COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
DOCKET NO. 2010-SC-0098-D
COURT OF APPEALS CASE NO. 2000-CA-0264

TONYA STAPLETON — APPELLANT

v.

APPEAL FROM
KENTUCKY COURT OF APPEALS
CASE NO. 2009-CA-0264

CITIZENS NATIONAL CORPORATION, et al — APPELLEE

BRIEF OF THE KENTUCKY CHAMBER OF COMMERCE, INC., KENTUCKY RETAIL FEDERATION, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS AMICI CURIAE IN SUPPORT OF APPELLEE

Submitted by:
Jeremy S. Rogers
Jason M. Nemes
Dinsmore & Shohl LLP
2500 National City Tower
101 South Fifth Street
Louisville, KY 40202
(502) 581-8000
Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

It is hereby certified that this brief of *amici curiae* was hand-delivered pursuant to CR 76.40(2) this 26th day of January, 2011 to Clerk, Kentucky Supreme Court, Room 209, Capitol Building, 700 Capitol Avenue, Frankfort, KY 40601; and a true and correct copy was sent via U. S. First Class Mail, postage prepaid, to Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; to Ms. Vicki Rice, Johnson Circuit Clerk, Johnson County Judicial Center, Suite 217, 908 3rd Street, Paintsville, KY 41240; to Hon. John David Preston, Judge, Johnson Circuit Court, Johnson County, Judicial Center, Suite 217, 908 3rd Street, Paintsville, KY 41240; to the Hon. Jonathon D. Weber and Hon. Susan Maines, Casey Bailey & Maines, 3151 Beaumont Centre Circle, Suite 200, Lexington, KY 40513; and to Donald W. McFarland, 171 Dixie Avenue, P.O. Box 82, Salyersville, KY 41465.

Jason M. Nemes

Jeremy S. Rogers
Jason M. Nemes
Counsel for Amici Curiae

INTRODUCTION

Appellant urges this Court to abandon settled precedent, thereby disrupting the operation of every business and imposing an unanticipated legal duty on businesses to virtually insure their patrons against injuries on their property resulting from naturally occurring conditions, such as snow and ice. The Kentucky Chamber of Commerce, Inc., the Kentucky Retail Federation, and the National Federation of Independent Business suggest that said change in the law is unwarranted.

Uncontrollable weather conditions that are as obvious to a business's customers as they are to the business's employees should not result in liability. Nor should Kentucky's businesses be required to accomplish the impossible—i.e., to master the elements and to neutralize the hazards posed by snow, ice or other naturally occurring weather conditions. Kentucky's well-established law as to a property owner's duty with respect to natural outdoor hazards, particularly snow and ice, is working well and should not be changed.

For many decades Kentucky's courts have consistently recognized a special category in premises liability law for natural outdoor conditions like snow and ice and have held that a property owner owes no duty to warn of, or to neutralize, such conditions. This Court has continued to uphold that rule of law in light of the advent of comparative fault. In addition, in all that time, the General Assembly has not seen fit to alter the law.

To overturn the precedent on this issue and to impose a duty upon property owners to safeguard against natural weather conditions would effect an unreasonable burden upon businesses and upon the economy. Property owners would be required to take onerous and expensive measures in an attempt to *completely remove* all snow and ice, when the commensurate benefit will likely be slight because snow and ice will typically melt away

naturally within a short period of time. Moreover, even the most diligent property owners will not be able to completely neutralize the risks posed by natural accumulations of snow or ice.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The facts of this case are straightforward and directly present the issue. Appellant Tonya Stapleton ("Stapleton") and her mother visited Citizens National Corporation ("Citizens National") to conduct business. It was a cold morning, with temperatures below freezing. And though it was sunny that day, it had recently snowed and sleeted. After safely entering Citizens National and conducting her business, Stapleton returned to her car with her mother. Unfortunately, however, this time Stapleton slipped on ice directly under her car door.

Stapleton sued in the Johnson Circuit Court. Citizens National moved for summary judgment, contending that it had no duty to protect Stapleton from injuries caused by natural outdoor hazards. The trial court agreed, but it allowed Stapleton time to develop proof that the Bank concealed the natural conditions or otherwise increased the likelihood that she would slip on ice. After discovery was taken, the trial court granted Citizens National its motion for summary judgment.

Stapleton appealed. The Court of Appeals unanimously affirmed the trial court, following the precedent that business owners owe no duty to invitees for injuries caused by natural outdoor conditions.

Stapleton moved for discretionary review in this Court, and her motion was granted on November 10, 2010.

ARGUMENT

The law of this case is reflected in longstanding precedent: a business owner has no duty to protect against injuries caused by natural outdoor conditions. Simply stated, the sole question for this Court is whether that settled precedent should be overturned and a duty imposed on every business in Kentucky—from mega-malls to mom-and-pop corner stores—to neutralize the elements and to insure against injuries on its property.

I. KENTUCKY'S "NO DUTY" RULE CONCERNING NATURALLY OCCURRING OUTDOOR CONDITIONS, SUCH AS SNOW AND ICE, IS CLEAR, REASONABLE, AND LONGSTANDING.

Stapleton's claims are based upon premises liability, which means that, in order to recover, she must demonstrate negligence on the part of Citizens National. To establish negligence, a plaintiff must prove duty, breach, causation, and damages. Illinois Central Railroad v. Vincent, 412 S.W.2d 874, 876 (Ky. 1967).

Here, the central issue is the non-existence of a duty. Without a duty, there is no cause of action for negligence. See id. It has long been the law of Kentucky that a property owner generally has no duty to protect invitees against naturally occurring outdoor conditions, such as snow and ice, which are as obvious to an invitee as to an owner of the premises. Standard Oil Co. v. Manis, 433 S.W.2d 856, 858-59 (Ky. 1968).

Addressing the issue, this Court noted that Kentucky's "case law regarding premises liability has developed within three distinct categories." Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d 364, 368 (Ky. 2005). The first category concerns natural outdoor conditions; the second category deals with foreign substances; and the third category involves hazards created by the property owner. Id. at 368. For very good reasons, each of those categories has

been treated differently under Kentucky's law of premises liability. For instance, a business owner is liable for injuries caused by foreign substances unless it proves "that the hazard was not caused by the owner or the owner's employees *and* that the hazard was not present for a sufficient period of time before the accident to give the owner notice to remove it or to warn invitees of its presence." Id. at 368 (citing Bartley v. Educ. Training Sys., Inc., 134 S.W.3d 612, 615-16 (Ky. 2004); Martin v. Mekanhart, 113 S.W.3d 95, 98 (Ky. 2003); Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431, 434-37 (Ky. 2003)) (emphasis in original).

A different rule of "no duty" has been formulated in the case of naturally occurring outdoor conditions, such as snow and ice, which are as obvious to an invitee as to an owner of the premises. Manis, 433 S.W.2d at 858-59. The plaintiff in Manis, who was on the premises as an invitee, slipped and fell on an icy platform. The Court, through the pen of Commissioner Watson Clay, considered existing precedent and held that the plaintiff was not entitled to relief because natural outdoor conditions caused him to fall, and the property owner had no duty to warn of, or protect against, the natural outdoor conditions. Id.

Kentucky's courts decided numerous cases over the succeeding decades under the principles set forth in Manis, but in 1987 this Court decided to reconsider the law to determine whether the "no duty" rule survived the advent of comparative fault in Kentucky. Corbin Motor Lodge v. Combs, 740 S.W.2d 944 (Ky. 1987). The plaintiff in Corbin Motor Lodge "slipped and fell on an icy sidewalk as he was leaving the restaurant," thus squarely presenting the rule of the Manis case. Id. at 945. In posing the question, Justice Vance noted that the premises owner would be absolved from liability "[w]ithout question" if the Manis "no duty" doctrine survived the adoption of comparative fault. Id.

The Court explicitly held that the rule in Manis was unaffected by the adoption of comparative fault. The Court explained that the rule is not predicated upon "a bar of contributory negligence" but, rather, is premised upon the notion that a property owner owes no duty in the first place. Id. at 946. Without a duty, the property owner has no "fault" to apportion. See id.

The Court in Corbin Motor Lodge recognized that the "no duty" rule in Manis was based upon the notion that the risk of a natural outdoor condition like ice or snow "was as obvious to the person injured as to the owner of the premises and that it occurred outdoors as a result of natural hazards." Id. at 946. In addition, numerous other reasons undergird the "no duty" rule. Fundamentally, snow and ice are distinct from man-made structures or isolated foreign objects not only in their obviousness but also in their origins. Property owners do not cause the snow or ice to fall on their property, and such weather conditions are ubiquitous and not unique to a particular property. As this Court has written, property owners cannot be expected to "stay the elements." PNC Bank, Ky, Inc. v. Green, 30 S.W.3d 185, 186 (Ky. 2000) (quoting Manis, 433 S.W.2d at 859). Nor can even the most diligent property owner make the premises "absolutely safe" from snow, ice and other natural conditions occurring outdoors. Id. at 186. To impose upon property owners a duty to control what cannot be controlled would be unjust.

While the Court in Corbin Motor Lodge recognized some "reasonable arguments" that may support a rule different from the Manis rule, the Court rejected them, reasoning that "persuasive considerations" support the Manis rule and "[u]nless the need to change the law is compelling, . . . stability in the law is of sufficient importance to require that we not overturn established precedent which itself is based upon a reasonable premise." Id. at 946. Thus, the "no duty" rule of Manis continues to be the law of Kentucky. The above-quoted view expressed in

Corbin Motor Lodge continues to be highly persuasive. Since the Manis decision, more than four decades have come and gone. Kentucky law has been absolutely consistent during that period of time. While this Court certainly possesses the power to change the law of premises liability, the General Assembly is also empowered to effect such a change. The inaction of the political law-making branch of government suggests that this element of public policy remain undisturbed. When the General Assembly proposes to change the law, hearings are held and the views of interested parties are considered. When the law is changed by the legislature, persons negatively affected thereby have time to adjust their affairs by various means, including the purchase of insurance.

Moreover, the rule of Manis does not shield property owners in all circumstances. Where an owner's actions heighten or conceal the hazard of the natural condition, the owner may be held liable for its negligence. Estep v. B.F. Saul Real Estate Inv., 843 S.W.2d 911, 914 (Ky. App. 1991). While, on the surface, such an exception might seem to incentivize a business to take no action to remove snow or ice, that is not the case. The primary goal of business is not to avoid premises liability; it is to attract customers through competition, quality, and service. Obviously, businesses across the Commonwealth continue to take measures to remove snow and ice in order to make their premises safer, and more attractive, for customers. The "no duty" rule does not disserve public safety. Rather it is recognition of reality with respect to the ability of property owners to control the elements. A business that was perceived to be indifferent to public safety would be punished in the marketplace.

II. THE COURT SHOULD NOT OVERTURN LONGSTANDING PRECEDENT AND THEREBY CREATE A LEGAL DUTY TO PROTECT AGAINST NATURALLY OCCURRING OUTDOOR CONDITIONS SUCH AS SNOW AND ICE.

As set forth above, the rule of Manis is no accident of jurisprudence. It is a carefully considered and longstanding rule based upon common sense. Overturning it in this case creates strict liability upon businesses and other land possessors for snow- and ice-related slips and falls. The costs of such putative liability, in addition to the litigation costs associated with transforming the issue into a jury-submissible comparative fault question would be quite substantial. Such costs would be borne not only by businesses, but, ultimately, by customers and the Commonwealth's economy as a whole.

There is simply no compelling need to change this aspect of the law. The rule of *stare decisis*,[1] which is fundamental to Kentucky's common law, counsels strongly in favor of maintaining the stability of the law on such a basic issue. See, e.g., Ballard County v. Kentucky County Debt Commission, 290 Ky. 770, 162 S.W.2d 771 (1942) (holding that it "is vital that there be stability in the courts in adhering to decisions deliberately made after ample consideration"); see also Yeoman v. Com., Health Policy Bd., 983 S.W.2d 459, 469 (Ky. 1998) ("Unlike some jurisdictions, stare decisis has real meaning to this Court."). As this Court held in Corbin Motor Lodge, the rule in Manis is founded upon sound legal principles and policy considerations; it does not reach "an absurd result," and no "change in the present law is compelled in order to avoid grave injustices." Corbin Motor Lodge, 740 S.W.2d at 946. This

[1] "*Stare decisis et non quieta movere*: To adhere to precedents, and not to unsettle things which are established." Black's Law Dictionary 1406 (6th ed. 1990); see also Ballard County v. Ky. County Debt Comm'n, 290 Ky. 770, 162 S.W.2d 771, 772-73 (1942) ("The rule *stare decisis, et non quieta movere* (to stand by precedent, and not to disturb settled points) finds support in the principle that courts ought not to withdraw or overrule decisions which have been promulgated and published by them, and on the faith and credit of which individuals and the public have entered into contracts or acquired property rights.").

question has been presented numerous times over many decades, and the positions of Stapleton and Citizens National have been thoroughly debated and decided by this Court.

The Court's recent decision in Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010), does not compel a change to the Manis rule, which operates only in the "special category" of injuries occurring outdoors as a result of natural conditions, such as ice and snow. Corbin Motor Lodge, 740 S.W.2d at 946. In McIntosh, this Court addressed the "open and obvious" doctrine in Kentucky's premises liability jurisprudence in a situation dealing with a man-made structure, namely a raised curb at a hospital emergency room entrance. 319 S.W.3d at 388, *et seq*. In that context, the Court adopted the position 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 (quoting Restatement (Second) of Torts § 343A(1) (1965)).

The Court relied upon the principles stated in that section of the Restatement, which tie the question of a land possessor's duty to the foreseeability of harm. Id. at 390. Instead of simply dismissing a hazard as "open and obvious," the Court reasoned that the question of duty should take into consideration that a risk of harm may still be foreseeable and unreasonable, thereby imposing a duty on the possessor to protect against, or warn of, such a risk. Id. at 390-92 (citing Coln v. City of Savannah, 966 S.W.2d 34, 42 (Tenn.1998)). The Court reasoned that the hospital may have created a hazard by negligently placing the curb in the path of a person who would likely interface with it during a time of extreme haste—after all, it was the entrance used by ambulances to transfer patients into the emergency room. Id. at 393-94.

As such, the decision in McIntosh supports the notion that snow and ice should continue to be treated differently under the law. There is no dispute that snow and ice in their natural

outdoor state are open and obvious. As such, the critical issue here is whether such snow and ice constitute the kind of unreasonable hazard that nonetheless justifies imposing a burdensome and practically impossible legal duty upon land possessors to effectively neutralize weather hazards. As Kentucky's courts have long held, the answer is no.

The Manis "no duty" rule is consistent with the Court's analysis in McIntosh. In McIntosh, the Court reasoned that the existence or non-existence of a land possessor's duty to invitees is predicated not solely upon his superior knowledge concerning the dangers of his property but also upon his unique position as the only person who can address the dangers. Id. at 392-93. While that reasoning applies logically to man-made hazards, it does not apply to naturally occurring outdoor conditions such as snow and ice.

Snow and ice are not hazards brought about by the construction of buildings or structures on property. Nor are they confined to controllable spaces. Neither ice nor snow is brought about by the actions of a land possessor's employees or invitees, or by any other factor that accompanies the possessor's conduct of business. Nor, unlike man-made structures or foreign substances, are snow and ice peculiar to a particular property. Rather, snow and ice are acts of God. They are simply beyond the ability of a business or other possessor of land to prevent, to control, or to effectively neutralize as a hazard. "When all else is said and done, common sense must not be a stranger in the house of the law." Cantrell v. Kentucky Unemployment Ins. Comm'n, 450 S.W.2d 235, 237 (Ky. 1970).

With that understanding, many jurisdictions have held that a land possessor does not have the duty to remove natural accumulations of snow or to warn invitees of the dangers associated with the natural accumulation of snow and ice. Perhaps the most recent decision on this issue was in the case of Scott & White Mem. Hosp. v. Fair, 310 S.W.3d 411 (Tex. 2010), in which the

Texas Supreme Court held "that naturally occurring ice that accumulates without the assistance or involvement of unnatural contact is not an unreasonably dangerous condition sufficient to support a premises liability claim." Id. at 414. On behalf of a unanimous court, Texas Chief Justice Wallace Jefferson wrote that,

> Requiring premises owners to guard against wintery conditions would inflict a heavy burden because of the limited resources landowners likely have on hand to combat occasional ice accumulations. . . . A premises owner/operator will be required 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.

Fair, 310 S.W.3d at 414 (internal citations, quotation marks and punctuation marks omitted).

In Fair, the Texas Supreme Court relied upon a decision of the Wyoming Supreme Court that adopted what is known as the "natural accumulation" rule, a rule similar to Kentucky's rule under Manis. See id. at 414 (citing Eiselein v. K-Mart, 868 P.2d 893 (Wyo. 1994)). The Wyoming Supreme Court in Eiselein articulated the policy underlying the "natural accumulation" rule as follows:

> The justification for the natural-accumulation rule comports with the factors to be considered in determining the existence of a duty. The magnitude of the burden on defendant to prevent injuries from snow or ice is great. As noted above, natural winter conditions make it impossible to prevent all accidents. The plaintiff is in a much better position to prevent injuries from ice or snow because the plaintiff can take precautions at the very moment the conditions are encountered.

Eiselein, 868 P.2d at 897-98.

Further, like this Court did in Corbin Motor Lodge, the Wyoming Supreme Court also specifically held that, because the natural accumulation rule is one of duty (and not of contributory negligence or assumption of risk), it therefore "survive[s] the adoption of comparative negligence." Eiselein, 868 P.2d at 897.

Notwithstanding the advent of comparative fault, many states have adopted or retained the special rule relating to natural accumulation of snow or ice, which is consistent with the modern trend of formulating the existence or non-existence of a duty as articulated in the Restatement (Second) of Torts § 343A(1). Texas, Wyoming, and Kentucky are not alone. As set forth in the Fair decision, numerous jurisdictions follow this rule for the special category of natural accumulations of snow and ice. See Fair, 310 S.W.3d at 414 n.4 & 6 (collecting cases). The Oklahoma courts have held that "[m]ere slipperiness of ice and snow in its natural state and accumulations does not give rise to liability." Dover v. W. H. Braum, Inc., 111 P.3d 243, 246 (Okla. 2005). In Ohio, the rule has been articulated as follows:

> [A]n owner or occupier of land ordinarily owes no duty to business invitees to remove natural accumulations of ice and snow from the private sidewalks on the premises, or to warn the invitee of the dangers associated with such natural accumulations of ice and snow.

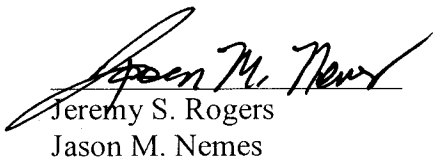
Brinkman v. Ross, 623 N.E.2d 1175, 1176 (Ohio 1993).

In this case, the Court should adhere to the longstanding precedent and continue to recognize that natural outdoor conditions such as snow and ice are within a special category of premises liability for which no duty is imposed upon a possessor of land. While it is obviously foreseeable in a general sense that people can slip on ice and snow, the openness and obviousness of such hazards, coupled with their uncontrollable origins and the virtual impossibility of immediately and effectively neutralizing them, counsels just as strongly in favor of retaining the Manis rule today as it did in the time of the Manis decision and the decision in Corbin Motor Lodge. Manis was good law then and it is good law now.

CONCLUSION

For all the reasons stated herein, the *amici curiae* urge the Court to affirm the longstanding precedent in Manis and to avoid the imposition of an onerous duty upon property possessors in Kentucky to protect against injuries caused by natural conditions.

Respectfully submitted,



Jeremy S. Rogers
Jason M. Nemes
DINSMORE & SHOHL LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
Phone: (502) 540-2300
Facsimile: (502) 585-2207
Counsel for Amici Curiae

827349v1