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

DICK'S SPORTING GOODS, INC. APPELLANT

v.

BETTY C. WEBB APPELLEE

BRIEF OF APPELLEE BETTY C. WEBB

Respectfully submitted

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing has been served by hand delivery and/or U.S. mail, postage prepaid, on this 13 day of April 2012, upon the following:

Original plus 10 copies to: Susan Stokeley Clary, Honorable Clerk of the Supreme Court of Kentucky, 209 Capital Building, 700 Capital Avenue, Frankfort, KY 40601-3488

Copies to: 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; Hon. P. Anthony Sammons, Dinsmore & Shohl, 250 West Main Street, Suite 1400, Lexington, KY 40507; Hon. Kevin C. Burke, 125 South Seventh Street Louisville, Kentucky 40202.

Bradly Slutskin, Counsel for Appellee

I. INTRODUCTION

This is a premises liability case arising from the injury Appellee, Betty C. Webb, sustained 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 and Dick's had failed to maintain their entranceway, allowing the floor mats to become disheveled so that they held a standing puddle of water. Ms. Webb attempted to step over the puddle onto dry appearing tile when she slipped and fell. She filed a lawsuit against Dick's on August 19, 2008, in Fayette Circuit Court. The Fayette Circuit Court sustained a summary judgment motion on behalf of Dick's on June 14, 2010. The Kentucky Court of Appeals reversed and remanded the Fayette Circuit Court's decision on August 5, 2011. Dick's motion for discretionary review was granted by this Court on December 14, 2011.

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellee would like the opportunity to participate in oral argument in order to field inquires from the Court. The opinion in this case could potentially have long-standing impact on the state of premises liability law in Kentucky. Appellee believes it is therefore important to appear before the Court to answer and address all questions and issues raised by the Court.

III. COUNTER-STATEMENT OF POINTS AND AUTHORITIES

IV. COUNTER-STATEMENT OF THE CASE

Appellee Betty Webb and her neighbor went to Dick's Sporting Goods to shop on December 8, 2007. They arrived to find the front entrance a mess. Just inside the entrance doors, the Appellant had laid out mats to cover the tile floor.[1] The mats however, were wet and spongy, and they had shifted from a parallel alignment into a "V" shape so that there was a puddle of water pooling between them.[2] Ms. Webb attempted to avoid the hazard by stepping over the puddle of water onto what she thought was dry tile.[3] In describing where she stepped, Ms. Webb stated, "I didn't know it was wet until I actually felt it when I fell."[4] Even though the tile looked dry, it was wet; and Appellee slipped, fell, and was injured. There was no testimony that the Appellant had taken any precautions or actions to remedy the hazardous store entrance.

Suit was filed and after discovery, Appellant moved for summary judgment on the issue of liability. In the motion, Appellant argued that the wet tile was open and obvious.[5] Therefore, there was no duty to remove or warn against.[6] The Appellee argued that she fell trying to step over the obvious puddle of water onto what appeared to be dry tile.[7]

The Circuit Court Judge held that the Appellant/business owner owed no duty to the Appellee to warn or protect against the wet floor. The Judge believed that the hazard

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1 Appellee's deposition p 20. (All deposition pages in the record are attached as exhibit 1).
2 Id. pp 19,20, 22 & 25.
3 Id.. p. 25 lines 4-12.
4 Id. p. 20 lines 17-18.
5 See Memorandum in Support of Motion for Summary Judgment p. 1.
6 Id.
7 See Appellee's Response to Motion for Summary Judgment p. 3.

was open and obvious to the Appellee, and sustained the motion for summary judgment.

Shortly thereafter, the Kentucky Supreme Court issued an opinion in Kentucky River Medical v. McIntosh[8] that clarified a business owner's duty to protect against open and obvious conditions.

Appellee then filed an appeal with the Court of Appeals which reversed the Trial Court's ruling on summary judgment, acknowledging that the McIntosh case gave rise to a genuine issue of material fact with respect to "open and obvious" hazards in premises liability cases, and remanded to the Fayette Circuit Court. Appellant then filed a motion for discretionary review which was granted by this Court.

V. ARGUMENT

A) THE APPELLANT OWED A DUTY TO EXERCISE REASONABLE CARE BECAUSE THE TYPE OF INJURY SUSTAINED BY THE APPELLEE WAS FORESEEABLE.

The trial court in this case granted the Appellant's motion for summary judgment because it felt that the hazard at issue was open and obvious. In McIntosh however, this Court stated:

> 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.[9]

The Court noted that, "[e]ven where the condition is open and obvious, a landowner's duty to maintain property in a reasonably safe condition is not obviated; it

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

merely negates the requirement to warn of such a condition."[10] Thus, even when liability is not imposed on landowners for failing to warn invitees of obvious conditions, "it makes a great deal of sense to impose liability on them for failing to *eliminate or reduce* the risk posed by unreasonable dangers."[11] Since "only land possessors and owners can legally remove" dangers, their duties are "also based on the land possessor's unique position as the only person who can fix the dangers."[12]

In the present case, Ms. Webb slipped and fell as she tried to negotiate a hazard that had been ignored and allowed to worsen by the landowner. The floor mats were wet, and they had slipped out of place to create a "V"-shaped area that allowed water to pool. Ms. Webb tried to avoid the hazard by stepping onto what she thought was dry tile but was injured in the process.

The fall sustained by the Appellee was not only foreseeable, but was anticipated by the Appellant. Appellant knew that its tile floor entrance became slick when wet, that's why it covered the tile with mats for its customers to walk over. The Appellant was rightly concerned with water on the tile because this was one section of the store that was exposed to the elements, either through the doors being constantly opened or by water being tracked in. It also knew that this was a high foot-traffic area as all parking lot customers were funneled into the store through this particular entrance. Appellant's attempt to cover its tile floors with mats make it clear that the slip-and-fall injury sustained by the Appellee was foreseeable.

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10 Id. at 393 *Citing* Phelan v. State, 804 N.Y.S.2d 886, 898 (N.Y. Ct. Claims 2005).
11 McIntosh at 393.
12 Id.

With a foreseeable injury, the Appellant owed a duty to Appellee just as the landowner did in McIntosh. Certainly, the Appellee had a duty to act reasonably to ensure her own safety. Therefore, just as in McIntosh, there are genuine issues of fact and it should be up to a jury to determine the degree of fault if any attributed to each party.

B. NO "DISTRACTION" IS NEEDED TO GENERATE A DUTY WHEN AN INJURY IS FORESEEABLE.

The Appellant argues that it owed no duty because Appellee cannot prove that she was "distracted". Appellee believes that this argument is not supported by McIntosh.

In McIntosh, the Court determined that for many open and obvious conditions, the land possessor would have no reason to anticipate the harm.[13] In cases where the injury was not foreseeable, but the land possessor has reason to expect that the invitee's attention might be distracted so that she will not discover what is obvious, the expectation of such a "distraction" generates a duty to exercise reasonable care.[14]

As argued in the previous section, this case involves a foreseeable injury so the presence of a "distraction" is not necessary to generate a land possessor's duty to exercise reasonable care.

McIntosh also discusses "distraction" in the comparative fault context. The Court explained that it would be unusual for a Plaintiff to avoid some share of comparative fault with respect to most open and obvious conditions.[15] It did note however, that in rare situations a Plaintiff might argue that a foreseeable "distraction" reduces or even

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13 Id. at 391.
14 Id.
15 Id. at 392.

eliminates her share of fault.[16]

There is however, no language in McIntosh, that supports the proposition that a Plaintiff must prove both a foreseeable injury and a "distraction" in order to withstand summary judgment. The case law is clear that "distraction" only comes into play when the injury itself was not foreseeable or when the parties are arguing percentage of fault. Since this case involves a foreseeable injury, in accordance with McIntosh, there is no need to prove a "distraction" in order to survive summary judgment.

C. APPELLEE PRESENTED AFFIRMATIVE EVIDENCE OF STEPS APPELLANT COULD HAVE TAKEN TO REMEDY THE HAZARD

The Appellant claims that Appellee offered no evidence of steps that could have been taken to remedy the hazard. The Appellant must have simply overlooked page 46 of Appellee's deposition which was attached as part of Exhibit 1 to the Appellant's brief before the Court. On that page, the Appellee described measures the Appellant could have taken to remedy the mess in its front entrance. Her suggestions included pushing the mats back together, putting more mats out, and running a heater, fan, or anything to dry up the water.[17] Based on this testimony, there is no merit to the argument that Appellee failed to offer steps the Appellant could have taken to remedy the hazard.

D. APPELLANT'S ASSERTION THAT WET TILE CANNOT CONSTITUTE AN UNREASONABLY DANGEROUS CONDITION IS MISPLACED

Appellant argues "significant authority from around the country" holds that

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16 Id.
17 Appellee's depo. p. 46.

tracked in rainwater cannot constitute an unreasonably dangerous condition.[18] Appellee disagrees and notes that the amicus brief identifies several Kentucky cases in which an injured Plaintiff survived summary judgment when the hazard at issue was rainwater on the floor.[19]

The two federal cases cited by the Appellant are readily distinguishable from this case. In Hackworth v. United States, 366 F.Supp. 2d 326 (D.S.C. 2005) the Plaintiff claimed she didn't see a puddle inside a Mini-Mart, stepped in it, and fell. The Court explained that under South Carolina law, the land possessor owed no duty for open and obvious conditions unless it could reasonably foresee that a patron would be distracted or not discover the hazard. [20] The Court determined that this hazard was so clearly open and obvious that Plaintiff should have discovered it and there was no evidence of distraction.[21] This case was therefore dismissed because the hazard was open and obvious, not because the Court proclaimed that rainwater cannot constitute an unreasonably dangerous condition.

While the law in Kentucky under McIntosh, imposes a duty on land possessors for all open and obvious conditions where an injury is foreseeable, South Carolina law only imposes a duty if the landowner anticipates that an invitee may be distracted or otherwise fail to discover an open and obvious condition.[22] Hackworth is also factually distinguishable from Appellee's case. Unlike Hackworth, the Appellee did notice the obvious puddle and was injured trying to navigate around it by stepping onto what she thought was dry tile. With differences in the law and facts, the out-of-state case law from

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18 Appellant's brief p. 16.
19 See Amicus Brief pp. 11-12.
20 Hackworth at 330.
21 Id. at 331.
22 Id. at 330.

Hackworth does not provide precedential value in this case.

Faircloth v. United States, 837 F. Supp. 123 (E.D.N.C. 1993) was also cited by the Appellant to support its argument that tracked-in rainwater cannot constitute an unreasonably dangerous condition. The Plaintiff in Faircloth asserted that she was injured when on a rainy day, she walked into the post office in a normal manner and her feet slipped from under her because the floor was wet.[23] She did not notice any water before she fell and made no attempt to navigate any obvious hazard.[24] The Court determined that the mere presence of water on the floor on a rainy day is not an unreasonably hazardous condition.[25] It further stated that the only way the Post Office could have prevented this injury was by having someone posted constantly to mop each time a customer entered or left.[26]

The same cannot be said for the instant case. In Appellee's case, there was clearly more water on the floor than foot-traffic residue. There was a pool of water that had accumulated and the safety mats had shifted so they no longer provided a dry path. While there were no reasonable steps the post office could have taken to prevent the minute and unappreciable amount of water that caused Faircloth's fall, the Appellee has identified several reasonable steps that would have made the entrance to Dick's safer. These included re-arranging the mats or using heaters, fans, or anything to dry up the noticeable pool of water.[27] The difference in the facts between these two cases, therefore, renders the ruling in Faircloth inapplicable to the instant case.

Due to the difference in facts between Appellee's case and Faircloth and the

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23 Faircloth at 127.
24 Id. at 128.
25 Id. at 127.
26 Id. at 129-130.
27 Appellee's depo. p. 46.

differences in law and facts in Hackworth, neither case provides applicable guidance that prohibits water pooled on tile from being considered an unreasonably dangerous condition.

E. THERE IS A GENUINE ISSUE OF MATERIAL FACT REGARDING THE CONDITION'S OPEN AND OBVIOUS NATURE

Notwithstanding the foregoing arguments, Appellee does not agree that the hazard in this case was "open and obvious". The trial court found that Appellant owed no duty to take reasonable steps to remedy the puddle or the wet tile because they were "open and obvious" conditions. However, Ms. Webb wasn't injured as a result of the puddle or what was obviously wet tile. She was injured when she slipped on what she thought was safe dry tile.[28] The dry-appearing tile does not constitute an open and obvious dangerous condition. Appellee carefully tried to avoid the wet areas and stepped on what looked safe.[29] If it looked safe, it couldn't have been "open or obvious". If the hazard was not "open or obvious" then the land possessor owed a duty of ordinary care to maintain their property in a reasonably safe condition, and a duty to discover unreasonably dangerous conditions on the land, and to either correct them or warn of their presence.[30] Under this scenario, summary judgment is improper because a jury should be allowed to determine whether the land possessor failed to comply with this duty.

F. THE STANDARD FOR SUMMARY JUDGMENT HAS NOT BEEN MET

Summary judgment was not proper in this case. Summary judgment should only

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28 Appellee's depo. p. 25.
29 Id.
30 McIntosh at 388, citing Perry v. Williamson, 824 S.W .2d 869 (Ky. 1992).

be utilized to terminate a case when it would be impossible for the plaintiff to produce any evidence at trial warranting a judgment in his favor.[31] This requires a trial court to construe the record in a light most favorable to the party opposing the motion in its ruling.[32] On appeal of a summary judgment, the standard of review is whether the trial court "correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law."[33]

In the present case, summary judgment is not supported when the facts are taken in the light most favorable to the Appellee. If the hazard was open and obvious, then the fact that Appellant anticipated this injury by attempting to cover its tile floors means that a jury should be allowed to determine the percentage of fault applied to both parties. If the hazard was not open and obvious, then the Appellant owed a duty to exercise reasonable care and it would be up to a jury to determine if that was accomplished.

VI. CONCLUSION

Wherefore, Appellee respectfully prays that this Court will uphold the Court of Appeal's reversal of the summary judgment and order of dismissal and remand the case to the Circuit Court for further pre-trial proceedings.

Respectfully submitted,

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31 Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991).
32 Id.
33 Pearson ex rel. Trent v. Nat'l Feeding Inc., 90 S.W.3d 46, 50 (Ky. 2002).

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VII. APPENDIX

In accordance with the Civil Rules, Appellee has not attached any items to the Appendix as all documents believed to be helpful to the Court were already attached to the Appellant's brief.