Pursuant to Court order

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

BENJAMIN WRIGHT, JR. **APPELLANT**

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

v.

Appeal from the Jefferson Circuit Court
Honorable Mary M. Shaw, Judge
Action No. 08-CI-007849

HOUSE OF IMPORTS, INC. d/b/a
IN STYLE **APPELLEE**

Response of Appellee, House of Imports, Inc., d/b/a In Style to Appellant's Brief

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Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that I have served ten (10) originals of this Response Brief via Federal Express upon Susan Stokely Clary, Clerk of the Supreme Court, Room 209, 700 Capital Avenue, Frankfort, Kentucky 40601, with one (1) copy served on this the 3rd of January 2012, to Hon. Mary Shaw, Judge, Jefferson Circuit Court, Division 5, 700 W. Jefferson Street, Louisville, Kentucky 40202, and to Hon. Damon B. Willis, Ewing, McMillin & Willis, PLLC, 1100 Republic Building, 429 W. Muhammad Ali Blvd., Louisville, Kentucky 40202, Hon. Kevin C. Burke, 126 South Seventh Street, Louisville, Kentucky 40202, and Sam Givens, Clerk, Court of Appeals, Commonwealth of Kentucky, 360 Democrat Drive, Frankfort, Kentucky, 40601.

J. D. RAINE, JR.

STATEMENT CONCERNING ORAL ARGUMENT

Since the matter at hand was tried in Jefferson Circuit Court in November, 2009, this Court has dealt with two (2) similar cases, Kentucky River Medical Center v. McIntosh, 319 S.W. 3d 385 (Ky. 2010) and Faller v. Endicott-Mayflower, LLC, et al, 2008-CA-001506-MR (CA 2011). (Discretionary review denied December 14, 2011) The issues in this case are similar to the issues presented in Faller and McIntosh, with the exception of the arguments concerning the testimony of the alleged expert witness, John Schroering. For this reason, the Appellee does not believe oral argument is necessary in this case.

STATEMENT OF POINTS AND AUTHORITIES

COUNTER-STATEMENT OF THE CASE

August 31, 2007, was Benjamin Wright's (Appellant) third visit to the House of Imports, a clothing store on Fourth Street in downtown Louisville.[1] Mr. Wright was interested in purchasing shoes to go with the new suit he intended to wear to his 55th class reunion from Central High School.[2] According to Mr. Wright, he had shopped at House of Imports on one occasion years before 2007 and a second time, while looking for his shoes, a few weeks prior to August 31.[3] Mr. Wright found the olive green shoes he was looking for[4] and took them to the cash register on the second level of the store, where he paid cash.[5] As Mr. Wright began to descend the same stairs which he had just ascended, his foot slipped from under him and he fell down the three (3) steps, landing on his knees on the first level.[6] Mr. Wright, who is dominant right handed,[7] was carrying the drawstring bag with his shoes in his right hand.[8] Although there was a handrail immediately to his right, the Appellant did not shift the bag with his newly purchased shoes to his left hand, so he could use the handrail.[9] Appellant testified at trial his attention was focused on leaving the store and his eyes were directed toward Fourth Street.[10]

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[1] VR 11/18/09; 11:40.28
[2] VR 11/18/09; 11:40.55
[3] VR 11/18/09; 11:40.28
[4] VR 11/18/09; 11:40.55
[5] VR 11/18/09; 11:43.39-11:44.37
[6] VR Khiani trial testimony; 11/19/09; 12:26.10-58
[7] VR 11/18/09; 12:15.57
[8] VR 11/18/09; 12:15.57
[9] VR 11/18/09; 12:01.38
[10] VR 11/18/09; 12:11.38

Mr. Wright did not know at the time what had caused him to fall. According to Appellant's trial testimony, as he lay on his back, his glasses knocked from his face, and in excruciating pain, he noticed some tape on the steps which was "ragged". [11] He "presumes" this is what caused him to fall,[12] but he is not sure.[13] He had not noticed the stairs nor the tape being in poor condition as he ascended them a few minutes before.[14]

This case was tried in Jefferson Circuit Court on November 17 through 19, 2009. Plaintiff tendered to the trial court, as an expert, John Schroering, a professional engineer based in Louisville. Defendant, after taking Mr. Schroering's deposition, objected to Mr. Schroering's testimony because the testimony would not assist the jury in determining any relevant issue presented at trial and because Mr. Schroering's testimony concerning the steps did not qualify as expert testimony under the criteria established by Daubert v. Merrell Dow Pharmaceuticals, Inc. , 509 US 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), as that case has been adopted in Kentucky through KRE 702 and Goodyear Tire and Rubber Company v. Thompson, 11 S.W. 3d 575 (Ky. 2000). A hearing was held out of the jury's presence on November 18th, to address Defendant's objections to Mr. Schroering's testifying at trial.[15]

While Mr. Schroering has qualified many times in the past as an expert in courts throughout this Commonwealth, in this case, as we will discuss, his testimony amounted to nothing more than a recitation of outdated and inapplicable building codes and regulations; all presented for the purpose of "piling on" the Defendant and trying to obscure an open and obvious situation, which should have resulted in a directed verdict

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[11] VR Wright Testimony 11/18/09; 11:45.35
[12] VR 11/18/09; 12:13.24
[13] VR 11/18/09; 12:13.04
[14] VR 11/18/09; 12:06.18; 12:07.59
[15] VR 11/18/09 beginning at 10:49.20

for Defendant, in a false light, so as to confuse the jury and distract their attention from the real issues of the case. For the most part, he was not giving "expert testimony". Rather than testify directly as to what caused Mr. Wright's fall, Mr. Schroering cited a litany of building codes and regulations which had no relationship to the facts of the case being tried. Mr. Schroering cited as applicable to Mr. Wright's situation the wrong edition of the Kentucky Building Code, and he failed to take into account KRS 198B.135, which creates a presumption that an injury which occurs more than five (5) years after the date of completion of construction modification of a building is not caused by that particular construction or modification. Mr. Khiani testified[16] no modifications had occurred to the building since 1997 or 98, well outside the five (5) year range. This presumption was not overcome by a preponderance of the evidence in this case. The uncontradicted evidence for the defendant was that the tape on the steps was changed when necessary and no one had encountered a problem with the steps before Mr. Wright fell. There was no evidence the tape on the steps was in a state of disrepair at the time Mr. Wright fell.

Despite vigorous argument on the part of defense counsel, the trial court allowed Mr. Schroering to testify, after the Daubert hearing on November 18, 2009. Defendant/Appellant's Prehearing Statement to the Court of Appeals listed Daubert v. Merrell Dow Pharmaceutical, 509 U.S. 579 (1993), as a significant case with respect to the issues presented. Defendant argued before the Court of Appeals that Mr. Schroering's testimony was not helpful to the jury in deciding the liability issue. In fact, Mr. Schroering's testimony confused and befuddled the jury because he cited a litany of building codes, regulations, and standards, which had no relevance to the case before

[16] VR 11/18/09; 2:26.20

them. The trial court committed obvious error by allowing the jury to hear Mr. Schroering's testimony.

Based on one of the cases cited by Defendant in its brief, (O'Connor and Raque Company v. Bill, 474 S.W. 2d 344 (KY 1971)) the Court of Appeals ruled specific building code and safety code sections should not have been cited by Mr. Schroering and then left out of the instructions. Following O'Connor and Raque v. Bill, supra, the Court of Appeals in our case held the jury should have been instructed on specific duties if the building code standards were controlling, just as instructions on statutory duties would be given in cases where a statute created a specific duty on one or more of the parties. The Appellee (Appellant at that time) argued to the Court of Appeals, and continues to maintain, the use by Mr. Schroering of outdated and irrelevant citations to the building code and other regulations was of no assistance to the jury in reaching their verdict, and likely, in fact, was misleading.

Very often, arguments based on Daubert focus on the qualifications of the expert. In the present case, the focus by House of Imports was not so much on whether Mr. Schroering could "qualify" as an expert, but rather whether his testimony, consisting primarily of reading codes and regulations which were not relevant, could be of any assistance to the jury. In making this point, House of Imports' argument relied on the reasoning in O'Connor and Raque v. Bill 474 S.W. 2d 344 (KY 1971), wherein Justice Palmore likened reading random building code provisions to the jury to reading traffic statutes to a jury in an automobile accident case

> ***"Generally speaking, however, it seems to us that an ordinance or regulation creating rights and duties is no different from a statute and should be treated in the same way. For example, statutes regulating traffic on the***

> ***highway are not read to the jury in accident cases. To the extent that they are applicable their substance is incorporated in the instructions covering the law of the case." 474 S.W. 2d 344, at 346***

So, it should have been in this case. For instance, Mr. Schroering cited a regulation requiring handrails to be of a certain design.[17] This regulation was irrelevant in the present case because Mr. Wright did not use, nor attempt to use, the handrail which was provided for him. The design of the handrail cannot have contributed to Mr. Wright's injury, yet a regulation concerning handrails was read to the jury.

Mr. Wright testified he slipped as he stepped toward the first step from the landing where he had transacted his purchase.[18] Nonetheless, Mr. Schroering testified concerning the difference in height of the various steps; again, citing building code regulations about the height of steps. All of this was irrelevant to the facts of this case.

House of Imports made specific and targeted motions for a directed verdict, both at the end of Plaintiff's proof[19] and, once again, at the conclusion of all proof. [20] In cases we will discuss later, Faller v. Endicott-Mayflower, et al, 2008-CA-001506-MR and Rucinski v. Cinemark, U.S.A., Inc., 2009-CA-002067-MR (unpublished), expert testimony was not utilized. In both cases the defendant premises owner was granted summary judgment, which was upheld by the appellate courts. Only in the case of Kentucky River Medical Center v. McIntosh, 319 S.W. 3d 385 (Ky. 2010), where an expert testified to a particular OSHA regulation which was applicable to the unique factual situation in McIntosh was a plaintiff able to overcome a timely motion for directed verdict and proceed to the jury. Had John Schroering's testimony, which added

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[17] VR 11/18/09; 11:32.39
[18] VR 11/18/09; 11:45.05
[19] VR 11/19/09 12:20.43
[20] VR 11/19/09 12:25.48

nothing to the jury's knowledge in this case, been excluded, House of Imports might well have been entitled to a directed verdict.

House of Imports believes it was entitled to a directed verdict, which would have been the logical conclusion to the matter had not John Schroering's incompetent and inadmissible testimony been presented.

The Plaintiff, Appellee below, filed a Motion for Discretionary Review from the Court of Appeals Opinion, which this Court accepted. Defendant did not file a Cross-Motion for Discretionary Review because such a motion was not necessary pursuant to CR 73.08. Fischer v. Fischer 438 S.W. 2d 949 (Ky. 2011) The defendant, while not obtaining all of the relief it asked for in the Court of Appeals, obtained sufficient relief through the Court of Appeals' decision to make a cross motion for discretionary review unnecessary.

ARGUMENT

I. THE COURT OF APPEAL'S RULING SHOULD BE AFFIRMED BASED ON DAUBERT V. MERRELL DOW PHARMACEUTICALS, 509 U.S. 579 (1993) AND GOODYEAR TIRE AND RUBBER COMPANY V. THOMPSON, 11 S.W. 3d 375 (KY 2000)

Throughout the pretrial proceedings in this case, and during trial, Defendant argued consistently that Plaintiff's alleged expert, John Schroering, should not be allowed to testify. During a hearing held before trial, pursuant to Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993),[21] Mr. Schroering admitted he did not know which addition of the Kentucky Building Code governed the condition of the steps in the store at House of Imports.

[21] VR 11/19/09 beginning at 11:00 a.m.

At trial, Mr. Khiani testified on behalf of House of Imports no modification had been made to the steps since 1997 or 1998.[22] Therefore, neither the 2004 (which Mr. Schroering incorrectly believed applied) nor the 2006 code (which was in effect at the time of Mr. Wright's fall) required Mr. Khiani to make any change in the steps. Because Mr. Schroering testified falsely, which was brought to the trial court's attention by counsel during the pretrial hearing, his testimony cannot possibly have been relevant to the issue nor helpful to the jury, as contemplated by Daubert. Further, Mr. Schroering cast doubt on his own expertise because he did not know which rules were in effect at the time of Mr. Wright's injury.

All of this was brought to the trial court's attention in the hearing held before Mr. Schroering testified. This question was preserved for the Court of Appeals' consideration in the Prehearing Statement (Section 8) where Daubert is mentioned specifically as a case upon which the House of Imports' appeal should be decided.

Appellant's reliance on Fischer v. Fischer, 438 S. W. 3d 949 (Ky. 2011) is misplaced. Mr. Wright's counsel cites Fischer in support of the contention it was necessary for House of Imports to file a cross-motion for discretionary review on the issue of whether House of Imports was entitled to a directed verdict in the trial court.

The Court of Appeals' Opinion in this case holds House of Imports was not entitled to a directed verdict, but gives the appellant adequate relief by reversing the trial court's judgment and remanding to the lower court for new trial. The plain holding of Fischer v. Fischer is that an appellant who obtains adequate relief on direct appeal need not file a cross-motion for discretionary review merely because the Court of Appeals does not sustain ***all*** of its grounds for reversal of a lower court judgment.

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[22] VR 11/18/09; 2:26.20

Specifically, in Fischer, Justice Noble, who authored the majority opinion in Kentucky River Medical Center v. McIntosh, 319 S.W. 3d 385 (Ky. 2010) wrote at length on the question of whether a party who receives all relief requested before the appellate court should be required to file a cross-motion for discretionary review. In overruling Commonwealth Transportation Cabinet Department of Highways v. Taub, 766 S.W. 2d 49, (Ky.1988) Justice Noble writes:

> ***...the rule in Taub presents this Court, and attorneys and litigants, with difficulty on occasion. As noted by some commentators, its "mandatory requirement" [of a cross-motion for discretionary review] may easily be a trap for the unwary because of the seeming conflict with the general rule that an appellate court may affirm the lower court's judgment on alternative grounds in the absence of a cross appeal. (Citing 19 Sheryl G. Snyder, Griffin Terry Sumner, 85 Matthew C Blickensderfer, Kentucky Practice Appellate Procedure § 11:5 (2005-2011) 348 S. W. 3rd 582 at 592.***

By requiring a prevailing party to seek a cross-appeal, Taub undermines "the general rule" that "a party may not appeal from a judgment in his own favor". Citing Miller v. Miller, 335 S.W. 2d 884, 886 (Ky. 1960); Brown v. Barkley, 628 S.W. 2d 616, 618 (Ky. 1982)

> ***"...[a] cross-appeal is appropriate only when the judgment fails to give the cross-appellant all the relief he has demanded or subjects him to some degree of relief which he seeks to avoid" id 348 S.W. 3d 582 at 594)***

Even though less than requested, the relief granted House of Imports by the Court of Appeals was a victory for House of Imports. Although the Court of Appeals did not grant the appellant all it asked for, in the form of instructions to the circuit court to dismiss the action, the remand for new trial provided adequate relief for the appellant, rather than giving relief the appellant would have wished to avoid. Since the proof at the

next trial, given the Court of Appeals' ruling concerning Mr. Schroering's testimony, would likely be different, there was no reason for House of Imports to file a cross-motion for discretionary review. The Fischer opinion states Taub is being overruled in part because

> ***Taub's reading of CR 76.21 to apply to a prevailing party is simply unworkable. The better approach is to require cross-appeals and cross-motions for discretionary review only where the party is aggrieved by the lower court. This approach avoids that "trap for the unwary" presented by having the opposing rules in both Taub and Vester (and related cases). It is simply unfair to litigants to have a rule that might prejudice them for their counsel's inability to negotiate between the Scylla and Charybdis of these two cases..." (Fischer at 597)***

The Court of Appeals read House of Imports' Prehearing Statement in its totality. While deciding, based on all of the evidence before the trial court, the appellant was not entitled to a directed verdict, the Court of Appeals nonetheless reversed the trial court's decision because the jury's verdict obviously had been corrupted by the irrelevant, incorrect, and nonsensical testimony of John Schroering, to whose testifying House of Imports had objected vehemently and whose testimony at trial was put in issue by item 8 of the Prehearing Statement informing the Court of Appeals Daubert would be a case upon which the appeal would turn. Obviously, the Court of Appeals understood Mr. Schroering was not helpful to the jury because he did not relate the incomprehensible mish mash of rules and regulations he recited to the actual duties imposed on House of Imports.

The appellant's recitation of the issues presented on the original appeal, and the Court of Appeal's Opinion dealing with those issues each make logical sense. The appellant apprised the Court of Appeals of a specific problem concerning the trial court's

decision and pointed to relevant case law which addressed the problem. The Court of Appeals followed through on Appellant's reasoning and reversed the trial court's judgment, remanding the case to Jefferson Circuit Court. This ruling was correct and well founded based on the material presented to the Court of Appeals.

II. THE COURT OF APPEALS RULING SHOULD BE REAFFIRMED BASED ON GOODYEAR TIRE AND RUBBER COMPANY V. THOMPSON, 11 S.W. 3d, 575 (Ky. 2000)

Goodyear Tire and Rubber Company v. Thompson, 11 S.W. 3d 575 (Ky. 2000), and KRE 702, together apply the standards of Daubert v. Merrell Dow (supra), in this Commonwealth to the testimony of witnesses who are not scientists. Specifically, in Thompson the "expert" was a mechanical engineer, Dr. O. J. Hahn. In upholding the trial court's ruling excluding Dr. Hahn's testimony, this Court held a trial court may apply the factors for determining admissibility of expert scientific knowledge to the testimony of engineers and other experts who are not scientists. (Goodyear Tire and Rubber v. Thompson, 11 S.W. 3d 575, at 576). The proper standard of review concerning the trial court's evidentiary ruling is abuse of discretion. (Thompson, supra at 577; citing Tumey v. Richardson, Ky 437 S.W. 2d 201, 205 (1969) and other cases), KRE 702 states

> ***"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Goodyear Tire and Rubber Company v. Thompson, 11 S.W. 3d 575 at 578***

At the trial of Benjamin Wright's case against the House of Imports, the trier of the fact needed no help in understanding any of the evidence presented nor in determining any issue of fact.

> ***"When faced with a proffer of expert testimony, then, the trial judge must determine at the outset of trial, pursuant to KRE 104, "whether the expert is proposing to testify to (1) scientific, [technical, or other specialized knowledge] that (2) will assist the trier of fact to understand or determine a fact in issue" (citing Daubert at 592) Goodyear supra at 578***
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> ***"In order to meet the above standard, proffered expert testimony, which is based on scientific, technical or other specialized knowledge" must be both relevant and reliable". (Goodyear at 578)***

Mr. Schroering's testimony met none of the requirements of Daubert and Thompson for reliability, scientific or technical knowledge or specialization. Mr. Schroering simply testified the steps upon which Mr. Wright fell violated building codes which were of no applicability. The question raised by Thompson, supra, in considering the relevance of expert testimony is whether the testimony "fits" (Thompson at 578). Mr. Schroering's testimony did not "fit" in this situation.

He did not visit House of Imports to make an inspection of the premises until August 27, 2009, approximately two (2) years after Mr. Wright's fall. He could not testify the steps he viewed were in the same condition as the steps Mr. Wright trod on the day he was injured. Mr. Schroering did testify tape placed by the store owner, Mr. Khiani, on the nose of the steps constituted a trip hazard and should not have been placed there.[23]

However, during the entire time Mr. Khiani had been using tape on the steps, no one had fallen.[24] Mr. Khiani testified he placed the tape on the steps because the metal strips formerly on the edge of each step would become slippery during icy or wet

[23] 11/19/09; 11:50.;18, 11:54.01
[24] VR 11/19/09; 1:59.20

weather. [25] Mr. Wright admitted nothing obstructed his view of the steps, and he did not make any effort to use the handrail provided on the steps.[26] Neither did Mr. Wright avail himself of the handicap ramp which was placed along the wall of the store, just a few feet from where he fell.[27] Mr. Wright did not ask for an alternative way down the steps prior to his fall.

Because Mr. Wright obviously was negligent in his own conduct by failing to use the handrail and/or failing to use the handicap ramp at his disposal, Plaintiff's counsel in this matter was faced with having to "bootstrap" a theory of negligence against House of Imports. This was accomplished by hiring an alleged expert to testify to irrelevant and outdated rules and regulations. The trial judge abused her discretion by allowing this testimony, as was argued to her in the hearing of November 18, 2009. Once the trial court allowed John Schroering to testify, all of his testimony became objectionable. In fact, the trial judge, in order to save time, granted the Defendant an ongoing objection to ***everything*** Mr. Schroering said.[28]

The proper course of action would have been to exclude John Schroering's testimony completely since it was neither reliable, relevant nor helpful to the jury in deciding the issues in this case.

III. THE COURT OF APPEAL'S DECISION IN THIS MATTER IS SUPPORTED BY RECENT DECISIONS IN KENTUCKY RIVERS MEDICAL CENTER, et al. V. McIntosh and FALLER V. INDICOTT-,MAYFLOWER, et al.

The appellant, Benjamin Wright, suffered his injury at the House of Imports in 2007. Suit was filed in 2008 and the case was tried in 2009. During the pendency of this

[25] VR 11/18/09; 1:59.20 and 11/18/09; 2:02.50
[26] VR 11/18/09; 12:01.38
[27] VR 11/18/09; 12:26.06
[28] VR 11/19/09; 11:17.50

action, two (2) cases have affected greatly the state of premises liability law in Kentucky. Primarily, this Court's Opinion in Kentucky Rivers Medical Center, et al. v. McIntosh 319 S.W. 3d 385 (Ky. 2010) has modified the "open and obvious" doctrine concerning premises liability, which was in effect when the instant matter was tried. The McIntosh decision emphasizes the central question in "fall down" cases is "foreseeability". Could the owner of the premises where the fall occurred have foreseen the hazard by which the patron was injured and eliminated the danger before an incident occurred? In the case of House of Imports, this question must be answered in the negative.

Not only was the condition of the steps "open and obvious," but a handrail was provided for the use of the patron, an alternative handicap ramp was provided, and the edges of the red carpeted steps were marked with contrasting silver tape. With the steps in this condition, the uncontradicted testimony of Bob Khiani, the store owner, was that no one had ever fallen on the steps in the condition they appeared on the day Mr. Wright was injured.[29]

Unlike Ms. McIntosh, Mr. Wright was not in a hurry, nor in an emergency situation. Much of this Court's Opinion in McIntosh is devoted to discussing the fact Ms. McIntosh, in the performance of her duties as a paramedic in an emergency situation, had much more to be concerned about than the condition of the curb over which she was bringing a critically ill patient into the hospital. Mr. Wright was in no such situation. The steps were completely open to his view, and an alternative method of moving from the mezzanine area of the store to the first floor was provided. Mr. Wright had no reason to be in a hurry, and he could have used the provided handrail. John Schroering's testimony concerning the shape of the handrail was irrelevant, and prejudicial to House of

[29] VR 11/18/09; 12:30.51

Imports, because Mr. Wright made no effort to use the handrail. If Mr. Wright would not exercise care for his own safety, what else could Mr. Khiani have done to make the way safe for Mr. Wright?

Mr. Khiani is not a safety expert. He is not required to be. He is required by the law in McIntosh not only to take reasonable precautions to warn patrons of dangerous conditions in his store, but to alleviate them as well. Mr. Khiani perceived no dangerous condition because nothing to be concerned about had ever happened. He testified the tape on the steps was changed regularly when it became worn or tattered. [30]

Further, the facts of this situation are distinguishable from those in another recent case because the concrete strip over which Mr. Horne fell at the auto dealership was hidden from view by an automobile. Horne v. Precision Cars of Lexington, 170 S. W. 3d 364, at 366 (Ky 2005) Managers of the dealership could well have foreseen the peril in which a customer might be placed while giving close inspection to a vehicle under which was hidden a trip hazard.

At the time of his fall, Mr. Wright was not using and did not require a cane or any other assistance in walking.[31] He had not observed any condition of the steps which caused him concern on his way up, and he did not avail himself of the handrail. Mr. Wright's situation is similar to the situation in Faller v. Endicott-Mayflower, et al, 2008-CA-001506-MR, in which this Court recently denied discretionary review of the Court of Appeals' second opinion, rendered after the case was remanded there by this Court. (Discretionary Review of the second opinion denied December 14, 2011)

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[30] VR 11/18/09; 2:01.14
[31] VR 11/18/09; 11:52.33

Ms. Faller tripped on the threshold of a restaurant as she was leaving. The threshold was of old construction, but was striped with black and yellow paint, so it would be noticeable. Ms. Faller had crossed the particular threshold on a number of occasions.

The Court of Appeals, considering these facts in light of McIntosh, upheld, for the second time, the Jefferson Circuit Court's granting of a summary judgment to the property owners because Ms. Faller had been injured making use of an entry and exit way the condition of which was neither defective nor hidden from her view. Like Mr. Wright, who testified he was looking toward Fourth Street when he fell, [32] Ms. Faller's attention was distracted as she looked behind her. Neither Mr. Wright's conduct, nor Ms. Faller's, can be blamed upon the business owner.

The Opinions in Faller makes no mention of testimony by an expert witness on either side. Perhaps, this is because neither side believed an expert was necessary since the condition of the steps at Buck's Restaurant were "open and obvious" to everyone. The Opinions in Faller do not recount any witness reciting a litany of building code regulations supposedly violated by the premises owner. Indeed, in Faller, as in Mr. Wright's case, no expert testimony was necessary or helpful to the jury. The Plaintiff's expert in McIntosh testified to a specific OSHA regulation which applied to the particular facts of that case.

CONCLUSION

The trial court erred in permitting the prejudicial and irrelevant testimony of John Schroering on behalf of the Plaintiff. As noted by Judge Johnstone in Goodyear Tire and Rubber v. Thompson, supra,

[32] 11/18/09; 12:11.38

> ***".....neither Daubert nor the rules of evidence require a trial court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." Goodyear Tire and Rubber v. Thompson, supra, at 571. citing KumhoTire Company v. Carmichael, 526 U.S. 137, at 157***
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> ***"the discretion given to a trial court in determining the admissibility of expert testimony "is discretion to choose among reasonable means of excluding expertise that is false and science that is junky..." Goodyear at 583; citing Kumho , 526 U.S. 137 at 158***

Mr. Schroering's testimony was the very sort of junk science Kumho Tire and Goodyear v. Thompson seek to avoid. His testimony concerning building codes and regulations had no relationship to the facts of this case. Mr. Schroering's testimony was neither relevant nor reliable. Plaintiff's alleged expert did not know what building code applied to the situation at hand, nor if one applied at all. As Judge Palmore observed in O'Connor and Raque v. Bill, supra, legal duties should not be the subject of expert testimony unless a specific instruction on those duties is to be given the jury. Mr. Schroering's testimony differed substantially from the quality of the testimony given by the expert, James Lapping, in McIntosh. Mr. Lapping testified to one specific OSHA regulation which was relevant to the situation at hand. He further explained why the violation of that particular regulation contributed to Ms. McIntosh's injury.

Mr. Schroering was unable to relate any specific code provision to the cause of Mr. Wright's fall. House of Imports objected regularly, consistently, and strenuously to Mr. Schroering's testifying in this case at all. The defendant's objections led to the holding of a Daubert hearing, after which the trial court erroneously decided the proffered testimony should be allowed. House of Imports preserved this error for review not only by objecting at the trial court level, but by pointing out in its Prehearing Statement the

existence of a Daubert issue. It may well have been that, had Mr. Schroering's irrelevant and prejudicial testimony not been admitted, the defendant would have received a directed verdict, based on Kentucky law as it existed at the time of trial, and as it has been effected by the McIntosh and Faller decisions. Except for the "expert" testimony, there was no evidence of negligence on the part of House of Imports, nor was there evidence of foreseeability of Mr. Wright's injury.

The trial court's admission of Mr. Schroering's testimony was not supported from the bench by any recitation of case law. The trial court's refusal to grant a directed verdict in this case flies directly in the face of Judge Shaw's ruling, barely a month before the trial of this matter in the unpublished case of Rucinski v. Cinemark, U.S. A., Inc., 2009-CA-002067-MR (Ky CA), rendered March 4, 2011. The Court of Appeals affirmed a summary judgment on behalf of a movie theatre where a patron fell on unlighted steps while a movie was playing. The Court of Appeals stated

> "...the trial court found that the dark stairs were an obvious and open condition that Rucinski recognized and voluntarily accepted when she attempted to walk down them before the house lights came on. Therefore, finding that Cinemark did not have a duty to warn Rucinski about the dark stairs, it granted summary judgment." (page 2 of unpublished Opinion)

The Court of Appeals cited with approval the trial judge's summary of her findings in accordance with McIntosh. Those findings included this statement

> "...as noted in section 343A of the Restatement, the possessor of land is not liable to harm to its invitees caused by a condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."[33]

[33] Rucinski v. Cinemark U.S.A., Inc., 2009-CA-992067-MR (KYCA) Unpublished

The facts in Rucinski and in this case are almost exactly the same. For whatever reason, the same trial judge has ruled differently in these cases, which have nearly identical facts. While counsel for House of Imports is mindful of CR 76.28 (4) regarding the citing of unpublished opinions, the reason for citing Rucinski v. Cinemark, is unique because, within a month, the same trial judge issued completely divergent rulings in very similar cases.

This Court recently (December 14, 2011) denied discretionary review in Faller v. Endicott-Mayflower, et al. the holding of which supports entirely House of Imports' position in this case. Ruling in favor of House of Imports would not be in conflict with Kentucky River Medical Center v. McIntosh, because the facts in McIntosh are so different from the facts in this case. Specifically, Ms. McIntosh was in an extreme emergency situation when she fell on an unmarked curb, while Mr. Wright was not in an emergency situation when he fell on marked steps where a handrail was available.

This Court should affirm the Court of Appeals opinion and ruling in this case and allow the matter to be returned to the Jefferson Circuit Court for trial.

Respectfully submitted,

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