**[Cite as *Hill v. W. Res. Catering, Ltd.*, 2010-Ohio-2896.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 93930**

## MARLENE A. HILL, ET AL.

PLAINTIFFS-APPELLANTS

vs.

## WESTERN RESERVE CATERING, LTD.

DEFENDANT-APPELLEE

**JUDGMENT:**
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-669564

**BEFORE:** Cooney, J., Kilbane, P.J., and Sweeney, J.

**RELEASED:** June 24, 2010

**JOURNALIZED:**

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COLLEEN CONWAY COONEY, J.:

**{¶ 1}** Plaintiffs-appellants, Marlene Hill ("Marlene") and Robert Hill ("Robert"), appeal the trial court's granting of summary judgment in favor of defendant-appellee, Western Reserve Catering Ltd. d.b.a. Houlihan's of Cleveland ("Houlihan's"). Finding no merit to the appeal, we affirm.

**{¶ 2}** In January 2008, Marlene and a coworker went to the Houlihan's restaurant at Tower City for lunch. Marlene had dined at Houlihan's approximately four times per year over the past several years. The hostess sat them in a booth in an area Marlene described as an alcove. This area is elevated from the remainder of the restaurant. As they approached the booth, the hostess warned them that there was a ramp and to "watch your step." After finishing lunch, Marlene proceeded to exit the restaurant by walking back down the ramp when she fell. Marlene stated that as she was walking down the ramp, she was not distracted and did not trip on anything. She explained that she forgot that the ramp was there. She further explained that she did not realize that she was walking down the ramp because that area was dimly lit and the carpeting in the dining area and on the ramp were uniform in color. At the bottom of the ramp, there was tile and a metal strip between the tile and carpet.

**{¶ 3}** In September 2008, Marlene and Robert filed suit against Houlihan's, asserting two causes of action. Count 1 alleged that Houlihan's negligence was the direct and proximate cause of her injuries. Count 2 of the complaint alleged a loss of consortium claim by Robert. Houlihan's moved for summary judgment, which Marlene and Robert opposed. The trial court granted Houlihan's motion, finding that "the ramp was open and obvious and [Marlene] was aware of the ramp. [Houlihan's] owed no further duty to [Marlene]."

**{¶ 4}** Marlene and Robert now appeal, raising one assignment of error, in which they argue that the trial court erred in granting summary judgment because a genuine issue of material fact exists. She claims that her unrebutted evidence demonstrates that the ramp was not "obvious."

Standard of Review

**{¶ 5}** Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court set forth the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, as follows:

> "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his

> favor. *Horton v. Harwick Chem. Corp*. (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274."

**{¶ 6}** Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138.

**{¶ 7}** Marlene argues that she adduced evidence that the dangerous condition was not discernable, which constitutes a material fact that should have been decided by the jury. She relies on her affidavit which she attached to her brief in opposition to Houlihan's motion for summary judgment. In her affidavit, she states that the ramp's decline was not obvious at the time of her fall because there was poor lighting and the ramp carpet and the carpet in the dining area were uniform in color.

**{¶ 8}** Marlene further argues that her observation that Houlihan's enhanced the lighting and added yellow markings to the ramp after her fall

created an issue of material fact. She contends that this evidence is admissible under Evid.R. 407 to impeach Houlihan's open and obvious claim.[1]

Open-and-Obvious Doctrine

**{¶ 9}** The open-and-obvious doctrine provides that premises owners do not owe a duty to persons entering those premises regarding dangers that are open and obvious. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶14, citing *Sidle v. Humphrey* (1963), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the 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." *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42, 597 N.E.2d 504.

**{¶ 10}** A business ordinarily owes its invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to

[1]We note that "'a nonmoving party may not avoid summary judgment by merely submitting a self-serving affidavit contradicting the evidence offered by the moving party. * * * This rule is based upon judicial economy: Permitting a nonmoving party to avoid summary judgment by asserting nothing more than "bald contradictions of the evidence offered by the moving party" would necessarily abrogate the utility of the summary judgment exercise. * * * Courts would be unable to use Civ.R. 56 as a means of assessing the merits of a claim at an early stage of the litigation and unnecessary dilate the civil process.'" (Citations omitted.) *Lennon v. Cuyahoga Cty. Juvenile Court*, Cuyahoga App. No. 86651, 2006-Ohio-2587, quoting *Greaney v. Ohio Turnpike Comm.*, Portage App. No.2005-P-0012, 2005-Ohio-5284.

warn its invitees of latent or hidden dangers.[2] *Armstrong* at ¶5, citing *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E.2d 474; *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 390 N.E.2d 810. When applicable, however, the open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims.[3] Id. It is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the plaintiff. Id.

**{¶ 11}** "Open and obvious hazards are neither hidden or concealed from view nor non-discoverable by ordinary inspection. The determination of the existence and obviousness of a danger alleged to exist on a premises requires a review of the facts of the particular case. Consequently, the bench mark for the courts is not whether the person saw the object or danger, but whether the object or danger was observable. There are exceptions to this rule, namely, attendant circumstances." (Citations omitted.) *Haymond v. BP America*, Cuyahoga App. No. 86733, 2006-Ohio-2732, ¶16; see, also, *McDonald v. Marbella Restuarant* Cuyahoga App. No. 89810, 2008-Ohio-3667.

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[2]In the instant case, it is undisputed that Marlene was a business invitee.

[3]To establish a negligence claim, Marlene must demonstrate the existence of a duty, a breach of that duty, and injury or damages proximately caused by the breach. See *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707.

**{¶ 12}** While "there is no precise definition of 'attendant circumstances' * * * they generally include 'any distraction that would come to the attention of a pedestrian in the same circumstances and reduce the degree of care an ordinary person would exercise at the time.'" *Klauss v. Marc Glassman, Inc.*, Cuyahoga App. No. 84799, 2005-Ohio-1306, ¶20, citing *McGuire v. Sears, Roebuck and Co.* (1996), 118 Ohio App.3d 494, 693 N.E.2d 807. Attendant circumstances are all facts relating to the event, such as time, place, surroundings or background, and the conditions normally existing that would unreasonably increase the normal risk of a harmful result of the event. Id., citing *Menke v. Beerman* (Mar. 9, 1998), Butler App. No. CA97-09-182.

**{¶ 13}** Attendant circumstances, however, do not include "an individual's activity at the moment of the fall, unless the individual's attention was diverted by an unusual circumstance of the property owner's making, and is beyond the control of the injured party." *McDonald* at ¶29, citing *Lang v. Holly Marlene Motel, Inc.*, Jackson App. No. 06CA18, 2007-Ohio-3898; *Backus v. Giant Eagle, Inc.* (1996), 115 Ohio App.3d 155, 684 N.E.2d 1273.

**{¶ 14}** When only one conclusion can be drawn from the established facts, the issue of whether a risk was open and obvious may be decided by the court as a matter of law. *Klauss* at ¶18, citing *Anderson v. Hedstrom Corp.*

(S.D.N.Y. 1999), 76 F.Supp.2d 422, 441; *Vella v. Hyatt Corp.* (S.D.Mich. 2001), 166 F.Supp.2d 1193, 1198. However, when reasonable minds could differ with respect to whether a danger is open and obvious, the obviousness of the risk is an issue for the jury to determine. Id., citing *Carpenter v. Marc Glassman, Inc.* (1997), 124 Ohio App.3d 236, 240, 705 N.E.2d 1281; *Henry v. Dollar General Store*, Greene App. No.2002-CA-47, 2003-Ohio-206; *Bumgarner v. Wal-Mart Stores, Inc.*, Miami App. No.2002-CA-11, 2002-Ohio-6856.

Subsequent Remedial Measures

**{¶ 15}** Marlene argues that the evidence in her affidavit that the ramp had enhanced lighting and yellow markings added after her fall created a genuine issue of material fact and is admissible under Evid.R. 407 to impeach Houlihan's open and obvious claim. We disagree.

**{¶ 16}** Evid.R. 407 prohibits the admission of evidence of subsequent remedial measures to prove negligence or culpable conduct. It provides: "[w]hen, after an injury or harm allegedly caused by an event are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for

another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." Id.

**{¶ 17}** In examining Evid.R. 407, the Ohio Supreme Court in *McFarland v. Bruno Mach. Corp.*, 68 Ohio St.3d 305, 1994-Ohio-62, 626 N.E.2d 659, noted that:

> "The policy reasons for Evid.R. 407 have been stated as resting on two grounds. The first justification for the rule is that evidence of subsequent remedial measures is thought to have minimal or nonexistent probative value in *establishing negligence.* Taking subsequent remedial action is not an admission of negligence. The rationale is that the injury may have been caused by reason of mere accident or through the plaintiff's contributory negligence. The second explanation for excluding evidence under this rule is based on the social policy of encouraging repairs or corrections. The argument behind this policy reason is that a defendant would be less likely to take subsequent remedial measures if the repairs or corrections could be used as evidence against the defendant at trial." (Emphasis in original and citations omitted.) Id. at 307-308.

**{¶ 18}** Here, the obviousness of the ramp's decline is the core issue of Houlihan's defense, and Marlene's attempt to introduce evidence that the ramp had enhanced lighting and yellow markings defeats the purpose of Evid.R. 407. See *Briscoe v. Ohio Dept. of Rehab. and Corr.*, Franklin App. No. 02AP-1109, 2003-Ohio-3533 (where the court found that the installation of a shower mat in a shower, after an inmate sustained injuries from a slip and fall accident in the same shower, was inadmissible in the inmate's negligence action against the Department of Rehabilitation and Correction).

See, also, *Immormino v. J&M Powers, Inc.* (C.P. 1998), 91 Ohio Misc.2d 198, 698 N.E.2d 516 (where the court found that a fast food restaurant's efforts to enhance warnings on cups containing hot beverages, after a large verdict was entered against the restaurant in a case involving a hot coffee spill, was not admissible as evidence of failure to warn in a subsequent case involving a hot tea spill). Because this evidence goes to Houlihan's negligence, we find that it is inadmissible under Evid.R. 407.

Obvious Nature of the Condition

**{¶ 19}** Marlene further argues that the ramp's decline was not discernible to her because of poor lighting and the uniform color in carpet in the dining area and on the ramp. She claims that there was no "depth perception" when she walked down the ramp.

**{¶ 20}** Poor lighting, however, does not rebut the presumption of the open and obvious danger. "'Darkness' is always a warning of danger, and for one's own protection it may not be disregarded." *Jeswald v. Hutt* (1968), 15 Ohio St.2d 224, 239 N.E.2d 37, paragraph three of the syllabus. In addition, taking the attendant circumstances together, they must divert the attention of a pedestrian to significantly enhance the danger of the defect and contribute to the fall. *Boros v. Sears, Roebuck and Co.*, Cuyahoga App. No. 89299, 2007-Ohio-5720, ¶15, citing *Stockhauser v. Archdiocese of Cincinnati* (1994), 97 Ohio App.3d 29, 646 N.E.2d 198.

**{¶ 21}** We find the instant case to be analogous to *McDonald,* in which the plaintiff fell down stairs while attempting to exit Marbella Restaurant. The plaintiff explained that she did not see the stairs when she fell. She claimed that the dim lighting in the restaurant, the unilluminated stairs, and the fact that the stairs were the same color as the dark rug that preceded them obscured her ability to see them. This court found that plaintiff's claim of attendant circumstances seeking to defeat the application of the open-and-obvious doctrine lacked merit. Id. at ¶39. "The circumstances that [plaintiff] complains of, namely, the same colored carpeting preceding the steps and the unilluminated warning lights on the stairs — all go to the visibility of the stairs but do not negate the obviousness of the darkness. Again, darkness is always a warning that should not be disregarded." Id. In affirming the trial court's granting summary judgment in Marbella's favor, this court found that "[b]ecause the darkness was an open and obvious condition, * * * Marbella had no duty to warn or protect against it." Id. at ¶40.

**{¶ 22}** Similarly, in the instant case, there was no evidence that Marlene was distracted when she fell. She testified that the hostess warned her that there was a ramp and "watch your step." Marlene explained that she forgot that the ramp was there. She further explained that she did not realize that she was walking down the ramp because that area was dimly lit and the carpeting in the dining area and on the ramp were uniform in color. As we stated in *McDonald,* these attendant circumstances "go to the visibility of the

[ramp] but do not negate the obviousness of the darkness[, which] is always a warning that should not be disregarded." Id. at ¶39.

**{¶ 23}** Moreover, courts have held that dimly lit steps and uniform color between a step and the floor do not render steps unreasonably dangerous, but rather present an open and obvious danger of which the person traversing the steps should be aware. See *Orens v. Ricardo's Restaurant* (Nov. 14, 1996), Cuyahoga App. No. 70403 (dimly lit step and uniform color between carpet and floor); *Kornowski v. Chester Properties, Inc.* (June 30, 2000), Geauga App. No. 99-G-2221 (lack of color contrast). Furthermore, "the plaintiff's failure to avoid a known peril is not excused by the fact that he 'did not think,' or 'forgot.'" *Raflo v. Losantiville Country Club* (1973), 34 Ohio St.2d 1, 3, 295 N.E.2d 202, citing *Baltimore & Ohio Rd. Co. v. Whitacre* (1880), 35 Ohio St. 627 (in which the Ohio Supreme Court upheld the trial court's award of summary judgment to the country club, finding that an "invitee with knowledge of [a step at an exit door] traverses it at his peril.")

**{¶ 24}** Because the ramp and darkness were open and obvious, we agree with the trial court's finding that Houlihan's had no duty to warn or protect Marlene, and thus, summary judgment was appropriate.[4]

[4]Having determined that the trial court did not err in granting Houlihan's motion for summary judgment, Robert's loss of consortium claim also fails. "[A] claim for loss of consortium is derivative in that the claim is dependent upon the defendant's having

**{¶ 25}** Accordingly, the sole assignment of error is overruled.

**{¶ 26}** Judgment is affirmed.

It is ordered that appellee recover of appellant 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 municipal 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.

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COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
JAMES J. SWEENEY, J., CONCURS IN JUDGMENT ONLY

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committed a legally cognizable tort upon the spouse who suffers bodily injury." *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 93, 585 N.E.2d 384.