Pursuant to Court order

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2011-SC-000518-DG

DICK'S SPORTING GOODS, INC. APPELLANT

v On Discretionary Review from the Kentucky Court of Appeals
Case No. 2010-CA-001194-MR

BETTY C. WEBB APPELLEE

BRIEF ON BEHALF OF *AMICUS CURIAE*, KENTUCKY JUSTICE ASSOCIATION

Submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2012, ten (10) originals of this brief were served via Federal Express upon Susan Stokley Clary, Clerk of the Supreme Court, Room 209, 700 Capital Ave., Frankfort, KY 40601, with one (1) copy served by regular mail upon each of the following: Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Kimberly Bunnell, Judge, Fayette Circuit Court, Fayette County Courthouse, 120 North Limestone Street, Lexington, Kentucky, 40507; P. Anthony Sammons, Dinsmore & Shohl, 250 West Main Street, Suite 1400, Lexington, KY 40507; Bradly Slutskin, 131 Morgan St., Versailles, KY 40383; Kelly Spencer, 535 Wellington Way, Suite 330, Lexington, KY 40503.

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STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

Do possessors of land have a duty of reasonable care to prevent foreseeable harm due to hazardous conditions on their property?

Consistent with modern tort law, this Court in *Kentucky River Medical Center v. McIntosh* answered the question in the affirmative and did so without qualification. As this Court explained:

> The lower courts should not merely label a danger as "obvious" and then deny recovery. Rather, they must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable.

Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385, 392 (Ky. 2010).

The scope of *McIntosh* is not limited to paramedics, hospital emergency room entrances, urgent situations, or any other specific factual circumstance which might be extracted from *McIntosh* to distinguish its holding.

The holding in *McIntosh* applies to all premises liability cases as the Court of Appeals correctly determined in this case.

PURPOSE AND INTEREST OF *AMICUS CURIAE*

Founded in 1954, the Kentucky Justice Association (formerly Kentucky Academy of Trial Attorneys) is a non-profit organization of over 1400 members dedicated to protecting the health and safety of Kentuckians, enhancing consumer protection, and preserving every citizen's right to trial by jury.

Amicus Curiae submits that land possessors, like all other non-immune entities, owe a duty of reasonable care to prevent foreseeable harm to others. This Court in *McIntosh* held

that the "obviousness" of a hazard is no longer a bar to recovery. Whether a hazard is obvious is one factor for the jury to consider in assigning fault to the parties. The Court of Appeals here appropriately reversed summary judgment in favor Dick's Sporting Goods where Ms. Webb slipped and fell on clear liquid that had pooled on the floor of the store.

In any event, pre-*McIntosh* case law independently supports the opinion of the Court of Appeals. It cannot be seriously argued that *McIntosh* restricted the rights of those who suffer injury due to hazardous conditions on store premises, and a strong line of cases pre-dating *McIntosh* holds that summary judgment would be improper under these facts.

STATEMENT OF THE CASE

Appellant Betty Webb and her neighbor went to Dick's Sporting Goods to shop for Christmas presents. When they went in, they found the entrance mats were wet and spongy. (Betty Webb depo., p. 20). The store had moved the mats from a parallel alignment into a "V" shape so that a puddle of water had pooled between them. (Betty Webb depo., pp. 19, 20, 22, 25). Webb attempted to avoid the hazard by stepping over the puddle onto what she thought was dry tile. (Betty Webb depo., p. 25). In describing where she stepped, Ms. Webb stated, "I didn't know it was wet until I actually felt it when I fell." (Betty Webb depo., p. 20, lines 17-19). Even though the tile floor where Ms. Webb stepped looked dry - it was not. She slipped, fell, and was injured. There was no testimony that Dick's had taken any precautions or actions to remedy the hazardous store entrance.

The Fayette Circuit Court entered summary judgment in favor of Dick's based on the open and obvious doctrine, but the Court of Appeals reversed and remanded in light of *McIntosh.* This Court granted discretionary review along with another case which affirmed

summary judgment based on the "open and obvious" doctrine. *Shelton v. Easter Seals, Inc.*, 2009-CA-00945 (Ky. App. June 24, 2011) .

Amicus Curiae submits that this Court's opinion in *McIntosh* was not intended to be a meaningless gesture, or worse, a return to the era of contributory negligence. The Court of Appeals in this case understood same and correctly applied *McIntosh.*

ARGUMENT

I. THE OBVIOUSNESS OF A HAZARD NO LONGER ABSOLVES A LAND POSSESSOR OF LIABILITY

A. The Restatement (Second) of Torts §343A (1965) and Exceptions to the Rule of Non-Liability for Possessors of land

In 1965, the American Law Institute published the Restatement (Second) of Torts. The ALI recognized that in many jurisdictions assumption of risk and contributory negligence existed as absolute defenses in premises liability cases. *See e.g.* Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions,* 100 U. Pa. L. Rev. 629 (1952)(examining the relationship between assumption of risk, contributory negligence, and open and obvious doctrines). Accordingly, Section 343A of the Second Restatement adopted a general rule of non-liability for what it labeled "known or obvious" dangers and then identified exceptions:

> § 343A. Known or Obvious Dangers
>
> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a

> known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Importantly, Comment f to Section 343A listed **examples** of exceptions to the "open and obvious" rule which were deemed compatible with the doctrines of assumption of the risk and contributory negligence:

> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§ 466 and 496D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances. (Emphasis added).

When the ALI published the Second Restatement, Kentucky still recognized contributory negligence and assumption of the risk as complete defenses in premises liability cases. Indeed, pre-Restatement case law rarely considered the "obviousness" of hazards independently from the doctrines of assumption of risk or contributory negligence. *See Seelbach, Inc. v. Mellman*, 293 Ky. 790, 170 S.W.2d 18 (1943)(plaintiff's claim not barred by assumption of risk, even though plaintiff knew of the hazardous condition the Seelbach's stairs, because plaintiff had to ascend and descend the stairs for work; however, plaintiff's claim properly barred under principles of contributory negligence as she failed to make use of a handrail); *Montgomery Ward v. Ellis,* 380 S.W.2d 223 (Ky.1954)(plaintiff's contributory negligence barred her claim where she admitted that she observed an overhanging doorway

in a shop yet struck her head on it a few moments later).

However, pre-Restatement case law also created exceptions on a case-by-case basis designed to mitigate the harshness of those doctrines. *See Majestic Theater Co. v. Lutz*, 210 Ky. 92, 275 S.W. 16 (1925)(holding that theatre patron was not guilty of contributory negligence despite knowledge of slippery marble floor); *Kroger Grocery & Baking Co. v. Monroe,* 237 Ky. 60, 34 S.W.2d 929 (Ky.1931) (holding that a customer was not guilty of contributory negligence even though she knew oil was on the floor before slip and fall); *Rodgers v. Staller*, 284 Ky. 108, 143 S.W.2d 1047 (1940)(holding that apartment tenant was not guilty of contributory negligence or assumption of the risk as a matter of law when she fell down stairs she had been climbed on numerous occasions).

In *Bonn v. Sears, Roebuck & Co.,* 440 S.W.2d 526 (Ky.1969), the Court adopted the Restatement (Second) of Torts, Section 343A, and its comments. Given the Second Restatement approach, the Court absolved Sears of any liability when a customer fell into a well-lighted automobile grease pit. The Court found that the customer's actions did not fall within any exception to non-liability identified in the Restatement.

Later cases followed *Bonn*, employed the general rule of non-liability, and strictly construed exceptions found in the Restatement. *See Wallingford v. Kroger*, 761 S.W.2d 621 (Ky. App. 1989)(Reversing summary judgment based on Comment f's risk/benefit exception where plaintiff had "no choice" but to cross a hazardous ramp incident to employment); *Rogers v. Prof'l Golfers Ass'n of Am.,* 28 S.W.3d 869, 872 (Ky.App.2000)(distinguishing *Wallingford* and Comment f's risk/benefit exception; affirming summary judgment because plaintiff could have avoided the hazard); *Horne v. Precision Cars of Lexington, Inc.,* 170

S.W.3d 364 (Ky.2005)(applying the "distraction" exception in Comment f where plaintiff tripped over a readily observable curb); *Johnson v. Lone Star Steakhouse and Saloon of Ky., Inc.*, 997 S.W.2d 490 (Ky.App.1999)(refusing to apply the distraction, forgetfulness, or risk/benefit exceptions, where plaintiff slipped on peanut shells on the floor of a restaurant).

As the post-*Bonn* cases reveal, application of the Second Restatement produced fact-intensive results largely dependent on whether the plaintiff could argue that his or her conduct "fit" into one of the specific enumerated exceptions. In many ways, the approach was more restrictive than pre-Restatement case law which crafted exceptions based on the equities of the particular case.

B. Abandonment of Assumption of Risk and Contributory Negligence Doctrines for "Pure" Comparative Fault

Soon after publication of the Second Restatement, Kentucky abandoned the assumption of risk doctrine. *Parker v. Redden*, 421 S.W.2d 586 (Ky. 1967). Then, in 1984, Kentucky abandoned contributory negligence in favor of comparative fault. *Hilen v. Hays*, 673 S.W.2d 713 (1984). In so doing, Kentucky became one of only thirteen states to adopt the "pure" form of comparative fault which entrusts the jury to assign fault to the parties so long as the tortfeasor is at least 1% at fault. *Id.*; *see also* Victor E. Schwartz, *Comparative Negligence* § 2.1(A) (2d. Ed. 1986).

Hilen overruled inconsistent case law including, most notably, a premises liability case which labeled the premises "hazard and its apparent nature" in terms of contributory negligence. *See Houchin* v. *Willow Ave. Realty Co.,* 453 S.W.2d 560, 563 (Ky. 1970)(overruled by *Hilen, supra*). Also consistent with *Hilen*, in products liability cases the

"patency of the danger" no longer constituted an absolute bar but, instead, became a "factor" for the jury to consider in determining liability. See *Montgomery Elevator Co. v. McCullough,* 676 S.W.2d 776, 780-81 (Ky. 1984). In 1988, the legislature codified pure comparative fault in "all tort actions." KRS 411.182(1).

Despite the judicial and legislative development of pure comparative fault, premises liability cases still looked to *Bonn. See Wallingford, supra; Rogers, supra; Horne, supra.* No attempt was made to reconcile pure comparative fault principles with contributory negligence as applied to premises liability, which case law described as an "extension of the rule set out in *Bonn v. Sears, Roebuck & Co.,* Ky., 440 S.W.2d 526 (1969)." *Dade Park Jockey Club* v. *Minton,* 550 S. W.2d 188, 190 (Ky. App. 1977).

It would take decades for Kentucky to recognize the full impact of *Hilen*, abandon the narrow focus on the injured party's conduct in premises liability cases, and place the focus where it properly belongs: on the foreseeability of harm.

C. *Kentucky River Medical Center v. McIntosh*: the Demise of the "Open and Obvious" Doctrine and the Shift to the Land Possessor's Duty of Reasonable Care to Prevent Foreseeable Harm

In *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), this Court undertook a lengthy and comprehensive review of the open and obvious doctrine. In its review, this Court noted that the doctrine, which has its roots in contributory negligence, is at odds with the concept of comparative negligence. *Id.* at 391. *McIntosh* recognized the growing trend among states to apply a comparative fault analysis to facts that previously

resulted in landowners being automatically absolved from liability for open and obvious conditions. *Id.* at 389.

Importantly, while *McIntosh* found that rejection of the open and obvious doctrine was consistent with the Restatement (Second) of Torts, Section 343A, *McIntosh* did not merely apply the Second Restatement. Instead, *McIntosh* adopted the modern trend reflected in the current draft of the Restatement (Third) of Torts, Liab. Physical Harm, §51, which clarifies that, in light of comparative fault principles, a defendant's duty and breach must be kept distinct from the plaintiff's negligence. This Court explained:

> The incompatibility between the open and obvious doctrine as an absolute, automatic bar to recovery and comparative fault is great. So great, in fact, that a few states have held that their comparative negligence statutes abolished the open and obvious doctrine outright.

McIntosh at 391. *McIntosh* went on to note that abolition of the open and obvious doctrine "makes good policy sense." *Id.* at 392. The opinion then adopted the approach employed by Mississippi, another pure comparative fault jurisdiction which abandoned the open and obvious doctrine in its entirety. See *Tharp v. Bunge Corp.* 641 So.2d 20, 25 (Miss. 1994). In so doing, this Court followed the modern trend. See *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 157, 824 P.2d 293 (1992) ("[a] risk is not made reasonable simply because it is made open and obvious to persons exercising ordinary care."); *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989)(abolishing open-and-obvious-danger doctrine in light of adoption of comparative negligence); *Hale v. Beckstead*, 116 P.3d 263 (Utah 2005)(same); *Cupo v. Karfunkel*, 1 A.D.3d 48, 767 N.Y.S.2d 40 (2d Dep't 2003)(same); *O'Donnell v. Casper*, 696

P.2d 1278 (Wyo. 1985)(same); *Woolston v. Wells*, 297 Or. 548, 687 P.2d 144 (1984) (same); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978)(same).

After abandoning the open and obvious doctrine, this Court gave the following guidance to the lower courts:

> The lower courts should not merely label a danger as "obvious" and then deny recovery. Rather, they must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable.

McIntosh at 392. Indeed, this is the true significance of *McIntosh*: it completely rejects the open and obvious doctrine and shifts the focus to foreseeability of harm. *McIntosh* did not merely re-affirm the Second Restatement approach or rely on the *Bonn* line of cases. Otherwise, there would have been no need to alter the Court of Appeals' opinion in *McIntosh* which performed that task quite well.

Finally, it is worth noting that, while some of the lower courts have had some difficulty appreciating the reach of *McIntosh*, our federal courts – which are not known for unreasonably expanding state tort rights – have had very little difficulty in correctly applying *McIntosh*. *See Schmidt v. Intercontinental Hotel Group Resources*, 2012 U.S. Dist. LEXIS 15502 at *9 (E.D. Ky. Feb. 8, 2012)("*McIntosh* and its progeny undoubtedly change the landscape of the open and obvious doctrine in Kentucky. No doctrinal discussion can now be complete without accounting for this case."); *Lahutsky v. Wagner Moving & Storage, Inc.*, 2011 WL 5597330(W.D. Ky. Nov. 11, 2011) (denying summary judgment in light of *McIntosh* despite obviousness of exterior icy stairway); *Wright v. Pilot Travel Centers*, 2011 WL 2457444 (W.D.Ky. June 17, 2011)(denying summary judgment in light of *McIntosh*

despite of obviousness of liquid on store floor); *Powers v. Tirupathi Hospitality, LLC*, , 2011 WL 251001 at *4 (E.D.Ky. Jan. 26, 2011) ("[T]he Court concludes that the Kentucky Supreme Court intended for its decision in *McIntosh* to apply to all premises owner liability claims, including cases involving purportedly open and obvious natural outdoor hazards.").

II. THE COURT OF APPEALS CORRECTLY APPLIED *MCINTOSH*

The Court of Appeals, consistent with *McIntosh*, found the duty of the landowner is separate from that of the invitee, and trial courts must "ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable." *McIntosh* at 392. Following the foreseeability analysis, the Court of Appeals reversed entry of summary judgment for Dick's and appropriately remanded to Fayette Circuit Court.

There is no question that Dick's could foresee that visitors/invitees would appreciate the wetness of the floor but proceed into the store anyway. As an initial matter, it is defies logic to suggest that any of Dick's representatives would have implied to Webb, or any other customer, that they must assume the **entire floor** is dangerous just because water had pooled in one spot. Yet Dick's now contends that Webb and others **must** assume same whenever they step over water onto what they think is dry tile. In any event, for the purposes of summary judgment, it does not matter whether Ms. Webb actually saw the puddle or knew of the wet floor - any more than it mattered that Irene McIntosh knew of the hazardous entrance at Kentucky River Medical Center. Indeed, if Paramedic McIntosh, in responding to Webb's fall, saw the puddle, stepped over it, and then fell on slick tile, Dick's could not seriously

argue that McIntosh would have no claim. The obviousness of the danger, or that Webb was shopping, or that McIntosh was tending to a patient, are fact-based concerns for the jury to sort out when assessing relative fault.

III. EVEN PRE-*MCINTOSH* CASE LAW SUPPORTS REVERSAL OF SUMMARY JUDGMENT IN THIS CASE

Finally, it should be noted that many case have addressed the precise factual circumstances before the Court, i.e. store customers who slip and fall on liquid. *See Wal-Mart v. Meyers*, 738 S.W.2d 841 (Ky. App. 1987), *Wal-Mart v. Lawson*, 984 S.W.2d 485 (Ky. App. 1998), *Jewell v. Equestrian Events, Inc.*, 2003 WL 22928470 (Ky. App. 2003); *Lanier v. Wal-Mart*, 99 S.W.3d 431 (Ky. 2003); *DeArmon v. Wal-Mart*, 2006 WL 3759699 (Ky.App. 2006); *Layne v. Wal-Mart*, 24 Fed.Appx. 364 (6th Cir. (Ky) 2001); *Mitchell v. Flying J*, 2007 WL 1959174 (W.D. Ky. 2007); *McIntosh v. U.S.*, 2010 WL 812835 (E.D.Ky. 2010); *Karrer v. Mac's Convenience Stores, LLC*, 2010 WL 3781711 (W.D. Ky. 2010)

In *Meyers*, plaintiff, upon entering Wal-Mart from the rain, saw a greeter with a mop. The greeter told plaintiff "I'm sweeping water out the door." The plaintiff proceeded to walk in the store anyway, stepped over a mat, and slipped on water near the front of the store. The Court of Appeals affirmed a verdict in favor of plaintiff.

In *Jewell*, plaintiff walked out of the rain into a courtesy tent at an equestrian event. The tent had a platform inside. Plaintiff walked across the platform to reach a buffet line on the other side of the tent - even though she was told to walk around the platform. The Court of Appeals found that it was "obvious" to plaintiff that it was raining outside and that a puddle had formed on the platform. Nevertheless, the Court reversed entry of summary

judgment in favor of the defendant catering service.

In *Layne*, plaintiff saw a Wal-Mart employee with a mop and a bucket. Plaintiff tried to avoid the area of the floor that she thought was wet. She slipped on the floor anyway. The Sixth Circuit affirmed a substantial verdict in favor of the plaintiff.

In *Mitchell*, plaintiff slipped on liquid inside a convenience store. Flying J had surveillance video showing a mop and yellow cone in the general area of the fall. Plaintiff claimed he did not see the liquid on the floor. The court found that the adequacy of the warning, and whether Flying J showed have cleaned up the hazardous condition anyway, were issues of fact for the jury.

In *McIntosh* (a federal case), plaintiff entered a post office. It was raining outside. Plaintiff testified that, upon entering the post office, he noticed that the rug near the front door was wet. He proceeded to walk over the rug thinking the tile floor was not wet. He slipped and fell anyway. The federal district court denied the United States' motion for summary judgment.

In *Karrer*, plaintiff entered a convenience store on a rainy day. The store owner placed two rugs near the entry, one outside the store and one inside store, in addition to cones to advise that the floors were slippery. Plaintiff walked in the store, claimed she didn't see the cones, and then slipped and fell on water. The federal district court denied defendant's motion summary judgment.

Dick's cannot seriously contend that *McIntosh* restricted Webb's right to recover for her injuries. Accordingly, pre-*McIntosh* case law also supports the Court of Appeals reversal of summary judgment in this case.

CONCLUSION

The "open and obvious" doctrine no longer bars recovery in premises liability cases. Even assuming it did, summary judgment would still not be appropriate. Accordingly, this Court should affirm the Court of Appeals.

Respectfully submitted,

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