the similarly unconcealed shelving unit stored against the wall.

Consequently, the only conclusion that a reasonable trier of fact could reach is that appellant herself was more than fifty percent negligent in causing her injuries and is therefore barred from recovery under comparative negligence principles. Therefore no genuine issue of material fact remains and summary judgment was appropriately granted to Heritage.

Appellants' single assignment of error is not well taken and is overruled.

Judgment affirmed.

It is ordered that appellees recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

TIMOTHY E. McMONAGLE
JUDGE

ANNE L. KILBANE, J., CONCURS IN JUDGMENT ONLY; AND

DIANE KARPINSKI, A.J., DISSENTS WITH DISSENTING OPINION (ATTACHED).

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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COUNTY OF CUYAHOGA

NO. 79103

OKSANA LOZITSKY, ET AL.	:	
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Plaintiffs-appellants	:	
	:	DISSENTING
v.	:	
	:	OPINION
HERITAGE COMPANIES, ET AL.	:	
	:	
	:	
Defendants-appellees	:	

DATE: FEBRUARY 7, 2002

KARPINSKI, ADM.J., DISSENTING:

I must respectfully dissent with the majority opinion in this case. Plaintiff-appellant claims that the trial court erred in granting summary judgment to defendant-appellee, the Heritage Co. Plaintiff argues that there remain genuine issues of material fact relating to her claim of negligence against defendant. I agree.

In February 1998, plaintiff[4] was employed as a cleaning woman for Janitorial Services, Inc., not a party here. Plaintiff was injured when she moved a box and a large metal shelving end-cap fell on top of her head. Plaintiff states that, on the date in

[4]In her deposition, plaintiff testified that she was born in Ukraine in 1967 and that she has been in this country for ten years. During her deposition, plaintiff used an interpreter who had a weak command of English grammar as is obvious from the transcript. Some of plaintiff's testimony, therefore, is difficult to understand.

question, she arrived at work at about 4 p.m. with her husband, who also worked for the same company. Plaintiff and her husband had been working for Janitorial for about two years and had always cleaned the same building during that time. It is undisputed that at the time of plaintiff's injury the building was under defendant's control.

As she started work, plaintiff walked into an adjacent garage area, inside of which was a small storage room. Steven Popelsky, an employee of defendant, testified in deposition that the lighting in the garage was "very strong." Plaintiff stated, however, that, using the light from the garage, she entered the storage room which was "really dark," but she could see the floor where she was walking and could distinguish the garbage bags and Windex on the shelves inside the room. Plaintiff testified that she has bad vision, is nearsighted, and on the day of the accident did not have glasses. The evidence is unclear about whether she owned glasses at the time and simply chose not to wear them or she did not even own any glasses when she was injured.

Plaintiff, as usual, entered the storage room to get toilet paper. She testified that she had been in the storage room many times before to gather cleaning supplies. Before the accident, there were boxes of toilet paper stacked high, so that she could not tell whether there was anything behind them. There is no dispute that the metal end-cap that fell on plaintiff was leaning

against a wall and was behind at least one box. At deposition, plaintiff testified:

> Q: As you walked towards the box of toilet paper, did you see the piece of metal leaning against the wall?
> A: She[5] never pay attention and so she didn't see that day as well.
>
> ***** ***** *****
>
> Usually it used to be a lot of boxes with toilet paper, so she couldn't see much, what was behind the--those boxes. And when--that day just one box left. That's why when she took it off, this piece fell on her.

Plaintiff also stated that she pulled the box towards the doorway so that she could see inside it (in order to see how much toilet paper was left). When she moved the box, the metal cap fell on her. Plaintiff testified that she did not know the metal end-cap was there until it fell on her. She also stated that she did not know that there was a light switch inside the storage room. Nor is there any evidence that defendant ever told or showed plaintiff or her husband where the switch was located in the storage room.

Defendant, on the other hand, admitted to having notice of the metal end-cap through its employee, Popelsky. Popelsky stated that

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[5]The interpreter uses the third person "she." Apparently, the interpreter uses the third person ("she") to translate the plaintiff's answer, presumably given in the first person ("I").

inside the storage room he had seen the metal item leaning "at an angle." He also states that he knew the cleaning crew put boxes "in front of the end-cap."

Under Civ.R. 56, we must view the evidence in a light most favorable to the non-movant, plaintiff, and decide whether there remain genuine issues of material fact which only the trier of fact can decide. In order to maintain a claim for negligence, a plaintiff must demonstrate a duty of care and that the breach of that duty directly and proximately caused the injury. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 693 N.E.2d 271; *Nice v. Meridia Hillcrest Hosp.* (Aug. 2, 2001), Cuyahoga App. No. 79384, unreported, 2001 Ohio App. LEXIS 3417. An owner of premises owes an invitee a duty to exercise ordinary care and to maintain the premises in a reasonably safe condition. *Light v. Ohio University* (1986), 28 Ohio St.3d 66, 502 N.E.2d 611; *Kubiak v. Wal-Mart Stores, Inc.* (1999), 132 Ohio App.3d 436, 725 N.E.2d 334. Further, in order for an invitee to show that the premises owner breached its duty, the invitee must show that either the owner created the condition and had actual knowledge of the condition or the danger existed for a sufficient length of time to establish constructive knowledge of the condition. *Nice, supra*; *Baudo v. Cleveland Clinic Foundation* (1996), 113 Ohio App.3d 245, 680 N.E.2d 733.

An invitee also has a corresponding duty to avoid open and obvious hazards which will foreseeably cause injury. *Texler*,

supra. Ultimately, the question of whether a plaintiff-invitee failed to avoid an open and obvious hazard involves the further question of whether the plaintiff was contributorily negligent. Because this analysis requires the fact finder to apportion each party's percentage of negligence, it necessarily involves questions related to the issue of causation. *Schindler v. Gale's Super-market, Inc.* (2001), 142 Ohio App.3d 146. I agree with the majority that the issue of causation is best determined by the jury unless the evidence is so compelling that reasonable minds can reach but one conclusion. I do not agree with the majority, however, that the evidence in this case compels only one conclusion.

"A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed ***." *Hounshell v. American States Insurance Co.* (1981), 67 Ohio St.2d 427, 433, 424 N.E.2d 311. Moreover, a trial court should not grant a motion for summary judgment if "the record is not sufficiently developed to make it ripe for summary judgment." *Trossi v. Nationsrent of Ohio, Inc.* (June 14, 2000), Tuscarawas App. No. 1999AP110062, unreported, 2000 Ohio App. LEXIS 2685; *Lawson v. May Department Store*, (Nov. 27, 2001), Mahoning App. No. 00 CA 191, unreported, 2001 Ohio App. LEXIS 5325 (absent proof of a material fact, summary judgment is premature.)

In the case at bar, resolution of numerous questions about the lighting in the storage room is central to deciding this case.

The lighting conditions existing at the time of plaintiff's injury are material to the merits of plaintiff's claims. Because there are too many unanswered questions about the storage room lighting the day of plaintiff's injury, the trial court erred in granting summary judgment. These various questions cannot be resolved on the record as it currently exists.

A central question in this case is whether the lighting was sufficient for her to see either the end piece or the light switch. The light she worked from was not overhead, but rather came through a door behind her. It is not enough to know she could discern some garbage bags and Windex. To draw any conclusions, we must know the location of these items, as well as the end piece, in relation to the light from the doorway. Nothing in the record says they were equally illuminated.

Nor does the record indicate the direction of or location of the light. A light located outside to the side of the door, for example, could illuminate one side of the room and not the other. Similarly, a light higher than the door might illuminate the floor and a box on the floor, but not the upper back part of the room. Or the light might permit plaintiff to see the side of a box, but not inside or, for that matter, behind. The location of the light switch relative to the light from the doorway and the position of plaintiff is similarly murky.

The defendant argues that the circumstances justify inferring defendant had notice that the metal end-cap was stored inside the

storage room "at an angle." The record is entirely too vague to conclude what plaintiff should have seen. In any event, what she should have seen is a jury question. Moreover, whether the metal end-cap, stored in the way it was, constitutes an unreasonable risk of harm is also a jury question. Popelsky's testimony, coupled with plaintiff's, strongly indicates that because boxes were usually stacked high in front of the metal end-cap she would not have reason to expect it and, therefore, it may not have been "open and obvious."

As to this same defense, there are genuine issues of material fact remaining about whether, by means of the ambient light from the garage, plaintiff actually could see sufficiently inside the storage room to appreciate the open and obvious nature of the metal piece. Next, as a reasonably prudent person, could she have anticipated that an injury was likely to occur if she moved the box. Regardless of which question one focuses upon and regardless of an answer in the affirmative, there is still the issue of whether plaintiff's negligence outweighs that of the defendant's. This question, based upon the facts in this case, cannot be resolved on summary judgment.

Defendant also references the "step-in-the-dark-rule," which generally holds that one who intentionally steps into total darkness, without investigation, may be contributorily negligent for any injuries suffered. *Posin v. A.B.C.* (1976), 45 Ohio St.2d 271. Defendant concedes that this rule typically presents jury

questions related to issues about the degree of darkness involved. These same issues arise under the open and obvious doctrine. In other words, the same question remains: how open and obvious was the end piece to a prudent worker walking into a room with only the light from the doorway. Either way, summary judgment is inappropriate to resolve questions about the extent of existing light at the time of injury and about what was lit.

There simply are too many unresolved questions related to the lighting conditions inside the storage room. The record is far too undeveloped to justify the trial court's premature grant of summary judgment to defendant. I would reverse and allow this case to proceed to trial.