Pursuant to Court order

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2011-SC-000518-DG

WILMA SHELTON — APPELLANT

v. On Discretionary Review from the Kentucky Court of Appeals
Case No. 2009-CA-000945-MR

KENTUCKY EASTER SEALS, INC. — APPELLEE

BRIEF ON BEHALF OF *AMICUS CURIAE*, KENTUCKY JUSTICE ASSOCIATION

Submitted by:

KEVIN C. BURKE
125 South Seventh Street
Louisville, Kentucky 40202
(502) 584-1403

COUNSEL FOR *AMICUS CURIAE*
KENTUCKY JUSTICE ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that on this 29th 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: Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Thomas L. Clark, Judge, Fayette Circuit Court, Fayette County Courthouse, 120 North Limestone Street, Lexington, Kentucky, 40507; Gregory Jenkins, 200 West Vine Street, Lexington, KY 40507; Joseph T. Pepper, 4965 U.S. Highway 42, Suite 1000, Louisville, KY 40222-6375, George Schuhmann, 3107 Lowell Avenue, Louisville, KY 40205.

KEVIN C. BURKE

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INTRODUCTION

Do possessors of land have a duty of reasonable care to prevent foreseeable harm due to hazardous conditions on their property?

Consistent with modern tort law, this Court in *Kentucky River Medical Center v. McIntosh* answered the question in the affirmative and did so without qualification. As this Court explained:

> The lower courts should not merely label a danger as "obvious" and then deny recovery. Rather, they must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable.

Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385, 392 (Ky. 2010).

The scope of *McIntosh* is not limited to paramedics, emergency room entrances, urgent situations, or any other specific factual circumstance which might be extracted from *McIntosh* to distinguish its holding. The holding in *McIntosh* applies to all premises liability cases, and it applies to this case.

PURPOSE AND INTEREST OF *AMICUS CURIAE*

Founded in 1954, the Kentucky Justice Association (formerly Kentucky Academy of Trial Attorneys) is a non-profit organization of over 1400 members dedicated to protecting the health and safety of Kentuckians, enhancing consumer protection, and preserving every citizen's right to trial by jury.

Amicus Curiae submits that land possessors, like all other non-immune entities, owe a duty of reasonable care to prevent foreseeable harm to others. This Court in *McIntosh* held that the "obviousness" of a hazard is no longer a bar to recovery. Whether a hazard is

obvious is one factor for the jury to consider in assigning fault to the parties. The Court of Appeals in this case erred in holding otherwise.

STATEMENT OF THE CASE

Ms. Shelton suffered serious injuries when she tripped over wires next to her husband's hospital bed at Cardinal Hill Rehabilitation Hospital (owned by Appellee Easter Seals). Shelton testified that she had to step over the wires to care for her ailing husband. In fact, she had no alternate route. A member of Shelton's family informed Cardinal Hill of the problem before the fall. Despite actual knowledge of the hazardous condition, Cardinal Hill did nothing.

The Fayette Circuit Court entered summary judgment in favor of Cardinal Hill, labeling the hazard "open and obvious." The Court of Appeals affirmed, and Shelton moved for discretionary review. This Court granted discretionary review, vacated the Court of Appeals' opinion, and remanded to the Court of Appeals for reconsideration in light of *McIntosh*.

On remand, the Court of Appeals distinguished *McIntosh* on its facts. The Court considered the status of Irene McIntosh, a paramedic who sustained injury after she knowingly encountered a hazardous condition on the premises of Kentucky River Medical Center. The occupation of paramedic, according to the Court, differed substantively from Appellant Shelton's role as primary caregiver for her life-long companion. Opinion at 7-8. The Court of Appeals also emphasized the "stressful and time-sensitive" nature of Ms. McIntosh's occupation. *Id.* This work-related stress, implied the Court, exceeded the anxiety one would have in caring for a bed-ridden spouse. *Id.* Given this subjective and counter-

intuitive calculus, the Court of Appeals concluded that McIntosh was properly awarded a six-figure verdict - while Shelton had no claim whatsoever.

This Court again accepted discretionary review, and properly so. The Court of Appeals, in direct violation of the holding in *McIntosh,* focused on the conduct of the injured party rather than the foreseeability of harm from the standpoint of the tortfeasor. The opinion usurps the fact-finding function of the jury which, in a pure comparative fault jurisdiction, determines the relative fault of the parties. *See Hilen v. Hays*, 673 S.W.2d 713 (1984); KRS 411.182. Instead of applying comparative fault principles, the Court of Appeals revived the inherently imprecise "all or nothing" approach of contributory negligence.

Amicus Curiae submits that the holding in *McIntosh* was not intended to be a meaningless gesture, or worse, a return to the era of contributory negligence. Because the lower courts have failed to correctly interpret *McIntosh*, this Court should clarify that the alleged obviousness of a hazard no longer bars recovery in premises liability cases.

ARGUMENT

I. THE OBVIOUSNESS OF A HAZARD NO LONGER ABSOLVES A LAND POSSESSOR OF LIABILITY

A. The Restatement (Second) of Torts §343A (1965) and Exceptions to the Rule of Non-Liability for Possessors of land

In 1965, the American Law Institute published the Restatement (Second) of Torts. The ALI recognized that in many jurisdictions assumption of risk and contributory negligence existed as absolute defenses in premises liability cases. *See e.g.* Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions,* 100 U. Pa. L. Rev. 629

(1952)(examining the relationship between assumption of risk, contributory negligence, and open and obvious doctrines). Accordingly, Section 343A of the Second Restatement adopted a general rule of non-liability for what it labeled "known or obvious" dangers and then identified exceptions:

> § 343A. Known or Obvious Dangers
>
> (1) 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.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Importantly, Comment f to Section 343A listed **examples** of exceptions to the "open and obvious" rule which were deemed compatible with the doctrines of assumption of the risk and contributory negligence:

> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§ 466 and 496D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances. (Emphasis added).

When the ALI published the Second Restatement, Kentucky still recognized contributory negligence and assumption of the risk as complete defenses in premises liability

cases. Indeed, pre-Restatement case law rarely considered the "obviousness" of hazards independently from the doctrines of assumption of risk or contributory negligence. *See Seelbach, Inc. v. Mellman*, 293 Ky. 790, 170 S.W.2d 18 (1943)(plaintiff's claim not barred by assumption of risk, even though plaintiff knew of the hazardous condition the Seelbach's stairs, because plaintiff had to ascend and descend the stairs for work; however, plaintiff's claim properly barred under principles of contributory negligence as she failed to make use of a handrail); *Montgomery Ward v. Ellis,* 380 S.W.2d 223 (Ky.1954)(plaintiff's contributory negligence barred her claim where she admitted that she observed an overhanging doorway in a shop yet struck her head on it a few moments later).

However, pre-Restatement case law also created exceptions on a case-by-case basis designed to mitigate the harshness of those doctrines. *See Majestic Theater Co. v. Lutz*, 210 Ky. 92, 275 S.W. 16 (1925)(holding that theatre patron was not guilty of contributory negligence despite knowledge of slippery marble floor); *Kroger Grocery & Baking Co. v. Monroe,* 237 Ky. 60, 34 S.W.2d 929 (Ky.1931) (holding that a customer was not guilty of contributory negligence even though she knew oil was on the floor before slip and fall); *Rodgers v. Staller*, 284 Ky. 108, 143 S.W.2d 1047 (1940)(holding that apartment tenant was not guilty of contributory negligence or assumption of the risk as a matter of law when she fell down stairs she had been climbed on numerous occasions).

In *Bonn v. Sears, Roebuck & Co.,* 440 S.W.2d 526 (Ky.1969), the Court adopted the Restatement (Second) of Torts, Sections 343A, and its comments. Given the Second Restatement approach, the Court absolved Sears of any liability when a customer fell into a well-lighted automobile grease pit. The Court found that the customer's actions did not fall

within any exception to non-liability identified in the Restatement.

Later cases followed *Bonn*, employed the general rule of non-liability, and strictly construed the exceptions found in the Restatement. *See Wallingford v. Kroger*, 761 S.W.2d 621 (Ky. App. 1989)(Reversing summary judgment based on Comment f's risk/benefit exception where plaintiff had "no choice" but to cross a hazardous ramp incident to employment); *Rogers v. Prof'l Golfers Ass'n of Am.*, 28 S.W.3d 869, 872 (Ky.App.2000)(distinguishing *Wallingford* and Comment f's risk/benefit exception; affirming summary judgment because plaintiff could have avoided the hazard); *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364 (Ky.2005)(applying the "distraction" exception in Comment f where plaintiff tripped over a readily observable curb); *Johnson v. Lone Star Steakhouse and Saloon of Ky., Inc.*, 997 S.W.2d 490 (Ky.App.1999)(refusing to apply the distraction, forgetfulness, or risk/benefit exceptions, where plaintiff slipped on peanut shells on the floor of a restaurant).

As the post-*Bonn* cases reveal, application of the Second Restatement produced fact-intensive results largely dependent on whether the plaintiff could argue that his or her conduct "fit" into one of the specific enumerated exceptions. In many ways, application (or misapplication) of the Restatement was more restrictive than even pre-Restatement case law which crafted exceptions to absolute defenses based on the equities of the particular case.

B. Abandonment of Assumption of Risk and Contributory Negligence Doctrines for "Pure" Comparative Fault

Soon after publication of the Second Restatement, Kentucky abandoned the assumption of risk doctrine. *Parker v. Redden*, 421 S.W.2d 586 (Ky. 1967). Then, in 1984,

Kentucky abandoned contributory negligence in favor of comparative fault. *Hilen v. Hays*, 673 S.W.2d 713 (1984). In so doing, Kentucky became one of only thirteen states to adopt the "pure" form of comparative fault which entrusts the jury to assign fault to the parties so long as the tortfeasor is at least 1% at fault. *Id.*; *see also* Victor E. Schwartz, *Comparative Negligence* § 2.1(A) (2d. Ed. 1986).

Hilen also overruled inconsistent case law including, most notably, a premises liability case which considered the "hazard and its apparent nature" within the confines of the contributory negligence doctrine. *See Houchin* v. *Willow Ave. Realty Co.*, 453 S.W.2d 560, 563 (Ky. 1970)(overruled by *Hilen*, *supra*). Consistent with *Hilen*, the "patency of the danger" in products liability cases no longer constituted an absolute defense, but became a "factor" for the jury to consider in determining liability. See *Montgomery Elevator Co. v. McCullough,* 676 S.W.2d 776, 780-81 (Ky. 1984). In 1988, the legislature codified pure comparative fault in "all tort actions." KRS 411.182(1).

Despite the judicial and legislative development of pure comparative fault, premises liability cases still looked to the pre-comparative fault holding in *Bonn*. *See Wallingford, supra; Rogers, supra; Horne, supra*. There was little effort to reconcile comparative fault principles with premises liability case law describing the contributory negligence doctrine as an "extension of the rule set out in *Bonn v. Sears, Roebuck & Co.*, Ky., 440 S.W.2d 526 (1969)." *Dade Park Jockey Club* v. *Minton,* 550 S. W.2d 188, 190 (Ky. App. 1977).

It would take decades for Kentucky to recognize the full impact of *Hilen*, abandon the narrow focus on the injured party's conduct in premises liability cases, and place the focus where it properly belongs: on the foreseeability of harm.

C. *Kentucky River Medical Center v. McIntosh*: the Demise of the "Open and Obvious" Doctrine and the Shift to the Land Possessor's Duty of Reasonable Care to Prevent Foreseeable Harm

In *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), this Court undertook a lengthy and comprehensive review of the open and obvious doctrine. In its review, this Court noted that the doctrine, which has its roots in contributory negligence, is at odds with the concept of comparative negligence. *Id.* at 391. *McIntosh* recognized the growing trend among states to apply a comparative fault analysis to facts that previously resulted in landowners being automatically absolved from liability for open and obvious conditions. *Id.* at 389.

Importantly, while *McIntosh* found that rejection of the open and obvious doctrine was consistent with the Restatement (Second) of Torts, Section 343A, *McIntosh* did not merely apply the Second Restatement. Instead, *McIntosh* adopted the modern trend reflected in the current draft of the Restatement (Third) of Torts, Liab. Physical Harm, §51, which clarifies that, in light of comparative fault principles, a defendant's duty and breach must be kept distinct from the plaintiff's negligence. This Court explained:

> The incompatibility between the open and obvious doctrine as an absolute, automatic bar to recovery and comparative fault is great. So great, in fact, that a few states have held that their comparative negligence statutes abolished the open and obvious doctrine outright.

McIntosh at 391. *McIntosh* went on to note that abolition of the open and obvious doctrine "makes good policy sense." *Id.* at 392. The opinion then adopted the approach employed by Mississippi, another pure comparative fault jurisdiction which abandoned the open and

obvious doctrine in its entirety. See *Tharp v. Bunge Corp.* 641 So.2d 20, 25 (Miss. 1994). In so doing, this Court followed the modern trend. See *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 157, 824 P.2d 293 (1992) ("[a] risk is not made reasonable simply because it is made open and obvious to persons exercising ordinary care."); *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989)(abolishing open-and-obvious-danger doctrine in light of adoption of comparative negligence); *Hale v. Beckstead*, 116 P.3d 263 (Utah 2005)(same); *Cupo v. Karfunkel*, 1 A.D.3d 48, 767 N.Y.S.2d 40 (2d Dep't 2003)(same); *O'Donnell v. Casper*, 696 P.2d 1278 (Wyo. 1985)(same); *Woolston v. Wells*, 297 Or. 548, 687 P.2d 144 (1984) (same); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978)(same).

After abandoning the open and obvious doctrine, this Court gave the following guidance to the lower courts:

> The lower courts should not merely label a danger as "obvious" and then deny recovery. Rather, they must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable.

McIntosh at 392. Indeed, this is the true significance of *McIntosh*: it completely rejects the open and obvious doctrine and shifts the focus to foreseeability of harm. *McIntosh* did not merely re-affirm the Second Restatement approach or rely on the *Bonn* line of cases. Otherwise, there would have been no need to alter the Court of Appeals' opinion in *McIntosh* which did exactly that.

Finally, it is worth noting, while the lower courts have struggled with *McIntosh* (most notably in this case), our federal courts – not known for unreasonably expanding state tort rights – have had very little difficulty applying *McIntosh*. *See Schmidt v. Intercontinental*

Hotel Group Resources, 2012 U.S. Dist. LEXIS 15502 at *9 (E.D. Ky. Feb. 8, 2012)("*McIntosh* and its progeny undoubtedly change the landscape of the open and obvious doctrine in Kentucky. No doctrinal discussion can now be complete without accounting for this case."); *Lahutsky v. Wagner Moving & Storage, Inc.*, 2011 WL 5597330(W.D. Ky. Nov. 11, 2011) (denying summary judgment in light of *McIntosh* despite obviousness of exterior icy stairway); *Wright v. Pilot Travel Centers*, 2011 WL 2457444 (W.D.Ky. June 17, 2011)(denying summary judgment in light of *McIntosh* despite of obviousness of liquid on store floor); *Powers v. Tirupathi Hospitality, LLC*, , 2011 WL 251001 at *4 (E.D.Ky. Jan. 26, 2011) ("[T]he Court concludes that the Kentucky Supreme Court intended for its decision in *McIntosh* to apply to all premises owner liability claims, including cases involving purportedly open and obvious natural outdoor hazards.").

II. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR IN AFFIRMING SUMMARY JUDGMENT BASED ON THE "OPEN AND OBVIOUS" DOCTRINE POST-*MCINTOSH*

According to the Court of Appeals, *McIntosh* did not abrogate the open and obvious doctrine. The Court therefore followed the exceptions to the traditional rule of non-liability found in the Restatement (Second) of Torts, Section 343A, cmt f, and *Bonn v. Sears, Roebuck & Co.,* 440 S.W.2d 526 (Ky.1969). None of the exceptions saved Shelton's claim, the Court determined, because the exceptions only apply if a party is "forced to encounter the hazard because of a necessity such as retaining one's livelihood." Opinion at 7.

But none of the cases cited for this proposition mention Section 343A of the Second Restatement. See Opinion at 7-8, *citing Houchin* v. *Willow Ave. Realty Co.,* 453 S.W.2d 560 (Ky. 1970); *Dade Park Jockey Club* v. *Minton,* 550 S. W.2d 188, 190 (Ky. App. 1977); *Fuhs*

v. Ryan, 571 S.W.2d 629 (Ky. App. 1978). The cases do, however, expressly apply the doctrine of contributory negligence. *Id.* For instance, this Court previously exposed *Houchin* as expressing "a clear statement of the [contributory negligence] rule" and overruled it. *Hilen* at 715. Thus, the Court of Appeals not only misapplied *McIntosh*, but implicitly revived the doctrine of contributory negligence.

In her brief, Appellant Shelton comprehensively details the flaws in the Court of Appeals' reasoning even under *Bonn* and the Second Restatement. *Amicus Curiae* will not repeat those arguments here. However, *Amicus Curiae* is compelled to point out that there is no good policy in a rule which allows Irene McIntosh recovery but shuts the courthouse door on Ms. Shelton. A paramedic is not more deserving of a jury trial than the primary caregiver of an ailing spouse; and the "stressful and time-sensitive" nature of McIntosh's work, emphasized by the Court of Appeals, is no greater than the anxiety associated with having a family member is hospitalized. Such distinctions are arbitrary and, in any event, defy human experience.

The proper focus is and should be "foreseeability of harm." Here, Cardinal Hill could foresee that visitor/invitees might trip over the wires when assisting patients at the hospital. Cardinal Hill, in fact, had actual knowledge of this hazard. It should not matter whether Ms. Shelton notices the wires but trips while comforting her husband, or whether a medical professional, like Irene McIntosh, subjects herself to the same hazard if called upon to attend to Mr. Shelton. Both injuries would be foreseeable. Both claims, therefore, should proceed to trial. The obviousness of the danger for each visitor/invitee is for the jury to decide when assessing relative fault.

CONCLUSION

The "open and obvious" doctrine is no longer a bar to recovery in premises liability cases. Accordingly, this Court should reverse and remand to the Fayette Circuit Court for further proceedings.

Respectfully submitted,

KEVIN C. BURKE
125 South Seventh Street
Louisville, Kentucky 40202
(502) 584-1403

COUNSEL FOR *AMICUS CURIAE* [1]
KENTUCKY JUSTICE ASSOCIATION

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