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MIAMI MANAGEMENT COMPANY, INC. APPELLANT

v. On Discretionary Review from the Kentucky Court of Appeals
Case No. 2011-CA-616

Appeal from Jessamine Circuit Court
Case No. 09-CI-907

ELGAN BRUNER and
DEANNA BRUNER APPELLEES

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 ADMINISTRATION

JEFF W. ADAMSON
PAUL A. CASI, II, P.S.C.
440 South Seventh Street, Ste. 100
(502) 584-0404

COUNSEL FOR *AMICUS CURIAE*
KENTUCKY JUSTICE ADMINISTRATION

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2013, ten (10) originals of this brief were served via U.S. express mail 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: Hon. C. Hunter Daugherty, Judge, Jessamine Circuit Court ,101 N. Main St., Nicholasville, KY 40356; R. Scott Wilder, 1222-1/2 N. Main St., Suite 2, London, KY 40741; Christopher Douglas, 1222-1/2 N. Main St., Suite 3, London, KY 40741; John William Walters, Melissa Thompson, Kellie Marie Collins, Golden & Waters, PLLC, Corporate Plaza, 771 Corporate Drive, Suite 905, Lexington, KY 40503.

JEFF W. ADAMSON

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION.....1

STATEMENT OF CASE.....1

ARGUMENT.....2

A. THE ABANDONMENT OF THE NO-DUTY, NON-LIABILITY DOCTRINES OF ASSUMPTION OF RISK, CONTRIBUTORY NEGLIGENCE, AND OBVIOUSNESS OF HAZARD.....2

1. TRADITIONAL DUTY OWED BY LAND POSSESSORS TO BUSINESS INVITEES.....2

Kentucky River Medical Center v. McIntosh, 319 S.W. 3d 385, 388 (Ky. 2010).....2

Perry v. Williamson, 824 S.W. 2d 869, 875 (Ky. 1992).....2

Hendricks v. Covington & Cincinnati Bridge Co., 6 S.W. 2d 1050, 1052 (Ky. 1928).....2

Lyle v. Megerle, 109 S.W. 2d 598, 600-601 (Ky. 1937).....3

2. THE NO-DUTY, NON-LIABILITY DOCTRINES OF ASSUMPTION OF RISK, CONTRIBUTORY NEGLIGENCE AND OPEN AND OBVIOUS HAZARD.....3

Fisher v. Hardesty, 252 S.W. 2d 877, 879 (Ky. 1952).....3

Seelbach, Inc. v. Mellman, 170 S.W. 2d 18 (Ky. 1943).....3

Pathways, Inc. v. Hammons, 113 S.W. 3d 85 (Ky. 2003).....4

Schreiner v. Humana, Inc., 625 S.W. 2d 580, 581 (Ky. 1981).....4

Fisher v. Hardesty, 252 S.W. 2d 877 (Ky. 1952).....4

3. ABANDONMENT OF ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE DOCTRINES IN FAVOR OF "PURE" COMPARATIVE FAULT.....5

Parker v. Redden, 421 S.W. 2d 586 (Ky.1967).....5

Hilen v. Hays, 673 S.W. 2d 713 (Ky. 1984).....5

Kentucky River Medical Center v. McIntosh, 319 S.W. 3d 319 (Ky. 2010).....5

Harrison v. Taylor, 768 P.2d 1321, 1325 (Idaho 1989).....5

Houchin v. Willow Ave. Realty Co., 453 S.W. 2d 560, 563 (Ky. 1970).....5

Montgomery Elevator Co. v. McCullough, 676 S.W. 2d 776, 780-781 (Ky. 1984).....5

KRS §411.182(1).....5

4. THE ADOPTION OF RESTATEMENT (SECOND) OF TORTS

§343A (1965) AND EXCEPTIONS TO THE RULE OF NON-LIABILITY FOR POSSESSORS OF LAND.....5
Bonn v. Sears Roebuck & Co., 440 S.W. 2d 526 (Ky. 1969).....5
Bonn v. Sears Roebuck & Co., 440 S.W. 2d 529 (Ky. 1969).....6
Restatement of the Law of Torts, 2d, Sections 343 and 343A.....6
Prosser on Torts, 3d Ed. (1964) Sec. 61, pp. 402-405).....6
Bonn v. Sears Roebuck & Co., 440 S.W. 2d 530 (Ky. 1969).....6

5. **THE OPEN AND OBVIOUS DOCTRINE WAS THE FINAL NO-DUTY DOCTRINE LEFT STANDING**.....6
Standard Oil Company v. Manis, 433 S.W. 2d 856 (Ky. 1968).....6
Standard Oil Company v. Manis, 433 S.W. 2d 858 (Ky. 1968).....7
Standard Oil Company v. Manis, 433 S.W. 2d 859 (Ky. 1968).....7
Wallingford v. Kroger, 761 S.W. 2d 621 (Ky. App. 1989).....7
Horne v. Precision Cars of Lexington, Inc., 170 S.W. 3d 364 (Ky. 2005).....7
Rogers v. Prof'l Golfers Ass'n of Am., 28 S.W. 3d 869, 872 (Ky. App. 2000).....7
Johnson v. Lone Star Steakhouse and Saloon of Ky., Inc., 997 S.W. 2d 490 (Ky. App. 1999).....7
Wal-Mart Discount City v. Meyers, 738 S.W. 2d 841 (Ky. App. 1987).....7
Fisher v. Hardesty, 252 S.W. 2d 844 (Ky. 1952).....8
Fisher v. Hardesty, 252 S.W. 2d 845 (Ky. 1952).....8
Hilen v. Hays, Ky. 673 S.W. 2d 713 (1984).....8
Standard Oil Co. v. Manis, Ky., 433 S.W. 2d 856 (1968).....8
Corbin Motor Lodge v. Combs, 740 S.W. 2d 944 (Ky. 1987).....8
Standard Oil Co. v. Manis, Ky., 433 S.W. 2d 946 (1968).....8
Corbin Motor Lodge v. Combs, 740 S.W. 2d 944 (Ky. 1987).....9

6. ***KENTUCKY RIVER MEDICAL CENTER V. MCINTOSH*: THE FINAL NO-DUTY DOCTRINE OF OBVIOUSNESS OF HAZARD IS ABOLISHED IN KENTUCKY AND THE DUTY OF FORESEEABILITY BECOMES THE LAW IN ALL PREMISES CASES**.....9
Kentucky River Medical Center v. McIntosh, 319 S.W. 3d 385, 388 (Ky. 2010).....9
Estep v. B.F. Saul Real Estate Investment Trust, 843 S.W.2d 911 (Ky. App. 1992).....9
PNC Bank, Kentucky, Inc. v. Green, 30 S.W.3d 185 (Ky. 2000)..9
Kentucky River Medical Center v. McIntosh, 319 S.W. 3d 389 (Ky. 2010).....9
Corbin Motor Lodge v. Combs, 740 S.W. 2d 944 (Ky. 1987).....9
Restatement, Second, Torts § 343(A)(1).....10
Kentucky River Medical Center v. McIntosh, 319 S.W. 3d 391 (Ky. 2010).....10

Kentucky River Medical Center v. McIntosh, 319 S.W. 3d 392 (Ky. 2010).....10, 11
Tharp v. Bunge Corp., 641 So. 2d 20, 25 (Miss. 1994).....10
Klopp v. Wackenhut Corp., 824 P. 2d 293 (N.M. 1992).....10
Harrison v. Taylor, 768 P. 2d 1321 (Idaho 1989).....10, 11
Hale v. Beckstead, 116 P. 3d 263 (Utah 2005).....11
Cupo v. Karfunkel, 767 N.Y.S. 2d 40 (2d Dep't 2003).....11
O'Donnell v. Casper, 696 P. 2d 1278 (Wyo. 1985).....11
Woolston v. Wells, 687 P. 2d 144 (Or. 1984).....11
Parker v. Highland Park, Inc., 565 S.W. 2d 512 (Tex. 1978).....11
Schmidt v. Intercontinental Hotel Group Resources, 850 F.Supp.2d 663 (E.D. Ky. 2012).....11
Faller v. Endicott-Mayflower, LLC, 359 S.W. 3d 10 (Ky. Ct. App.).....12
Shelton v. Kentucky Easter Seals Society, Inc., 2011 WL 2496182 (Ky. Ct. App., June 24, 2011).....12
Webb v. Dick's Sporting Goods, 2011 WL 3362217 (Ky. Ct. App., August 5, 2011).....13
Lahutsky v. Wagner Moving & Storage, Inc., 2011 WL 5597330 (W.D. Ky. 2011).....13
Wright v. Pilot Travel Centers, 2011 WL 2457444 (W.D. Ky. 2011).....13
Powers v. Tirupathi Hospitality, LLC, 2011 WL 251001 *4 (E.D. Ky. 2011).....13

B. THE COURT OF APPEALS CORRECTLY APPLIED MCINTOSH.....14
Kentucky River Medical Center v. McIntosh, 319 S.W. 3d 393 (Ky. 2010).....14, 15

CONCLUSION.....14
Hilen v. Hays, Ky. 673 S.W. 2d 713 (1984).....15
KRS 411.182(1).....15
Corbin Motor Lodge v. Combs, 740 S.W. 2d 944 (Ky. 1987).....15

I. INTRODUCTION

The Kentucky Justice Association moves pursuant to CR 76.12(7) for leave to file a brief as *Amicus Curiae* in support of the Appellees' position in this case.

Founded in 1954, the Kentucky Justice Association (formerly Kentucky Academy of Trial Attorneys) is a non-profit organization of approximately 1200 members dedicated to protecting the health and safety of Kentuckians, enhancing consumer protection, and preserving every citizen's right to trial by jury. This case is of substantial interest to the Kentucky Justice Association, its members, and the consumers it represents.

The issue posed is whether this Court in *McIntosh* abolished the open and obvious doctrine as a complete bar to recovery and imposed a duty of reasonable care to prevent foreseeable harm to others upon land possessors for *all* premises liability cases, including cases involving slips and falls on snow and ice. Appellant, Miami Management Company, Inc. ("Miami Management"), requests that the Court make exception and resurrect the no-duty open and obvious doctrine for cases involving such naturally occurring hazards.

Amicus Curiae submits that the holding in *McIntosh* was the final step in a long process of abandoning the no-duty, non-liability doctrines of assumption of risk, contributory negligence and obviousness of the hazard to make way for an earnest and doctrinally consistent application of comparative fault principles to premises liability cases. *McIntosh* abolished the last one – the open and obvious doctrine – and left no doubt that it meant to abolish this rule, as it had the other two, once and for all. Whether a hazard of any kind is obvious is one of many factors for the jury to consider in assigning fault among the parties. The Court of Appeals in this case was correct in holding as such.

Because some lower courts have attempted to carve out exceptions to the *McIntosh* holding where none exist, this Court should clarify that the alleged obviousness

of a hazard no longer serves to negate the duty owed by land possessors, including in cases where the harm arises from naturally occurring hazards such snow and ice.

WHEREFORE, the Kentucky Justice Association respectfully requests that this Court grant its motion for leave to file the *amicus curiae* brief tendered with this motion.

II. STATEMENT OF CASE

On January 27, 2009, the Appellee, Elgan Bruner ("Bruner"), traveled to Wendy's Restaurant in Nicholasville, Kentucky, one of over 150 throughout the Commonwealth of Kentucky, to meet his wife, Co-Appellee, Deana Bruner, for lunch. Upon arrival in the parking lot, Bruner noticed that the parking lot had been cleared of snow, stating in his deposition that he observed that the snow had been pushed and that he assumed it was safe to exit his vehicle and traverse the parking lot. Immediately upon doing so, he slipped and fell on ice which resulted in his injuries. Another patron had also fallen in the same parking lot earlier that day. Appellee's wife joined in the suit for purposes of her loss of consortium claim.

III. ARGUMENT

A. THE ABANDONMENT OF THE NO-DUTY, NON-LIABILITY DOCTRINES OF ASSUMPTION OF RISK, CONTRIBUTORY NEGLIGENCE, AND OBVIOUSNESS OF HAZARD

1. Traditional Duty Owed by Land Possessors to Business Invitees

Under Kentucky law, land possessors generally "owe a duty to invitees to discover unreasonably dangerous conditions on the land and to either correct them or warn of them." *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385, 388 (Ky. 2010) (*citing Perry v. Williamson*, 824 S.W.2d 869, 875 (Ky. 1992)).

This has long been rule even in cases involving naturally occurring outdoor hazards. *See Hendricks v. Covington & Cincinnati Bridge Co.*, 6 S.W.2d 1050, 1052 (Ky. 1928) (If a premises owner "knew, or by the exercise of ordinary care could have known, of the presence of [a] large area of ice upon the footway [of the premises], where

pedestrians were expected to walk and upon which [plaintiff] fell, and took no steps to sand it, or otherwise to render it reasonably safe for the traveler, then it failed to discharge that duty which an owner of premises owes an invitee."); *See also*, *Lyle v. Megerle*, 109 S.W.2d 598, 600-601 (Ky. 1937) (holding in a slip and fall on melted snow and slush that "[t]he duty, in respect of maintaining the premises in a safe condition, is an active, affirmative, and positive one" and "the jury should [be] allowed to determine whether the condition was reasonably safe for the defendant's customers, and the defendant knew or ought to have known it; that is, whether he exercised ordinary care, and, as well, whether the plaintiff observed due diligence.").

2. The No-Duty, Non-Liability Doctrines of Assumption of Risk, Contributory Negligence and Open and Obvious Hazard

However, over time, exceptions to a land possessor's duty have developed under the no-duty, non-liability doctrines of assumption of risk, contributory negligence and obviousness of the hazard, which have all been used to negate the traditional duty a land possessor owed to invitees in the event the rule applied. *See, e.g.*, *Fisher v. Hardesty*, 252 S.W.2d 877, 879 (Ky. 1952), (involving a slip and fall on ice in the entranceway of a store, the court held that "[t]here is no duty to warn the invitee of any defect or danger which is well-known to the invitee as to the owner or occupant, or which is obvious or which should be observed by the invitee in the exercise of ordinary care."); *Seelbach, Inc. v. Mellman*, 170 S.W.2d 18 (Ky. 1943) (plaintiff's claim not barred by assumption of risk, even though plaintiff knew of the hazardous condition on 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).

The no-duty, non-liability doctrines often forced courts to conflate separate and distinct elements of negligence – duty and breach thereof – when issues of fact existed as to whether these doctrines applied to negate the land possessor's duty. As such, a plaintiff

was required to not only prove that he was injured as a proximate result of encountering a condition on the premises involving an unreasonable risk of harm, but that, as part of his case, the land possessor *owed him a duty* to take reasonable precautions to warn him or protect him from such danger.

Under fundamental negligence principles, duty, the first element of any negligence action, should present questions of law for judges *alone* to decide, while disputed issues of fault associated with the breach of that duty and consequent injury typically fall within the province of the jury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003). The no-duty, non-liability doctrines were too often determined, however, on a case-by-case basis – with judges sometimes resolving factual issues associated with these defenses in an effort to determine whether the land possessor had no duty and other times passing the questions of duty and breach onto juries.

In *Schreiner v. Humana, Inc.*, 625 S.W.2d 580 (Ky. 1981), this Court recognized that Kentucky courts "have never held that all natural conditions outdoors are equally apparent to landowners and invitees. On the contrary, whether a natural hazard like ice or snow is obvious depends upon the unique facts of each case." *Id.* at 581; *See also*, *Fisher v. Hardesty*, 252 S.W.2d 877 (Ky. 1952) ("Ordinarily, the question whether the injury was caused solely by the defendant's negligence, or was contributed to by plaintiff should be left to the jury, but, where there is no conflict of evidence as to the manner of the injury, and when the facts show unmistakably that the injury resulted from an act of the plaintiff, which in law is in itself negligence, the court should not submit the question to the jury."). While implicitly accepting this atypical application of negligence principles in premises cases, liability has undoubtedly been summarily resolved by courts in the past when juries would have been better suited to decide the matter.

3. Abandonment of Assumption of Risk and Contributory Negligence Doctrines in Favor of "Pure" Comparative Fault

As Kentucky courts began to turn away from the no-duty, non-liability doctrines in 1967 with the abandonment of the assumption of risk in *Parker v. Redden,* 421 S.W.2d 586 (Ky. 1967) and with the judicial adoption of a "pure" form of comparative fault in 1984 in *Hilen v. Hays,* 673 S.W.2d 713 (Ky. 1984). As courts did so, the application of the last remaining doctrine – obviousness of hazard – became increasingly unwieldy. *See McIntosh,* 319 S.W.3d at 389 (the conflict between the no-duty doctrines and fundamental negligence principles mattered little until the adoption of comparative fault because "it was irrelevant whether an open and obvious danger 'excused a land possessor's duty to an invitee, or simply insulated the possessor from liability' by virtue of the plaintiff's contributory negligence in avoiding his own injury. 'In either event, the injured invitee could not recover.'") (*citing Harrison v. Taylor*, 768 P.2d 1321, 1325 (Idaho 1989).

This doctrinal dilemma was especially worth noting given that the Court in *Hilen* applied its holding to all negligence cases, including premises liability cases. *See Houchin v. Willow Ave. Realty Co.*, 453 S.W.2d 560, 563 (Ky. 1970) (overruled by *Hilen*) (a premises liability case which considered the "hazard and its apparent nature" within the confines of the contributory negligence doctrine) and concurrently applied it to the absolute "patent danger" defense products liability cases in *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776, 780-781 (Ky. 1984).

In 1988, the legislature codified pure comparative fault to abandon contributory negligence as a bar to a claimant's recovery in all tort actions. *See* KRS §411.182(1).

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

Kentucky courts adopted Section 343A of the Second Restatement of Torts and its comments in *Bonn v. Sears Roebuck & Co.*, 440 S.W.2d 526 (Ky. 1969), which created

exceptions to the rule that a land possessor will not be liable for open and obvious dangers and underscored foreseeability as the basis for a landowner's duty to invitees:

> § 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 obviouness.
>
> (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.

Bonn noted that "the term 'obvious' means that both the condition and the risk are apparent to and would be recognized by a reasonable man in the position of the visitor exercising ordinary perception, intelligence and judgment." *Id.* at 529. (*citing* Restatement of the Law of Torts, 2d, Sections 343 and 343A. and Prosser on Torts, 3d Ed. (1964) Sec. 61, pp. 402-405). The *Bonn* court further cautioned courts in granting summary judgment in negligence cases, because determination of the issue of fact involved in these cases depends upon the application of the standard of care of an ordinarily prudent individual. *Id.* at 530.

5. The Open and Obvious Doctrine Was the Final No-Duty Doctrine Left Standing

The application of the no-duty doctrine of obviousness of hazard persisted as exceptions to the harsh rule developed, most notably in premises cases involving natural outdoor hazards such as snow and ice. In *Standard Oil Company v. Manis*, 433 S.W.2d 856 (Ky. 1968), the court acknowledged the general rule that land possessors have a duty to maintain their "premises in a reasonably safe condition for use in a manner consistent with the purpose of invitation, or at least not to lead them into a dangerous trap or to expose them to an unreasonable risk[,]" but affirmed that "[n]atural outdoor hazards

which are as obvious to an invitee as to the owner of the premises do not constitute unreasonable risks to the former which the landowner has a duty to remove or warn against." *Id.* at 858. The Court further held:

> There was no duty on appellant to stay the elements or make this walkway absolately (sic) safe. Nor was there a duty to warn appellee that the obvious natural conditions may have created a risk. If a 'glare of ice' existed on the platform, whatever hazard it constituted was as apparent to appellee as it was to appellant. We are unable to find a breach of duty by the latter.

Id. at 859.

After *Bonn* and *Manis*, Kentucky courts attempted to apply the open and obvious doctrine in premises cases, including matters involving naturally occurring hazards, consistent with both *Bonn's* Section 343A and the harsh, so-called *Manis* rule. *See, e.g.*, exceptions applied in *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) and *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); *See* exceptions not applied in *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); *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 comparative fault principles of *Hilen* settled into Kentucky jurisprudence, however, the courts began to express concern about the doctrinal conflict inherent in the application of the *Manis's* harsh open and obvious rule in the context of comparative fault. For instance, in *Wal-Mart Discount City v. Meyers*, 738 S.W.2d 841 (Ky. App.

1987) (discretionary review denied), the Kentucky Court of Appeals recognized the need to apply *Hilen's* comparative fault principles to slip and fall cases. In *Meyers*, the plaintiff was injured when he slipped and fell on what he thought was ice on a cold day in a large vestibule area of a discount store. The defendant appealed from a denial of its directed verdict and argued that prior decisions, including *Fisher*, *supra*, support a directed verdict. *Id.* at 844.

The court rejected the application of *Fisher* and other premises liability precedent in favor of the application of *Hilen's* comparative fault principles. "[W]e note that given this jurisdiction's adoption of a pure form of comparative negligence, the *Curtis* and *Fisher* decisions have obviously lost much, if not all, of their viability as controlling precedents." *Id.* at 844. The fact the slip and fall occurred on snow and ice, which was known to the plaintiff, did not negate the duty of the land possessor to maintain its premises in a reasonably safe condition. *Id.* at 845.

That same year, and in the same month as it denied discretionary review in *Meyers*, this Court in *Corbin Motor Lodge v. Combs*, 740 S.W.2d 944 (Ky. 1987) gave deference to arguments being made in favor of abandoning the doctrine altogether in premises cases but in the end applied *Manis*. In *Corbin Motor Lodge,* the plaintiff had been driving on Interstate 75 when a snowstorm caused the closure of the road. Plaintiff entered the restaurant of the Corbin Motor Lodge over a sidewalk which, according to his testimony, he knew was very slick. Upon leaving the restaurant, he slipped on the same slick sidewalk. While applying *Manis*, the Court cautioned:

> There are persuasive considerations which favor the rule enunciated in *Standard Oil Company v. Manis*, *supra*. There are also some reasonable arguments for a different ruling. We do not think the law in this area, as it exists today, reaches an absurd result or that a change in the present law is compelled in order to avoid grave injustices. Unless the need to change the law is compelling, the majority of this court is of the opinion that stability in the law is of sufficient importance to require that we not

> overturn established precedent which itself is based upon a reasonable premise.

Id. at 946.

In their dissent, Justices Lambert and Leibson, disagreed and found the need to settle this duty or no-duty question for all premises cases to be as compelling as ever:

> The law should require all persons to exercise ordinary care for the safety of all other persons who might foreseeably be injured by their acts or omissions. This rule has been widely applied in our law and expressly adopted in a number of our decisions. In this case, however, the majority has made an exception and held that the landowner owes no duty. Thus, any further inquiry is foreclosed. If the "duty" barrier were removed, the trier of fact would be free to consider the issues which should govern liability, i.e. whether the defendant was negligent and, if so, whether his negligence was a substantial factor in causing the injuries and damages. There can be no justification of automatically shielding a party from liability because of status without any inquiry into the care exercised by him.

Id. at 947.

6. *Kentucky River Medical Center v. McIntosh*: The Final No-Duty Doctrine of Obviousness of Hazard is Abolished in Kentucky and the Duty of Foreseeability Becomes the Law in All Premises Cases.

While the courts spent the next two decades tinkering with the application of open and obvious doctrine in natural hazard cases and imposing more specific standards upon land possessors to address such hazards as snow and ice, especially when such duties were voluntarily assumed (*see, e.g. Estep v. B.F. Saul Real Estate Investment Trust*, 843 S.W.2d 911 (Ky. App. 1992) and *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d 185 (Ky. 2000)), it was not until *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010) that this Court squarely confronted the conflict between the traditional open and obvious doctrine and comparative fault in premises liability cases; abandoned the last no-duty doctrine; and placed the focus where the *Corbin Motor Lodge* dissent believed it belonged all along: on the foreseeability of harm.

In *McIntosh*, the Court noted that the trend among the states is to reject the traditional rule that an open and obvious condition precludes the plaintiff from any possibility of recovery, and to adopt an approach which allows "the jury to evaluate the comparative fault of the parties, typical in modern negligence cases." *Id.* at 389.

Relying upon the Restatement, Second, Torts § 343(A)(1), adopted in *Bonn*, which absolves the landowner from liability in open and obvious situations "unless the possessor should anticipate the harm despite such knowledge [by the plaintiff] or obviousness" to the plaintiff, the Court held foreseeability the key consideration at the outset of all premises liability cases. If the risk of harm is foreseeable, then a jury should resolve remaining disputed facts associated with the land possessor's negligence in failing to prevent or warn against the harm and the claimant's negligence in traversing an open and known hazard.

McIntosh further 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.

> 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.

Id. at 391.

McIntosh went on to note that abolition of the open and obvious doctrine "makes good policy sense." *Id.* at 392. *McIntosh* adopted the Mississippi approach, 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); *See also*, *Klopp v. Wackenhut Corp.*, 824 P.2d 293 (N.M. 1992) ("[a] risk is not made reasonable simply because it is made open and obvious to persons exercising ordinary care."); *Harrison v.*

Taylor, 768 P.2d 1321 (Idaho 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*, 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*, 687 P.2d 144 (Or. 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, 319 S.W.3d at 392 (emphasis added).

Appellants request the Court to resurrect the open and obvious doctrine for use in premises cases involving naturally occurring outdoor hazards, including snow and ice cases. However, nothing in the plain language of *McIntosh* carves out such an exception. Under *McIntosh*, the reasonableness of an actor's conduct must be determined in *all* circumstances under the principles of comparative fault. As in all other negligence actions, the question of negligence and breach of duty on the part of the land possessor and the question of a plaintiff's voluntary exposure to a known hazard, whether naturally occurring, man-made or a foreign substance, is placed where it rightfully belongs, in the hands of a jury.

While some lower courts have attempted to carve out exceptions to the *McIntosh* holding, the federal courts have understood *McIntosh's* embrace of comparative fault principles when sitting in diversity over premises liability cases. For instance, in *Schmidt v. Intercontinental Hotel Group Resources*, 850 F.Supp.2d 663 (E.D. Ky. 2012), a premises case involving a slip and fall on a patch of ice on a hotel sidewalk, the Eastern

District of Kentucky held that under *McIntosh* foreseeability may exist "when 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.'" *Id.* at 670. Moreover, fault may also lie "if the land possessor expects 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.* The jury may blame [the Plaintiff] for some or all of the event, but it is the jury that must make the assessement. *Id.* at 671.

In *Schmidt*, the Eastern District of Kentucky applied the second § 343A exception and found genuine issues of material fact precluding summary judgment. Quoting from the Commentary, the Court further noted:

> In determining whether the possessor of land should expect harm to invitees notwithstanding the known or obvious character of the danger, the fact that premises have been held open to the visitor, and that he has been invited to use them, is always a factor to be considered, as offering some assurance to the invitee that the place has been prepared for his reception, and that reasonable care has been used to make it safe.

Restatement (Second) of Torts § 343A, cmt. G.

Specifically, the Eastern District held it was for a jury to determine if "the hotel knew well the risk and sent [Plaintiff] on a path that assured she would have to traverse the risk (or figure out on her own a different path)." *Id.*

The *Schmidt* court also rejected two Post-*McIntosh* cases which interpreted the *McIntosh* abolishment of the open and obvious doctrine narrowly and granted summary judgment on the grounds of the obviousness of the hazard – *Faller v. Endicott-Mayflower, LLC*, 359 S.W.3d 10 (Ky.Ct.App. 2011) and *Shelton v. Kentucky Easter Seals Society, Inc.*, 2011 WL 2496182 (Ky. Ct. App., June 24, 2011), the Court found *McIntosh*

to apply generally to all premises liability cases. Quoting *Webb v. Dick's Sporting Goods*, 2011 WL 3362217 (Ky. Ct. App., August 5, 2011):

> Based on our reading of *McIntosh*, a trial court is required to determine whether the landowner met its duty to protect the invitee in all circumstances where it is foreseeable that the invitee might: be distracted; realize there is a danger but forget about that danger; or choose to ignore the danger because the benefit outweighs the risk.

Id. at 672. *See* other federal courts apply *McIntosh* broadly, *Lahutsky v. Wagner Moving & Storage, Inc.*, 2011 WL 5597330 (W.D. Ky. 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. 2011) (denying summary judgment in light of *McIntosh* despite of obviousness of liquid on store floor); *Powers v. Tirupathi Hospitality, LLC*, 2011 WL 251001 *4 (E.D. Ky. 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.").[1]

B. THE COURT OF APPEALS CORRECTLY APPLIED *MCINTOSH*

Bruner slipped and fell on a patch of ice in a parking lot that had been plowed hours earlier. Bruner contends the land possessor breached its duty of reasonable care to prevent foreseeable harm to others. Miami Management claims that Bruner knew of the snowy and icy conditions when he entered the parking lot and should have been aware that the parking lot was hazardous. Miami Management further asserts that the Court should apply an absolute open and obvious defense to snow and ice cases as they are distinct from other premises liability cases.

[1] As Bruner correctly notes in his Response to the Motion for Discretionary Review, since McIntosh, the Kentucky Court of Appeals and Kentucky Federal Courts have issued over twenty (20) premises liability opinions, both published and unpublished, with about one-third of those cases involving naturally occurring outdoor hazards. In each instance, the courts used McIntosh in analyzing whether or not summary judgment was appropriate. *See* Bruner's Response to Motion for Discretionary Review, page. 1.

Whether the ice was open and obvious is a fact question. The real question is foreseeability; if the ice was open and obvious, Miami Management may still have reasonably foreseen that Plaintiff would fall. In fact, the record here includes sufficient evidence to conclude that Bruner's fall was foreseeable, including evidence that a person had fallen in the parking lot prior to Bruner's fall. The Court of Appeals correctly held that, under *McIntosh*, the jury must sort out these kinds of facts and related questions.

As this Court in *McIntosh* noted, while it may in some cases "make little sense to impose liability on land possessors for failing to warn invitees of conditions which are obvious, it makes a great deal of sense to impose liability on land possessors for failing to *eliminate or reduce the risk* posed by unreasonable dangers." *McIntosh*, 319 S.W.3d at 393.

Miami Management owed a duty to Bruner, given that his injury was foreseeable. Bruner, in turn, had a duty to act reasonably to ensure his own safety, heightened by the arguably open and obvious nature of the danger of the natural occurring hazard of snow and ice on the day of his fall. Thus, the Court of Appeals was correct in holding that there were genuine issues of material fact with regard to comparative fault that only a jury can resolve.

IV. CONCLUSION

Gone are the days when an alleged open and obvious hazard bars a plaintiff's recovery notwithstanding the negligent conduct of the defendant. Adoption of a comparative negligence standard in 1984 in *Hilen* and its codification under KRS 411.182(1) in 1988 manifests a clear judicial and legislative intention to retreat from the inflexible and unforgiving no-duty, non-liability doctrines of assumption of risk, contributory negligence and obviousness of the hazard. This Court held in *McIntosh* that the open and obvious doctrine no longer negates a land possessor's duty to keep its premises in a reasonably safe condition and that the obviousness of *any* hazard – whether

it be man-made, naturally made or the presence of a foreign substance – may be considered by the trier of fact to determine the plaintiff's percentage of negligence.

Miami Management asserts that *McIntosh* should be read narrowly to abolish the open and obvious danger doctrine only as to human-created conditions and not in the context of naturally occurring outdoor hazards on business premises, such as snow and ice. The Court in *McIntosh* places no such limitation on its holding.

Wendy's is a modern restaurant franchise with over 150 locations throughout the Commonwealth of Kentucky. The public is invited to enter and dine at the restaurant at all times, night and day, and rain, snow, ice or shine. As Justice Lambert noted in his *Corbin Motor Lodge* dissent, "[c]onsidering the availability of snow and ice removal equipment and the reasonable expectations of patrons entering the business premises, it is not unreasonable to require such a business establishment to exercise ordinary care for the safety of patrons on a sidewalk in front of the building. To hold this because the hazard was as obvious to [the Plaintiff] as it was to the restaurant management is not a sufficient reason to deny [Plaintiff] an opportunity to prove negligence. The management had at its disposal the means to remedy or warn against the hazard. [Plaintiff] did not." *Id.* at 947.

This observation rang true then and rings even more true today.

Respectfully submitted,

PAUL A. CASI, II
JEFF W. ADAMSON
PAUL A. CASI, II, P.S.C.
440 South Seventh Street, Suite 100
Louisville, Kentucky 40202
(502) 584-0404

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