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

VS.

KENTUCKY EASTER SEALS SOCIETY, INC. — APPELLEE

BRIEF FOR APPELLEE KENTUCKY EASTER SEALS SOCIETY, INC.

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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of this Brief for Appellee have been sent by hand delivery this April 13, 2012, to the Hon. Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, Room 209 State Capitol, 700 Capital Avenue, Frankfort, KY 40601, and by first class United States mail to the Hon. Gregory Jenkins, 200 West Vine Street, Suite 610, Lexington, KY 40507, the Hon. Joseph T. Pepper, Pepper Law Office, 4965 U.S. Highway 42, Suite 1000, Louisville, KY 40222-6375, the Hon. George Schuhmann, 3107 Lowell Avenue, Louisville, KY 40205, the Hon. Thomas L. Clark, Judge, Fayette Circuit Court, Fayette County Courthouse, 120 North Limestone Street, Lexington, KY 40507, and the Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. It is further certified that the Record on Appeal has not been withdrawn by Appellee.

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STATEMENT CONCERNING ORAL ARGUMENT

The Appellee agrees that an oral argument will assist the honorable Court in clarifying the law on open and obvious hazards as well as illuminating there are no genuine issues of material fact remaining.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Appellee, Kentucky Easter Seal Society, Inc. d/b/a Cardinal Hill Rehabilitation Hospital, does not accept the Appellant's Statement of the Case, and submits that the following statement of the facts is essential to a fair and adequate understanding of the issues on appeal:

Appellant Wilma Shelton's husband was a patient at Cardinal Hill Rehabilitation Hospital (hereinafter "Cardinal Hill") for six weeks in 2007. Cardinal Hill is a rehabilitation facility, focusing on assisting patients in transitioning back into their daily lives after having been treated for illnesses at other facilities. Notably, Cardinal Hill is not a trauma facility and does not treat the acutely ill.

During the time her husband was at Cardinal Hill, Ms. Shelton visited her husband on a daily basis, often times spending the majority of the day at the facility. (R. Vol. 2 pg 184; Exhibit 1—Deposition of Wilma Shelton, 11:20-23) Admittedly, Ms. Shelton was aware of the cords extending from the wall to her husband's bed from the very first time she entered her husband's room. (R. Vol. 2 pg 184; Exhibit 1, 13:7-13) She was even made aware of them before she ever set foot inside the rooms at Cardinal Hill. Ms. Shelton testified that she "…I had a neighbor, her husband was in the room, two or three rooms down at Cardinal Hill and she had warned me to be careful of all the wires and cables." (Id.) Ms. Shelton further testified that upon each daily visit, she was well aware of the wires and "tried to always avoid, [ ] the wires". (R. Vol. 2 pg 184; Exhibit 1, 24:11-15)

Five weeks into Mr. Shelton's stay at Cardinal Hill, Ms. Shelton fell giving rise to this civil action. On March 9, 2007, Ms. Shelton spent the afternoon with her husband at Cardinal Hill and before leaving, approached Mr. Shelton to kiss him goodbye. (R. Vol. 2 pg 184; Exhibit 1, 18:6-7) This was a routine practice of Ms. Shelton's, something she did upon leaving Cardinal Hill every time and "about half the time" Mr. Shelton was in his bed during this ritual. (R. Vol. 2

pg 184; Exhibit 1, 34:16-24) At the time of her fall, Ms. Shelton did not notice any significant change in the location or arrangement of the cords. (R. Vol. 2 pg 184; Exhibit 1, 16:21-25) Everything was exactly the same as it had been for the past five weeks. (R. Vol. 2 pg 184; Exhibit 1, 27:15-19) As Ms. Shelton turned to the leave room after kissing her husband goodbye, she fell despite having encountered the cords without incident over the prior five weeks.

The cords at issue were required for the assistance and treatment of Mr. Shelton, as explained by the nurse (see below) and acknowledged by Michelle Crockett, Ms. Shelton's daughter, and the presence of such cords is required and consistent with other treatment facilities.

> Q: Are you suggesting that its different from other hospitals?
>
> A: Oh, no, no, no, I guess it's common.
>
> Q: Okay, have you been to other hospitals and seen the same type thing?
>
> A: Yes, I have.

(R. Vol. 2 pg 184; Exhibit 2—Deposition of Michelle Crockett, 12:18-23) It reasonable to presume the cords provide a telephone connection and necessary electricity to the beds of the patients admitted to Cardinal Hill, allowing them to adjust their beds and utilize call lights to gain the attention of the nursing staff when needing assistance. Ms. Shelton also recognized that the cords also facilitated a bed alert system as a safety precaution for the patients, which automatically notified the nursing staff if a patient were to leave their bed without summoning required assistance. (R. Vol. 2 pg 184; Exhibit 1, 10:13-25)

Appellant asserts Ms. Crockett complained to the staff at Cardinal Hill regarding the hazard posed by the cords in her step-father's room. Ms. Crockett's testimony however indicates

she merely inquired as to why the cords were in the particular location and voiced her opinion they were "in the way".

> Q: Now, you said you had complained about the cords on the floor in the past?
>
> A: Uh-huh, I had made mention—when a nurse was in the room I was like well why do all these cords have to be on the floor, they all go to different things which I understand that but it is a rehabilitation centers, there are people walking around on walkers, that's the last thing they would need to have there especially my stepdad, he's paralyzed on the left side, its not the safest environment.
>
> Q: Was this one occasion, several—or I'm sorry, one conversation you had about the cords, more than one?
>
> A: No, I'm sure I mentioned it more than once, now whether there was nurse in the room every time, no, but my stepdad heard me say it, so it was heard, yes.
>
> Q: Heard by…
>
> A: My stepdad and a nurse.
>
> Q: On more than one occasion?
>
> A: I have to say its possible.
>
> Q: Okay, but at least once?
>
> A: At least once, yes.
>
> Q: Tell me in as much detail as possible what it was you said on that one occasion while the nurse was in the room.
>
> A: Just like I just—why are there cords all over the floor, they're always here, they're in the way, I've had to kick them under the bed.
>
> Q: You were saying that?
>
> A: I was saying that, I've had to kick them under the bed before.

Q: What was the response?

A: Well, Miss, I'm sorry, they're there for a reason...

(R. Vol. 2 pg 184; Exhibit 2, 10:24-12:11) Ms. Crockett did not express frank concern that the cords posed a tripping hazard or give notice that she or anyone else had an unsafe encounter with the cords. Rather, she simply asked why the cords were there and stated she had moved them away to under the bed. It's unclear as to whether she actually stated she believed there were dangers posed by the cords to her stepdad's safety.

By the time of the fall at issue Ms. Shelton had spent a significant amount of time over the prior five weeks at Cardinal Hill going about her regular departure routine, something she had done every day for five weeks with no issue. When asked why she tripped on the wires on this specific occasion, Ms. Shelton offered no substantive answer: "As I remember maybe there wasn't as many laying, just scattered everywhere in the floor, just this one, one wire was beside his bed and it—when I bent over it slid down and somehow I hooked my foot in it and it was like something had me around the ankle." (R. Vol. 2 pg 184; Exhibit 1, 24:18-23) She goes on to say that as she approached his bed that day she saw the wires beside the bed.

Q: How do you know it slid down as you put it?

A: Well, that's the only way it could have been because I was watching when I went—when I went to bend over and I saw the wires beside the bed but I didn't, you know, I wasn't aware of it, I wasn't—but the only thing I can figure is it slipped down and my foot got tangled in it because I felt like somebody had me by the ankle.

Q: So you saw the wire there when you bent over to kiss your husband goodbye?

A: No, I didn't see that then, I said afterwards when I was falling I real—I was trying to realize how I'd hooked my foot in that wire.

> Q: Okay, now I thought you did tell me earlier that you had seen the wires next to the bed on every day—
>
> A: I had saw the wires, yes, but I had never, you know, I had never had any—never got tangled up in them, this one that was—which I'm assuming looked like a telephone wire was down in the railing beside his bed or somewhere along there.

(R. Vol. 2 pg 184; Exhibit 1, 24:24-25:19) Appellant asserts throughout her brief she momentarily forgot about the wires, however the above quoted testimony does not support this assertion, neither does any testimony or evidence in the record.

Based of the above testimony of Appellant, the Fayette Circuit Court granted Cardinal Hill summary judgment on the grounds the cords were open and obvious. (R. Vol. 2, p 175) On appeal, the Kentucky Court of Appeals upheld the lower court's decision, not once, but twice. Having been directed by the Supreme Court of Kentucky to reconsider the appeal based on its decision in Kentucky River Medical Center et. al. v. McIntosh, 319 S.W. 3d 385 (Ky. 2010), the Court of Appeals once again affirmed its original decision, upholding the trial court's granting of summary judgment for Cardinal Hill. (Opinion of Kentucky Court of Appeals Reaffirming, rendered June 24, 2011) Subsequently, the Supreme Court of Kentucky granted discretionary review for a second time after the Court of Appeals denied Appellant's petition for rehearing.

SUMMARY OF THE ARGUMENT

As noted by the Court of Appeals in its second opinion, the Supreme Court of Kentucky did not abolish the open and obvious doctrine in Kentucky River Medical Center et al. v McIntosh, 319 S.W. 3d 385 (Ky. 2010). Instead, the Supreme Court adopted a strict and narrow set of exceptions that were properly addressed by the Court of Appeals. Not only was it not foreseeable that Ms. Shelton would suffer an injury on the cords she agrees were open and obvious, but Ms. Shelton was not distracted, was not made to forget about the cords, and was not forced to encounter the cords due to some urgent necessity. Further, the Court of Appeals' analysis was consistent with previous, narrow applications of McIntosh by the Court of Appeals. Too many exceptions, as permitted in the companion case, Webb v Dick's Sporting Goods, No 2010-CA-001194-MR, (Ky. App. 2011), to the open and obvious rule fragments and confuses the law. Therefore, the Court of Appeals' decision should be affirmed in its application and analysis of McIntosh.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE LOWER COURT'S GRANTING OF SUMMARY JUDGMENT IN FAVOR OF CARDINAL HILL.

A. Standard of Review

On appeal, the standard of review as to whether a trial court properly granted summary judgment is "whether 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." Scifres v. Kraft, 916 S.W. 2d 779, 781 (Ky. App. 1996). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Lewis v. B&R Corp., 56 S.W. 3d 432, 436 (Ky. App. 2001) (citing Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W. 2d 476, 482 (Ky. 1991)). Summary Judgment is proper if the nonmoving party could not possibly be successful at trial. Id. at 436. "Impossibility" as set forth in the summary judgment standard is "used in a practical sense, not in an absolute sense." Id. (citing Perkins v. Hasuladen, 828 S.W. 2d 652, 654 (Ky. 1992). A "party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." Wymer v. JH Properties, Inc., 50 S.W. 3d 195, 199 (Ky. 2001) (citation omitted).

B. Duties of Landowner and Invitee

Under Kentucky law, a landowner must only exercise ordinary care to fulfill their duty to keep the premises in a reasonably safe condition. Lewis v B&R Corp., 56 S.W. 3d 432, 438 (Ky. App. 2001); Rogers v Professional Golfers Assoc. of America, 28 S.W. 3d 869, 872 (Ky. App. 2000); Lanier v Wal-Mart Stores, Inc., 99 S.W. 3d 431, 436 (Ky. 2003). This does not however

lead to a property owner becoming an insurer of its patron's safety, as the Lanier Court refused to hold property owners "absolutely" liable for all injuries sustained on their property. Lanier, 99 S.W. 3d at 436. As a general rule, a landowner owes no duty of care to an invitee for those hazardous conditions which are deemed "open and obvious". Corbin Motor Lodge v Combs, 740 S.W. 2d 944, 946 (Ky. 1987); Reece v Dixie Warehouse and Cartage Co., 188 S.W. 3d 440, 450 (Ky. App. 2006).

The term "obvious" continues to mean both the condition and the risk are apparent to and would be recognized by a reasonable person in the position of the invitee exercising ordinary perception, intelligence, and judgment. Bonn v. Sears, Roebuck & Co., 440 S.W.2d 526, 529 (Ky. 1969). An invitee has a right to assume the premises he has been invited to use are reasonably safe, but this does not relieve the invitee of the duty to exercise ordinary care for her own safety, nor does it entitle her to walk blindly into dangers that are obvious, known to her, or would be anticipated by one of ordinary prudence. Smith v. Smith, 441 S.W.2d 165, 166 (Ky. App. 1969) (citations omitted). In this case, the presence of the cords at issue was undoubtedly and incontrovertibly of an open and obvious nature. The cords are standard as all homes, offices, businesses and hospital rooms with electricity and telephones have numerous cords of differing types in various locations throughout such premises. Finally, due to their ubiquitous nature, cords such as these are not unreasonably dangerous.

C. McIntosh's Exception to the Open and Obvious Doctrine With Foreseeable Distractions

In Kentucky River Medical Center v McIntosh, 319 S.W. 3d 385 (Ky. 2010), a paramedic tripped over an unmarked cement curb while transporting a patient to the hospital in an emergency situation. Despite the fact the paramedic was very familiar with the hospital entrance, the Court held that the injury was foreseeable and thus the hospital was found liable to

McIntosh. In coming to this conclusion, the Court established a "focus on foreseeability in its analysis of whether or not a defendant has a duty." Id. at 390. The Court stated the fact "[t]hat harm from an open and obvious danger can sometimes be foreseeable suggests that there should be some remaining duty on the land possessor." Id. The Court went on to say "[i]f the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable". Id. at 392.

In its discussion of the open and obvious doctrine in McIntosh, the Supreme Court outlined the principles found in the *Restatement (Second) of Torts § 343A*. The Court stated:

> For many open and obvious dangers, the land possessor would have no reason to anticipate the harm, and so he would not be liable. However sometimes "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 against it." In these situations, the injury is still foreseeable, and so liability should be imposed.

McIntosh, 319 S.W. 3d at 391. (citing *Restatement (Second) of Torts § 343A*(1) cmt. f) While these modifications are imposed to prevent a court from simply labeling a hazard open and obvious and denying liability, they are also meant to alter the position of the injured party "to the extent that only under rare circumstances could a plaintiff avoid some share of the fault under comparative negligence." Id. at 392. The modifications established in McIntosh, create a heightened standard for a plaintiff to be on the lookout for her own safety by paying reasonable attention to her surroundings. Id. However, generally, even in the absence of a duty to warn as it relates to open and obvious conditions, a land owner continues to have a duty to eliminate a risk if an injury to an invitee remains foreseeable. Specifically, the Court stated "[e]ven though it will often make little sense to impose liability on land possessors for failing to warn invitees of conditions which are obvious" land owners still have a duty to "eliminate or reduce the risk

posed by unreasonable dangers." Id. at 393. The extended duty is twofold: 1) if the injury due to the open and obvious condition is foreseeable then, 2) there is a duty to eliminate unreasonable risks. The duty to eliminate the unreasonable dangers, is not impressed upon land owners without first determining the injury is foreseeable. Simply put, without foreseeability, there is no duty to remedy.

In evaluating the hospital's duty in McIntosh in relation to foreseeability of the injury, the Court specifically noted "the context in which McIntosh sustained her injury: she was transporting a critically ill patient into a hospital, in an effort to save his life" emphasizing the "dire need to rush critically ill patients through the emergency room entrance should be self evident" McIntosh, 319 S.W. 3d at 394. In these circumstances, the Court determined the hospital had reason to foresee the injury and thus, a duty to protect against it or eliminate the same.

In the case at hand, the existence of the cords is indeed an open and obvious condition. Under previous Kentucky law, this would have eliminated Cardinal Hill's duty to warn invitees of the same. Bonn v. Sears, Roebuck & Co., 440 S.W.2d 526, 528 (Ky. 1969); Johnson v. Lone Star Steakhouse & Saloon, 997 S.W.2d 490, 492 (Ky. App. 1999). However, under McIntosh the first prong of the two step test in determining the scope of Cardinal Hill's extended duty must focus on whether Ms. Shelton's injuries were foreseeable. In this instance, if Ms. Shelton's injuries were indeed foreseeable, which Appellee maintains they were not, only then would Cardinal Hill have a duty to eliminate the risk. If Ms. Shelton's injuries were not foreseeable, which Cardinal Hill certainly believes, then there is no remaining duty and thus no question of apportionment or comparative fault. With no foreseeability, Cardinal Hill is entitled to summary judgment.

II. THE COURT OF APPEALS PROPERLY ANALYZED THE FORESEEABILITY OF APPELLANT'S INJURY.

Despite the Appellants argument, the Court of Appeals did not fail to consider the foreseeability of Ms. Shelton's injuries, but rather, determined after an evaluation and discussion of the facts, that her injuries were simply not foreseeable. In reaching this decision, the panel considered Ms. Shelton's factual circumstances in comparison to those of Ms. McIntosh. In the subject case, the Court of Appeals panel reviewed the McIntosh exceptions the Appellant asserted were applicable to her circumstances. Ms. Shelton could not enter any proof of foreseeable distraction. Thus, the Court of Appeals panel rightly found the record did not support denial of summary judgment. Unlike Ms. McIntosh, Ms. Shelton was not acting under any stress or time constraints or required to conduct crucial activities. Instead she was undergoing "normal" activities. (Opinion of Kentucky Court of Appeals Reaffirming, rendered June 24, 2011) Further, the circumstance of Ms. Shelton's fall did not involve substantial necessity forcing her to encounter the cords. The Court of Appeals panel did not accept kissing her husband goodbye as an urgent necessity that would make her entanglement with the cords foreseeable to Cardinal Hill. Without substantial necessity there is no foreseeability. Thus, even if the Court of Appeals panel had discussed foreseeability at length in its second opinion, as the Appellant suggests it should have, the final result would be the same.

While the Court in McIntosh may not have outlined specific factors to consider in determining foreseeability, the rare exceptions set forth in McIntosh are nevertheless viable guidelines. Consequently the focus on the time constraints and urgency under which Ms. McIntosh was forced to encounter the open and obvious condition in determining her injury defines foreseeability. Therefore, it was proper for the Court of Appeals to consider the particular

context in this case as compared to the context of McIntosh. The Court of Appeals' reasoning is fully supported by the very different scenarios.

A. There Was No Foreseeable Distraction To Wilma Shelton.

It is important to emphasize the patients at Cardinal Hill are not being treated for acute, unstable illnesses. These patients are in rehabilitation, preparing to make the transition back to their regular lives. While that is not to say there should be no concern for these patients by their family members, the routine needs of patients at Cardinal Hill requiring the attention of a family member is not comparable to the urgent distractions of a paramedic when managing a critically ill patient. There are few reasons to suspect a family member will be so distracted in their family member's perfunctory care that they might fail to recognize and appreciate an open and obvious condition such as electrical or telephone cords. In fact, Mr. Shelton was nearing the end of his stay at Cardinal Hill having fully progressed in his rehabilitation. (R. Vol. 2 pg 184; Exhibit 1, 12:6-7) Ms. Shelton fell during her usual course of business in her routine interactions with him. The particular circumstances at hand do not support the occurrence of a foreseeable distraction resulting in an extended duty imposed upon Cardinal Hill. No concrete event diverted Ms. Shelton's attention from the well-known presence of the cords. Cardinal Hill could not foresee that a regular visitor who is intimately familiar with the premises, in no hurry, performing typical tasks and engaging in usual conduct, will fall on cords she acknowledged seeing every day for five weeks, including just before the incident occurred. Instead, Ms. Shelton should have been attentive to the open and obvious condition she so regularly encountered.

Appellant asserts her injury should have been foreseeable to Cardinal Hill because she was going about her usual course of business or completing what she deems "normal and foreseeable tasks", including kissing her husband goodbye. Analysis of foreseeability does not

focus on whether the task is foreseeable but instead whether the invitee would be distracted during the completion of that task. Whether it is foreseeable Ms. Shelton would be carrying out certain tasks is simply unrelated to the required analysis. In fact, Ms. Shelton was not in the process of completing any of her "normal and foreseeable tasks." Instead, she was simply exiting the room after having kissed her husband goodbye. Notably, Ms. Shelton did not fall in the midst of her process of kissing her husband goodbye and there is no factual basis to support she was distracted after completing this simple, routine task she had done so many times before under the same conditions.

B. It Was Not Foreseeable Wilma Shelton Would Be Made To Forget The Previously Encountered Open And Obvious Condition.

The assertion by the Appellant that she was made to forget the condition of the cords near her husband's bed is entirely unsupported by the record. There was no event that caused her to not remember the cords. There is not one instance of Ms. Shelton claiming she forgot about the cords. At no point in her deposition, even when prompted to explain why she fell on that particular day, did Ms. Shelton ever allege to have failed to remember the existence of the cords. In contrast, she expressly admitted she did indeed see the cords as she approached her husband's bed just before her fall:

> "Well, that's the only way it could have been because I was watching when I went—when I went to bend over and I saw the wires beside the bed but I didn't, you know, wasn't aware of it, I wasn't—but the only thing I can figure is it slipped down and my foot got tangled in it because I felt like somebody had me by the ankle."

(R. Vol. 2 pg 184; Exhibit 1, 24:24-25:6) Ms. Shelton went on to say:

> "I had saw the wires, yes, but I had never you know, I had never had any—never got tangled up in them…"

(R. Vol. 2 pg 184; Exhibit 1, 25:15-16) Not only is the assertion of forgetfulness unsupported by the record, it cannot be foreseeable that she would somehow be made to forget the presence of the cords. As stated above, Ms. Shelton was most familiar the layout of the room and very aware of the existence of the cords not only at Cardinal Hill but at other treatment facilities as well as she had been admitted to other hospitals on various occasions. (R. Vol. 2 pg 184; Exhibit 1, 6-10) Further, she "tried to always, [] avoid the cords", acknowledging she saw them every day. (R. Vol. 2 pg 184; Exhibit 1, 24:14-15) Based on her own admission there is not a factual basis to support a conclusion that it was foreseeable Ms. Shelton forgot the presence of the cords.

Appellant contends Ms. Shelton's situation is comparable to an illustration found in the *Restatement (Second) of Torts.* That illustration reads:

> The A Drug Store has a soda fountain on a platform raised six inches above the floor. The condition is visible and quite obvious. B, a customer, discovers the condition when she ascends the platform and sits down on a stool to buy some ice cream. When she has finished, she forgets the condition, misses her step, falls and is injured. If it's found that his could be reasonably anticipated by A, A is subject to liability to B.

According the Reporter's Notes to this section of the *Restatement*, the above referenced illustration is based on an old decision from the Supreme Court of Texas, Walgreen-Texas Co. v Shivers, 154 S.W. 2d 625 (Tex. 1941), a case later overruled. In Walgreen-Texas Co. the plaintiff stepped off a soda platform after being on the platform long enough to drink a cup of coffee. Id. 154 S.W. 2d at 627. At that time however, the Court specifically noted to novelty of raised soda platforms. "[T]his platform was a thing not in general use, and not generally known to customers at lunch and cold drink counters. The testimony shows that this platform was the only one of its kind in use in Beaumont, and that very few were in use in [Texas]. It was not a thing usually used at lunch or cold drink counters, and customers would not be expected to be

fully aware of its use or dangers in casually mounting and using the same for food or drink;..." Id. 154 S.W. 2d at 629.

Contrary to the Appellant's assertions, this illustration is easily distinguished from the subject case. Unlike the novelty of a raised soda platform in Texas in 1941, electric and telephone cords are commonly used and are encountered in a person's life regularly. In a hospital, electric cords and telephone cords are even more frequently found due to the increased need for power sources in confined spaces. Ms. Shelton admitted knowing hospitals use IVs, blood pressure monitors and telephones, all of which of course require electrical cords for power. (R. Vol. 2 pg 184; Exhibit 1, pg 6-10) Further, Ms. Shelton encountered the cords daily and acknowledged her daily awareness of the cords over a five week period. (R. Vol. 2 pg 184; Exhibit 1, pg 24:11-15) In contrast, the plaintiff in Walgreen-Texas Co. had encountered the platform on only two occasions, the first just a few hours before the subject fall and the second just a few minutes before the subject fall. Id. 154 S.W. 2d at 627.

C. There Was No Foreseeable Urgency Or Necessity For Wilma Shelton To Encounter The Open And Obvious Condition.

In McIntosh, the Supreme Court recognizes only rare circumstances in which the benefits of encountering an obvious hazard outweigh the risks of a possible injury. Under dire circumstances, like those in McIntosh, "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." Id. 319 S.W. 3d at 394. The Court of Appeals in the case at hand also specifically discussed this balancing test focusing on the language of the *Restatement (Second) of Torts § 343A*(1), which says that "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...the advantages of doing so would outweigh the apparent

risk." Kentucky case law prohibits plaintiffs from recovering under this exception without showing a context of substantial necessity or urgency causing the invitee to indeed proceed. "The examples given by both the Restatement and case law are situations in which a party was forced to encounter the hazard because of a necessity such as retaining their means of livelihood." Fuhs v Ryan, 571 S.W. 2d 627, 629 (Ky. App. 1978). The *Restatement* further illuminates this concept in Comment G:

> "[D]efendants, however, may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception and intelligence could be expected to avoid."

(*Restatement (Second) of Torts § 343A*(1) cmt. g). It can be reasonably assumed that Ms. Shelton would not fall on omnipresent cords for which she had a duty to use ordinary care to avoid.

As set forth by the Court of Appeals in this case, Ms. Shelton's desire to kiss her husband goodbye on that particular day is not a situation of substantial necessity or urgency. Being able to do so was a nicety and being unable to do so was merely an inconvenience. A kiss does not qualify as an urgent necessity under this exception and the kiss had been completed. Moreover, the cords at issue had been successfully kicked out the way, under the bed by her daughter, Ms. Crockett, in the past. (R. Vol. 2 pg 184; Exhibit 2, 12:3-5) This fact underscores that Ms. Shelton could have avoided the cords rather than proceeding to entangle herself in them. To expect landowners to foresee invitees encountering known hazards to complete tasks which are not of significant urgency is to ask them to be an insurer against any and all injuries that occur on their premises, for which the law in this state correctly does not allow. Lanier, 99 S.W. 3d at 436.

D. Foreseeability As A Duty Is A Legal Issue.

Because Ms. Shelton's injuries were not foreseeable to Cardinal Hill, there is no issue to present to the jury. In her brief, Appellant notes the Supreme Court's discussion of comparative fault: "The jury is fully capable of considering how a person's familiarity with a danger should bear upon his respective share of fault, if at all." (citing McIntosh, 319 S.W. 3d at 394). While a jury is most capable in considering the facts and apportioning fault, in order to present the case to the jury for this task, there must first be a duty, which is a question of law. "The question of duty presents an issue of law." Mullins v Commonwealth Life Ins. Co., 839 S.W. 2d 245, 248 (Ky. 1992). The McIntosh decision did not alter the open and obvious doctrine so that it is no longer a question of duty, but instead expanded a landowner's duty to include an additional inquiry as to the foreseeability of injury. The Supreme Court specifically said: "Rather, [the lower courts] must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger." McIntosh, 319 S.W. 3d at 392. Accordingly, the foreseeability analysis requires determination of the existence of a duty, a question of law to be addressed by the court. As there is no foreseeable injury in this case, there is no extended duty to Cardinal Hill and no need for a jury to address apportionment of fault.

III. THE COURT OF APPEALS HAS NARROWLY AND CONSISTENTLY APPLIED MCINTOSH.

The narrow approach in the application of McIntosh by this Court of Appeals panel is not the first of its kind. In Lucas v Gateway Community Services Organization et al., 343 S.W. 3d 341 (Ky. App. 2011), the Court of Appeals had one of its first opportunities to apply the McIntosh modified open and obvious standard. In that case, plaintiff stepped on a piece of crumbling gravel, falling to ground and severely injuring her arm. The Court of Appeals upheld the lower court's decision to grant summary judgment in favor of the defendant landowners on

two different bases. First, the record clearly showed the plaintiff was well aware of the condition of the lot, having frequented the lot on numerous occasions to pick up her children. She was admittedly aware of the fact there were both blacktop and gravel portions in the parking lot and had exercised caution in walking in those graveled areas. Lucas, 343 S.W. 3d at 345-346.

The second basis for upholding the lower court's decision in Lucas concerned the foreseeability of the injury pursuant to McIntosh. Lucas applied the element of distractibility from McIntosh in making an injury more foreseeable. Lucas 343 S.W. 3d at 346. In Lucas, the court found "[u]nlike the plaintiff in McIntosh, Lucas was not distracted by some outside force, such as rushing an ill patient into the hospital. As the court points out, Lucas was not acting under time-sensitive or stressful circumstances. Rather, she was following a friend into the parking lot that she admitted she was familiar with and that she admitted using caution to walk on when she visited the premises." Lucas 343 S.W. 3d at 346. Accordingly, the Court of Appeals panel in Lucas narrowly and correctly interpreted McIntosh and properly found there was no duty for the landholder. Similarly, in the case at hand, Ms. Shelton was well aware of the cords' presence and had no distractions or urgent business before she fell.

In Jones v Abner, 335 S.W. 3d 471 (Ky. App. 2011), the Court of Appeals once again narrowly construed McIntosh opining that the plaintiff's injuries after she slipped and fell while stepping into the bathtub were not foreseeable. Plaintiff Jones and her husband had been at staying at the defendant's hotel over a three day weekend and when she stepped into the tub for her third shower and fell. Jones, 335 S.W. 3d at 473. She sued claiming the bathtub's condition was unreasonably dangerous due to its slippery condition.

The Court of Appeals in Jones emphasized that the Supreme Court felt "it was important to stress the context in which McIntosh sustained her injury" as it "emphasized that her 'dire

need to rush critically ill patients through the emergency room entrance should be self evident'; such a distraction was unquestionably foreseeable to by the hospital..." Jones, 335 S.W. 3d at 477-478. The Court of Appeals appropriately recognized the defense of foreseeable distraction that was available to Ms. McIntosh could not be properly extended to the plaintiff Jones, who slipped while stepping into a bathtub she had encountered several times prior to her fall. "Whereas McIntosh's focus was properly and foreseeably on something other than the hazard, Jones' focus, necessarily, should have been on the hazard itself." Id. at 478. Unable to present any evidence that plaintiff Jones was distracted from her duty to act reasonably on behalf of her own safety the Court of Appeals affirmed the lower court's granting of summary judgment in favor of the landowner. Likewise, Ms. Shelton has entered no proof of being focused on an outside event foreseeably diverting her awareness from cords with which she had daily encounters. Just as Plaintiff Jones, Ms. Shelton should have been paying attention to what she was doing.

The Court of Appeals again applied McIntosh in True v Fath Bluegrass Manor Apartment, 358 S.W. 3d, 23 (Ky. App. 2011). In that case, Plaintiff and his girlfriend rented an apartment from the property owner. Upon inspecting the premises prior to moving in, the plaintiff acknowledged a loose balcony railing. After moving into the apartment, plaintiff and his girlfriend filed maintenance requests for the repair of the loose balcony. Despite repair, the balcony railing came loose again, causing the plaintiff to fall from the balcony to the ground below. Plaintiff brought suit against the property owner alleging breach of duty to repair and negligence. The trial court granted summary judgment in favor of the property manager and on appeal, the Court of Appeals applied McIntosh and Lucas. "In Lucas (citation omitted), it was stressed that there must be a reasonably foreseeable distraction that caused the plaintiff to fail to

discover an obvious condition, forget its existence, or fail to protect against the danger." True 358 S.W. 3d at 14. (citing Lucas 343 S.W. 3d at 346)

The Court of Appeals determined there was no evidence in the record to show the plaintiff was distracted from his duty to act reasonably to ensure his own safety by correctly recognizing the heightened duty set forth in McIntosh based on the plaintiff's familiarity with the location and the open and obvious condition. True 358 S.W. 3d at 15. With this reasoning, the Court of Appeals appropriately declined to apply "the exceptional circumstances described in McIntosh". Id. As in True, as well as in Ms. Shelton's case, there are no such exceptional circumstances as described in McIntosh. Ms. Shelton was well aware of the cords and she cannot show her attention was diverted from her duty to use due care with an open and obvious condition.

In Faller v Endicott-Mayflower, LLC, 359 S.W. 10 (Ky. App. 2011), a decision marked "to be published", the Court of Appeals was asked to reconsider its affirmation of the trial court's granting of summary judgment in favor of the defendant in light of McIntosh. Plaintiff Faller was a patron at a restaurant "who tripped over a threshold marked with yellow-and black-striped caution tape while leaving a restaurant following a leisurely holiday meal." Faller, 359 S.W. 10 at 15. The plaintiff had only been to the restaurant on a few occasions but even so, in reaffirming its original decision, the Court of Appeals, made a strict factual distinction between that set of facts and those presented in McIntosh. Plaintiff Faller was exiting a restaurant at her leisure after a casual meal. Ms. McIntosh was rushing into a hospital to emergently treat a critically ill patient. Plaintiff Rhoda Faller failed to pay attention to where she was stepping as she was looking back to a friend who was following her. Ms. McIntosh was giving all her attention to the lifesaving care of the patient in her care. The Court of Appeals determined "[t]he

factual distinctions between McIntosh and Rhoda [the plaintiff] are too great for us to consider Rhoda's fall foreseeable." Faller, 359 S.W. 10 at 15.

In light of our courts' consistent narrow application of McIntosh based on the precursors of falls, the Court of Appeals decision in the case at hand should stand. Like all of the plaintiffs discussed above, the facts in the record surrounding the Appellant's fall are distinctly different from those in McIntosh. In each of these cases, the Court of Appeals refused to extend and expand the exceptions clearly delineated in McIntosh to factual circumstances so dissimilar. It would only serve to fragment and confuse the law to interpret the Supreme Court's decision more broadly.

A. The Court Of Appeal's Ruling In Webb v Dick's Sporting Goods Is A Misapplication Of McIntosh.

In its review of Webb v Dick's Sporting Goods, No 2010-CA-001194-MR (Ky. App. 2011), the Court of Appeals failed to correctly apply the principles established in McIntosh and its progeny. The Court of Appeals noted that "trial courts 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.'" Webb at 7. (citing McIntosh 319 S.W. 3d at 392) Under the circumstances in Webb, the Court of Appeals did not limit the application of McIntosh to emergent scenarios. Instead, it expanded McIntosh to plaintiffs who recognize puddles of water on the floor, fail to change their route, and voluntarily encounter the risk so as to not be delayed in their shopping. As a consequence, Webb's application of the exceptions by the Court of Appeals could effectively abolish the open and obvious doctrine, a step the Supreme Court has not been willing to take as yet.

The application of McIntosh in Webb also goes against the previous applications of the doctrine by the Court of Appeals. The prior decisions focus on a limited distinction between the facts in McIntosh and those of subsequent plaintiffs. In Webb, the panel did not properly apply the facts of the record to the standard. Ms. Webb was familiar with the defendant's store, having been there before. She recognized and acknowledged the puddles on the tile floor. In fact, as she navigated the wet floor, she was paying close attention to where she was stepping. And finally, had she waited only a few seconds for other patrons to pass, she could have entered the store without encountering the hazard. Webb outlined the three exceptions in its decision whereby "a trial court is required to determine whether the landowner met its duty to protect an invitee in all circumstances where it is foreseeable that the invitee might: be distracted, realize there is a danger but forget about the danger, or choose to ignore the danger because the benefit outweighs the risk." Id. at 8. Yet, had the Webb panel narrowly applied McIntosh as its predecessor panels, the decision would have resulted in a decision affirming the lower court's granting of summary judgment in favor of Dick's Sporting Goods, as the facts do not lead to a foreseeable injury.

B. The Court of Appeals Ruling Reaffirming Summary Judgment Correctly Considered McIntosh

The Court of Appeals properly applied the exceptions to the "open and obvious" doctrine carved out by the Supreme Court in McIntosh. The Opinion of Kentucky Court of Appeals Reaffirming, rendered June 24, 2011, analyzes the unique facts surrounding the Appellant's fall and narrowly tailors the three exceptions. Ms. Shelton's testimony unequivocally establishes: 1) she knew of the presence of the cords; 2) she was actively focused on the cords without distraction; and 3) there was no substantial necessity or urgency that required her to encounter herself in the cords. Consequently, it was correct to find there to be no foreseeable injury therefore extinguishing Cardinal Hill's duty. As there is no duty, Appellant's call for a jury to

apportion fault is unwarranted. Without a breach of duty, the Appellant's claim of negligence fails as a matter of law and summary judgment in favor of Cardinal Hill is appropriate.

The Plaintiff cannot show affirmative evidence of a foreseeable distraction. In its review of the Court of Appeals' interpretations of McIntosh in the case at hand and in Webb v Dick's Sporting Goods , the Appellee maintains that a narrow reading requiring a foreseeable distraction is not only consistent with the majority of the previous interpretations by the Court of Appeals, but also is necessary to preserve the open and obvious doctrine. The context of falls must continue to be considered as to significant novel distractions not the perfunctory task at the time of the fall. Had the Supreme Court meant to entirely abolish the doctrine, the McIntosh decision would have done so by finding any diversion foreseeable, but it did not. Allowing for a too broad application only serves to fragment and confuse the law.

CONCLUSION

For the forgoing reasons, Cardinal Hill respectfully requests this honorable Court enter an Order affirming the Opinion of the Kentucky Court of Appeals thereby dismissing this matter in favor of Cardinal Hill by Summary Judgment.

Respectfully Submitted by,

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