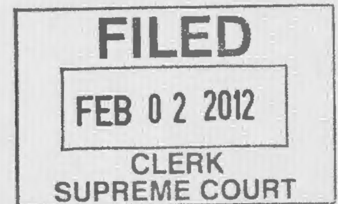


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2011-SC-264-D

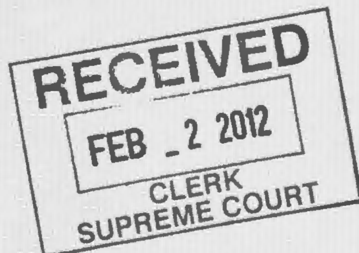
BENJAMIN WRIGHT, JR. APPELLANT

v. On Discretionary Review from the Kentucky Court of Appeals
Case No. 2009-CA-2359

Appeal from Jefferson Circuit Court
Honorable Mary M. Shaw, Judge
Case No. 08-CI-7849

HOUSE OF IMPORTS, INC.
D/B/A IN STYLE APPELLEE

REPLY BRIEF ON BEHALF OF APPELLANT, BENJAMIN WRIGHT, JR.



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(CERTIFICATE OF SERVICE INSIDE)

CERTIFICATE OF SERVICE

I hereby certify that on this 1ST day of February, 2012, ten (10) originals of this brief were served via Federal Express upon Susan Stokley Clary, Clerk of the Supreme Court, Room 209, 700 Capital Ave., Frankfort, KY 40601, with one (1) copy served by regular mail upon each of the following: J.D. Raine, Jr., Ferreri & Fogle, PLLC, 333 Guthrie Green, Suite 203, Louisville, Kentucky 40202; Hon. Mary Shaw, Judge, Jefferson Circuit Court, Division Five, 700 W. Jefferson Street, Louisville, Kentucky 40202; and Sam Givens, Clerk, Court of Appeals, Commonwealth of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601.

KEVIN C. BURKE

INTRODUCTION

House of Imports claims that the testimony of Plaintiff's safety expert, John Schroering, should have been stricken as not "reliable, relevant, nor helpful to the jury in deciding the issues in this case." (Appellee's brief, p. 12). But House of Imports failed to identify that issue in the Civil Appeal Prehearing Statement. In any event, Schroering, a safety professional, appropriately testified as to the hazardous condition of Appellee's stairs. The trial court did not abuse its discretion in allowing the testimony. There was no valid reason for the Court of Appeals to order a new trial.

House of Imports' remaining arguments hinge on the "open and obvious" doctrine (See Appellee's brief, pp. 12-14, 17-18). However, House of Imports concedes that the relief received in the Court of Appeals was "less than requested," as the Court of Appeals only remanded for a new trial and refused to absolve House of Imports of liability. (Appellee's brief, pp. 6, 8). House of Imports had to file a motion or cross-motion for discretionary review in order to argue non-liability based on the "open and obvious" doctrine either in this Court or on remand. Because House of Imports failed to do so, the Court of Appeals' ruling regarding the inapplicability of the "open and obvious" defense is now the law of the case.

REBUTTAL ARGUMENT

I. HOUSE OF IMPORTS FAILED TO IDENTIFY ANY ISSUE CONCERNING EXPERT TESTIMONY IN ITS CIVIL APPEAL PREHEARING STATEMENT AND ANY SUCH ISSUE WAS THEREFORE WAIVED

House of Imports' primary argument can be summarized in a single issue statement:

Did the trial court abuse its discretion in allowing expert testimony from John Schroering?

But that issue was not identified in the Civil Appeal Prehearing Statement. House of Imports only identified one issue:

> Whether the Defendant was entitled to a directed verdict on the issue of liability [based on the "open and obvious" doctrine], or at the very least, an instruction that Plaintiff was negligent as a matter of law.

House of Imports attempts to work around this problem by arguing that any issue mentioned *in any case cited in the Prehearing Statement* is sufficient to preserve all such issues for review. (Appellee's brief, pp. 7, 9) House of Imports cites no authority for same. Indeed, if this were the rule, there would be no need to identify issues in the Prehearing Statement at all. Appealing parties would simply string-cite case law without elaboration.

For the reasons stated in the opening brief (see Appellant's brief, pp. 6-8), House of Imports' waived any objection to Schroering's expert testimony; the Court of Appeals erred in considering issues other than the single issue identified in House of Imports' Prehearing Statement; and reversal and remand for reinstatement of the circuit court judgment is appropriate.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING JOHN SCHROERING TO TESTIFY REGARDING THE HAZARDOUS CONDITION OF HOUSE OF IMPORTS' STAIRS

Even if House of Imports properly preserved the issue, the trial court did not abuse its discretion in allowing Schroering's expert testimony.

House of Imports acknowledges the following:

(1) Whether to allow expert testimony is reviewed for abuse of discretion (Appellee's brief, p. 10);

(2) John Schroering, a certified safety professional, is qualified to testify regarding hazards in premises liability cases (Appellee's brief, p. 4);

(3) Schroering could testify that the hazardous condition of Appellee's steps contributed to Mr. Wright's fall because, among other things, the owner of House of Imports replaced a safety feature on the steps with red duct tape (Appellee's brief, p. 11).

Indeed, House of Imports' owner, Mr. Khiani, claimed that he would routinely replace old duct tape with new duct tape to make the stairs *less slippery.* At trial, Schroering explained why use of the duct tape is hazardous. Like the expert's testimony in *Kentucky River Medical Center v.* McIntosh, 319 S.W.3d 385 (Ky. 2010), this is not something the public would likely know in the absence of expert testimony, especially given Mr. Khiani's lay testimony to the contrary. *See also Jones v. Winn-Dixie of Louisville, Inc.*, 458 S.W.2d 767 (Ky. 1970)(allowing expert testimony in premises liability case concerning visibility of sidewalk).

Although House of Imports indirectly concedes that the condition of the stairs is the proper subject of expert testimony, Appellee nonetheless argues that Schroering's testimony should have been stricken as "false," "nonsensical," and "incomprehensible." (Appellee's brief, pp. 5, 9). Specifically, House of Imports claims that Schroering relied on the "wrong" edition of the Building Code, even though the standards relied upon are found in <u>all</u> editions of the Building Code as well as other sources relied upon by safety professionals, such as the American National Standards Institute (ANSI), the American Society for Testing Materials (ASTM), and the Standard Practice for Safe Walking Surfaces (SPSWS). House of Imports also focuses on the fact that "no one had fallen" before Mr. Wright's fall in order to undermine Schroering's testimony. (Appellee's brief, p. 11, 13). However, House of Imports admitted in a pre-trial hearing that the existence or non-existence of other falls is "**not**

evidence" and should not be considered.[1]

Even if House of Imports has properly characterized Schroering's testimony brief (which it has not) there is no requirement that an expert's testimony be infallible in order to be admissible. That other experts may disagree with an expert's methodology or conclusions goes to the weight not the admissibility of expert testimony. *See Com. v. Martin,* 290 S.W.3d 59, 68-69 (Ky. App. 2008)(collecting cases). Here, House Imports did not obtain expert testimony to rebut Schroering's testimony or challenge the standards he relied on. Instead, House of Imports relied on the lay testimony of Mr. Khiani and the rhetorical devices of Counsel. This is not an appropriate basis to strike expert testimony.

III. HOUSE OF IMPORTS CONCEDES THAT THE ISSUE OF NON-LIABILITY BASED ON THE OPEN AND OBVIOUS DOCTRINE IS NOT PROPERLY BEFORE THE COURT

House of Imports concedes the following:

(1) The Court of Appeals only granted relief by way of a new trial, and refused to find non-liability as matter of law for House of Imports based on the open and obvious doctrine (Appellee's brief, p. 7); and

(2) House of Imports did not receive "all the relief it asked for in the Court of Appeals." (Appellee's brief, p. 6).

House of Imports nonetheless contends that it did not need to file a cross-motion for discretionary review in compliance with *Fischer v. Fischer*, 438 S.W.3d 582 (Ky. 2011). The reason: House of Imports only intends to re-argue the open and obvious issue on remand. (Appellee's brief, p. 9). House of Imports, however, ignores the "law of the case" doctrine which prohibits reconsideration of issues in subsequent proceedings once the issue is finally

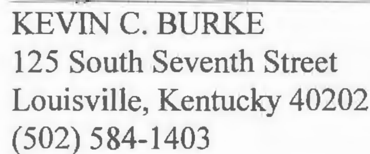
[1] VR 11/17/09; 11:00:45- 11:00:53 (Emphasis added).

decided on appeal. *See Inman v. Inman,* 648 S.W.2d 847, 849 (Ky.1982). Here, the Court of Appeals found that the open and obvious doctrine did not absolve House of Imports of liability as a matter of law. House of Imports did not request review of that ruling under *Fischer*, *supra*. Accordingly, the issue has been finally resolved. To the extent House of Imports enmeshes the open and obvious doctrine as part of its other arguments (see Appellee's brief, pp. 14-15, 17-18), those arguments should be disregarded as well.

CONCLUSION

WHEREFORE, Appellant, Benjamin Wright, Jr., respectfully requests that this Court reverse the Opinion of the Court of Appeals and remand to the trial court with directions to reinstate the jury verdict and judgment.

Respectfully submitted,



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