



**COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2012-SC-000318**

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
Civil Action No. 09-CI-907**

**ELGAN BRUNER and
DEANNA BRUNER**

APPELLEES

BRIEF ON BEHALF OF APPELLEES

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 9th day of April, 2013, ten (10) originals of this brief were served via hand-delivery upon Susan Stokley Clary, Clerk of the Supreme Court, Room 209, 700 Capital Ave., Frankfort, KY 40601, with (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; John William Walters, Melissa Thompson, Kellie Marie Collins, Golden & Waters, PLLC, Corporate Plaza, 771 Corporate Dr., Ste. 905, Lexington, KY 40503; Kevin C. Burke, 125 S. 7th St., Louisville, KY; Hon. Jeff W. Adamson, Paul A. Casi, II, PSC, 440 S. 7th St., Ste. 100, Louisville, KY 40202.

R. SCOTT WILDER

COUNTERSTATEMENT CONCERNING ORAL ARGUMENT

The Appellees state that given the Court of Appeals' ruling and the issues herein, there is no need for oral argument.

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COUNTERSTATEMENT OF THE CASE

On January 27, 2009, the Plaintiff, Elgan Bruner (hereinafter "Bruner"), traveled to Wendy's Restaurant, located in Nicholasville, Kentucky to meet his wife, Plaintiff, Deanna Bruner, for lunch.¹ Upon arrival in the parking lot, Bruner, specifically noticed that the parking lot had been cleared, noting in his deposition that he had saw that the snow had been pushed and that he assumed it was safe to exit his vehicle.² Immediately upon doing so, he slipped on ice and fell to the pavement, thereby sustaining injuries.³ Bruner reported the fall to Wendy's management and, at that time, was told by the manager on duty that that another person had already fallen in the parking lot that morning.⁴ The other fall was confirmed by the Wendy's manager, John Lake, who testified in his deposition that, while he could not remember which fall occurred first, he did remember two separate falls occurring within a fifteen (15) to twenty (20) minute time interval. ⁵ Bruner is in need of surgery to repair a torn rotator cuff,⁶ but is unable to have the procedure due to the fact that he is uninsured.⁷

Bruner filed his complaint in Jessamine Circuit Court on September 9, 2009. ⁸ His wife, Deanna, joined for the purposes of her loss of consortium

¹ Dep. E. Bruner, p. 29, ll. 14-15.

² Dep. E. Bruner, p. 39, ll. 6-11.

³ Dep. E. Bruner, p. 29, ll. 6-7.

⁴ Dep. E. Bruner p. 51, ll. 6-8.

⁵ Dep. J. lakes, p. 21, l. 25 and pp. 22-23, ll 21-1.

⁶ Dep. E. Bruner p. 16, ll. 7-10

⁷ Dep. E. Bruner p. 23, ll. 2-5

⁸ Record on Appeal, pp. 2-6.

claim.⁹ Following some discovery, the Defendant's filed their motion for summary judgment, arguing that the ice which caused Bruner's fall was open and obvious.¹⁰ The Circuit Court granted this motion,¹¹ and Bruner appealed.¹² The Court of Appeals reversed the Circuit Court's entry of summary judgment and remanded the case for trial.¹³ Wendy's then sought discretionary review in this Court.

ARGUMENT

A. SUMMARY JUDGMENT STANDARD

The *de novo* standard of review for summary judgment is whether there is a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The record must be viewed in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. *Steelvest, Inc. v. Scansteel Service Center*.¹⁴ Summary Judgment should only be used "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant."¹⁵ Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not grant summary judgment if there is any issue of material fact. The trial judge must examine the evidence, not to decide any issue of fact, but to

⁹ Record on Appeal, pp. 2-6.

¹⁰ Record on Appeal, pp. 91-110.

¹¹ Record on Appeal, pp. 132-133.

¹² Record on Appeal pp. 134-135.

¹³ *Bruner v. Miami Management Company, Inc.*, 2012 Ky App. Unpub. Lexis 315 (Ky. App. April 27, 2012).

¹⁴ *Steelvest, Inc. v. Scansteel Service Center*, 807 S.W.2d 476, 480 (1991)

¹⁵ *Id.* at 483, citing *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985).

discover if a real issue exists.¹⁶ Consequently, summary judgment should be granted, “only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor.”¹⁷ Since jury questions exist as to the reasonableness of the Appellants’ action in clearing their parking lot, summary judgment was inappropriate.

B. MCINTOSH ADDRESSED THE ENTIRE BODY OF KENTUCKY PREMISES LIABILITY LAW, NOT JUST ARTIFICIAL HAZARDS.

In *McIntosh v. Kentucky River Medical Center*, the Court undertook an in depth analysis of the open and obvious doctrine.¹⁸ The Court noted the growing trend among the states to reject the traditional rule that, once a danger is labeled as open and obvious, the plaintiff is precluded from any possibility of recovery.¹⁹ Concluding that the “incompatibility between the traditional open and obvious rule and comparative fault is palpable; any incompatibility should be resolved in favor of comparative fault,” the court abandoned the open and obvious doctrine in Kentucky premises liability law.²⁰ *McIntosh* went on to note that the departure from the open and obvious doctrine makes good policy sense.

“This Court should discourage unreasonably dangerous conditions rather than fostering them in their obvious forms. It is anomalous to find that a defendant has a duty to provide reasonably safe premises and at the same time deny a plaintiff recovery from a breach of that same duty. The party in the best position to eliminate a dangerous condition should be burdened with that responsibility. If a dangerous condition is obvious to the plaintiff, then surely it is obvious to the

¹⁶ *Id.* at 480.

¹⁷ *Huddleston v. Hughes*, 843 S.W.2d 901, 903 (Ky. App. 1992), citing *Steelvest*, *supra* (citation omitted).

¹⁸ *McIntosh v. Kentucky River Medical Center*, 319 S.W.3d 385 (Ky. 2010).

¹⁹ *Id.* at 389.

²⁰ *Id.* at 391-392.

defendant as well. The defendant, accordingly, should alleviate the danger.²¹

Ultimately, *McIntosh* adopted the position embodied in the Restatement (Second) of Torts § 343(A)(1), and held that:

“[L]ower 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. Thus, this Court rejects the minority position, which absolves, ipso facto, land possessors from liability when a court labels the danger open and obvious.”²²

Thus, the focus is now on foreseeability in all categories of premises liability cases and the reasonableness of the defendant’s conduct must be determined in accordance with comparative fault principles. Since it was foreseeable that Wendy’s patrons would encounter slick, hazardous conditions in its parking lot when Wendy’s chose to open for business in spite of the hazardous weather, the question of fact for the jury becomes: whether the Parties’ conduct, including Appellant’s choice to open its business in such weather, its methods for snow/ice removal and/or whether previous incidents that day caused Appellants to reasonably foresee the injuries to Appellee, was reasonable. Likewise, the actions and conduct of the Appellees would also be analyzed by the jury.

The policy considerations discussed in *McIntosh* cannot be narrowly construed as to limit its application to only artificial hazards. Lower courts

²¹ *Id.* at 392 citing *Tharp v. Bunge Corp.* 641 So.2d 20, 25 (Miss. 1994)

²² *Id.* at 392.

addressing premises liability cases have clearly understood this point. Since *McIntosh*, the Kentucky Court of Appeals and Kentucky Federal Courts have issued at least twenty-two (22) premises liability opinions, both published and unpublished. Seven (7) of these opinions, including the Court of Appeals decision in the case *sub judice*, have involved naturally occurring outdoor hazards.²³ All seven (7) of these opinions used *McIntosh* in analyzing whether or not summary judgment was appropriate. The Appellees are unable to find any Kentucky case involving a naturally occurring hazard, post -*McIntosh*, where said decision was not used in the analysis. Thus, the Appellants' assertion that *McIntosh's* application is limited to only artificial hazards is not well taken.

C. WHY THE COURT SHOULD NOT ADOPT THE NATURAL ACCUMULATION RULE.

The Appellants urge the Court to adopt the natural accumulation rule which holds that “a landowner or possessor of real property has no duty to remove natural accumulations of ice, snow, or water from its property.”²⁴

Determining liability for a slip and fall injury based on whether the plaintiff fell on a natural rather than an unnatural accumulation of snow or ice is not proper under the status of Kentucky's comparative fault rule. The only rationale that can be offered in support of this proposed rule is that a property owner owes a duty to repair or warn of only those dangerous conditions on his or her property that

²³ See *Moore v. St. Joseph Health System, Inc.*, 2012 WL 1886660 (Ky. App. 2012); *Webb v. Dick's Sporting Goods*, 2011 WL 3362217 (Ky. App. 2011); *Schmidt v. Intercontinental Hotels Group Resources, Inc. and Hotel*, 2012 WL 404948 (E.D. Ky. 2012); *Lahutsky v. Wagnor Moving & Storage, Inc.*, 2011 WL 5597330 (W.D. Ky. 2011); *Powers v. Tirupathi Hospitality, LLC* 2011 WL 251001 (E.D. Ky. 2011); *Wright v. Pilot Travel Centers*, 2011 WL 24574444 (W.D. Ky. 2011); the case *sub judice*.
²⁴ Appellants' Brief p. 13; citing *Krywin v. Chicago Transit Authority*, 938 N.E.2d 440, 447 (Ill. 2010).

were created by the property owner. This is analogous to distinguishing between man-made hazards and outdoor/inclimate weather hazards which, as argued herein, this Court in *McIntosh*, avoided. Further, such an exception, if recognized, may go so far as to affect the generally recognized duty to keep one's property reasonably safe for lawful visitors regardless of the source of the danger.

This Court has had ample opportunity to address any exceptions in inclimate weather cases such as "natural accumulation". In *Corbin Motor Lodge v. Combs*²⁵, *Estep v. B.F. Saul Real Estate Investment Trust*²⁶ and *PNC Bank, Kentucky, Inc. v. Green*²⁷ all addressed inclimate weather cases and the applicability of Kentucky's comparative fault law versus its open and obvious doctrine. Kentucky has never addressed this principle and do so at this juncture would create, perhaps, another complicated open and obvious analysis and/or would establish potentially yet another type of hazard from the three (3) that are generally recognized (man-made, foreign substance and inclimate weather). This Court in *McIntosh* clearly sought to simplify Kentucky's analysis by abolishing the open and obvious doctrine and by ruling that premises liability cases are to be determined under the comparative fault analysis.

D. THE COURT OF APPEALS CORRECTLY APPLIED THE FORESEEABILITY ANALYSIS ACCORDING TO MCINTOSH.

The Appellants herein made some attempt to clear their parking lot and sidewalks of ice and snow. In doing so, they must have done this in a reasonable

25 740 S.W.2d 944 (Ky. 1987).

26 843 S.W.2d 911 (Ky.App. 1992).

27 30 S.W.3d 385 (Ky. 2000).

manner or be liable for their failure. Whether the condition, as it then existed when Bruner arrived, was open and obvious is a fact question. Further, a fact question existed as to the foreseeability of Bruner's fall. The Court in *McIntosh* held that "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."²⁸ Herein, Bruner was aware of the inclement weather. However, he was unaware that a hazard was still posed to him.

Q. When you stepped out of the car did you look at the pavement before you stepped out?

A. I opened my door and stepped right out just like you would any other day. **I'd seen the snow was pushed, I was assuming it was safe to get out of your truck.** (Emphasis added).

Record, Dep. E. Bruner p. 39, ll. 6-11.

Further evidence of the foreseeability of the injury, a manager, who was on duty at the time in question, specifically admitted in his deposition that at least one other fall occurred on the premises on this same date:

Q. Had there been another report of a fall that day?

A. Yes.

....

Q. All right. Do you know approximately what time of the day that was?

A. It was actually like within the time - - I don't recall which one was first, but I recall two falls like within, I don't know, 15, 20 minutes.

Record, Dep. J. Lakes p. 21, l. 25 and pp. 23-24, ll 21-1

While Mr. Lakes could not recall if this other fall had occurred before or

²⁸ *McIntosh*, 319 S.W.3d at 393.

after the Plaintiff's fall, the Plaintiff, Elgan Bruner, in his deposition, clearly remembered that the "manager told me someone else had fallen that morning, some old man had fell out there that morning."²⁹ Given that another patron had fallen before the Plaintiff's arrival, Bruner's fall in this case was foreseeable to the Defendants. Since *McIntosh*, as set forth above, specifically requires courts to ask whether the land possessor could reasonably foresee that an invitee would be injured by some condition on their property, jury questions exist in the present case regarding the whether Appellant's actions were sufficient to alleviate foreseeable risk of harm. This is especially so, given whether the Defendant's actions upon learning of an earlier fall were reasonable.³⁰

CONCLUSION

The open and obvious doctrine no longer should provide a trial judge the ability to label a condition (be it man-made, foreign substance or inclimate weather) as open and obvious and deny recovery. Rather, Kentucky's comparative negligence standard must prevail upon all premises cases. The important policy set forth in the *McIntosh* case is that landowners can no longer escape duties to keep their premises in safe condition by merely relying upon said condition to be open and/or obvious. Although the Court in *McIntosh* dealt with a man-made hazard when the open and obvious rule was abolished therein, no limitations were addressed regarding to what type of hazard a comparative fault analysis was to apply. Rather, even outdoor hazards place upon landowners the

²⁹ Record (Dep. E. Bruner p. 51, ll. 6-8) *See also* Record (Dep. E. Bruner p. 32, ll. 20-24) "...I'd went in to make my report and some old man had fell right before I did out there, I don't know who he was or nothing but they was talking about some guy had fell."

³⁰ *McIntosh v. Kentucky River Medical Center*, 319 S.W.3d 385, 392 (Ky. 2010).

same responsibility and duties of the landowner to prevent foreseeable harm. The Parties' attention to these conditions and their resulting liability should then be weighed by a jury.

Respectfully submitted,

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A handwritten signature in black ink, appearing to be 'C. Douglas', written over a horizontal line.