COMMONWEALTH OF KENTUCKY
SUPREME COURT

CASE NO: 2011-SC-000554-DG
COURT OF APPEALS FILE NO. 2009-CA-000945-MR
FAYETTE CIRCUIT COURT ACTION NO. 08-CI-1094

WILMA SHELTON — APPELLANT

v.

KENTUCKY EASTER SEALS SOCIETY, INC. — APPELLEE

REPLY BRIEF FOR THE APPELLANT, WILMA SHELTON

Submitted by:

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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of this Reply Brief for Appellant have been sent by United States express mail this April 30, 2012, to Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, Room 209 State Capitol, 700 Capital Avenue, Frankfort, KY 40601, and by first-class U.S. Mail to Melissa A. Wilson and Allison M. Helsinger, Ward, Hocker & Thornton, PLLC, 333 West Vine Street, Suite 1100, Lexington, KY 40507; Gregory Jenkins, 200 West Vine Street, Lexington, KY 40507; the Hon. Thomas L. Clark, Judge, Fayette Circuit Court, Fayette County Courthouse, 120 North Limestone Street, Lexington, Kentucky, 40507; and the Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. It is further certified that the Record on Appeal has not been withdrawn by Appellant.

George Schuhmann
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STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

In its brief, the Appellee concludes that Ms. Shelton's injuries were not foreseeable to Cardinal Hill for three reasons. First, in the Appellee's opinion, "[n]o concrete event diverted Ms. Shelton's attention from the well-known presence of the cords" (*Appellee's Brief, at 12*). Second, "no event caused her to not remember the cords" (*Appellee's Brief, at 13*). Third, "being able to [give her husband a goodbye kiss] was a nicety and being unable to do so was merely an inconvenience." *Appellee's Brief, at 16*. As to this last point, the Appellee notably contrives from whole cloth a remarkable conclusion of law, without citation to or support from any source, that neatly encapsulates the misguided nature of the Appellee's arguments throughout its brief: "Without substantial necessity there is no foreseeability." *Appellee's Brief, at 11*.

The Appellee has, as a practical matter, been forced to reach this unsupported legal conclusion because the Appellee bears the awkward task of spinning a silk purse from a sow's ear: the Appellee must portray the Court of Appeals' relentless focus, in its Opinion Re-Affirming, on *Ms. Shelton*, and on what that honorable court deemed to be the relatively frivolous nature of Ms. Shelton's kissing her husband goodbye, as a proper legal analysis regarding the foreseeability of Ms. Shelton's injuries to *Cardinal Hill*, per this Court's mandate in Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010), whereby trial courts "must ask whether the *land possessor* could reasonably foresee that an invitee would be injured by the danger." Id. at 394 (emphasis added).

Accordingly, in drafting its brief, the Appellee was constrained to mimic the reasoning of the Court of Appeals' Opinion Re-Affirming in this case, hence the Appellee's tripartite argument concerning only the foreseeability of Ms. Shelton's

injuries to *Ms. Shelton*, rather than to *Cardinal Hill*. The Appellee does, however, go even further than the Court of Appeals in ascribing the entirety of Ms. Shelton's misfortune to nothing more than her own clumsiness: "Ms. Shelton should have been attentive to the open and obvious condition she so regularly encountered." *Appellee's Brief, at 12*. "Ms. Shelton should have been paying attention to what she was doing." *Appellee's Brief, at 19*.

The Appellee is understandably eager to cast Ms. Shelton in an unfavorable light and to direct the Court's attention away from the risky and negligent conduct of Cardinal Hill, which had a duty to eliminate or reduce the danger posed by the hazard it acknowledges it had created. However, in its eagerness to divert attention from Cardinal Hill, the Appellee has, perhaps unintentionally, confused the four (4) disjunctive examples given in the Restatement (Second) of Torts § 343A(1), comment f, concerning "cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger," and conflated situations in which (1) the "invitee's attention may be distracted, so that he will not discover what is obvious," (2) the invitee "will forget what he has discovered," (3) the invitee will "fail to protect himself against" the discovered hazard, and (4) "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." McIntosh, *supra*, 319 S.W.3d at 389-90, *citing* Restatement (Second) of Torts § 343A(1), comment f. The Appellee even goes so far as to fabricate evidence not in the record to support its conflation of legal theories, namely, insisting that Ms. Shelton "was actively focused on the cords without

distraction" at the time of her fall. *Appellee's Brief, at 22.* The actual testimony shows that, when she was directly asked, "So you saw the wire there when you bent over to kiss your husband goodbye?" Ms. Shelton responded thus:

> 09 **No, I didn't see that then,** I said
> 10 afterwards when I was falling I real--I was trying to
> 11 realize how I'd hooked my foot in that wire.

(R. Vol. 2 p. 184; Appellee's Brief Exhibit 1, 25:07-11) Had Ms. Shelton actually testified, in the imagined words of the Appellee, that she "was actively focused on the cords without distraction," then an analysis of whether Cardinal Hill could reasonably anticipate that Ms. Shelton would proceed to leave her husband's bedside, despite her knowledge of the danger posed by the cords, would be appropriate. However, those facts are not in the record, and the Appellee's many arguments throughout its brief belittling the urgency of Ms. Shelton's goodbye kiss for her husband are, for that reason, misplaced.

More importantly, "substantial necessity," in the Appellee's words, is not the legal basis for determining foreseeability of injury to an invitee under Kentucky law. "Foreseeable risks are determined in part on what the *defendant* knew at the time of the alleged negligence." Pathways, Inc. v. Hammons, 113 S.W.3d 85, 90 (Ky. 2003) (emphasis added).

> The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have.... **For the purpose of determining whether the actor should recognize that his conduct involves a risk, he is required to know (a) the qualities and habits of human beings** [.]

Id., citing Restatement (Second) of Torts § 289(a) (emphasis added). Accordingly, under the foreseeability rule adopted by this Court in McIntosh, a land possessor may be liable

to its invitee where the land possessor "should anticipate the harm" an invitee may suffer from an encounter with an open and obvious hazardous condition on the land, despite the invitee's knowledge of that condition. McIntosh, *supra*, 319 S.W.3d at 389, *citing* Restatement (Second) of Torts § 343A(1) (1965). To this end, McIntosh goes on to mandate that the lower courts "must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger." Id. at 394.

Like the Appellee in its brief, the Court of Appeals has failed to address the central question of this case: Were Ms. Shelton's injuries reasonably foreseeable, not to Ms. Shelton, but to *Cardinal Hill*? In its brief, the Appellee has gamely attempted to portray the Court of Appeals' deeming that the *invitee*'s goodbye kiss was not "urgent" as a foreseeability analysis as to what the *premises owner* could reasonably anticipate regarding whether its invitee might momentarily forget the hazard the landowner had placed before her. The Appellee "maintains" and "certainly believes" (*Appellee's Brief, at 10*) that Ms. Shelton's injuries were not foreseeable to Cardinal Hill, yet in so doing, the Appellee has brought to the forefront one of the many genuine issues of material fact that preclude summary judgment in this case, *viz.*, the Appellee and the Court of Appeals take great delight in chiding Ms. Shelton, but devote not a word to Cardinal Hill – the "land possessor" – and the risk it took in choosing to string unsecured cables along its patient's bedside, its knowledge that those cables presented a trip hazard to invitees, and its failure to take any steps to reduce or eliminate the risk posed thereby. Cardinal Hill is a rehabilitation facility, and as such is required to know the "qualities and habits of [the] human beings" whom it can expect to visit its business premises. Pathways, *supra*, 113 S.W.3d at 90. And one quality it can reasonably expect of its invitees it that they will

come to Cardinal Hill for the express purpose of tending to their recuperating loved ones, and may foreseeably in so doing momentarily forget the open and obvious hazards that Cardinal Hill has laid out for them. The rule under McIntosh is that "cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger" include those in which the land possessor can reasonably expect that the invitee will **forget what she has discovered**. McIntosh, *supra*, 319 S.W.3d at 390, *citing* Restatement (Second) of Torts § 343A(1), comment f (1965).

That is the case before the Court here. The McIntosh decision makes clear that an analysis of the "necessity or urgency" of the invitee's task is relevant when the invitee has asserted that she proceeded to encounter the danger despite full consciousness of the risks. *See, e.g.*, Wallingford v. Kroger Co., 761 S.W.2d 621, 624 (Ky. App. 1988). This case, however, does not hinge on the issue of whether a goodbye kiss is "urgent," because Ms. Shelton has never made such a claim, and she does not claim now that she proceeded to kiss her husband goodbye after having carefully weighed the costs and benefits of so doing, nor that she remained "actively focused on the cords without distraction" as she turned from the bed, in the fabricated words proffered by the Appellee without citation to the record.

Nor does the Appellee's insistence that Ms. Shelton did not encounter a "concrete event" *(Appellee's Brief, at 12)* or "significant novel distraction" *(Appellee's Brief, at 23)* merit serious discussion, because Ms. Shelton differs in no way from Irene McIntosh in this regard: neither Ms. McIntosh nor Ms. Shelton encountered anything out of the ordinary at the time of their respective accidents; rather, both were carrying out precisely

those activities the respective land possessors could reasonably foresee they would be carrying out. Under McIntosh, where "the plaintiff had the defense of foreseeable distraction, as she was attending her patient [...], the jury was properly instructed to compare the faults of the parties in this case." McIntosh, *supra*, 319 S.W.3d at 394. In the instant case, Ms. Shelton also has the defense of foreseeable distraction, as she was attending her husband, just as Irene McIntosh was attending her patient. And just like Kentucky River Medical in McIntosh, Cardinal Hill in the instant case had good reason to anticipate that Ms. Shelton, like Irene McIntosh, would be tending to her husband, "not to each step she was taking," McIntosh, *supra*, 319 S.W.3d at 393, and therefore Cardinal Hill also had good reason to expect that Ms. Shelton, like Ms. McIntosh, might momentarily forget the trip hazard Cardinal Hill had strung along her husband's bedside while she tended to him.

On this point, Ms. Shelton testified she fell as she was turning away from her husband's beside (R. Vol. 2, p. 184; Exhibit 1, p. 26:2-21), not as she was "exiting the room," in words of the Appellee's own making. *Appellee's Brief, at 13.* The Appellee even insists that "exiting the room" is not a normal and foreseeable activity of Cardinal Hill's invitees. *Id.* "Whether it is foreseeable Ms. Shelton would be carrying out certain tasks is simply unrelated to the required analysis." *Appellee's Brief, at 13.* Yet under Kentucky law, it is *precisely* what the defendant premises owner knew about its property – and what it could expect of its invitees at the time of the accident – that is crucial to the analysis of foreseeability. Pathways, *supra*, 113 S.W.3d at 90. In its brief, the Appellee has failed to appreciate the difference between two distinct phenomena: (1) an invitee's being *distracted* from a hazard by some event or thing, and (2) an invitee's momentarily

forgetting a hazard she has discovered. The Appellee has again muddled the disjunctive examples and adopted in McIntosh from the Restatement (Second) of Torts § 343A(1), comment f. Neither Irene McIntosh's tending to her patient nor Ms. Shelton's tending to her recuperating husband were "outside events" or "significant novel distractions," and the Appellee's fabrication of such a legal standard is improper and inapposite.

In contrast to the above scenarios, this case concerns an invitee who momentarily forgot the hazard she had discovered, and a land possessor who had reason to anticipate that she would so forget. Significantly as to this point, the Appellee in its brief also chooses to mimic the Court of Appeals' unexplained decision to alter the language of McIntosh and the Second Restatement, insisting that Ms. Shelton must demonstrate that she was "made to forget" the cords. *Appellee's Brief, at 13.* A showing that the invitee was "*made* to forget" the hazard by some outside event is not an evidentiary standard to be found in McIntosh or in the Restatement. Rather, the standard is a showing that "**the possessor has reason to expect that the invitee** [...] **will forget what he has discovered** [.]" McIntosh, *supra*, 319 S.W. 3d at 390, *citing* Restatement (Second) of Torts § 343A(1), comment f (1965). The Appellant has already outlined in her Brief, at Section III.B., the facts of record that, viewed in the light most favorable to the Appellant, amply demonstrate why Cardinal Hill had reason to expect that Ms. Shelton would forgot the hazard she had discovered, and will not repeat those arguments here.

Nevertheless, the Appellee's allegation in its brief that the record does not support a finding that Ms. Shelton momentarily forgot about the cords calls for particular scrutiny and rebuttal. Specifically, on page 13 of its brief, the Appellee attempts to portray the calculated "forgetfulness" of defense counsel as dispositive evidence that Ms. Shelton did

not momentarily forget the cords: "There is not one instance of Ms. Shelton claiming she forgot about the cords." *Appellee's Brief, at 13.* Yet the Appellee ignores the simple fact that Ms. Shelton was never asked by counsel for Cardinal Hill whether she forgot about the cords. Nor did defense counsel ask Ms. Shelton what she was thinking about, or where she was looking just before she fell. Defense counsel was in control of the plaintiff's deposition, yet chose not to pursue these questions pertaining to the moment Ms. Shelton fell. Thus, Appellee has taken an insupportable leap of logic: Because defense counsel never asked Ms. Shelton whether she forgot about the cords as she turned from kissing her husband goodbye, the Appellee has hastily concluded that such evidence cannot be found in the record. But Ms. Shelton unambiguously testified that the cord became entangled around her leg at some point while she was standing at her husband's bedside, and that she did not discover what had caused her to fall until she was already on the floor. (R. Vol. 2, p. 184; Appellant's Brief Exhibit 2, p. 26:2-21) The only reasonable inference to be drawn from these facts is that Ms. Shelton momentarily forgot about the dangerous cords Cardinal Hill had left unsecured along her husband's bedside.

Moreover, by the Appellee's logic, defense counsel in Kentucky premises liability cases can now assure themselves of obtaining summary judgment by calculatedly "forgetting" to ask at deposition whether plaintiff-invitees momentarily forgot the owner-created hazards they have encountered, and then halt discovery to move for summary judgment based on defense counsel's calculated failure to ask the relevant questions. Ms. Shelton testified in detail that she tripped on the cords just as she was turning from having kissed her husband goodbye, (R. Vol. 2, p. 184; Appellant's Brief Exhibit 2, pp. 17-26). Ms. Shelton further testified that she was *not* looking at the cords as she fell or

just before she fell. (R. Vol. 2, p. 184; Appellant's Brief Exhibit 2, p. 26:07-09) "In this Commonwealth, it is axiomatic that appellate courts are not fact-finders; and neither are trial courts when ruling on motions for summary judgment." Calhoun v. CSX Transp., Inc., 331 S.W.3d 236, 245 (Ky. 2011). To the extent the opinions of the parties, or of the Court, differ regarding the significance of Ms. Shelton's testimony, a genuine issue of material fact precludes summary judgment in this case.

Just as importantly, the Appellee, in its brief, ignores that the invitee and the premises owner have *separate and distinct* duties under Kentucky law, and the first focus of the reviewing court should be, under McIntosh, the conduct of the *premises owner* as it relates to foreseeability. McIntosh makes clear that the duty of the landowner is two-fold: to warn of dangers that are not obvious, *and* to take reasonable steps to eliminate or reduce the danger posed hazards that are obvious. The law imposes this duty on landowners because of "the land possessor's unique position as the only person who can fix the dangers." McIntosh, *supra*, 319 S.W.3d at 393. The landowner's duty is separate from that of the invitee, and it is this duty to eliminate or reduce the foreseeable risks posed by known hazards that must first be examined by the trial court.

On this very point, this Court, in McIntosh, refers to the case of Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d 364 (Ky.2005), from which this Court concluded that the land possessor in that case – an auto dealership – "would expect that a customer ... '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.'" Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385, 392 (Ky. 2010), *citing* Horne, *supra*, 170 S.W.3d at 370. Certainly if an *auto dealership* can reasonably expect that its customer-invitees may

forget hazards they have discovered, then a *rehabilitation facility* has all the more reason to expect that its invitees may momentarily forget, as they tend to their loved ones, that the patients' bedsides have unsecured wires running along them.

On review of a summary judgment, the facts of record must be viewed in a light most favorable to the non-moving party. In its brief, the Appellee keeps its analysis solely on the invitee, and does not at all consider that Cardinal Hill knowingly placed the cords in its rehabilitation facility along its patient's bed, had been informed that the cords presented a trip hazard, and had taken no steps at all toward reducing or eliminating the risk that the cords posed to invitees. Cardinal Hill took a risk in so acting, and now balks at the notion of accounting for the risk it took, instead solely blaming Ms. Shelton for tripping on the hazard Cardinal Hill created, knew about, and left in place. In sharp contrast to the effect Cardinal Hill's risk-taking has had on Ms. Shelton's physical well-being, securing the cords would have been inexpensive, easy and quick. Because Ms. Shelton's injuries were reasonably foreseeable to Cardinal Hill, Cardinal Hill owed Ms. Shelton a duty of care under Kentucky law, and it is now for a jury to examine Cardinal Hill's breach of that duty on remand from this honorable Court.

Respectfully submitted,

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