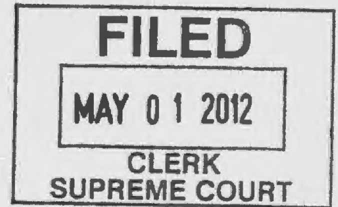

KENTUCKY SUPREME COURT
NO. 2011-SC-000518-D
(2010-CA-001194)

DICK'S SPORTING GOODS, INC. **APPELLANT**

v. **APPEAL FROM**
KENTUCKY COURT OF APPEALS
2010-CA-001194

BETTY C. WEBB **APPELLEE**

REPLY 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 30th day of April 2012, upon the following courts and persons: Clerk, Kentucky Supreme Court, Room 209, Capitol Building, 700 Capitol Avenue, Frankfort, KY 40601; 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.

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ARGUMENT

I. *McINTOSH* DID NOT PRECLUDE SUMMARY JUDGMENT WHERE THE CLAIMANT ADMITTEDLY WAS AWARE OF THE HAZARD AND NOT DISTRACTED.

The Court's decision in Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010), modified the "open and obvious" doctrine, but did not abolish it. McIntosh explains that the most important factor in determining whether a duty exists is foreseeability. Id. at 390. But, foreseeability of injury is not presumed, particularly when the hazard is open and obvious. Id. To prove a foreseeable injury, circumstances must exist under which a landowner should anticipate that the dangerous condition will cause physical harm to the invitee, despite its known or obvious nature. Id. Typically, physical injury is not foreseeable when a condition is both known and obvious to an invitee.

McIntosh explains that there must be circumstances which render an accident foreseeable despite the open and obvious nature of a condition. Such circumstances include a foreseeable distraction or a situation where the invitee is forced to subject herself to the risk out of serious necessity. Id. at 390-395. In McIntosh, though the hospital emergency room entrance at issue traditionally would have been considered objectively as an open and obvious hazard, the evidence suggested McIntosh, a paramedic, may have been reasonably distracted. In finding that the hospital owed McIntosh a duty to correct the layout of the emergency room entrance, the Court noted "[i]t was important to stress the context in which McIntosh sustained her injury," which involved rushing a critically ill patient into the hospital. Id. at 393.

The nature of McIntosh's activity thus made it foreseeable she would become distracted because the hospital could expect she "would be tending to the patient, not to

each step she was taking." Id. Though the hospital may not have had a duty to warn McIntosh, it still made "a great deal of sense to impose liability . . . for failing to *eliminate or reduce* the risk posed by unreasonable dangers." Id. (Court's emphasis). The Court expounded upon that which constitutes an unreasonable danger, stating "defendants . . . may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme." RESTATEMENT (SECOND) OF TORTS § 343A, *comment g*. "This is particularly true where a reasonable alternative way is open to the visitor, known or obvious to him, and safe." Id.

Webb could not show that any circumstances existed which would render her encounter with a known and obvious condition foreseeable. She argues that though she saw a puddle, she slipped on tracked-in rainwater that looked like dry tile. Dick's could not have expected that Webb would be harmed by these conditions, neither of which would constitute an extreme hazard.

The context of Webb's accident was far different from that of McIntosh. Though a patron might have become distracted by Christmas holiday enthusiasm, the record in the case *sub judice* demonstrates otherwise. Webb's attention was focused presently and directly on the presence of water on the entranceway floor when she fell. By her own testimony, Webb admitted that it had been raining, that she had just crossed a wet parking lot, that the soles of her shoes were wet, that she saw a puddle upon entering the store, and that she was focused on stepping over that puddle when she fell. Depo. of Betty C. Webb, pp. 15-16; 22; 25-26. She admitted that a "wet floor" sign would not have prevented her accident, as she already was aware of the water. Id. at 31-32. Thus, as Webb was presently aware of the water on the floor, Dick's had no duty to warn her

about it. Webb could recover only if the floor's condition presented an "unreasonable danger" notwithstanding her present awareness of the risk. Tracked-in rainwater at a store entranceway does not constitute such an extreme or unreasonable danger as a matter of law to impose liability on Dick's.

In Webb's case, rainwater at the entrance particularly did not constitute an unreasonable danger because she had active, present awareness of the risk. Dick's could not foresee that tracked-in rainwater would present an unreasonable risk of harm to a customer with active, present awareness of the water. Tracked-in water on tile flooring is a common hazard. Dick's would have no reason to anticipate that it would pose an unreasonable danger to a patron who saw water on the floor, who was presently aware of the water and not distracted, and who knew the soles of her own shoes were wet. All Webb had to do was be patient and wait a moment for other customers to pass, wipe her shoes on the mat, and carefully step onto the tile floor. As she testified, she could have stayed on the mats and avoided the wet area entirely if she had waited momentarily for other customers to finish entering the store. Id. at p.25.

The McIntosh Court found liability was appropriate because a hospital reasonably could anticipate that a paramedic could be distracted by attending to her critically ill patient and forget about the curb. Presumably the curb over which McIntosh tripped did not pose in itself an unreasonable risk of harm if McIntosh had testified that she had not been distracted, that she had not forgotten about the curb, and that she was actively focused on stepping over it. Similarly, tracked-in rainwater at the entranceway of a commercial business does not present an unreasonable danger to a customer who sees the water and has present awareness of the risk presented. See Pervel v. Hospital Service

Assoc. of New Orleans, 192 So. 2d 852 (La. Ct. App. 1966) (entranceway that is slippery in wet weather did not support claim of negligence). This does not present such an "extreme risk" as to impose liability on the store owner.

As a matter of law, Webb did not meet the exceptions to the open and obvious doctrine. She was not distracted but presently aware and focused on the water on the floor. No one pushed her, and there was no urgent necessity for her to enter the store. Moreover, Dick's could not foresee that a customer with full awareness of the open and obvious condition of the floor nevertheless would proceed to slip and fall. Water on a tile floor at the entranceway of a commercial store is not such an extreme or unreasonably dangerous condition as to impose a duty to correct the hazard. And the only way to have reduced the risk of customers slipping would have been for Dick's to wipe the floor completely dry after the entrance of each customer prior to the next one. Kentucky law never has required a premises owner or occupier to be the insurer of its customers' safety. See Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431, 436 (Ky. 2003) ("a business is not an insurer of its patrons' safety and is not strictly liable for injuries suffered by a customer on its premises").

II. CONTRARY TO WEBB'S PRESENT ARGUMENT, SHE DID NOT 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."

Webb inaccurately argues that she presented affirmative evidence at the trial court of "steps that could have been taken [by Dick's] to remedy the hazard." See "Brief of Appellee Betty C. Webb," p.9. She does note correctly, however, that Dick's included one page from her deposition testimony in its memorandum in support of summary

judgment which included Webb's speculation of other things that might have been done. Id. But Dick's cited that page for evidence of Webb's past experience with wet floors through her employment as a custodian. See "Memorandum of Law in Support of Motion for Summary Judgment," pp. 8-9. In Webb's response in opposition to summary judgment, she did not include this portion of transcript and she did not argue Dick's could have taken any steps to have corrected the hazard. See "Plaintiff's Response to Motion for Summary Judgment." All she argued was that Dick's should have posted "wet floor" signs. Id. at pp. 2 & 3.

The party opposing a motion for summary judgment "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 481 (Ky. 1991). Once the party moving for summary judgment meets its prima facie burden of demonstrating the absence of a genuine issue of material fact, the burden shifts to the opposing party. The party opposing summary judgment must then produce affirmative evidence to counter the movant's evidence. De Jong v. Leitchfield Deposit Bank, 254 S.W.3d 817, 825 (Ky. Ct. App. 2007). Furthermore, in order to argue an issue on appeal, a party must first raise the issue before the trial court. Regional Jail Auth. v. Tackett, 770 S.W.2d 225, 228 (Ky. 1989) ("The Court of Appeals is without authority to review issues not raised in or decided by the trial court."). Issues not raised or presented to the trial court are not properly preserved for review by the appellate court, and may not be raised on appeal. Id.; see also Hall v. Arnett by Greene, 709 S.W.2d 850, 853 (Ky. Ct. App. 1986).

In opposing Dick's motion for summary judgment at the trial level, Webb did not present any evidence through deposition testimony or otherwise that Dick's could have

taken any measures to have eliminated water at the entranceway. The only argument Webb presented to the trial court in opposition to summary judgment was that Dick's should have placed "wet floor" signs. As Dick's argued in support of summary judgment, Webb admitted in her deposition that "wet floor" signs would not have helped her because she had seen and already was aware of the puddle of water. See "Memorandum of Law in Support of Motion for Summary Judgment," p.3 (citing Depo. of Betty Webb at pp. 27-28).

Though she may have speculated in other testimony that Dick's could have undertaken other efforts, Webb simply did not raise this issue, did not reference or cite her other testimony, and did not make any argument to the trial court that other measures were possible. She therefore failed to meet her obligation under CR 56 to present affirmative evidence in opposition to summary judgment and is precluded from raising the issue on appeal.

III. WEBB'S "DRY-APPEARING TILE" ARGUMENT IS SPECIOUS.

The duty to warn arises from the theory that the person or entity in control of a premises is likely to have superior knowledge of latent conditions on the property which could pose a safety risk. Once an invitee, however, learns of a potential hazard, the premises owner no longer has superior knowledge. "The purpose of a warning is to equalize the parties' knowledge about the danger." McIntosh, 319 S.W.3d at 393. When the parties' knowledge is already equal, a warning would serve no purpose. Id.

In the present case, Webb's knowledge of the wet tile at the entranceway was at a minimum equal to Dick's. She saw water on the floor upon entering the store, knew that her own shoes were wet, and was actively stepping over water. Webb argues that the one

particular tile onto which she stepped appeared dry, though was actually wet.[1] But this tile was immediately adjacent to the puddle over which she was stepping. Effectively Webb is arguing that Dick's had a duty to warn that this one particular "dry-appearing tile" was actually wet. Any reasonable person in Webb's position, however, upon walking inside from the rain, viewing mats in the floor, and viewing a puddle, would have appreciated the risk of such a condition. Webb's misinterpretation of the law would effectively preclude application of the open and obvious doctrine in any case, because a plaintiff could simply testify that she subjectively believed the condition was not open and obvious. This is not the law in Kentucky.

Furthermore, if the piece of tile looked dry to Webb, she does not explain how Dick's should have had superior knowledge about the hidden wetness of this dry-appearing tile. If this one particular piece of tile appeared dry to Webb, then it would have appeared dry to Dick's. Dick's would not have had any superior knowledge to convey to her. Moreover, no practical way would exist for Dick's to warn Webb about the hidden wetness of one particular piece of tile. She testified that a wet-floor sign would not have helped her, as she already was aware of water on the floor.

Additionally, Webb did not offer any evidence as to how Dick's could have ensured that floor would stay absolutely dry and free of water. Customer foot traffic was continually tracking water into the entranceway. Dick's had no practical options at its disposal that would have allowed it to maintain the entranceway in a completely dry state.

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[1] A more reasonable inference as to the source of water that caused Webb to slip would be the water on the soles of her own shoes. If the tile appeared dry to Webb, it may have been. She testified that there was water on the soles of her own shoes from walking across the wet parking lot. This likely is the best explanation for Webb's fall.

IV. NO AUTHORITY SUPPORTS WEBB'S ARGUMENT THAT TRACKED-IN RAINWATER AT A BUSINESS' ENTRANCEWAY IS AN UNREASONABLY DANGEROUS CONDITION.

No Kentucky appellate decision supports Webb's statement that "several Kentucky cases" hold that tracked in rainwater constitutes an unreasonably dangerous condition regardless of the claimant's awareness of the condition. Several of the cases referenced by Webb did not have anything to do with tracked-in rainwater. See Mitchell v. Flying J. Inc., 2007 U.S. Dist. Lexis 47579 (W.D. Ky., June 27, 2007) (customer fell where defendant had just cleaned a coffee spill); Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431, 434 (Ky. 2003) (nature of slick substance speculated as being shampoo but never determined). Further, most of the cases referenced by Webb involved an issue as to the extent of the claimants' awareness of the condition and not whether the condition was itself "unreasonably dangerous" even if claimants have knowledge of the condition. See McIntosh v. United States, 2010 U.S. Dist. Lexis 19558 (E.D. Ky., March 4, 2010) (claimant did not discover wet condition of floor in lobby, well past obviously wet vestibule area); Jewell v. Equestrian Events, Inc., 2003 Ky. App. Unpub. Lexis 840, *11-12 (Ky. Ct. App., Dec. 12, 2003) (reversed trial court's determination that wet platform was open and obvious condition, as claimant's knowledge that ground around platform was wet did not equal knowledge the platform itself was wet, and evidence further suggested possible issue of insufficient lighting); Wal-Mart Discount City v. Meyers, 738 S.W.2d 841, 842 (Ky. Ct. App. 1987) (claimant's testimony showed lack of knowledge of floor's wet condition several steps inside store).

Some of the cases referenced by Webb also involved a hazard created by the premises owner itself. See DeArmon v. Wal-Mart Stores, Inc., 2006 Ky. App. Unpub.

Lexis 915 (Ky. Ct. App., Dec., 22, 2006) (issue whether orange substance on floor was a cleaning product left by store cleaning staff); Wal-Mart v. Lawson, 984 S.W.2d 485, 488 (Ky. Ct. App. 1998) (evidence showed condition causing claimant's fall was created by the negligence of the store or its employees rather than simply as the result of adverse weather conditions). In Karrer v. Mac's Convenience Stores, LLC, 2010 U.S. Dist. Lexis 99627, *4 (W.D. Ky., Sept. 22, 2010), though it was a rainy day, the plaintiff actually slipped deep inside the store at the end of an aisle in the "exact area" where a store employee had just finished mopping "only moments before." Thus, tracked-in rainwater was not even an issue.

In the absence of Kentucky authority on point, Dick's cited several federal decisions from other jurisdictions that addressed whether tracked-in rainwater was in itself an unreasonably dangerous condition. Dick's never represented that the premises liability law in these other jurisdictions was the same as that in Kentucky. Rather, Dick's argued these cases were instructive on the discrete point that tracked-in rainwater at a store entrance is a common hazard and not an unreasonably dangerous condition. As the Faircloth court noted, "the mere presence of water on a floor on a rainy day is not an unreasonably dangerous situation." Faircloth v. United States, 837 F. Supp. 123, 127 (E.D.N.C. 1993).

Moreover, the decision of Hackworth v. United States, 366 F. Supp. 2d 326 (D.S.C. 2005), was remarkably similar factually to the present matter, as it had been raining, the claimant recalled "jumping puddles" as she crossed the parking lot, she stomped her feet before entering to shake water off, and she was looking down as she entered because she was aware of rain being tracked in. Though the court did dismiss the

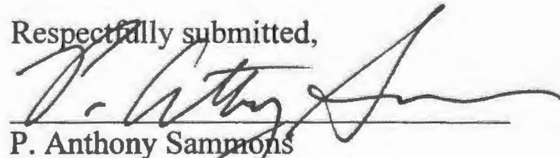
claimant's case based on the "open and obvious" doctrine, its decision noted that "[t]he degree of care owed with regard to an open and obvious danger is commensurate with the circumstances involved . . . ." Id. at *8. The court's opinion made the distinction between tracked-in rainwater at a building's entrance and water on the floor well inside the interior. Id. at ** 10-11.

In the present case, no disputed issue of fact existed that Webb was aware of the rainy condition, having walked across the wet parking lot. She knew the soles of her own shoes were wet. Upon entering the store, she looked down and saw a puddle of water. She was consciously aware of the puddle and stepped over it onto what she thought was wet tile. No way existed for Dick's to have warned about allegedly dry-appearing though wet tile to someone who already was aware of water on the floor. Where a person has knowledge and present awareness of a wet floor, the risk posed is not unreasonable. Dick's would have owed a duty to correct the hazard only if the risk associated with water at the entranceway floor was such an extreme risk even to persons with awareness of the risk. Tracked-in rainwater is not such an extreme risk.

Conclusion

For the foregoing reasons, Dick's Sporting Goods respectfully requests the Courts to enter an order reversing the Court of Appeals and reinstating the Circuit Court's order granting summary judgment.

Respectfully submitted,



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