KENTUCKY SUPREME COURT
NO. 2011-SC-000518-D
(2010-CA-001194)

DICK'S SPORTING GOODS, INC. — APPELLANT

v.

On Appeal from the Kentucky Court of Appeals
Case Number 2010-CA-001194
and
From Fayette Circuit Court
Civil Action No. 08-CI-4183
Honorable Kimberly N. Bunnell

BETTY C. WEBB — APPELLEE

BRIEF OF APPELLANT DICK'S SPORTING GOODS, INC.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Brief of Appellant Dick's Sporting Goods, Inc. has been served via regular United States Mail, postage prepaid, this 16th day of February 2012, upon the following courts and persons: Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Kimberly N. Bunnell, Fayette Circuit Court, Robert S. Stephens Courthouse, 120 N. Limestone, Lexington, KY 40507; Bradley Slutskin, 131 Morgan Street, Versailles, KY 40383; and Kelly Spencer, Spencer Law Group, 535 Wellington Way, Suite 330, Lexington, KY 40503.

Counsel for Appellant

INTRODUCTION

This case arises from the accident of Appellee, Betty C. Webb ("Webb"), on December 8, 2007, when she slipped and fell while entering Dick's Sporting Goods ("Dick's) in Fayette County, Kentucky. It was a rainy afternoon, the soles of Webb's shoes were wet, and water had been tracked in by other store customers. Webb saw a puddle on the entranceway floor and was attempting to step over the puddle when she fell. She filed a lawsuit against Dick's on August 19, 2008, in Fayette Circuit Court. The Fayette Circuit Court granted Dick's motion for summary judgment on June 14, 2010. The Kentucky Court of Appeals reversed by "Opinion Reversing and Remanding" ("the Opinion") on August 5, 2011. Dick's motion for discretionary review was granted by this Court on December 14, 2011.

STATEMENT CONCERNING ORAL ARGUMENT

Dick's requests oral argument to assist with clarification of the issues and authorities presented, and to respond to inquiries of the Court. Oral argument particularly would be helpful as this appeal concerns the scope of the Court's opinion in Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010), which adopted an exception to the "open and obvious" hazard doctrine where a claimant can demonstrate "reasonable distraction." Dick's proposes that McIntosh is not applicable to cases where the claimant can offer no evidence of forgetting a hazard or having been reasonably distracted from it at the time of his/her fall, absent an affirmative showing the condition is unreasonably dangerous despite its open and obvious character.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Summary judgment was proper because Webb could not present any affirmative evidence that Dick's Sporting Goods ("Dick's") either owed her a duty to warn or to remedy the hazard of wet tile at a store entrance on a rainy day. Dick's did not owe Webb a duty to warn, because she was fully aware and appreciated the hazard at the time she encountered it. She was not distracted from the hazard. She knew the floor was wet, and she was in the process of stepping over a "puddle" when she fell. See Depo. of Betty Webb, p.25 (the portions of Webb's deposition that were part of the record at the trial court have been provided hereto for the Court's convenience at Appendix, Tab "1". These were the only portions of Webb's deposition offered by her or Dick's to the Court in the parties' respective briefs.).[1] Webb was not distracted by anything and appreciated the hazard, attempted to step over it, and in doing so fell. Id. In her deposition, she admitted that a "wet floor" sign would not have helped her, as she was aware of the water on the floor. Id. at pp. 25-26. Her argument at the Court of Appeals that she was not aware the particular tile was wet on which she

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[1] Appellee Webb implicitly criticizes the trial court for not allowing her to file a copy of her entire deposition for appeal purposes. See "Brief on Behalf of Appellant Betty C. Webb," at fn. 1. The trial court, however, was correct not to allow the filing of Webb's entire deposition as the parties had cited only a select number of pages from her deposition when arguing the motion for summary judgment, which pertinent pages were attached to the parties' respective briefs. Under Kentucky law, "[t]he record on appeal is based on the record in the circuit court . . . ." Coyle v. Capital Eng. Services, 314 S.W.2d 541, 542 (Ky. 1958). "Depositions not used in a hearing or the trial are not, for appeal purposes, a part of the record, the proceedings, or the evidence." Springfield Coal Co., Inc. v. Meade, 430 S.W.2d 652, 653 (Ky. 1968). "Therefore, the 'record on appeal' . . . is complete without their inclusion." Id. Moreover, CR 75.07(1) expressly "exclud[es] depositions not read into evidence," even if filed with the clerk, from that which is otherwise the "original record on file." Ky. R. Civ. P. 75.07(1).

slipped and fell, just beyond the puddle, and that Dick's had a duty to warn about that specific tile is nonsensical.

Moreover, Webb neither argued nor presented any affirmative evidence in opposition to summary judgment that Dick's could have corrected the problem. The day of Webb's fall, December 8, 2007, was a rainy day during the Christmas holiday shopping season. Id. at pp. 15 & 25; "Verified Complaint" at ¶ 3. Foot traffic continued to bring water into the store at the front entrance as customers entered from the wet parking lot. Webb testified that she walked across the wet parking lot to get to Dick's. Depo. of Betty Webb, at pp. 15-16. She knew that the soles of her own shoes were wet upon entering the store. Id. In opposing summary judgment, Webb did not argue that Dick's could have done something to have remedied the known risk of walking on wet tile or of walking with wet shoes onto tile floors. The only evidence she offered as to any measure Dick's could have taken was to warn customers by placing wet floor signs in the area. See "Plaintiff's Response to Motion for Summary Judgment," pp. 2-3. But she admitted in her deposition this would not have helped her as she already was aware of the water on the floor. Depo. at pp. 31-32. She fully appreciated the risk of walking on wet tile. Id. at pp. 25; 46-47. Thus, Dick's could not have provided any warning that would have averted her fall.

Therefore, under the circumstances of the case, Webb failed to provide affirmative evidence in opposition to summary judgment that Dick's owed Webb either a duty to warn or a duty to correct the hazard. Summary judgment

therefore was proper as the Fayette Circuit Court correctly determined no genuine issue of disputed fact existed and Dick's was entitled to judgment as a matter of law.

ARGUMENT

I. WEBB FAILED TO OFFER ANY AFFIRMATIVE EVIDENCE IN OPPOSITION TO SUMMARY JUDGMENT THAT SHE WAS UNAWARE OF WATER ON THE FLOOR, DISTRACTED, OR THAT ANY ACTION BY DICK'S COULD HAVE CORRECTED THE "HAZARD."

The standard of review on appeal whether a trial court properly granted summary judgment is "whether the trial court correctly found that there were no genuine issues of as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. Ct. App. 1996). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" Lewis v. B&R Corp., 56 S.W.3d 432, 436 (Ky. Ct. App. 2001) (citing Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 482 (Ky. 1991)). Summary judgment is proper if the nonmoving party could not possibly be successful at trial. Id. at 436. "Impossibility" as set forth in the summary judgment standard is "used in a practical sense, not in an absolute sense." Id. (citing Perkins v. Hausladen, 828 S.W.2d 652, 654 (Ky. 1992)). A "party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." Wymer v. JH Properties, Inc., 50 S.W.3d 195, 199 (Ky. 2001) (citation omitted).

Under Kentucky law, the owner of a premises to which the public is invited has a general duty to exercise ordinary care to keep the premises in a reasonably safe condition. Rogers v. Professional Golfers Assoc. of America, 28 S.W.3d 869, 872 (Ky. Ct. App. 2000); Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431, 436 (Ky. 2003). A property owner, however, is not an insurer of the safety of his customer, and is not absolutely liable for injuries sustained on his property. See Lanier, 99 S.W.3d at 436. "Reasonable care on the part of the possessor of business premises does not ordinarily require precaution or even warning against dangers that are known to the visitor or so obvious to him that he may be expected to discover them." Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc., 997 S.W.2d 490, 492 (Ky. Ct. App. 1999)). Specifically, a property owner does not have a duty to protect patrons from or warn patrons about "open and obvious" conditions. Reece v. Dixie Warehouse and Cartage Co., 188 S.W.3d 440, 450 (Ky. Ct. App. 2006). A condition is open and obvious when "both the condition and the risk are apparent to and would be recognized by a reasonable man in the position of the visitor exercising ordinary perception, intelligence, and judgment." Reece, 188 S.W.3d at 450; Bonn v. Sears Roebuck & Co., 440 S.W.2d 526, 529 (Ky. 1969).

At the trial level, Dick's presented evidence of the following admissions made by Appellee Webb in her deposition:

- Webb's fall occurred on a rainy day during the Christmas shopping season;

- It had been raining throughout the day, and the parking lot was wet;
- By the time Webb entered Dick's store, the soles of her shoes were wet from the rain-soaked parking lot;
- Having been employed in custodial services prior to her retirement, she was aware of the dangers inherent from walking on wet tile;
- Upon entering the store, Webb saw that a puddle of water had collected just inside at the entrance;
- Webb could have walked around the puddle in a different direction, but she did not want to wait until other customers had passed;
- Webb consciously was acting to step over the puddle onto what appeared to be dry tile when she slipped;
- A "Wet Floor" sign would not have helped her, because she already knew the floor was wet due to the puddle.

See Depo. of Betty Webb, at Tab 1. (As stated previously, the pages attached at Tab 1 were the only portions of Webb's deposition testimony presented to the trial court by the parties' briefs: "*Motion for Summary Judgment*" and "*Memorandum of Law in Support of Motion for Summary Judgment*," dated May 7, 2010; "*Plaintiff's Response to Motion for Summary* Judgment," dated June 1, 2010; and "*Reply in Support of Motion for Summary Judgment*," dated June 9, 2010).

Dick's thus presented incontrovertible evidence that Webb saw the water on the tile, fully appreciated the risk, and was consciously focused on the hazard as she decided to encounter it. She was not distracted but was fully cognizant and aware of the hazard she was encountering. The placement of a "wet floor" sign at the entrance would not have prevented her fall, as it could not have provided her with any additional information. She saw the puddle and was focused on stepping over it. She herself admitted a sign would not have mattered as she

saw the water on the floor. She could have avoided the water by walking around it, but she simply did not want to wait for other shoppers to pass.

In opposing the Motion for Summary Judgment at the trial level, the only evidence Webb offered was that Dick's should have posted "wet floor" signs and her testimony that she thought she was stepping over the puddle onto seemingly dry tile. See "Plaintiff's Response to Motion for Summary Judgment," pp. 2 & 3. With regard to the first, by her testimony she admitted that a "wet floor" sign would not have helped her, because she saw the puddle of water. She thus was aware of water on the entrance floor. With regard to her second piece of evidence, she claimed that the tile onto which she was stepping just past the puddle appeared to be dry, but she slipped anyway. She offered no explanation or evidence as to how Dick's could have warned of an apparently dry but wet piece of tile for a person already aware of the wet floor. A "wet floor" sign would not have provided this very specific warning, and Webb admitted that a "wet floor" sign would not have mattered as she already saw the water on the floor. Webb also failed to appreciate that by her own testimony the soles of her own shoes were wet, having just come from outside.

Moreover, Webb presented no evidence in opposition to Dick's motion that the store could have taken any measures to have corrected dry-appearing, but wet tile. Webb was required to present affirmative evidence sufficient to show a disputed question of material fact. She failed to meet this requirement. Thus, summary judgment in Dick's favor was proper.

II. SUMMARY JUDGMENT WOULD HAVE BEEN PROPER IN LIGHT OF *KENTUCKY RIVER MEDICAL CENTER v. McINTOSH.*

Although the trial court granted summary judgment in Dick's favor prior to this Court's ruling in Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010), summary dismissal of Webb's case nevertheless would have been proper and in accordance with the Court's opinion.

A. McIntosh abrogated the "open and obvious" doctrine but did not abolish it.

In McIntosh, this Court modified the open and obvious doctrine in premises liability cases but did not abolish it. As the Court is aware, the plaintiff in McIntosh was a paramedic who had been injured when she tripped over a curb as she was taking a critically ill patient into the Kentucky Medical River Medical Center. Id. at 387. Although the plaintiff had been to the hospital numerous times, her attention was not focused on the curb but on her critically ill patient. Id. at 387-88. The hospital argued that the curb was open and obvious, therefore barring the plaintiff from recovery. Id. at 388.

Noting that the "open and obvious" doctrine arose in the era of contributory negligence, this Court adopted the modern trend as set forth in section 343A(1) of the Restatement (Second) of Torts:

> 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.*

Id. at 389-90 (quoting RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965)) (Court's emphasis in original).

Under this approach a premises owner generally still would not be liable for injuries caused by open and obvious conditions *unless* the harm to the invitee was *foreseeable* despite the open and obviousness of the condition. The Court explained:

> For many open and obvious dangers, the land possessor would have no reason to anticipate the harm, and so he would not be liable. However, sometimes "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." In these situations, the injury is still foreseeable, and so liability should still be imposed.

Id. at 391 (citing RESTATEMENT (SECOND) OF TORTS § 343A(1) cmt. f.)

The Court went on to state that under the Restatement an open and obvious condition remains "a heightened type of danger which places a higher duty on the plaintiff to look out for his own safety. Such a condition, being open and obvious, should usually be noticed by a plaintiff who is paying reasonable attention." Id. at 392. With such open and obvious condition, the land possessor would have no duty to warn because:

> The purpose of a warning is to equalize the parties' knowledge about the danger. So when we presume their knowledge is already equal, as we do for obvious conditions, the warning would serve no purpose.

Id. at 393.

Nevertheless, "[e]ven though it will often make little sense to impose liability on land possessors for failing to warn invitees of conditions which are obvious," a possessor still has the duty to maintain its property in a reasonably safe condition by eliminating or reducing "the risk posed by *unreasonable dangers*." Id. (emphasis added). Thus, even in the absence of a duty to warn of a condition that is open and obvious, the possessor still would have a duty to eliminate a risk if the invitee's injury remained foreseeable.

This Court thus concluded the hospital owed a duty to McIntosh to warn and protect her from the otherwise open and obvious condition. Id. at 393. The Court reasoned, "the Hospital had good reason to expect that a paramedic, such as [the plaintiff] would be *distracted* as she approached the emergency room entrance." Id. (emphasis added). Furthermore, the Court held the hospital had reason to expect that the plaintiff would have forgotten that the curb was there even though she had seen it before. Id. at 394. The Court noted, "it is important to stress the context in which [the plaintiff] sustained her injury: she was rushing a critically ill patient into a hospital, in an effort to save his life." Id. Therefore, in those dire circumstances, "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." Id. In McIntosh, "the Hospital owed a duty to [the plaintiff], given that her injury was foreseeable. [The plaintiff], in turn, had a duty to act reasonably to ensure her own safety, heightened by her familiarity with the location and the

arguably open and obvious nature of the danger." Id. at 395. McIntosh also had presented evidence of reasonable precautions the hospital could have taken to correct the risk presented by the curb, including the alternate design of other hospital emergency room entrances and testimony from an expert who was an engineer and certified safety professional that the entrance violated OSHA regulations. Id. at 395-96.

Thus, under the Court's modification of the "open and obvious" doctrine as enunciated in McIntosh, a premises possessor still would be entitled to summary judgment with regard to an open and obvious condition unless the plaintiff could come forward with *affirmative evidence* showing either an issue of foreseeable distraction or the possessor's failure to eliminate or reduce the risk of an *unreasonable* danger. In the present matter, Webb was unable to present any affirmative evidence of either.

B. Webb could not offer any affirmative evidence that she was distracted.

Webb's testimony conclusively demonstrated that the puddle of water and wet tile were open and obvious, that she understood the risk presented, and that she was actively stepping over the water. She admitted in both her responses to interrogatories and deposition testimony that she noticed the pool of water and wet tile. In her responses to Dick's interrogatories, she stated that "[a]s I walked in, I noticed the rugs were in a v-pattern separated from each other causing a gap where water was gathered making a pool." See Pl.'s Resp. to

Def.'s Interrog. # 6 (Tab "2") (originally cited and offered as an exhibit to Dick's "Memorandum of Law in Support of Motion for Summary Judgment"). Webb additionally testified in her deposition:

> Q: You then noticed some water in between the two mats; correct?
>
> A: Yes.

Depo. of Betty C. Webb, p.25. She thus knew the floor inside of the building was wet from having crossed the parking lot. She admitted that it had been raining, that puddles had developed outside in the parking lot, and that the soles of her shoes were wet. Id. at pp. 15-16. Webb also testified:

> Q: So you were walking slow enough to where you did notice the water on the slippery tile; correct?
>
> A: Yes.

Id. at p.26.

Webb further admitted that she knew the floor of Dick's was wet when she entered the store and that warning signs would not have made a difference. She testified:

> Q: But you knew it was wet walking into the building; correct?
>
> A: Yes. Yes.
>
> Q: So how would the sign have added anything to your awareness of the fact that it was wet?
>
> A: . . . I don't think it would have made much difference if there was one because of the puddle, but there wasn't one.

Id. at pp. 31-32. Webb additionally knew the risk of wet tiles, and she was consciously engaged in stepping over the water. She testified:

> Q: . . . But you did notice water in order to try and avoid it?
>
> A: Yes.

Id. at p.22.

Her testimony further confirmed her conscious appreciation of the risk:

> Q: And you tried to step over it because you knew water on tile is slick; correct?
>
> A: Yes.

Id. at p.25. Prior to retirement, Webb also had worked in custodial services at Eastern Kentucky University. She therefore was very familiar with wet tile and the inherent danger of it. She testified:

> Q: When you were working at EKU as a custodian, did you have any experience dealing with wet tile?
>
> A: Experience?
>
> Q: Did you ever mop the floors?
>
> A: Oh, I mopped the floors, yes.
>
> Q: When you knew they were wet, were you careful not to walk across them?
>
> A: Oh yes.

Id. at pp. 46-47. At the time of her accident, Webb attempted to step from the mat she was standing on, over a puddle of water, and onto the tile:

Q: And it was your step onto the wet tile that caused you to fall?

A: Yes.

Id. at p.28. Webb further admitted that she could have avoided the wet tile. She stated:

Q: Now, when you're standing on the mat and you needed it to step over the water; correct? Could you have stepped in another direction in order to have avoided the puddle in the middle of the "v"?

A: No, there were other people walking in.

Q: Could you have waited for them to pass so you wouldn't have had to step over the hazard?

A: I probably could have waited, but I didn't.

Id. at p.25.

The record is indisputable. Webb knew the floor at the entrance of the store was wet, water having been tracked in from the outdoors by multiple customers. Webb knew it had been raining outside and that the soles of her own shoes were wet. She further had actual, personal knowledge of the risk a wet floor presented from her years working as a custodian. She was not distracted or forgetful of the potential hazard but admittedly had present awareness of the situation and was consciously encountering it. Dick's had no duty to warn Webb under these circumstances. She herself admitted that a "Wet Floor" sign would not have helped her, as she saw the puddle of water. Thus, the absence of a sign was not a contributing cause of her fall. In opposing Dick's motion for summary

judgment, Webb argued only that Dick's still owed her a duty to warn notwithstanding her active awareness and appreciation of the wet floor. See "Plaintiff's Response to Motion for Summary Judgment," filed June 1, 2010. Summary judgment was proper at the time of entry and remains proper in light of McIntosh.

C. Wet tile at a store entrance on a rainy day is not an uncommon or unreasonably dangerous condition.

As Webb was consciously aware of the open and obvious water on the tile, Dick's would have an obligation to correct or remedy the condition only if it posed an *unreasonably* dangerous risk. McIntosh, 319 S.W.3d at 393. Part of the analysis of whether a risk remains unreasonably dangerous despite its open and obviousness turns on whether "the possessor has reason to expect the invitee would proceed to encounter the known or obvious danger because . . . the advantages of doing so would outweigh the apparent risk." RESTATEMENT (SECOND) OF TORTS § 343A, *comment f* (1965). "The examples given by both the Restatement and case law are situations in which a party was forced to encounter the hazard because of a necessity such as retaining their means of livelihood." Shelton v. Kentucky Easter Seals Society, Inc., 2011 Ky. App. LEXIS 93, at *8 (Ky. Ct. App. June 24, 2011) (citing Fuhs v. Ryan, 571 S.W.2d 627, 629 (Ky. Ct. App. 1978)). As the comments to section 343A of the Restatement also reflect:

> [D]efendants, however, may reasonably assume that members of the public will not be harmed by *known or obvious dangers which are not extreme*, and which any reasonable person exercising ordinary attention,

> perception, and intelligence could be expected to avoid. *This is true particularly where a reasonable alternative way is open to the visitor, known or obvious to him, and safe.*

RESTATEMENT (SECOND) OF TORTS § 343A, *comment g* (emphasis added).

Significant authority from around the country holds that tracked-in rainwater does not constitute such an extreme or unreasonably dangerous condition. See, e.g., Faircloth v. United States, 837 F. Supp. 123, 127 (E.D.N.C. 1993) (citing Dawson v. Carolina Power & Light Co., 144 S.E.2d 831, 834 (N.C. 1965)). Premises owners thus have no duty to continuously remove tracked-in water. See Wilson v. Gorski's Food Fair, 554 N.E.2d 412 (Ill. Ct. App. 1990).

For example, in Hackworth v. United States, 366 F. Supp. 2d 326 (D.S.C. 2005), the plaintiff, Carmen Hackworth, filed a lawsuit against the federal government under the Federal Tort Claims Act ("FTCA") after she fell in a Naval Weapons Station's Mini-Mart convenience store. According to Hackworth's deposition testimony, "it had been raining for several days[] and was raining as she approached the Mini-Mart . . ." Id. at 328. She recalled "jumping puddles" on the way from her car to the store's entrance. Id. As she approached the entrance, she stopped to stomp her feet and shake the water off herself before entering. Id. She contended "that, on her first step inside the Mini-Mart, as soon as she stepped off of a rubber mat, she slipped and fell." Id. She maintained that she did not see what she later described as a three-foot puddle, even though she was looking down. Id. South Carolina law, similar to Kentucky, recognized an

exception to the open and obvious rule "where the premises owner should reasonably anticipate that invitees may be distracted or will not discover the danger." Id. at 330.

The United States District Court for the District of South Carolina granted the government's motion for summary judgment. The court stated that "[t]he degree of care owed with regard to an open and obvious danger is commensurate with the circumstances involved . . . ." Id. If Hackworth had slipped on water in the middle of the store after walking many feet across dry floor, then the government would have owed her a duty. Id. The court held that as she was aware of the water, had "jumped puddles" coming from her car, and was looking down, Hackworth had not entered the Mini-Mart without warning that there could be a puddle at the entrance. Id. The government thus had no duty to warn her, particularly as the evidence did not suggest she could reasonably have been distracted. Id. at 330-31. Although the court addressed the issue in terms of duty to warn, implicit in the court's opinion was the premise that water at the entrance of a store on a rainy day is a common hazard.

In another FTCA claim, the United States District Court for the Eastern District of North Carolina expressly found that "the mere presence of water on a floor on a rainy day is not an unreasonably dangerous situation." Faircloth, 837 F. Supp. 2d at 127 (applying North Carolina negligence and premises liability law) (citation omitted). The plaintiff brought the claim after suffering injury from a fall in a post office. The accident happened on a rainy afternoon at

approximately 4:20 p.m., ten minutes before the post office was to close. Id. at 125. It had been raining since at least 3:00 p.m. Id. The plaintiff, who was wearing flip-flops, entered the post office, made a right turn, and was heading toward the counter when she slipped and fell. Id. The court held that summary judgment was proper as the government owed no duty to the plaintiff, as the condition was open and obvious and was not unreasonably dangerous. Id. at 129-30. The court further noted that the only way to keep an entranceway completely dry would be to station an employee at the entrance to mop continuously as customers enter:

> The only way the Court knows for the United States to have kept the lobby floor completely dry is for it to have stationed an employee by the door all day for the sole purpose of mopping up each time a customer entered or left the [building]. This it was not required to do.

Id. (quoting Hess v. United States, 666 F. Supp. 666, 672 (D. Del. 1987)). Thus, the court granted summary judgment, holding the plaintiff had failed to present evidence sufficient to establish the existence of a duty owed to her. Id. at 130.

Similarly, Webb was fully aware of the tracked-in water at the entrance of Dick's store. The soles of her own feet were wet, according to her testimony. She and every other customer were continuing to track water into the store. Webb testified that she could have waited for other customers to pass and have avoided the wet area entirely; she simply did not want to wait a few moments.

Instead, she did not exercise reasonable care for her own well-being and proceeded across the puddle, even though another known, obvious, and safe way for her to proceed was available. See RESTATEMENT (SECOND) OF TORTS § 343A, *comment g* (emphasis added). As such, the tracked-in water confronted by Webb was not an unreasonably dangerous condition that would have imposed a duty on Dick's to station an employee at the front of its store to mop water constantly as patrons entered.

Dick's did not have a duty to make the premises absolutely safe. Based on the circumstances, a moist tile floor at the entrance of a store on a rainy day did not present an unreasonable danger to Webb. Further, Webb did not come forward with any affirmative evidence that the condition was correctable under the circumstances. Customer foot traffic on a wet and rainy day caused the entranceway to be wet. Every store with tile flooring presents a risk of slipping upon entering from the rain. Webb herself testified that the soles of her own shoes were wet upon entering the store. She did not come forward to offer any affirmative evidence to oppose summary judgment on the basis that some way existed for Dick's to ensure customers coming in with wet feet would not slip on the wet tile. And she herself admitted that she did not have to encounter the wet tile. She could have waited a moment for other customers to pass and continued around the puddle by walking on the mats.

In accordance with McIntosh, summary judgment in Dick's favor was proper. The floor's condition was open and obvious to Webb. She offered no

evidence of foreseeable distraction. Rather, she was fully cognizant of the condition and was actively engaged in stepping over it. In opposing summary judgment, Webb did not offer any evidence that Dick's failed to take action to correct an *unreasonably* dangerous condition. On a rainy day during a busy shopping season, customers continually track water into stores. The wet soles of customers' shoes pose the greatest risk to slipping on a tile floor. The risk of slipping upon entering a store with tile floors is commonly known. Webb offered no affirmative evidence that this risk was unreasonable, and she did not offer any evidence as to what actions could have been taken to reduce the risk.

III. SUMMARY JUDGMENT IN DICK'S FAVOR IS CONSISTENT WITH SEVERAL RECENT KENTUCKY COURT OF APPEALS OPINIONS.

Under Kentucky law, once Dick's presented evidence that it was entitled to summary judgment, Webb had the duty to present affirmative evidence showing that a genuine issue of fact existed for trial. Lewis v. B&R Corp., 56 S.W.3d at 436. A "party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." Wymer, 50 S.W.3d at 199. Webb could not offer any evidence of her being distracted nor that the condition was unreasonably dangerous. Summary judgment in Dick's favor was proper. Summary judgment also was consistent with several recent opinions from the Kentucky Court of Appeals that have followed McIntosh. Application of these opinions supports the trial court's grant of Dick's motion for summary judgment.

In Lucas v. Gateway Community Services Organization, Inc., the plaintiff brought suit after falling in the defendant's parking lot. 343 S.W.3d 341, 342 (Ky. Ct. App. 2011). The parking lot was partially paved. As the plaintiff stepped from the paved portion to the gravel portion, she stepped on a piece of crumbling gravel and fell to the ground injuring her arm. Id. The plaintiff had walked through the parking lot several times and was familiar with the fact that a portion of the lot was gravel. Id. The defendant asserted that the condition was open and obvious. Id. at 342-43. Applying McIntosh, the court considered whether the condition was open and obvious. Id. at 345-46. The court found that there were no issues of disputed fact where the plaintiff testified in her deposition that she was well aware of the condition, had visited the location multiple times, and had admitted that she used caution when walking in the parking lot. Id. at 346. The court then considered whether there was an issue of fact concerning the foreseeability of the injury. Id. The court found there was no evidence that the plaintiff was distracted while she was walking through the parking lot and, therefore, the injury was not foreseeable. Id. After concluding the condition was open and obvious and the injury was not foreseeable to the defendant premises owner, the court affirmed the summary judgment for the defendant. Id.

In Shelton v. Kentucky Easter Seals Society, Inc., the plaintiff brought suit after tripping on wires near her husband's bedside. 2011 Ky. App. LEXIS 93, at *2. The plaintiff had visited her husband in the hospital every day for five weeks

and was aware that there were many wires on the right side of his bed. Id. at *1-3. The court held, "it is well established in Kentucky, as a general rule, that if a hazardous condition is 'open and obvious', a landowner owes no duty of care to an invitee regarding the hazardous condition." Id. at *4 (citing Corbin Motor Lodge v. Combs, 740 S.W.2d 944, 946 (Ky. 1987)). The court went on to hold, "a landowner has no liability for physical harm to invitees caused by '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.'" Id. at *4-5 (citing Bonn v. Sears, Roebuck & Co., 440 S.W.2d 526 (Ky. 1969)). The court concluded that the plaintiff had failed to produce evidence that she was distracted or that she was forced to encounter the hazard by necessity. Id. at *7. The plaintiff conceded that she "knew of the wires on the right side of her husband's bed, establishing that the hazard was open and obvious." Id.

The plaintiff nevertheless argued that a hospital should foresee that visitors would be distracted by tending to their loved ones. Id. at *6. The court explained that while there may be situations where an invitee is "forced to encounter the hazard because of a necessity such as retaining their means of livelihood," "[t]he plaintiff cannot recover if there was 'no substantial necessity or urgency for the plaintiff's subject himself to the risk.'" Id. at *8 (citations omitted). The court found that there was no urgent need for the plaintiff to approach her husband's bedside: "[a]pproaching his bed to kiss him goodbye simply does not meet the necessary and urgent requirement given by the courts

of Kentucky. Inconvenience or convenience under these circumstances was not a substantial necessity or urgency." Id. at *8-9 (citations omitted).

Similarly, in Jones v. Abner, 335 S.W.3d 471 (Ky. Ct. App. 2011), the Court of Appeals affirmed a trial court's grant of summary judgment where the plaintiff had slipped and fallen while stepping into a bathtub. Mazie Jones was a guest at the "Lil' Abner Motel" when she slipped and fell in the bathtub, sustaining a concussion and other injuries. Id. at 473. She and her husband had arrived at the motel on a Friday for a weekend stay. Id. She had showered upon her arrival at the motel and again on the following day. Id. On Sunday morning, she again was preparing to shower and, with the water running, she put her right foot into the tub. Id. As she then picked up her left foot, she slipped and hit the side of her head against the tub. Id. She sued alleging that the bathtub's condition was unreasonably dangerous. Id. She specifically asserted that the bathtub was slippery because of the methods used to clean it and made worse by the absence of appropriate non-slippage devices in the bathtub such as a handrail and no-slip safety strips at the bottom of the tub. Id. at 473-74.

Following a period of discovery, the defendant motel moved for summary judgment asserting that Jones could not show she encountered an unreasonably dangerous condition at the motel. Id. at 474. The motel further argued that Jones' cause of action should be barred because the condition of the tub was open and obvious. Id. The trial court granted the motel's motion on the grounds that

Jones could only speculate as to what caused her fall and that she was unable to show she had encountered an unreasonably dangerous condition caused by the motel. Id. The Court of Appeals affirmed the grant of summary judgment, noting that "[t]he party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." Id. at 475 (quoting Wymer v. JH Properties, Inc., 50 S.W.3d 195, 199 (Ky. 2006)).

The Court of Appeals found that Jones had failed to provide any evidence to support her assumption that something slippery had caused her fall. Id. It further recognized that "the risks inherent in bathing or showering are open, apparent, and obvious to anyone who has ever taken a bath or shower." Id. at 476. The Court of Appeals further rejected Jones' assertion that a bathtub which is not equipped with safety-strips or handholds is an inherently dangerous condition. Id. at 476-77. It noted that Jones had "failed to produce evidence [in opposition to summary judgment] of any type of industry standard, statutory law, or common-law rule that could arguably reflect a duty on the part of [Jones] to equip motel bathtubs with such safety devices." Id. at 477. The Court of Appeals continued that while the owner of a motel has a duty to provide reasonably safe accommodations, it is not an insurer of a guest's safety. Id. An invitee continues to have the duty to exercise ordinary care for his/her own safety and does not have a "license . . . to walk blindly into dangers that are obvious, known to him, or would be anticipated by one of ordinary prudence."

Id. (quoting Rogers v. Professional Golfers Ass'n of America, 28 S.W.3d 869, 872 (Ky. Ct. App. 2000)).

In Judge Acree's concurring opinion, he stated that "[t]he case *sub judice* demonstrate[d] that summary judgment is still available in proper cases despite the fact that analysis under McIntosh does not stop with a determination that a hazard is open and obvious." Id. Judge Acree further opined that McIntosh's distraction was unquestionably foreseeable by the hospital, considering the necessity of an emergency professional rushing to save lives. Id. at 477-78. "Whereas McIntosh's focus was properly and foreseeably on something other than the hazard, Jones' focus, necessarily, should have been on the hazard itself." Id. at 478. As "Jones presented no evidence whatsoever that she was distracted from her 'duty to act reasonably to ensure her own safety, heightened by her familiarity with the location and the arguably open and obvious nature of the danger,'" summary judgment was proper as the case was clearly distinguishable from McIntosh. Id.

These opinions are well-reasoned and recognize that, while McIntosh adopted a "defense of reasonable distraction," 319 S.W.3d at 394, the plaintiff still has the obligation to offer actual evidence that he/she actually was reasonably distracted. In the case *sub judice*, Webb did not offer any evidence of reasonable distraction. Rather, her testimony unequivocally established: (1) she knew it had been raining; (2) she noticed the parking lot was wet as she crossed it; (3) she knew the soles of her own shoes were from just having walked in from the

parking lot; (4) she saw the condition of the entranceway floor at Dick's was wet and noticed a puddle of water; (5) she was actively focused on and stepping over the puddle when she fell; and (6) she could have walked around the puddle, remaining on the mats provided, if she had simply waited for other customers to pass. Depo. of Betty Webb, pp. 15-16, 22, 25-25, 28, 31-32, 46-47. Webb did not present any evidence that she was distracted whatsoever, much less reasonably distracted. She argued in opposition to summary judgment only that Dick's should have placed warning signs, even though she admitted they would not have helped prevent her fall as she already was aware of the water.

The hazard of a wet entranceway floor is not an uncommon or unreasonably dangerous condition. It particularly was not unreasonably dangerous to Webb as she had no substantial necessity or urgency that required her to continue to confront the condition. She admitted in her deposition that she could have waited until other customers passed. She simply did not want to wait and proceeded to step over the wet area. Dick's should not be held liable for such a common condition when nothing distracted its invitee from the risks posed.

IV. THE COURT OF APPEALS' RULING IGNORED THE RECORD AND WAS BASED ON SPECULATION.

The Court of Appeals concluded that it was foreseeable Webb would be distracted considering the Christmas shopping season. See Opinion, p.7. The Court of Appeals did not cite anything in the record to support this conclusion.

Because the Court of Appeals could envision that some shoppers might be distracted does not mean that Webb was. Further, this conclusion stands in direct contravention to the undisputed evidence in the record that Webb was *not distracted* and had not forgotten about the water on the floor. She was purposefully trying to step over it, set her wet shoe on the other side of the puddle, and then slipped.

At the Kentucky Court of Appeals, Webb improperly argued that Dick's breached a duty to her by its "failure to clean up a dangerous hazard." See "Brief on Behalf of Appellant Betty Webb," at p.7. But Webb did not argue this at the trial level; she argued only that Dick's breached its duty to warn of the hazard and that it had failed to place a "wet floor sign." "Plaintiff's Response to Motion for Summary Judgment," p.3. Nevertheless, she further failed to recognize that McIntosh only imposes a duty to correct unreasonably dangerous conditions. Webb offered no evidence in opposition to summary judgment that the floor was unreasonably dangerous.

A. Webb did not offer any evidence or present any argument in opposition to summary judgment that she was distracted.

Contrary to the Court of Appeals' interpretation of Dick's argument to it, Dick's did not argue McIntosh should be so narrowly limited to only invitees engaged in lifesaving activities. Dick's instead argued simply that claimants must offer *some evidence* to show a genuine issue of fact he or she *actually was distracted* or had forgotten about a risk presented. Thus, Dick's did not argue for

such a narrow interpretation of McIntosh but only that Plaintiff Betty Webb had to present evidence of her actually being distracted in order to create an issue of fact sufficient to withstand summary judgment. She could not, and did not, do this.

Instead, her testimony was clear that she was not distracted. She saw the puddle. She was actively step stepping over the puddle. She had not forgotten about it. She had not forgotten about the rain outside. She knew her own shoes were wet.

The Court of Appeals completely disregarded Webb's own testimony and somehow reached a conclusion that an invitee such as Webb foreseeably could be distracted during the Christmas shopping season. Although that might be possible upon an appropriate showing, by Webb's own testimony she was not distracted.

B. The Court of Appeals inaccurately concluded that Webb had offered evidence of steps Dick's could have taken to remedy the hazard.

At the Court of Appeals, Dick's demonstrated that Webb had not offered any affirmative evidence at the trial level regarding any measures Dick's could have taken to eliminate moisture on the tile at the store's entrance. Dick's argued that Webb had not come forward with any affirmative evidence as to how long the puddle of water was present at the entrance and did not present any evidence that the condition was correctable under the circumstances. The Court of Appeals disagreed stating:

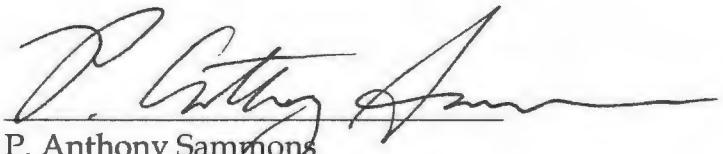
> That argument is not supported by the record. Webb offered several remedies that Dick's could or should have undertaken: moving the mats together to prevent pooling of water; extending the mats further into the store; and putting fans or heaters near the entrance.

See "Opinion Reversing and Remanding," at p.8. The Court of Appeals, however, provided no citation to the trial court record. A review of the briefs filed by the parties before the trial court demonstrates that Webb did not make any of the arguments referenced by the Court of Appeals in opposition to Dick's motion for summary judgment. She argued only the absence of a "wet floor" sign, which Webb admitted in her deposition would not have helped her as she was aware of water on the floor. Webb also did not offer any affidavits, deposition testimony, or any affirmative evidence to create such an issue.

V. CONCLUSION

For the foregoing reasons, Dick's Sporting Goods respectfully requests the Court enter an Order Reversing the Opinion of the Kentucky Court of Appeals, thereby reinstating the Fayette Circuit Court's Order Granting Summary Judgment.

Respectfully submitted,



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