Circuit Court for Anne Arundel County
Case No. C-02-CV-20-001675

UNREPORTED

IN THE COURT APPELLATE COURT

OF MARYLAND*

No. 1842

September Term, 2021

JAMES DAILY

v.

RED ROOF INNS, INC., *ET AL.*

Kehoe,
Nazarian,
Reed,

JJ.

Opinion by Nazarian, J.

Filed: March 16, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

** This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

James Daily was a regular guest at the Red Roof Inn Plus in Linthicum Heights. At the direction of an employee, he smoked cigarettes in a picnic area across the parking lot from his room. While in the picnic area sometime after 10:00 PM on September 29, 2018, Mr. Daily heard a "rustling" sound coming from behind a nearby maintenance shed. Fearing for his safety, he decided to investigate, so he walked behind the maintenance shed into a dark area with no lighting. He tripped over ladders stored behind the shed and suffered a serious ankle injury.

Mr. Daily filed a negligence action in the Circuit Court for Anne Arundel County against R&R (BWI) LP and RRI West Management, LLC, doing business as Red Roof Inns (we'll call them both "Red Roof"). After the close of discovery, Red Roof moved for summary judgment, arguing that the undisputed evidence demonstrated a lack of primary liability and that Mr. Daily was contributorily negligent. The circuit court found that Mr. Daily was contributorily negligent as a matter of law and granted summary judgment in favor of Red Roof. Mr. Daily asserts on appeal that the trial court made improper inferences in favor of Red Roof and overlooked genuine issues of material fact, specifically whether an exigency motivated his venture behind the shed and whether he acted reasonably under the circumstances. We agree with Mr. Daily that genuine disputes of material fact precluded summary judgment on the issue of contributory negligence, and we reverse and remand for further proceedings.

I. BACKGROUND

Mr. Daily, a Pennsylvania resident, worked at the Curtis Creek Drawbridge jobsite in Baltimore and was a regular guest at a Linthicum Heights hotel operated and managed by Red Roof. Beginning in 2017, Mr. Daily typically stayed at the hotel Monday through Thursday nights and returned home on the weekends.

On September 29, 2018, Mr. Daily, who usually smoked cigarettes by the door outside his room, was told by a Red Roof housekeeper that he couldn't smoke within fifty feet of the building and must smoke instead in a grassy picnic area on the hotel property. The picnic area, including space behind a shed up to the tree line, was freshly mowed at the time. Mr. Daily testified in his deposition that he was unfamiliar with the picnic area of the hotel and regarded it as "not a real safe area" because it was "high traffic" and a lot of "people . . . cut through" the area walking between hotels. He testified as well that he often saw "cops there in the parking lot."

After work that same day, Mr. Daily and his co-worker, Steven Page, went out to dinner and, after returning, went to the picnic area to smoke. After about thirty minutes, sometime after 10:00 PM when it was "pretty dark," Mr. Daily heard a noise, investigated, and tripped over ladders on the ground behind the shed:

> [MR. DAILY:] We were in that area and I heard a bunch of noise from back behind the shed. And that was a popular pathway in between the hotels, and I wanted to see what that noise was because I didn't want nobody jumping out. I was just—it's just my nature to investigate things around me that made me uncomfortable, and I went behind the shed.
>
> As I was going behind the shed, I had no idea that the ladders were there. It was dark, and the next thing I know, I was on the

> ground because I tripped over a ladder. And I didn't even know it was when it happened.
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> * * *
>
> [COUNSEL FOR RED ROOF:] You testified that you heard what you described as, quote, a bunch of noise. Was it voices? Was it rustling? Did it sound like an animal? Like what was the nature of the noise?
>
> [MR. DAILY:] It was rustling like it sounded like somebody was back there.
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> * * *
>
> I just wanted to investigate what it was. I didn't know what it was; I wanted to know what it was because it was bothering me. . . . I wasn't scared, I'm just aware of my situation all the time.

Mr. Daily stated that the noise caused him to have concern for his own personal safety, that he was curious as to what was making the noise and "want[ed] to feel safe," so he walked "cautiously" while looking "[b]ack in the bushes back behind the shed" when he tripped. He didn't think to use his cellphone flashlight because he doesn't typically use it and he "wasn't worried about having a flashlight." After he fell, Mr. Page helped him back to his room. His ankle required surgery, and he was unable to work for over three months.

Mr. Daily filed his lawsuit against Red Roof on August 8, 2020. In the operative complaint, he asserted counts for negligence and negligence *per se* (Count I) and *respondeat superior* (Count II). He alleged that Red Roof "failed to store their ladders, or maintenance equipment, in a safe manner on the Premises" and "failed to warn" him "where and how the ladders were stored on the Premises." He alleged further that Red Roof "did not provide adequate lighting in the area nor any visual cues or warnings to protect patrons or other persons from avoiding injury with their ladders. The area was pitch black."

The complaint asserted that Mr. Daily was "walking safely in a reasonable, safe, and cautious manner when his foot became entangled in [Red Roof's] ladders" and that he "could not see the unmarked ladders on the ground that extended past the wall of [Red Roof's] shed, and were unaccompanied by any warning or adequate lighting, despite exercising due care and caution for his own safety."

After the close of discovery, on July 28, 2021, Red Roof filed a Motion for Summary Judgment under Maryland Rule 2-501. In its supporting Memorandum of Law, Red Roof argued that Mr. Daily lacked the evidence to prove Red Roof breached any duty of care owed to him and, alternatively, that Mr. Daily was contributorily negligent as a matter of law. Red Roof argued that "[o]ther than to satisfy his own curiosity, [Mr. Daily] did not have a reason to walk to the back of the shed." In addition, Red Roof argued, he "knew he was walking in an area that was dark," and he "had his Samsung cell phone with him, which he believed was equipped with a flashlight, but he did not use it." Red Roof urged the court to adopt a rule that "total darkness *in itself* is an open and obvious danger as a matter of law, for which an owner of land has no duty to warn." Thus, Red Roof argued, "when faced with darkness, it was incumbent on [Mr. Daily] to take reasonable steps to protect his own safety and to be sure he could see where he was walking so as to avoid what would otherwise be open and obvious conditions that could pose a hazard." It argued

his failure to do so was contributorily negligent, just as the Supreme Court of Maryland[1] held in *Bennett v. District Heights Apartments, Inc.*, 252 Md. 655, 662 (1969).

Red Roof argued that *Bennett* controlled and compelled entry of summary judgment:

> The facts in the case at bar are analogous to those in *Bennett*. In his deposition testimony, [Mr. Daily] admitted that he had never been in the area behind the shed at any time prior to the alleged incident. Necessarily, by proceeding, [Mr. Daily] entered into a strange and unfamiliar surrounding. Therefore, as stated by the [Supreme Court], the law imposed an extra duty upon [Mr. Daily] to mind those surroundings—a duty that would not have applied if [Mr. Daily] were in a familiar area. Additionally, [Mr. Daily] testified that there was no lighting in the area behind the shed, that it was dark and his sight distance was "not very far," and that he believed the area was not safe. He testified that he knew he was walking in an area that was dark. Nonetheless, [Mr. Daily] proceeded to walk behind the shed for no reason other than to satisfy his own curiosity, even though the noise he heard caused him to be concerned for his personal safety. His justification that it is his "nature to investigate" only confirms that [Mr. Daily's] decision was uniquely personal to him, as contrasted with what a reasonable person in his position would have done under the circumstances of feeling concerned for his personal safety.

Red Roof's motion also noted that Mr. Daily "failed to take a single precautionary measure to avoid potential injury, including and especially his failure to make use of an available

[1] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

light source that was on his person" and that Mr. Daily "admitted to consuming alcohol immediately prior to the alleged incident." For those reasons, Red Roof asserted, it was "indisputable that no reasonable person in [Mr. Daily's] position would have proceeded under those circumstances without taking some precautionary measure to avoid injury."

Mr. Daily filed a twenty-three page opposition to Red Roof's summary judgment motion, with numerous attached exhibits, that disputed the factual inferences Red Roof drew in its motion. Mr. Daily highlighted the concern he felt for his personal safety when he investigated the source of the noise, stating that "it was his safety that caused him to investigate the sound so that he could feel safe" not, as Red Roof characterized it, that he acted merely out of "curiosity." He argued as well that the picnic area was "dark" but not "pitch black." Although the complaint characterized the area as "pitch black," "Mr. Daily testified he had never seen the complaint and the use of the word was his counsel's not his own. . . . He repeatedly confirmed the area was dark." The motion noted that Mr. Daily "could see his feet" and "walked cautiously" toward the source of the sound, and argued that it was speculative to assume that he had an operable flashlight on his phone. His motion argued both that there remained genuine issues of material fact and that the facts were susceptible to more than one permissible inference, and thus, these disputes needed to be resolved by a trier of fact.

In response to Red Roof's reliance on *Bennett*, Mr. Daily contended that *Higgins v. City of Rockville*, 86 Md. App. 670 (1991), and *Tie Bar, Inc. v. Shartzer*, 249 Md. 711, 715 (1968), controlled and require that a jury decide whether he was contributorily negligent:

> In *Higgins*, the Plaintiff arrived at an unlit parking lot when it was dark outside. He and his boys proceeded from the parking lot down an unlit driveway to an athletic field. Plaintiff started to trot or run down the driveway. He was "primarily looking straight ahead" but occasionally glanced to his side or behind him—never down at the ground or at his feet. Suddenly, he tripped over . . . a chain cable gate . . . . There was no warning prior to the gate. . . .
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> In this case, Mr. Daily was walking cautiously, not running like Mr. Higgins. Unlike Mr. Higgins, Mr. Daily was only looking straight ahead. Unlike Mr. Higgins, Mr. Daily also looked down at his feet. Moreover, the hazardous ladders Mr. Dail[]y tripped over had no warning.
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> Second, like *Tie Bar* . . . the [Supreme Court of Maryland] held that a plaintiff was not negligent for walking into a dark area when directed by the business—again, Mr. Daily was ordered to the picnic area by [Red Roof].

On October 18, 2021, the circuit court held a hearing on the motion. Red Roof argued the "the salient material facts are clearly not in dispute" and that "[n]o reasonable person goes into the dark without taking reasonable steps to be able to see where they are going." Applying *Bennett*, Red Roof argued that Mr. Daily ventured into the dark and was "obligat[ed] to get some kind of lighting implement before [he went] into an area of darkness." Red Roof argued also there was no exigency that justified his venture behind the shed:

> There's this other issue of whether or not he should be excused for his conduct because he was concerned for his safety. That doesn't apply here in my opinion, Your Honor, because in the continuum all we have here that he says caused some concern for his safety was a rustling noise, a noise of some undetermined cause. It could have been as benign as a chipmunk, or a squirrel, or a racoon. But it may very well have been a person who was passing through. But merely having someone in the area doesn't create this [im]minent fight or flight scenario.

> And by surreptitiously going into the dark to find out the source of this noise [Mr. Daily] was arguably increasing the danger by confronting it as opposed to either remaining in this smoking area with his colleague or walking across the parking lot to his room, alerting someone at the hotel, or doing something else. . . . I will admit that finding contrib[utory negligence] as a matter of law does not happen with great frequency. But this entire argument is based upon [Mr. Daily's] own admissions as to his own conduct out there. And as I said before, he's charged with his unreasonableness in doing what he did.

In response, the court asked about the evidence that "homeless folks were staying in the woods back there" and that Mr. Daily was sent by Red Roof representatives to smoke in that area. Counsel for Red Roof responded that "[h]omeless people being back in the woods doesn't create an obligation or a need by [Mr. Daily] to go encounter them merely because he hears some vague noise or rustling behind the shed." In other words, Red Roof argued, the possibility that the noise was caused by homeless people didn't "excuse Mr. Daily from his decision to go back there . . . under the case law."

The court ruled on the record and found Mr. Daily contributorily negligent as a matter of law. The court stated that "even by his own admission this was a venture of sorts. A venture into an unknown area, with unknown conditions." The court applied the reasoning in *Bennett* and found Mr. Daily walked into a strange environment where there was no exigency without taking reasonable measures to ensure his safety:

> I don't believe that reasonable minds would disagree that that was a somewhat idiosyncratic response on the part of [Mr. Daily]. . . . [T]his is a person faced with an unfamiliar situation where the condition of darkness obviously rendered the use of his eyesight impaired. And so therefore he had an obligation to take reasonable means to ensure his safety in that unknown environment. [Mr. Daily] apparently testified in his deposition

> that indeed there was no lighting behind the shed, none, that it was dark, and his sight distance was not very far. And notwithstanding that Mr. Daily walked behind the shed because of some desire to investigate. . . . [T]hat's almost a per se assumption of some degree of risk insofar as he was venturing into an unknown area.
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> * * *
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> The Court finds that the darkness in itself in this case was indeed a hazard. And the Court finds that the reasoning that we see in Bennett versus District Heights, as I said before, also applies or is analogous to how this Court reasons in this case . . . that reasonable minds would not differ, that it was contributorily negligent as a matter of law to walk into that strange environment when there wasn't an exigency. Meaning there wasn't the proverbial cry for help where I think that similar with Bennett it's said well in that case the Plaintiff was entitled to wait for the maintenance persons to come. And you could even argue in Bennett there was a more compelling reason which was he was worried about the safety and sanctity of people in the building. Whereas in this case there was a higher degree of gratuitous actions on the part of [Mr. Daily] in this Court's estimate even than in Bennett.

The court clarified that it was not ruling on the issue of Red Roof's primary negligence. On October 20, 2021, the court entered a written order granting Red Roof's motion for summary judgment and entered judgment in favor of Red Roof. Mr. Daily timely appealed.

II. DISCUSSION

This case presents one issue for our review: whether the trial court erred in granting summary judgment in favor of Red Roof.[2] Summary judgment is appropriate when "there

[2] Mr. Daily phrased his Questions Presented as:

> 1. Maryland has gone as far as any jurisdiction in the country

Continued . . .

> holding that even the slightest evidence suggesting the lack of contributory negligence is sufficient to carry the case to the jury. In this case, Appellant James Daily was directed to smoke in a freshly mowed picnic area by Appellees. There were no signs, warnings, markings, instructions, or any other communication restricting where Mr. Daily could walk in the picnic area. Despite limited lighting in the area, Appellees placed step ladders on the ground without any warnings or markings – despite admitting that such conditions required such a warning. While walking through this unrestricted picnic area in the evening, Mr. Daily tripped and fell over the unmarked ladder placed by Appellees. The Trial Court ruled that no reasonable juror in the State of Maryland could find Mr. Daily's actions reasonable under the circumstances – thus making his actions contributorily negligent as a matter of law – despite providing a real-world example to the contrary. Is there room for reasonable minds to differ as to the reasonableness of Mr. Daily's actions under the circumstances thus precluding the entry of summary judgment against Mr. Daily?
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> 2. Summary Judgment is only permitted when there are no genuine disputes of material fact. In this case, Mr. Daily tripped and fell over an unmarked ladder placed on the ground by Appellees in a freshly mowed, unrestricted picnic area where he was directed to smoke by Appellees. He did not see the ladder before he tripped, and he was provided no warning of its presence – despite Appellees['] admission that it was required under the circumstances of limited lighting at night. Disputes remain over the amount of lighting, visibility, speed of Mr. Daily, exigency of circumstances, and demarcation of the picnic area boundaries. Were these disputes of fact material to the determination of whether Mr. Daily's actions constituted contributory negligence – thus precluding the entry of summary judgment against Mr. Daily?

Red Roof stated its Question Presented as, "Was the trial court legally correct in granting Red Roof's Motion for Summary Judgment on the basis of finding that Mr. Daily was contributorily negligent as a matter of law in the happening of the subject fall?"

is no genuine dispute as to any material fact and . . . the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). A circuit court's decision to grant summary judgment is reviewed *de novo*. *Streaker v. Boushehri*, 230 Md. App. 101, 117 (2016) (citation omitted). Furthermore, "we review the facts and all inferences drawn from those facts in the light most favorable to the plaintiff." *Gurbani v. Johns Hopkins Health Sys. Corp.*, 237 Md. App. 261, 267 (2018) (citation omitted). And the inferences drawn in favor of the nonmovant—here, Mr. Daily—"must be *reasonable* ones." *Id.* (citation omitted).

The circuit court granted Red Roof's motion for summary judgment solely on the ground that Mr. Daily was contributorily negligent. Contributory negligence, an affirmative defense, "is the doing of something that a person of ordinary prudence would not do, or the failure to do something that a person of ordinary prudence would do, under the circumstances." *Potts v. Armour & Co.*, 183 Md. 483, 490 (1944) (citation omitted). Although contributory negligence ordinarily is a jury question, a plaintiff can be contributorily negligent as a matter of law when there is no genuine dispute as to the plaintiff's own negligence. *See Miller v. Muleenix*, 227 Md. 229, 232 (1961). A court can find contributory negligence as a matter of law where "the act so relied on [is] distinct, prominent and decisive, and one about which reasonable minds would not differ in declaring it to be negligence." *Id.* But it bears repeating that contributory negligence ordinarily is left for the jury to decide:

> The question of contributory negligence must be considered in the light of all the inferences favorable to the plaintiff's case

> that may be fairly deduced from the evidence. Where there is a conflict of evidence as to material facts relied on to establish contributory negligence, or more than one inference may be reasonably drawn therefrom, the question should be submitted to the jury. In order that a case may be withdrawn from the jury on the ground of contributory negligence, the evidence must show some prominent and decisive act which directly contributed to the accident and which was of such a character as to leave no room for difference of opinion thereon by reasonable minds.

Reiser v. Abramson, 264 Md. 372, 377–78 (1972) (citation omitted); *see also Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 220 (1992) ("Usually inquiries into the reasonableness of conduct are the province of the jury rather than of the court.").

Mr. Daily's decision to walk behind the shed to investigate the "rustling" noise was surely a "distinct, prominent and decisive" act, and so we ask—could reasonable minds differ in declaring Mr. Daily to be negligent when he investigated the source of the noise? Mr. Daily argues, as he did before the circuit court, that *Higgins* and *Tie Bar* instruct that his actions were justified and the question of whether he exercised due care should have gone to the jury. Red Roof asserts that the trial court applied the rule stated in *Bennett* correctly and that summary judgment was appropriate.

In *Higgins*, the City of Rockville maintained an unlit parking lot where Mr. Higgins parked his car. 86 Md. App. at 674. Mr. Higgins and his young children "proceeded from the parking lot down an unlit driveway, apparently the primary route" to their destination, an athletic field. *Id.* Three of the children, including a three-year-old, moved ahead of him, and "[f]earing that the youngest would fall down the stairs leading to the field, [Mr.] Higgins increased his pace to a trot or a run down the driveway." *Id.* He tripped over

something in the driveway (which turned out to be a chain or cable gate strung between two posts) and broke his elbow. *Id.* We held that whether Mr. Higgins was contributorily negligent was a question for the jury:

> Where the act "is of such a nature that reasonable minds, after considering all the circumstances surrounding the accident, may draw different conclusions as to whether it constituted contributory negligence," . . . it becomes a question for the jury.
>
> [Mr.] Higgins may have been guilty of contributory negligence but not so clearly and decisively so as to take the issue away from the jury.

Id. at 690 (*quoting Shroyer v. McNeal*, 84 Md. App. 649, 658 (1990) (citation omitted)).

The Supreme Court held similarly in *Tie Bar* that contributory negligence was a jury question. 249 Md. at 716. The plaintiff there, Mr. Shartzer, was hired to paint a tie shop and was told by the shopkeeper to enter the premises and walk to the back of the shop "to turn on the lights because all lighting was controlled by the circuit breaker panel which was located there." *Id.* at 713. Upon entering, Mr. Shartzer walked to the back room, "as instructed, to turn on the lights. As he opened the door which swung inwardly and stepped inside, he . . . tumbled down the basement stairway" and was injured. *Id.* At the close of the evidence in that case, the circuit court denied the shopkeeper's motion for directed verdict and the case went to the jury, which rendered a verdict for Mr. Shartzer. *Id.* On appeal, the Court affirmed, noting that Mr. Shartzer had never been to the store before and "was not familiar with the premises." *Id.* at 716. There was no contributory negligence as a matter of law where Mr. Shartzer was told to go into the store and instructed that "there was only one place the lights could be turned on and . . . where that place was, but" wasn't

told about the "dangerous condition which existed along the way." *Id.* (citation omitted). The shopkeeper insisted that Mr. Shartzer was "negligent in failing to notice the light switch beside the door before he opened it or in failing to light a match to provide illumination after opening the door . . . ." *Id.* But the Court held that the issue was submitted to the jury properly because "more than one inference can be drawn from the facts in this case as to the care or lack of care of [Mr. Shartzer]." *Id.* (citation omitted).

Red Roof urges that *Bennett* controls. In that case, Mr. Bennett was a tenant of an apartment located directly above a boiler room that contained a leaky furnace that heated three adjacent apartment buildings. *Bennett*, 252 Md. at 656. In the past, smoke and oil fumes had reached the apartments and the fire department had ordered the buildings evacuated. *Id.* at 657. One evening, the fumes reached Mr. Bennett's apartment again, so he phoned maintenance, then called back a second time about thirty to forty-five minutes later after his calls "were unheeded." *Id.* After about an hour, Mr. Bennett decided to investigate himself, "to see if the condition of the oil or the boiler would warrant getting the people out of the building or to notify the Fire Department." *Id.* It was undisputed that "[i]t was a dark night. He had no flashlight and did not attempt to borrow one. There was no outside light . . . and no illumination . . . ." *Id.* at 657–58. Mr. Bennett, who admitted he couldn't see the steps beyond the second step, slipped on oil and leaves on the steps leading down to the boiler room and sustained injuries. *Id.* at 658. He sued and obtained a jury

verdict in his favor, but the circuit court granted the defendant's motion for judgment notwithstanding the verdict. *Id.*

The Supreme Court of Maryland held that Mr. Bennett was guilty of contributory negligence under the rule that a person who goes into darkness is not justified in doing so without first finding out where they are going and what dangers might be there:

> "A person who comes into an unfamiliar situation, where a condition of darkness renders the use of his eyesight ineffective to define his surroundings, is not justified, in the absence of any special stress of circumstances, in proceeding further, without first finding out where he is going and what may be the obstructions to his safe progress. Violation of that rule is contributory negligence as a matter of law.
>
> Under some circumstances, however, there may be a question for the jury . . . . This situation exists when the facts permit a finding that the injured party's conduct had its basis in a reasonable expectation."

Id. at 659 (*quoting* 1 Shearman & Redfield, Negligence, § 126 (revised ed. 1941)). The Court distinguished *Tie Bar* on the ground that the injured plaintiff there "was following instructions given him by the manager of the store" and that "more than one inference could be drawn from the facts as to the care or lack of care of the plaintiff . . . ." *Id.* The Court reasoned that for Mr. Bennett, "[r]easonable minds would not differ that it was contributory negligence as a matter of law to walk blindly into this strange environment when not necessary":

> He was faced with no sudden emergency, as indicated by the fact that an hour elapsed after smoke and oil fumes were detected before an investigation was made, during which time he may have taken a shower. The fire company was not called until after his investigation. No further inquiry was made of the maintenance man before he made the investigation. [Mr.]

> Bennett was unfamiliar with the area, yet in this day of light and modern conveniences he made no attempt to obtain light, although by his own statement if a portion of the steps had been removed he would have been unable to see this.

Id. at 661–62.

At oral argument in this case, the parties zeroed in rightly on one issue *Bennett* raises—whether there was an exigency justifying Mr. Daily's "venture" into the darkness. *Bennett* stressed that in that case, there was an "absence of any special stress of circumstances[] in proceeding further," *id.* at 659 (citation omitted), that he went to the boiler room "when not necessary," *id.* at 662, and there was "no sudden emergency, as indicated by the fact that an hour elapsed after smoke and oil fumes were detected," *id.* at 661, to excuse Mr. Bennett's actions. *Bennett* also stated the broader rule that "[u]nder some circumstances, however, there may be a question for the jury . . . when the facts permit a finding that the injured party's conduct had its basis in a reasonable expectation." *Id.* at 659 (citation omitted).

This case isn't quite so black-and-white. To Mr. Daily, it "sounded like somebody was back there" behind the shed and he was concerned for his personal safety, so he walked cautiously toward the sound to investigate. Since we view the facts in the light most favorable to Mr. Daily, as we must on this posture, he was instructed by Red Roof to smoke in an unlit, unfamiliar, "high traffic" area, where he sometimes saw police cars and ambulances. While following that instruction, he heard the "rustling" sound, feared for his personal safety, and wanted to ensure the safety of himself and those around him. He walked into an area that was mowed freshly and that he reasonably could expect was being

maintained in a manner free from obstructions. Although Red Roof seeks to paint these inferences as unreasonable—"a rustling noise poses no danger that is obvious," it claims, so Mr. Daily acted merely to "satisfy his curiosity"—reasonable minds could differ under the totality of these circumstances as to whether it was reasonable or necessary for Mr. Daily to walk toward the source of the sound. The circuit court drew these inferences in Red Roof's favor either by: (a) assuming away whether there was an exigency and whether Mr. Daily had a reasonable expectation he would not meet an obstruction in the area where he walked to investigate the source of the noise or (b) by resolving the factual dispute about whether Mr. Daily's actions were reasonable under the circumstances.

Again, the standard for summary judgment is high—there can only be contributory negligence as a matter of law when "the act so relied on [is] distinct, prominent and decisive, and one about which reasonable minds would not differ in declaring it to be negligence." *Miller*, 227 Md. at 232. Where there was a rustling sound coming from the woods, where Mr. Daily feared for his safety (and the safety of his friend), and arguably no time to wait for help or grab a flashlight, the question of whether Mr. Daily acted reasonably under the circumstances was an issue for the trier of fact. Whether he would win on this theory at trial will remain to be seen, but to the extent the circuit court found Mr. Daily contributorily negligent as a matter of law, summary judgment is reversed and the case is remanded for further proceedings consistent with this opinion. We express no view on the other half of Red Roof's summary judgment motion, *i.e.*, whether Red Roof breached any duty of care to Mr. Daily—the circuit court ruled only on contributory

negligence, so that and any other questions bearing on Red Roof's liability remain open on remand.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEES TO PAY COSTS.