COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2010-SC-0098-D
COURT OF APPEALS CASE NO. 2009-CA-0264

TONYA STAPLETON — APPELLANT

APPEAL FROM
JOHNSON CIRCUIT COURT
ACTION NO. 09-CI-00185

v.

CITIZENS NATIONAL CORPORATION, et al — APPELLEE

BRIEF OF APPELLEE, CITIZENS NATIONAL CORPORATION

Submitted by:

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by U.S. Mail and/or hand delivery on this the 11th day of March, 2011: Johnson Circuit Court Clerk, Johnson County Judicial Center, Suite 109, 908 3rd Street, Paintsville, Kentucky 41240; Hon. Donald W. McFarland & Lovely, PSC, 171 Dixie Avenue, P.O. Box 82, Salyersville, Kentucky 41465; Hon. John David Preston, Judge, Johnson Circuit Court, Johnson County Judicial Center, Suite 217, 908 3rd Street, Paintsville, Kentucky 41240 and ten copies to the Kentucky Supreme Court (via hand delivery), 700 Capital Avenue, #209, Frankfort, Kentucky 40601. The undersigned does also certify that the record on appeal has not been removed from the Johnson Circuit Court and/or Kentucky Court of Appeals on or before this date.

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INTRODUCTION

This case arises from a slip and fall on a wet/icy spot in parking lot of Citizens National Bank. The Johnson Circuit Court entered summary judgment for Citizens National on the grounds the bank had no duty to remove or warn of the naturally occurring outdoor hazard, and the bank had taken no measures that concealed the hazard. The Court of Appeals affirmed.

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT CONCERNING ORAL ARGUMENT

Citizens National requests oral argument as it may assist the Court with the resolution of the legal issues presented in this appeal.

COUNTERSTATEMENT OF THE CASE

On January 30, 2008, Tonya Stapleton ("Stapleton") and her mother, Lois Barker, drove to Citizens National bank in Paintsville. (Pl. Dep. at 20; Barker Dep. at 5.) Her mother parked the car in an available space in front of the building. There were no cars parked on either side of their car. (Pl. Dep. at 27.) Stapleton exited the vehicle from the front, passenger side door of the car; walked to the rear of the vehicle; and then directly into the bank accompanied by her mother. (Pl. Dep. at 21.) Both women walked in to the bank without incident. (Pl. Dep. at 47; Barker Dep. at 21.)

A few minutes later, Stapleton and her mother left the bank and returned to their car via the same route. (Pl. Dep. at 25.) Stapleton again walked around the rear of the car and along the passenger side to the front passenger door. (Pl. Dep. at 25.) She opened the door and took two steps forward to enter the car. (Pl. Dep. at 26.) As she stepped with her right foot, she slipped on ice that was directly under the open door, causing her to fall. (Pl. Dep. at 26-27.)

Her mother, who was in the driver's seat at the time of the fall, hurried around to the other side of the car and assisted her daughter into the vehicle. (Pl. Dep. at 31.) Her mother then went into the bank to notify them about the fall and the ice. (Pl. Dep. at 28.) An employee (and possibly two) came out to assist Stapleton, and also to inspect the scene and take a report. One of the employees used a camera to take pictures of the scene. (Pl. Dep. at 28-29; Barker Dep. at 11, 12.)

The morning of January 30, 2008 was "extremely" cold, (Barker Dep. at 12), approximately 30 degrees. (Pl. Dep. at 22.) It had snowed or sleeted a few days before the accident date. (Pl. Dep. at 23.) Barker advised she did not notice ice on the parking lot in other

places before the fall, but afterward she saw other icy spots in other portions of the parking lot. (Barker Dep. at 9.)

At their depositions, Stapleton and her mother were asked to review two pictures taken at the scene. (Pl. Dep., Ex. A.) After reviewing the pictures, Stapleton was questioned:

> Q: Now I want you to take a look at this. And I do not know if this is your mother's car in this photograph. First of all, identify whether it is or it isn't or if you can tell.
> A: Okay.
> Q: And two (2), identify whether or not this looks like the parking stall that were parked in at the time, if you can tell.
> A: Yes.
> Q: Yes to both questions or yes . . .
> A: Yes, that's the car.
> Q: Does that appear to be the way the parking stall looked on the day that you fell.
> A: Yes.
>
> * * *
>
> Q: Let me ask you a few questions about this. This, this would be, obviously, the passenger side door. . .
> A: Yes.
> Q: front passenger side door. In looking at those photos, is it pretty evident to you that there's either a wet spot or an icy spot in the stall, just from the picture?
> A: Yes.

(Pl. Dep. 33-34.) Her mother was shown the same photographs. She testified:

> Q: Can you identify those for me.
> A: Yeah. That's my car and that's the ice.
> Q: Alright, So does that depict what the parking stall looked like at Citizen [sic] National on the date of the accident?
> A: Yes.
> Q: Okay, is that a fair and accurate representation of it?
> A: Yes.
>
> * * *
>
> Q: In looking at that photograph or actually at both of those photographs, is it evident to you that there is either a wet spot or an icy spot near the passenger side door of the car?

A: Yes. That's all ice.

(Barker Dep. 6-7.)

Citizens National moved for summary judgment on the grounds it had no duty to remove or warn of a naturally occurring outdoor hazard, and on the grounds the hazard was open and obvious. At Stapleton's request, the trial court extended discovery to permit her to develop facts as to whether Citizens National concealed the hazard. Stapleton, through her attorney, deposed employees of the bank, but did not develop any testimony on that issue. Citizens National renewed its motion for summary judgment and the Johnson Circuit Court dismissed the case. The trial court concluded the bank did not have a duty to remove or warn of the ice since it was a natural outdoor hazard, and there was no evidence the bank exacerbated or concealed the hazard. (Summary Judg. at 1, 2.) Stapleton appealed and the Court of Appeals affirmed.

STANDARD OF REVIEW

Appellate courts review a granting of summary judgment to ensure the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. First Federal Sav. Bank v. McCubbins, 217 S.W.3d 201, 203 (Ky. 2006). Summary judgments are reviewed *de novo*. Hallahan v. Courier-Journal, 138 S.W.3d 699, 705 (Ky.App. 2004).

ARGUMENT

Under the longstanding rule the Court announced in Standard Oil Company v. Manis, 433 S.W.2d 856, 858 (Ky. 1968), Citizens National had no duty to remove or warn of the ice since it was a naturally occurring outdoor hazard. Accordingly, the Johnson Circuit Court correctly entered summary judgment in favor of the bank. Citizens National urges this Court to refrain from applying the foreseeability test set out in Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010) to this case or other cases involving natural outdoor hazards. Instead, the preservation of the Manis decision, which has worked well to balance the duties and responsibilities of both store owners and invitees, would best serve the public policy of the Commonwealth.

A. Citizens Nation owed no duty to remove or warn Stapleton of the natural outdoor hazard.

In Kentucky, the law does not impose a duty on storeowners to remove or warn of natural outdoor hazards which are as obvious to an invitee as an owner of the premises. Standard Oil Company v. Manis, 433 S.W.2d at 858. In Manis, the plaintiff slipped and fell during broad daylight on an outdoor walkway that was wet from melted snow and ice. Id. at 857. The Court dismissed the action holding there was no duty to stay the elements or make the walkway absolutely safe. Id. at 859. The Court reasoned that "*natural outdoor hazards* which are as obvious to an invitee as to the owner of the premises do not constitute *unreasonable* risks to the former which the landowner has a duty to remove or warn against." Id.

The only exception to the natural outdoor hazards rule is where a storeowner undertakes protective measures that exacerbate or conceal the hazard. Estep v. B.F. Saul Real Estate Investment Trust, 843 S.W.2d 911 (Ky. App. 1992). In Estep, the storeowner had taken steps to remove snow from the sidewalk, but a later dusting of snow concealed a large patch of ice upon

which the plaintiff slipped and fell. The Court of Appeals reversed the summary judgment and held there was an issue of fact as to whether the measures taken by the storeowner to clear the sidewalk were reasonable or whether the measures unreasonably concealed the hazard. Id. at 913. This Court applied the same analysis but reached a different conclusion in PNC Bank, Kentucky, Inc. v. Green, 30 S.W.3d 185, 187 (Ky. 2000). In Green, the plaintiff fell on an icy sidewalk in front of the bank despite the fact bank employees had spread a melting agent 90 minutes before the fall. Id. at 186. This Court held the bank was not liable for the slip and fall since it took reasonable precautions that did not make the hazard any less obvious or increase the risk of harm. Id. at 187-88. Importantly, the Green court noted,

> [w]e are of the opinion that it is against public policy, and even common sense, to impose liability on those who take reasonable precautions if such does not escalate or conceal the nature of the hazard, **while absolving those who take no action whatsoever.**

Id. (emphasis added.) The final clause of that sentence is clearly a reference to the longstanding rule that premises owners have no duty to remove or warn of natural outdoor hazards such as ice and snow. Id. (noting Estep, supra, "reiterated the well-known rule that a duty **voluntarily assumed** cannot be carelessly undertaken without incurring liability therefore").

Citizens National had no duty to remove ice that naturally collected on the parking lot surface. Nor did Citizens National have a duty to warn Stapleton the ice was present or could constitute a hazard. Ice on a parking lot surface on a very cold day, just a day or two removed from a sleet/snow, is not an unreasonable risk for which the law should impose a duty on a premise owner. To the contrary, it is simply one of the many common and obvious risks of which people are vulnerable during the winter as they travel around the Commonwealth.

The exception to the natural outdoor hazards rule is inapplicable to these facts. There is no evidence Citizens National took any measures which exacerbated or concealed the ice on the

parking lot. As the trial court concluded, Stapleton was given an opportunity to take discovery regarding whether Citizens National in any way concealed the ice or made hazard more dangerous. Stapleton was unable to adduce any evidence supporting the exception.

All the evidence emphasized the fact the ice was readily visible and obvious. Ms. Stapleton knew it was very cold that day and had recently sleeted/snowed. She should have been aware remnants of the precipitation could make parking lots and sidewalks slippery. What is more, immediately after the fall, her mother looked around the Citizens National parking lot and saw there was snow and ice in other portions of the Citizen National parking lot. The pictures taken just minutes after the accident clearly show the ice along the passenger side door of Ms. Stapleton's vehicle. In fact, Ms. Stapleton and her mother capitulate the ice was visible. Ms. Stapleton agreed that the ice in the picture was "evident." (Pl. Dep. at 33-34.) Her mother, without even being posed a specific question about the pictures, offered the following testimony:

> Q: Can you identify [the pictures] for me?
> A: Yeah. That's my car **and that's the ice**.

(Barker Dep. at 6-7.) Stapleton had multiple opportunities to see the ice: when she exited the car, returned to the car, and opened the car door before she fell. The pictures demonstrate the obviousness of the ice. These facts and admissions belie Stapleton's argument now that the ice was obscured. Stapleton admitted the ice was obvious. The ice was unobscured. As such, the ice did not constitute an unreasonable risk for which the law imposes a duty to remove or warn.

While Stapleton acknowledges the holding in Standard Oil Company v. Manis would absolve Citizens National of liability, she attempts to distinguish it by citing Estep, 843 S.W.2d 911 and Schreiner v. Humana, Inc., 625 S.W.2d 580, 581 (1982). (App. Br. at 7). However, both are inapposite to instant case since they dealt with the exception to the general rule

governing natural outdoor hazards. Estep presented a situation where the storeowner's actions had concealed the ice. In Schreiner, the premises owner had removed the snow from the sidewalk, but a film of transparent ice remained. Moreover, the premises owner had been notified of the hazardous condition before the fall. Those facts are markedly different from this case where Citizens National took no steps which obscured the ice.

Instead of Estep and Schreiner, the present case is more analogous to the facts of Bryan v. O'Charley's Inc., No. 2002-CA-001503-MR, 2003 WL 21949182 (Ky.App. Aug. 15, 2003). There, the plaintiff allegedly slipped on ice in a parking lot during the day when there had been no precipitation. After a directed verdict, plaintiff appealed raising many of the arguments now proffered by Stapleton. The Court of Appeals rejected the arguments and specifically distinguished Estep, noting there was no evidence the storeowner concealed the hazard while attempting to clear the ice. Id. at *3.

In order to succeed on a negligence claim, a plaintiff must establish, *inter alia*, the existence of a legal duty imposed on the defendant. Lewis v. B & R Corp., 56 S.W.3d 432, 436-37 (Ky.App. 2001). The existence of a legal duty is a question of law to be determined by the Court. Id. In premises liability claims regarding natural outdoor hazards, if there is no duty to remove or warn of the hazard, then there can be no negligence if an invitee is injured by the hazard. Corbin Motor Lodge v. Combs, 740 S.W.2d 944, 946 (Ky. 1987); see also Ashcraft v. Peoples Liberty Bank & Trust Co., Inc., 724 S.W.2d 228, 229 (Ky. App. 1987).

Without a duty owed to Ms. Stapleton, there can be no negligence on the part of Citizens National. Accordingly, the Citizens National was entitled to a judgment as a matter of law and summary judgment was proper.

B. **The Court should decline to apply the River Medical Center v. McIntosh to this case or other cases involving natural outdoor hazards and, instead, preserve the longstanding rule in Standard Oil Company v. Manis.**

In her brief, Stapleton asks the Court to evaluate this case as an "open and obvious" hazard case and apply the recent decision in Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010). (App. Br. at 7, 13.) The present case is a natural outdoor hazard case whereas the McIntosh holding involved a hazard created by the Defendant. This case presents the quintessential natural outdoor hazard scenario and the analysis is controlled by Standard Oil Co. v. Mannis, supra. The McIntosh holding should not be extended to judicially imposed a new duty upon landowners in relation to naturally occurring outdoor hazards .

1. McIntosh is not applicable to this case.

This Court instructs there are three distinct areas of premises liability law, each with its own specific jurisprudence: 1) naturally occurring outdoor hazards, 2) encounters with foreign substances, and 3) hazards created/maintained by the premises owner. See Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d 364, 368-69 (Ky. 2005) (addressing encounter with hazard created by store owner); see also Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431 (Ky. 2003) (addressing encounter with foreign substance).

Stapleton's request to apply McIntosh to this case should be refused. In McIntosh, the hazard was a curb located outside an emergency room entrance. Id., 319 S.W.3d at 387-88. The plaintiff, a paramedic, tripped and fell over the curb while she was transporting a patient from the ambulance into the hospital. Id. McIntosh falls under the rubric of an encounter with hazard created/maintained by the premises owner. Since McIntosh has nothing to do with naturally occurring outdoor hazards it has no precedential value to the present case. Similarly, many of the other cases cited to by Stapleton are simply are inapposite to this case: Lanier v. Wal-Mart

Stores, Inc., 99 S.W.3d 431 (2003) (dealing with foreign substance) and Martin v Meckanhart Corporation, 113 S.W.3d 95 (2003) (dealing with oil in the parking lot). (App. Br. at 5.) The present case deals solely with a naturally occurring outdoor hazard and McIntosh, Lanier, and Martin, are not controlling.

2. McIntosh should not be extended.

Citizens National urges this Court not to extend the holding in McIntosh to this case or other cases involving natural outdoor hazards. The reasons are twofold: a) the foreseeability test announced in that case fails in application to natural outdoor hazards; and 2) the current rule adequately addresses the issue.

In McIntosh, the Court was confronted with issue of whether the open and obvious doctrine, as it related to a hazard created/maintained by the premises owner, should bar recovery as a matter of law. Id. at 387. The doctrine previously insulated premises owners from liability. Id. at 392. However, this Court reasoned the open and obvious defense as a complete bar to liability is inconsistent with the tenet of comparative fault. Id. at 391. Departing from the doctrine and relying on the rationale of the Restatement (Second) of Torts § 343A (1) (1965), this Court adopted a foreseeability test. Id. at 389-90. "If the land possessor can foresee the injury and fails to take reasonable precautions to prevent the injury, he can be held liable." Id. at 392. In adopting this foreseeability test and the attendant reasonableness standard this Court abrogated the open and obvious defense as a complete bar to liability. Now, whether a hazard was or should have appreciated by the plaintiff is a comparative fault issue to be addressed within an apportionment instruction. Id.

While the foreseeability test is readily applied to hazards created/maintained by the premises owner, the application to natural outdoor hazards is strained. Unlike a curb or other

potential man-made hazard that may exist on a property, all foul weather, including heavy rain, snow, ice, sleet, can foreseeably cause injury to invitees. This universal acknowledgment that snow and sleet can be slick is the reason the law treats natural outdoor hazards differently. In Standard Oil Company v. Manis, supra., the Court explained "the dangers that are created by the elements, such as the forming of ice and falling of snow, are **universally known** . . . and all persons on his property must assume the burden of protecting themselves therefrom." Id. at 858 (internal citations omitted) (emphasis added).

The extension of McIntosh to naturally occurring outdoor hazards would have dire consequences for all property owners. Since the law assumes all snow and ice is foreseeably dangerous, premises owners will have an absolute duty to completely remove all snow and ice. Natural accumulations would give way to liability even though premises owners have no control over the weather. Moreover, premises owners may not be in position to recognize and take continuing action against hazards of snow and ice that can arise and fluctuate over short period of time. Naturally occurring outdoor hazards have always been treated differently by the law for that reason. Both the Courts and the Legislature have always declined to impose such a legal duty.

A review of the precise language of Restatement (Second) of Torts § 343A(1) (1965), as well as the elaborations in the comments, illustrations, and annotations, demonstrates its authors did not intend the foreseeability test to apply to natural outdoor hazards. The text of § 343A(1) reads:

> 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.

(Emphasis added.) None of the comments to § 343A(1) refer to, or make mention of, naturally occurring outdoor hazards. Similarly, the illustrations to the comments do not describe outdoor hazards, but are limited to glass doors, see id. ill. 1, a weighing scale, see id. ill. 2, a raised platform, see id. ill. 3, a fallen rainspout, see id. ill. 1, 4, and a waxed stairway, see id. ill. 5.[1]

There is also a conspicuous absence in § 343A(1)'s annotations to cases where premises owners were held liable for slip and falls due to natural accumulations of snow and ice. In Barrasso v. Hillview West Condominium Trust, 74 Mass.App.Ct. 135, 140, 904 N.E.2d 778, 783 (Mass.App. 2009), the Massachusetts court reversed summary judgment in favor of the premises liability for further proceedings on "whether the plaintiff slipped on a nonactionable 'natural accumulation' of snow and ice, or an actionable 'unnatural accumulation.' Similarly, in Soederberg v. Concord Greene Condominium Ass'n, 76 Mass.App.Ct. 333, 338, 921 N.E.2d 1020, 1024, 1025 (Mass.App. 2010), the same court held

> that the open-and-obvious danger rule did not operate to negate a landowner's duty to remedy hazardous conditions resulting from unnatural accumulations of ice and snow, at least where, as here, those hazards lay in a known path of travel; it was entirely foreseeable that people would engage snow or ice hazards lying in well-traveled pathways, even if those hazards were open and obvious.

In other cases, liability was extended due to naturally occurring accumulations only when intervening circumstances occurred. In Terry v. Central Auto Radiators, Inc., 732 A.2d 713, 718 (R.I. 1999), a garage was held liable for a customer's slip and fall on snow and ice as she was attempting to retrieve her car, which had been moved during a storm to an area approximately 100 feet away from shop. The court held there was an unusual circumstance since the plaintiff

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[1] § 343A(2), which is not cited by the Court in the McIntosh, mentions snow in illustration 8 to comment g. There, the Restatement describes a railroad being held liable when the only convenient approach to the station is over a footbridge which, "**through the negligence of the Railroad**, is covered with snow and ice." This suggests the railroad, through some affirmative action caused the buildup of snow and ice and that it was not a natural accumulation. But again, the Court never cited subsection (2) of the §343A in McIntosh.

could not have retrieved her vehicle without increasing her risk of harm. In McKim v. Forward Lodging, Inc., 266 Mich.App. 373, 384, 702 N.W.2d 181, 188, 189 (Mi.App. 2005), reversed 474 Mich. 947, 706 N.W.2d 202 (Mi. 2005), the court found liability where the icy situation was caused by spraying hot water on the hotel roof to dislodge an ice jam and did not take immediate remedial action was a special aspect rendering the condition unreasonably dangerous.

Finally, the annotations refer to Kellermann v. Car City Chevrolet–Nissan, Inc., 306 Ill.App.3d 285, 290–293, 713 N.E.2d 1285, 1290–1292 (Ill.App. 1999). In that case, a customer slipped and fell on snow that had accumulated on a car sales lot. The trial court dismissed the negligence action. The appellate court affirmed, holding the trial court correctly applied the natural-accumulation rule. The dissent did not argue the natural accumulation rule was improper, but instead that under the circumstance the dealership should have taken additional precautions since it sought to bring the invitee on to the premises with the intent of diverting the invitee's attention and changing the invitee's focus to defendant's cars.

The foreseeability test articulated in McIntosh and based upon § 343A(1) should not be applied to natural outdoor hazards. Snow and ice are undeniable potential hazards, but they are universally recognized. Moreover, unlike other hazards the premises owner has no control over the elements, may not have the power or resources to correct or lessen the hazard, and does not necessarily have sufficient time to become aware and address the hazard after it arises.

Kentucky courts have historically and consistently ruled premises owners have no legal duty to warn of or remove of naturally occurring outdoor hazards. The rationale behind the rule is two-fold: (1) premise owners cannot control the elements; and (2) invitees are equally aware the elements can be hazardous, that is to say they can foresee snow and ice being dangerous. For

these reasons, courts have always viewed natural hazards differently. These fundamental precepts remain true. Accordingly, there is no reason to depart from the effective legal rule.

Other states continue to adhere to similar rules that store owners are not responsible for natural accumulations of snow and ice. In Gagne v. Sears, Roebuck and Co., 210 S.W.3d 856 (Tx.App. 2006), the Texas court held a natural accumulation of ice – even on a sidewalk near the entrance of a store – did not pose an unreasonable risk of harm. Under Missouri law, there is no duty to remove snow or ice that accumulates naturally and is a condition general to the community. Willis v. Springfield General Osteopathic Hosp., 804 S.W.2d 416, 419 (Mo.App. S.D.1991)(citing Alexander v. American Lodging, Inc., 786 S.W.2d 599, 601 (Mo.App. W.D.1990)).

Departure from the current rule in favor of the McIntosh holding is unnecessary, as the current rule governing natural outdoor hazard cases already confers a reasonableness standard. The Estep case stands for the proposition that if a premises owner undertakes the removal of a natural accumulation of ice and snow than he must do so reasonably. 843 S.W.2d 911. The court held that while owners are not liable for a natural accumulation of snow or ice, if they undertake to clear the premises, "presumably to attract more customers," they must act reasonably. Id. at 914-15. "The question of whether they acted reasonably is a classic jury question, which precludes summary judgment." Id. The trial court specifically gave to Appellant an opportunity to develop such proof, yet none was discovered.

Experience suggests premises owners and occupiers routinely, if not customarily, clear their sidewalks and parking lots during inclimate weather in order to attract customers. And, if they chose to do then they must do so reasonably so as not to increase the risk of harm to invitees. This is a good rule and one that has been effectively applied by courts in Kentucky.

Only when the premises owner conceals or exacerbate the natural outdoor hazard will the law impose liability. Estep, supra. PNC Bank, Kentucky, Inc. v. Green, supra.

C. **Should the Court extend MacIntosh to naturally occurring outdoor hazards, the Court should not impose the new duty retroactively.**

In the event the Court decides to overturn well established and reasoned case law differentiating naturally occurring outdoor hazards from other premises liability claims, the ruling should not have retroactive application.

Under the long standing rule in Mannis, a premises owner does not have a legal duty to warn of or remedy naturally occurring outdoor hazards absent specific action by the premises owner. At the time of Stapleton's fall, Kentucky statutory law and case law imposed no legal duty upon Citizens National to warn or remedy of the ice. Stapleton concedes as much in her brief, yet asks the Court to now impose such a duty.

The imposition of the legal duty is a substantive change to the law as opposed to a procedural change. While procedural changes may be applied retroactively, Kentucky law does not permit retroactive application of substantial changes. Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984); Commonwealth v. Alexander, 5 S.W.3d 104 (Ky. 1999).

While not a statutorily imposed legal duty, the analysis is the same. When a person commits a crime, he is held to the law of punishment applicable when the crime was committed. Should the law change after the commission to include a harsher penalty, he cannot be given the greater punishment. The rationale is one should be able to known and appreciate the potential consequences of one's actions when taking the action.

The same is true of tort law. If a tort has not yet been created, statutorily or judicially, when the act occurs, one cannot be held liable under a tort created subsequently. Again, there is no notice to the tort feasor that his action would have that legal consequence.

Citizens National should be permitted to act in accordance with the substantive law in place when Stapleton fell. That law imposed no duty on Citizens National. Citizens National had no notice that it could be held liable for this injury at the time it occurred and could not know it would have the duty the Appellant asks this court to impose. To impose such a duty now is an unjust result.

CONCLUSION

The general rule has served Kentucky well: "that natural outdoor hazards which are as obvious to an invitee as to the owner of the premises do not constitute unreasonable risk to the former which the landlord has a duty to remove or warn against." Standard Oil Company v. Manis, at 858. The law governing premises liability clearly posits Citizens National had no duty to remove or warn Appellant of the naturally occurring outdoor hazard. Since the Appellant does not dispute the nature of the hazard and offered no evidence Citizens National concealed the hazard, there was not genuine issue of material fact and summary judgment was proper.

WHEREFORE, Citizens National respectfully requests the summary judgment entered by the Johnson Circuit Court and the Opinion of the Court of Appeal be AFFIRMED.

Respectfully submitted,

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