COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2012-SC-000318
COURT OF APPEALS CASE NO. 2011-CA-000616-MR
APPEAL FROM JESSAMINE CIRCUIT COURT
ACTION NO. 09-CI-00907

MIAMI MANAGEMENT COMPANY, INC., and
WENDY'S INTERNATIONAL, INC. APPELLANTS

VS.

ELGAN BRUNER and
DEANNA BRUNER APPELLEES

REPLY BRIEF ON BEHALF OF APPELLANTS

CERTIFICATE OF SERVICE

This is to certify that on April 19, 2013, the Reply Brief on Behalf of Appellants, Miami Management Company, Inc., and Wendy's International, Inc., has been served by hand-delivering an original and nine copies to Susan Stokley Clary, Clerk, Supreme Court, 209 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601, and by mailing a true and accurate copy to the following: Hon. Hunter Daugherty, Chief Judge, Jessamine Circuit Court, Division I, 101 N. Main Street, Nicholasville, Kentucky 40356; Hon. Christopher F. Douglas, Douglas Law Office, PLLC, 1222-1/2 North Main Street, Suite 3, London, Kentucky 40441; Hon. R. Scott Wilder, Gambrel & Wilder Law Offices, PLLC, 1222-1/2 North Main Street, Suite 2, London, Kentucky 40441; Hon. Jeff W. Adamson, Paul A. Casi, II, PSC, 440 S. 7th Street, Suite 100, Louisville, Kentucky 40202; Hon. Kevin C. Burke, 125 S. 7th Street, Louisville, Kentucky 40202.

Respectfully submitted,
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TABLE OF POINTS AND AUTHORITIES

The Bruners and KJA have failed to recognize that Kentucky has historically treated naturally-occurring conditions, such as snow and ice, differently from other conditions in the context of premises liability. This is also true in other states that continue to treat snow and ice differently, even after the adoption of comparative fault principles.

The Federal District Court opinions that the Bruners and KJA cite are not dispositive of the issue before the Court. Indeed, they are not even instructive. The position that the Bruners advocate imposes an absolute duty on landowners, making them insurers of their invitees' safety. Such a position is at odds with the economic realities that business owners face and is contrary to Kentucky law and the Restatement (Second) of Torts § 343A.

1. Snow and ice are inherently different from permanent conditions on the land which has lead to their different treatment under Kentucky law.

The Bruners and KJA have asserted that *Kentucky River Medical Center v. McIntosh*[1] abolished Kentucky's three categories of premises liability, thereby imposing an absolute duty upon landowners and abolishing the open and obvious doctine altogether. This broad approach is at odds with *McIntosh* itself and is at odds with § 343A. *McIntosh* focused on the elimination of *unreasonable* dangers.[2] Yet Kentucky has long held that snow and ice that are obvious are not unreasonably dangerous.[3]

Snow and ice that are obvious present a unique challenge to premises liability law. Snow and ice are temporary and impermanent. Snow and ice ean

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[1] *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010).
[2] *Id.* at 393.
[3] *Standard Oil Company v. Manis*, 433 S.W.2d 856, 858 (Ky. 1968).

resolve themselves in a brief period of time. Snow and ice are unpredictable in their formation and accumulation, and can arrive before the landowner has any ability to take preventative or remedial measures. It is these unique characteristics about snow and ice that lead Kentucky to treat them differently in the context of premises liability. None of these unique characteristics were changed by *McIntosh*. Nor should the law eliminate any recognition of snow and ice's unique characteristics.

The most recent Supreme Court case to address naturally-occurring snow and ice was *PNC Bank, Kentucky, Inc. v. Green*.[4] That case struck the appropriate balance between § 343A and the recognition of the ongoing yet transient nature of snow and ice. *PNC Bank* recognized that, amidst an ongoing snow and ice storm, it would be impossible for the landowner to maintain constant watch over the condition of the sidewalk.[5] This holding is in the spirit of *Standard Oil*'s proclamation that a landowner has no duty to stay the elements.[6] *PNC Bank* recognized that the accumulation of snow and ice makes it impossible for a landowner to make its premises completely safe. Recognition that snow and ice are different from artificial conditions such as a curb, a fallen rainspout, or a raised soda fountain platform has been a hallmark of Kentucky premises liability law for over 40 years. This distinction is also borne out throughout numerous other states that have also adopted comparative fault principles.

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[4] *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d 185 (Ky. 2000).
[5] *Id.* at 187.
[6] *Standard Oil Company v. Manis*, 433 S.W.2d at 859.

2. Other jurisdictions continue to treat snow and ice differently in the context of premises liability.

KJA has indicated that numerous other jurisdictions have "abolish[ed] [the] open-and-obvious-danger doctrine in light of adoption of comparative negligence."[7] This sweeping statement does not hold up to even the slightest scrutiny. Indeed, KJA has indicated that at least two particular jurisdictions, Wyoming and Texas, have adopted such an approach.

Miami Management discussed the approach taken by Wyoming and Texas at length in its brief. Both Wyoming and Texas have adopted the "natural accumulation" rule *after* their adoption of comparative fault.[8] The adoption of comparative fault is not at odds with recognition that snow and ice are different from other conditions in the context of premises liability. Comparative fault also is not at odds with a legal distinction for snow and ice in premises liability jurisprudence. In other words, comparative fault can and does co-exist with separate treatment of snow and ice. There is nothing that Miami Management is seeking that is not already widely accepted and practiced by other jurisdictions. Miami Management is not seeking a modification of the law of premises liability; it is seeking a confirmation that snow and ice continue to fit in this framework post-*McIntosh*.

Courts that recognize the inherent difference in snow and ice, be it under the "natural accumulation" doctrine or the "Connecticut rule," do so in the comparative fault framework. This recognition is not, as KJA suggests, a resurrection of an archaic no-duty rule. Instead, it is a recognition that

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[7] Kentucky Justice Association *Amicus Curiae* Brief, p. 11.
[8] *See Eiselein v. K-Mart, Inc.*, 868 P.2d 893 (Wyo. 1994); *Wal-Mart Stores, Inc. v. Surratt*, 102 S.W.3d 437 (Tex. App. 2003).

landowners do not become insurers of an invitee's safety simply because of wintry conditions. Courts that recognize the inherent difference in snow and ice also recognize that a landowner cannot keep its sidewalk and parking lot clear from ongoing snow and ice during a winter storm.

The import of the law of these jurisdictions is clear: different treatment of snow and ice from other conditions in premises liability law can exist in the framework of comparative fault. Comparative fault does not eliminate the open and obvious doctrine. Nor does comparative fault serve as a bar to summary judgment.

3. Federal District Court cases interpreting Kentucky law are not instructive on the issue presently before the Court.

The Bruners and KJA have both cited to Federal District Court opinions from diversity cases that interpret Kentucky law for the proposition that *McIntosh* imposes an absolute duty on landowners. Those courts, however, have done nothing more than speculate as to how this Court intended for snow and ice to be treated. Thus, the opinion of a Federal trial court speculating on the application of Kentucky law cannot be binding or instructive on this Court in determining how the law concerning snow and ice must be applied.[9]

Of the federal cases that the Bruners and KJA have cited, only one of them, *Schmidt v. Intercontinental Hotels Group Resources, Inc.*,[10] is published. Given the spatial constraints of a Reply brief, the Appellants will limit their discussion on this issue to *Schmidt*.

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[9] *See Bell v. Commonwealth*, 566 S.W.2d 785, 788 (Ky. App. 1978) ("The Kentucky appellate courts need not follow the Federal Circuit Court of Appeals on rulings involving Kentucky law").
[10] *Schmidt v. Intercontinental Hotels Group Resources, Inc.*, 850 F. Supp. 2d 663 (E.D. Ky. 2012).

Schmidt involved the same snow and ice storm that lead to Bruner's litigation.[11] Bruner's fall occurred early in the storm whereas Schmidt's fall occurred at the conclusion of the storm.[12] Schmidt fell on a hotel sidewalk in a dimly-lit area at nighttime.[13] Schmidt fell where she did because she had been told by the desk clerk that this was the only entrance to her room.[14] The *Schmidt* court likened the circumstances of Schmidt's fall unto the waxed stairway illustration from the Restatement (Second) of Torts § 343A.[15] It was these factors that lead the court to conclude that there was a question of fact concerning the foreseeability of harm to Schmidt.

Schmidt is not a categorical rejection of the open and obvious doctrine. Nor is it a rejection of the notion that summary judgment remains appropriate in the premises liability context. While *Schmidt* is certainly indicative of how courts have treated snow and ice post-*McIntosh*, it is not binding on this Court or any court in the Commonwealth. This Court is no more bound by the opinion in *Schmidt* than it is by the opinion of any trial court. The unpublished Federal District Court opinions are of even less value, as these are nothing more than trial court orders reflecting how a particular judge treated a particular motion. In other words, this Court need not look to how Federal trial courts have interpreted Kentucky law to determine the correct interpretation of Kentucky law. "The highest court of a state is the final arbiter of what is state law."[16] Deference to these opinions results in an Ouroboros-like approach to jurisprudence: the

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[11] *Id.* at 668.
[12] *Id.* at 667-668.
[13] *Id.* at 667.
[14] *Id.* at 671.
[15] *Id.*
[16] *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940).

Federal trial court says this is how Kentucky law is applied, therefore, that is how the Supreme Court of Kentucky shall apply Kentucky law. But such an approach is inconsistent with the principles of federalism inherent in our legal system.

4. The approach that the Bruners advocate is at odds with the economic realities of modern society and would make landowners insurers of their invitees' safety during winter.

The Bruners focused upon the fact that Wendy's was open for business during the storm. The approach that the Bruners advocate amounts to strict liability on the part of a landowner. The Bruners have argued that it was foreseeable to Wendy's that customers would encounter snow and ice in its parking lot during an ongoing storm and, because Wendy's was open for business, Wendy's must make those premises completely safe for its customers. This approach would make any landowner an insurer of its invitees' safety any time a business is open during winter. Such an approach is antithetical to the longstanding principle of Kentucky law that a landowner "does not insure [an invitee's] safety."[17]

Under KJA and the Bruners' approach, a landowner is faced with two options once winter is coming: forgo operating at the first sign of snow and ice or expend considerable resources to guarantee that no snow or ice forms or accumulates on any area where an invitee may tread. Neither approach is appealing to the landowner or the general public. Closing because of wintry conditions deprives the public of access to goods and services, and also results

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[17] *Scuddy Coal Co. v. Couch*, 274 S.W.2d 388, 390 (Ky. 1954).

decreased income to employees who are sent home.[18] Requiring a landowner to expend physical and financial effort to protect its invitees from snow and ice results in increased prices for consumers, as no business can be expected simply to absorb these additional costs. This approach is almost certain to have a disparate impact on smaller businesses throughout Kentucky who lack the resources and funds necessary to stay the elements and make the premises safe for all of their invitees during wintry conditions. The end result of the Bruners' approach would cripple small businesses who are unable to expend the costs necessary to insure their invitees' safety. The Bruners' approach will also increase the cost of doing business in Kentucky for out-of-state conglomerates, thus reducing the likelihood of their transacting business in the Commonwealth, and negatively impacting Kentucky's economy. Such an approach cannot be justified by KJA and the Bruners' mantra of comparative fault.

Texas, a comparative fault jurisdiction that has adopted the "natural accumulation" rule, has rejected the Bruners' position, in part due to the economic realities that such a position would require.[19] The Court of Appeals of Texas was "reluctant to require a premises owner/operator to expend a great deal of physical and financial effort to protect its invitees from a naturally occurring condition which usually disappears on its own in a short period of time."[20] Instead, the Court of Appeals of Texas recognized that "the public is better served if businesses are able to remain open in order to supply customers with needed

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[18] While this case involves the operation of a Wendy's franchise, this position is one that would be considered by all businesses, from restaurants, gas stations, and retail stores to hospitals, financial institutions, and attorneys' offices.

[19] *Wal-Mart Stores, Inc. v. Surratt*, 102 S.W.3d at 443.

[20] *Id.*

goods and services during times of harsh weather conditions."[21] This approach recognizes the importance of categories of conditions in the premises liability context.

Separate categories of premises liability only makes sense if there is different treatment for those categories. Kentucky has long recognized this to be the case.[22] *McIntosh* dealt with one category of premises liability: artificial conditions. The comments to § 343A also only deal with artificial conditions. Nothing in *McIntosh* or § 343A indicates that they must necessarily apply to naturally-occurring conditions such as snow and ice. Nothing in *McIntosh* or § 343A indicates the imposition of a duty that would make a landowner an insurer of an invitee's safety, as the Bruners suggest. In short, the imposition of an absolute duty on landowners during wintry conditions is contrary to both *McIntosh* and § 343A. And it is also contrary to Kentucky law that recognizes a landowner does not insure its invitees' safety.

Conclusion

The treatment of snow and ice separately from other conditions in the context of premises liability is consistent with the modern approach to premises liability jurisprudence. Snow and ice are different, and the imposition of a blanket rule treating all conditions the same is at odds with what other jurisdictions have done. It is also at odds with the economic realities that businesses face.

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[21] *Id.*
[22] *See Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 368 (Ky. 2005).

Kentucky need not adopt such an unworkable blanket rule, however. Other jurisdictions throughout the United States continue to treat snow and ice differently in the premises liability context even with the adoption of comparative fault. Whether it be through the "natural accumulation" approach or the "Connecticut rule," these approaches are consistent with this Court's opinion in *PNC Bank*. *PNC Bank* represented the law of snow and ice before *McIntosh*. There is nothing in either *McIntosh* or § 343A that is inconsistent with *PNC Bank* representing the law of snow and ice after *McIntosh*.

Respectfully submitted,

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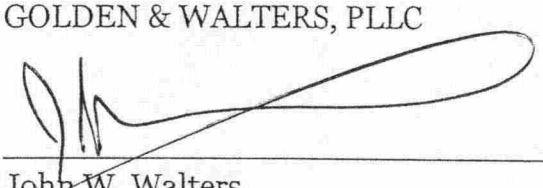

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