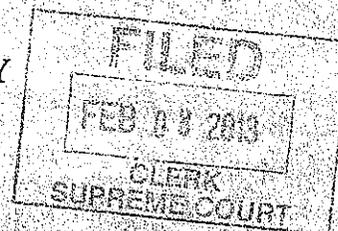


COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
CASE NO. 2012-SC-000318-D



MIAMI MANAGEMENT COMPANY, INC., and  
WENDY'S INTERNATIONAL, INC.

APPELLANTS

VS.

Appeal from Kentucky Court of Appeals  
Case No. 2011-CA-000616-MR  
Jessamine Circuit Court  
Case No. 09-CI-00907

ELGAN BRUNER and  
DEANNA BRUNER

APPELLEES

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**BRIEF OF APPELLANTS**

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**CERTIFICATE OF SERVICE**

This is to certify that the original and nine copies of the Brief of Appellants has been hand-delivered to Susan Stokley Clary, Clerk, Supreme Court, 209 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601, and copies have been served via U.S. Mail, postage prepaid, to the following: Hon. Christopher F. Douglas, Douglas Law Office, PLLC, 1222-1/2 North Main Street, Suite 3, London, Kentucky 40441; Hon. R. Scott Wilder, Gambrel & Wilder Law Offices, PLLC, 1222-1/2 North Main Street, Suite 2, London, Kentucky 40441; Hon. Hunter Daugherty, Chief Judge, Jessamine Circuit Court, Division I, 101 N. Main Street, Nicholasville, Kentucky 40356, on this the 8<sup>th</sup> day of February, 2013.

Respectfully submitted,

GOLDEN & WALTERS, PLLC

A handwritten signature in black ink, appearing to read "John Walters", written over a horizontal line.

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## ISSUES PRESENTED

1. Kentucky law has long treated snow and ice differently from other conditions in the premises liability context. This Court recently adopted the Restatement (Second) of Torts § 343A, which does not address snow and ice. Does Kentucky's prior case law concerning snow and ice still apply?

2. *McIntosh* and § 343A indicate that a landowner may still be liable for open and obvious conditions where it is foreseeable that an invitee would become distracted and fail to observe the open and obvious condition. Bruner fell during an ongoing snow and ice storm. Is it foreseeable that an invitee would become distracted and fail to observe snow and ice during an ice storm?

## **STATEMENT CONCERNING ORAL ARGUMENT**

Pursuant to CR 76.12, the Appellants respectfully request oral argument. Oral argument will assist the Court as this case involves complex issues of law concerning the application of existing case law to the recently adopted Restatement (Second) of Torts § 343A.

## TABLE OF POINTS AND AUTHORITIES

Issues Presented.....	i
Statement Concerning Oral Argument.....	ii
Table of Points and Authorities.....	iii-vi
Statement of Facts and Procedural History.....	1-2
Standard of Review.....	3
<i>Hammons v. Hammons</i> , 327 S.W.3d 444 (Ky. 2010).....	3
<i>Mitchell v. University of Kentucky</i> , 366 S.W.3d 895 (Ky. 2012).....	3
Argument.....	3-24
1. <b><i>Kentucky River Medical Center v. McIntosh's</i> adoption of § 343A of the Restatement (Second) of Torts did not address naturally-occurring outdoor conditions</b> .....	4-12
<i>Kentucky River Medical Center v. McIntosh</i> , 319 S.W.3d 385 (Ky. 2010).....	4-5
Restatement (Second) of Torts § 343A.....	4
<i>Horne v. Precision Cars of Lexington, Inc.</i> , 170 S.W.3d 364 (Ky. 2005)....	5
1.1. <b>The rationale of § 343A(1) does not extend its application to naturally-occurring outdoor conditions such as snow and ice</b> .....	5-7
Restatement (Second) of Torts § 343A.....	6
1.2. <b>Kentucky law treats snow and ice differently than artificial conditions upon the land and recognizes that snow and ice are not unreasonably dangerous conditions</b> .....	7-12
<i>Standard Oil Company v. Manis</i> , 433 S.W.2d 856 (Ky. 1968).....	7, 8, 11
<i>Horne v. Precision Cars of Lexington, Inc.</i> , 170 S.W.3d 364 (Ky. 2005).....	7, 9
<i>Kentucky River Medical Center v. McIntosh</i> , 319 S.W.3d 364 (Ky. 2010).....	8, 11

	<i>PNC Bank, Kentucky, Inc. v. Green</i> , 30 S.W.3d 185 (Ky. 2000).....	9-10, 11
	<i>Estep v. B.F. Saul Real Estate Investment Trust</i> , 843 S.W.2d 911 (Ky. App. 1992) .....	9
	<i>Carrier v. Dairy Queen Wholly Owned Stores, Inc.</i> , 2005 Ky. App. Unpub. LEXIS 1184 (Ky. App. March 11, 2005).....	11
<b>2.</b>	<b>Other jurisdictions continue to treat snow and ice differently in the context of premises liability, and there is no reason for Kentucky to change its law in this regard.....</b>	<b>12-22</b>
	<i>Associated Insurance Service, Inc. v. Garcia</i> , 307 S.W.3d 58 (Ky. 2010).....	13
	74 A.L.R. 5th 49 (2013).....	13
<b>2.1.</b>	<b>Other jurisdictions continue to recognize the absence of a duty on the part of a landowner in the context of naturally-occurring snow and ice.....</b>	<b>13-19</b>
	<i>Krywin v. Chicago Transit Authority</i> , 938 N.E.2d 440 (Ill. 2010).....	13
	<i>Kellerman v. Car City Chevrolet-Nissan</i> , 713 N.E.2d 1285 (Ill. App. Ct. 1990).....	13-14
	<i>Brinkman v. Ross</i> , 623 N.E.2d 1175 (Oh. 1993).....	14
	Wyo. Stat. Ann. § 1-1-109 (1988).....	14
	<i>Eiselein v. K-Mart, Inc.</i> , 868 P.2d 893 (Wyo. 1994).....	14-15
	<i>Fast v. State</i> , 680 N.W.2d 265 (N.D. 2004).....	16
	<i>PNC Bank, Kentucky, Inc. v. Green</i> , 30 S.W.3d 185 (Ky. 2000).....	16
	<i>Wal-Mart Stores, Inc. v. Surratt</i> , 102 S.W.3d 437 (Tex. App. 2003).....	16
	Oliver Wendell Holmes, Jr., <i>The Common Law</i> , 1-2 (Little, Brown, and Company 1909) (1881).....	17
	<i>Hofner v. Lanctoe</i> , 821 N.W.2d 88 (Mich. 2010).....	17-19
	<i>Scuddy Coal Co. v. Couch</i> , 274 S.W.2d 388 (Ky. 1954).....	18

<b>2.2. Jurisdictions that do not recognize the "natural accumulation" rule recognize the unique issues posed by snow and ice and treat them differently from artificial conditions.....</b>	<b>19-22</b>
<i>Papadopoulos v. Target Corp.</i> , 2, 930 N.E.2d 142 (Mass. 2010).....	19, 20
<i>Mucsi v. Graoch Associates Partnership</i> #12. 31 P.3d 684 (Wash. 2001).....	20, 21-22
<i>Touchette v. Weis Markets</i> , 37 A.3d 1241 (Pa. Super. Ct. 2011).....	20
<i>Richardson v. Corvallis Public School District No. 1</i> , 950 P.2d 748 (Mont. 1997).....	20
<i>Burrell v. Kwik Shop, Inc.</i> , 2005 Neb. App. LEXIS 249 (Neb. App. October 18, 2005).....	20
<i>Kraus v. Newton</i> , 558 A.2d 240 (Conn. 1989).....	20
<i>Berardis v. Louangxay</i> , 969 A.2d 1288 (R.I. 2009).....	20
<i>Fad Limited Partnership v. Feagley</i> , 377 S.E.2d 437 (Va. 1989).....	20
<i>Worley v. Bradford Pointe Apartments, Inc.</i> , 73 P.3d 149 (Kan. App. 2003).....	20
<i>Mattson v. St. Luke's Hospital of St. Paul</i> , 89 N.W.2d 743 (Minn. 1958).....	21
<b>3. Summary judgment was appropriate because it was not reasonably foreseeable to Wendy's that Bruner would become distracted or would not appreciate the danger posed by snow and ice.....</b>	<b>23-26</b>
<i>Kentucky River Medical Center v. McIntosh</i> , 319 S.W.3d 385 (Ky. 2010).....	23, 24
<i>Lucas v. Gateway Community Services Organization, Inc.</i> , 343 S.W.3d 341 (Ky. App. 2011).....	23
<i>Bruner v. Miami Management Company, Inc.</i> , 2012 Ky. App. Unpub. LEXIS 315 (Ky. App. April 27, 2012).....	23
Restatement (Second) of Torts, § 343A.....	24-25
Conclusion.....	25-26

Index to Appendix.....27

## Statement of Facts and Procedural History

This matter involves a slip and fall in Jessamine County that allegedly occurred on or about January 27, 2009. January 26, 2009, marked the beginning of an ice storm that crippled central Kentucky for several days.<sup>1</sup> On that day, areas of Jessamine County were without power, schools were closed, and a number of automobile accidents had occurred.<sup>2</sup> This ice storm was so severe that, on February 5, 2009, the President declared 93 Kentucky counties, including Jessamine County, to be major disaster areas.<sup>3</sup>

On the morning of January 27, 2009, after the first snow, Wendy's was open for business. Wendy's had utilized the services of a contractor to plow and salt areas of the parking lot,<sup>4</sup> but Wendy's did not itself plow the parking lot. Bruner planned to meet his wife,<sup>5</sup> Deanna, at Wendy's for lunch that afternoon. Bruner arrived at Wendy's around 1:00 or 2:00 p.m.,<sup>6</sup> and waited approximately five minutes in his truck for Deanna to arrive.<sup>7</sup> While waiting, Bruner observed the snow that had been previously plowed from the parking lot.<sup>8</sup> Bruner admitted that there was approximately two inches of snow that had fallen<sup>9</sup> and that he had no difficulty observing the parking lot.<sup>10</sup>

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<sup>1</sup> Record on Appeal, p. 105

<sup>2</sup> Record on Appeal, pp. 100-101.

<sup>3</sup> Record on Appeal, p. 105.

<sup>4</sup> Record on Appeal, p. 121-122.

<sup>5</sup> At the time of Bruner's alleged fall, he and Deanna were engaged to be married.

<sup>6</sup> Elgan Bruner Deposition, p.38, ll. 2-9, previously included as Appendix 4 to Appellees' Brief to Court of Appeals.

<sup>7</sup> Elgan Bruner Deposition, p. 33, ll. 8-11, previously included as Appendix 4 to Appellees' Brief to Court of Appeals.

<sup>8</sup> Elgan Bruner Deposition, p. 29, ll. 4-5, previously included as Appendix 4 to Appellees' Brief to Court of Appeals.

<sup>9</sup> Elgan Bruner Deposition, p. 29, ll. 2-3, previously included as Appendix 4 to Appellees' Brief to Court of Appeals.

<sup>10</sup> Elgan Bruner Deposition, p. 38, ll. 2-9, previously included as Appendix 4 to Appellees' Brief to Court of Appeals.

Deanna arrived at Wendy's and pulled in to the spot next to Bruner. After Deanna arrived, Bruner exited his vehicle and allegedly slipped on a patch of ice and fell to the ground.<sup>11</sup> Bruner and Deanna reported this fall to Wendy's before Bruner sought treatment at the emergency room.<sup>12</sup>

On September 9, 2009, Bruner and Deanna filed negligence and loss of consortium claims against Miami Management<sup>13</sup> and Wendy's, alleging that they had failed to keep the premises safe, failed to prevent or correct unsafe conditions, and failed to warn of the icy danger.<sup>14</sup> Wendy's filed an answer denying liability.<sup>15</sup> After some discovery had been completed, Wendy's filed a motion for summary judgment.<sup>16</sup> Wendy's argued that the ice that allegedly caused Bruner's fall was open and obvious to Bruner, precluding any potential liability for Wendy's.<sup>17</sup> The Jessamine Circuit Court granted this motion,<sup>18</sup> and Bruner appealed.<sup>19</sup> The Court of Appeals, in a split decision, held that summary judgment was improper.<sup>20</sup> Wendy's sought, and was granted discretionary review on the issue of the application of this Court's holding in *Kentucky River Medical Center v. McIntosh*<sup>21</sup> to naturally occurring outdoor conditions.

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<sup>11</sup> Elgan Bruner Deposition, p. 29, ll. 10-11, previously included as Appendix 4 to Appellees' Brief to Court of Appeals.

<sup>12</sup> Elgan Bruner Deposition, p. 29, ll. 14-25, previously included as Appendix 4 to Appellees' Brief to Court of Appeals.

<sup>13</sup> Miami Management is the franchisor of this particular Wendy's location. For purposes of this brief, Wendy's refers to both Miami Management and Wendy's International.

<sup>14</sup> Record on Appeal, pp. 2-6.

<sup>15</sup> Record on Appeal, pp. 43-47.

<sup>16</sup> Record on Appeal, pp. 91-110.

<sup>17</sup> Record on Appeal, pp. 91-110.

<sup>18</sup> Record on Appeal, pp. 132-133.

<sup>19</sup> Record on Appeal, pp. 134-135.

<sup>20</sup> *Bruner v. Miami Management Company, Inc.*, 2012 Ky. App. Unpub. LEXIS 315 (Ky. App. April 27, 2012).

<sup>21</sup> *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010).

### Standard of Review

This appeal stems from an order granting summary judgment. As such, the standard of review on appeal is whether the trial court correctly found that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.<sup>22</sup> Summary judgment does not involve factual questions, only legal ones. Because summary judgment only involves questions of law, an appellate court will review the issue *de novo*.<sup>23</sup>

### Argument

The Court recently adopted § 343A of the Restatement (Second) of Torts. The rationale of that section, however, does not apply to naturally-occurring conditions such as snow and ice. As far as those conditions are concerned, Kentucky law has long recognized that snow and ice are treated differently in the premises liability context. Other courts around the country similarly continue to treat snow and ice differently in this context and apply different standards for these conditions. The majority of the sitting panel of the Court of Appeals misinterpreted the application of this Court's holding in *Kentucky River Medical Center v. McIntosh*,<sup>24</sup> and erroneously determined that *McIntosh* imposed an absolute duty on landowners. The Court of Appeals must be reversed, as entry of summary judgment in this matter was appropriate.

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<sup>22</sup> *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010).

<sup>23</sup> *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

<sup>24</sup> *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010).

1. ***Kentucky River Medical Center v. McIntosh's* adoption of § 343A of the Restatement (Second) of Torts did not address naturally-occurring outdoor conditions.**

In 2010, this Court decided *Kentucky River Medical Center v. McIntosh*,<sup>25</sup> which marked a sea change in the law of premises liability. In *McIntosh*, the Court adopted § 343A of the Restatement (Second) of Torts, which provides that a possessor of land is not liable to invitees for their injuries due to open and obvious conditions unless the possessor should foresee the harm, in spite of its open and obvious nature.<sup>26</sup>

*McIntosh* involved a paramedic who was injured when she was rushing a patient into a hospital and fell over a curb.<sup>27</sup> In adopting § 343A(1), the Court focused on the fact that it was foreseeable to the hospital that an invitee, particularly a paramedic, could become distracted and fail to notice something that would otherwise have been obvious to her -- in that case, the curb at the emergency room entrance.<sup>28</sup> The Court ultimately held that this foreseeable distraction meant that the hospital owed a duty to the paramedic in spite of the open and obvious nature of the curb at the entrance to the emergency room.<sup>29</sup>

The Court observed that even if there is no duty to warn for open and obvious conditions, there is still a duty to take precautions other than a warning. "Even though it will often 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 them for failing to *eliminate or reduce* the risk

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<sup>25</sup> *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010).

<sup>26</sup> Restatement (Second) of Torts § 343A(1) (1965).

<sup>27</sup> *McIntosh*, 319 S.W.3d at 387.

<sup>28</sup> *Id.* at 394.

<sup>29</sup> *Id.* at 395.

posed by unreasonable dangers."<sup>30</sup> *McIntosh's* analysis centered around unreasonable dangers.

In reaching its holding in *McIntosh*, the Court undertook an extensive analysis of the rationale behind § 343A and why a landowner may still owe a duty in the face of an open and obvious condition. "Under the Restatement (Second) view, in such cases, the land possessor may still owe a duty of reasonable care, which may require him to take other reasonable steps to protect the invitee against the known or obvious condition."<sup>31</sup> The rationale behind this was to "discourage unreasonably dangerous conditions rather than fostering them in their obvious forms."<sup>32</sup> Neither *McIntosh* nor the Restatement addresses the application of this rationale to naturally-occurring outdoor conditions such as snow and ice. The absence of this discussion is of great importance in Kentucky, as Kentucky's premises liability law has evolved into three separate areas, with one of these areas devoted largely to snow and ice.<sup>33</sup>

**1.1. The rationale of § 343A(1) does not extend its application to naturally-occurring outdoor conditions such as snow and ice.**

The most recent premises liability case decided by this Court, *McIntosh*, specifically dealt with a hazard caused by the owner -- a curb at the entrance to the emergency room. To provide courts with guidance as to its application, the drafters of the Restatement provided a number of comments and illustrations to accompany § 343A. These comments and illustrations detail scenarios where the

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<sup>30</sup> *Id.* at 393 (emphasis in original).

<sup>31</sup> *McIntosh*, 319 S.W.3d at 390 (internal quotation marks and brackets omitted).

<sup>32</sup> *Id.* at 392 (citing *Tharp v. Bunge Corp.*, 641 So.2d 20, 25 (Miss. 1994) with approval).

<sup>33</sup> See *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 368 (Ky. 2005).

landowner is liable and why, and also detail a scenario where the landowner is not liable and why.

*McIntosh's* application of § 343A(1) is consistent with the illustrations to that section of the Restatement that describe scenarios where a landowner may be liable: a department store with a scale protruding into one of its aisles near a store display that distracts customers from noticing the scale;<sup>34</sup> a raised soda fountain platform in a drug store where the customer could forget the platform was raised after ordering and eating food;<sup>35</sup> a fallen rainspout that runs across a walkway alongside a grocery store that customers carrying groceries routinely use as an exit;<sup>36</sup> and a freshly waxed stairway in an office building that serves as the only approach to a particular office.<sup>37</sup> These illustrations all present scenarios where it would be foreseeable to the landowner that an invitee could become distracted and either fail to observe the obvious condition or proceed in spite of it. These illustrations all involve artificial conditions caused by the owner of the property -- the same condition that *McIntosh* explicitly dealt with. Tellingly, none of the illustrations to § 343A(1) involve naturally-occurring outdoor conditions.

While no illustration to § 343A(1) involves a naturally-occurring condition, the drafters did provide one illustration where the landowner has no liability: a customer lost in thought walks into a plate glass window that is obvious to anyone exercising ordinary care or perception.<sup>38</sup> This illustration is crucial, as it demonstrates that there are scenarios where a landowner will not be liable to an

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<sup>34</sup> Restatement (Second) of Torts § 343A(1), Illustration 2.

<sup>35</sup> Restatement (Second) of Torts § 343A(1), Illustration 3.

<sup>36</sup> Restatement (Second) of Torts § 343A(1), Illustration 4.

<sup>37</sup> Restatement (Second) of Torts § 343A(1), Illustration 5.

<sup>38</sup> Restatement (Second) of Torts § 343A(1), Illustration 1.

invitee when a condition is open and obvious. The distinctions between this illustration and the ones where a landowner is liable are numerous: the landowner did nothing to distract from the open and obvious nature of the glass, it was not foreseeable that the invitee would forget that the glass was present, and it was not foreseeable that the invitee would be distracted and fail to observe the obvious glass. The import of this illustration is that § 343A(1) does not impose an absolute duty on the part of the landowner; there still remain situations where a landowner is not liable for open and obvious conditions.

**1.2. Kentucky law treats snow and ice differently than artificial conditions upon the land and recognizes that snow and ice are not unreasonably dangerous conditions.**

For over 40 years, Kentucky law has treated naturally-occurring outdoor conditions separately from other conditions in premises liability law.<sup>39</sup> The different treatment afforded to naturally-occurring outdoor conditions resulted in the development of three distinct areas of premises liability law, as recognized by this Court in *Horne v. Precision Cars of Lexington, Inc.*<sup>40</sup> Those categories involve naturally-occurring outdoor conditions such as snow and ice; injury as a result of a foreign substance or other dangerous condition on the premises; and hazards caused by the owner.<sup>41</sup>

*McIntosh* dealt with a condition that was an unreasonable danger, a poorly-placed curb, and the Court recognized that landowner liability was predicated upon "failing to *eliminate or reduce* the risk posed by unreasonable

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<sup>39</sup> See *Standard Oil Company v. Manis*, 433 S.W.2d 856 (Ky. 1968).

<sup>40</sup> *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 368 (Ky. 2005).

<sup>41</sup> *Id.*

dangers."<sup>42</sup> Inasmuch as *McIntosh* sought to "discourage unreasonably dangerous conditions . . ."<sup>43</sup> it has no application with respect to snow and ice because, as a matter of law, those conditions are not unreasonably dangerous. Kentucky law has long held that snow and ice are not unreasonably dangerous conditions, as "*natural 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 a landowner has a duty to remove or warn against."<sup>44</sup> Because snow and ice are not unreasonable dangers as a matter of law, there can be no landowner liability for failing to eliminate snow and ice from the premises or for failing to reduce snow and ice from the premises.

*Standard Oil Company v. Manis*<sup>45</sup> involved an invitee who was making a delivery to the landowner's premises.<sup>46</sup> While walking across a platform, the invitee slipped on a patch of ice, later observing that there was a substantial amount of snow and ice on the ground throughout the premises.<sup>47</sup> There was evidence that the landowner had cleared snow and ice from the platform earlier that day before the invitee's fall.<sup>48</sup> The Court of Appeals held that the landowner owed no duty to the invitee "to stay the elements or make this walkway absolutely safe. Nor was there a duty to warn [the invitee] that the obvious natural conditions may have created a risk."<sup>49</sup>

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<sup>42</sup> *McIntosh*, 319 S.W.3d at 393 (emphasis in original).

<sup>43</sup> *McIntosh*, 319 S.W.3d at 392.

<sup>44</sup> *Standard Oil*, 433 S.W.2d at 858 (emphasis in original).

<sup>45</sup> *Standard Oil Company v. Manis*, 433 S.W.2d 856 (Ky. 1968).

<sup>46</sup> *Id.* at 857.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 859.

This Court clarified the holding from *Standard Oil in PNC Bank, Kentucky, Inc. v. Green*.<sup>50</sup> *PNC Bank* involved an invitee who fell on an icy sidewalk where the weather alternated between snow and freezing rain.<sup>51</sup> The landowner in that case made multiple efforts to spread a melting agent on the sidewalk to eliminate and prevent the buildup of ice; however, it had not done so for over 1 and 1/2 hours prior to the invitee's fall.<sup>52</sup> In holding that PNC Bank owed no duty to its invitee who fell on the ice, the Court focused upon the fact that "the risk was as obvious to the injured party as it was to the owner of the premises, and that it occurred as a result of natural outdoor hazards."<sup>53</sup> PNC Bank had attempted to clear its sidewalks, but "given the fact that it was intermittently snowing and sleeting that day, it would have been virtually impossible for bank employees to have maintained a constant watch over the condition of the sidewalk."<sup>54</sup> An important factor to the Court in *PNC Bank* was the fact that "nothing that PNC Bank did made the natural hazard any less obvious or increased the likelihood that Green would slip and fall."<sup>55</sup>

The Court indicated that a landowner's duty with naturally-occurring outdoor conditions is simply to take reasonable precautions to ensure the safety of its invitees without heightening or concealing the nature of the condition.<sup>56</sup> After articulating this standard, the Court held that the trial court's entry of

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<sup>50</sup> *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d 185 (Ky. 2000).

<sup>51</sup> *Id.* at 186.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 187.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 187-88. *PNC Bank* explained that heightening or concealing the open and obvious nature of the snow and ice served to make the condition worse. Thus, the duty imposed by *Estep v. B.F. Saul Real Estate Investment Trust*, 843 S.W.2d 911 (Ky. App. 1992) only arises when the landowner's conduct exacerbates the condition of snow and ice. See also *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 368 (Ky. 2005).

summary judgment was appropriate, thereby indicating that PNC Bank's treatment of the sidewalk in the morning constituted a reasonable precaution.<sup>57</sup> In essence, a landowner owes a duty to invitees to take reasonable precautions to ensure their safety and attempting to remove snow and ice from an area was a reasonable precaution. Thus, as a matter of law, a landowner does not breach its duty when it attempts to remove snow and ice, so long as the snow and ice removal does not heighten or conceal the nature of the dangerous condition.

It would have been virtually impossible for Wendy's employees to maintain a constant watch over the condition of the parking lot; Bruner fell during the inception of one of the worst ice storms ever to hit Jessamine County. Nothing that Wendy's did made the snow and ice on the ground any less obvious or increased the likelihood that Bruner would slip and fall. Much like the landowner in *PNC Bank*, Wendy's took reasonable precautions to ensure the safety of its invitees without heightening or concealing the nature of the condition. Wendy's utilized the services of a contractor to plow the parking lot in the morning before Bruner's fall.<sup>58</sup> Much like the invitee in *PNC Bank*, Bruner's fall took place during daylight hours,<sup>59</sup> he was aware of the inclement weather condition,<sup>60</sup> and Bruner observed that the parking lot appeared to have been plowed.<sup>61</sup> The Court of Appeals addressed a similar set of facts in an unpublished

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<sup>57</sup> *PNC Bank*, 30 S.W.3d at 188.

<sup>58</sup> Record on Appeal, p. 121-122.

<sup>59</sup> Elgan Bruner Deposition, p. 38, ll. 2-9, previously included as Appendix 4 to Appellees' Brief to Court of Appeals.

<sup>60</sup> Elgan Bruner Deposition, p. 29, ll. 2-3, previously included as Appendix 4 to Appellees' Brief to Court of Appeals.

<sup>61</sup> Elgan Bruner Deposition, p. 29, ll. 4-5, previously included as Appendix 4 to Appellees' Brief to Court of Appeals.

case pre-*McIntosh*. In *Carrier v. Dairy Queen Wholly Owned Stores, Inc.*,<sup>62</sup> the Court of Appeals held that "a parking lot plowed to facilitate car traffic but otherwise still wet and snowy the day following a snow storm, is more like the conditions our cases have held to be obvious than those deemed not obvious."<sup>63</sup> The court ultimately went on to hold that "[a] reasonable person exercising ordinary perception would have recognized that, though the lot had been plowed, it had not been thoroughly cleared; patches of snow and ice remained. . . . we agree with the trial court that the risk cannot be deemed an unreasonable one."<sup>64</sup> Pre-*McIntosh*, Kentucky's courts routinely applied the open and obvious doctrine to snow and ice to determine that a landowner had no liability in the face of open and obvious snow and ice. *McIntosh* did not alter this outcome.

*McIntosh*'s rationale implicitly recognizes the distinction with regards to naturally-occurring conditions. In *McIntosh*, this Court stated that, while a landowner may not have superior knowledge in the context of open and obvious conditions, "the land possessor still has the superior ability to issue repairs."<sup>65</sup> As this Court has recognized is the case with snow and ice, however, there is no concern with the issuance of repairs. A landowner has no duty to stay the elements.<sup>66</sup> It is "virtually impossible for [landowners] to . . . maintain[ ] a constant watch over the condition . . . "<sup>67</sup> where snow and ice are concerned. A

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<sup>62</sup> *Carrier v. Dairy Queen Wholly Owned Stores, Inc.*, 2005 Ky. App. Unpub. LEXIS 1184 (Ky. App. March 11, 2005).

<sup>63</sup> *Id.* at \*4-\*5.

<sup>64</sup> *Id.* at \*5.

<sup>65</sup> *McIntosh*, 319 S.W.3d at 393.

<sup>66</sup> *Standard Oil*, 433 S.W.2d at 859.

<sup>67</sup> *PNC Bank*, 30 S.W.3d at 187.

landowner therefore does not have the superior ability to issue repairs to the property where snow and ice are concerned.

The rationale for the adoption of § 343A in *McIntosh* is not present where the hazard is a naturally-occurring outdoor condition such as snow and ice. *McIntosh* does not apply to *Horne's* category of naturally-occurring conditions. The law in this area has remained the same since *Standard Oil* was decided in 1968. *Standard Oil* was as sound a principle then as it is now. To hold otherwise would undercut a substantial body of tort law and would inject uncertainty into the operation of virtually every business serving the public in the Commonwealth. For these reasons, *McIntosh's* adoption of § 343A of the Restatement (Second) of Torts must not be extended to *Horne's* category of naturally-occurring conditions such as snow and ice. Nothing in the Court's adoption of § 343A(1) in *McIntosh* abrogates this long-standing principle of Kentucky law. Wendy's was faced with an almost identical situation as the landowner in *PNC Bank* and responded in an almost identical fashion. *PNC Bank* is still the controlling authority with respect to snow and ice in the context of premises liability. Summary judgment was appropriate and, as such, the Court of Appeals must be reversed.

**2. Other jurisdictions continue to treat snow and ice differently in the context of premises liability, and there is no reason for Kentucky to change its law in this regard.**

*McIntosh's* adoption of § 343A(1) marked a drastic change in Kentucky's application of the open and obvious doctrine and did not address how the body of premises liability law for snow and ice fit within this framework. In light of this change, it is understandable that there may be some uncertainty as to how *PNC Bank* fits within this framework. It is not uncommon for this Court to look to

other jurisdictions for guidance on new or novel questions of law.<sup>68</sup> As far as snow and ice are concerned, courts throughout the country continue to treat them differently for purposes of premises liability law. This treatment has more or less coalesced into two distinct schools of thought: the "natural accumulation" rule and the "Connecticut rule."<sup>69</sup> Under either approach, entry of summary judgment in favor of Wendy's would be appropriate.

**2.1. Other jurisdictions continue to recognize the absence of a duty on the part of a landowner in the context of naturally-occurring snow and ice.**

Many of Kentucky's sister states have addressed the issue of the duty of a landowner in the context of naturally-occurring snow and ice and continue to recognize the so-called "natural accumulation" rule. The "natural accumulation" rule provides that "a landowner or possessor of real property has no duty to remove natural accumulations of ice, snow, or water from its property."<sup>70</sup> Simply put, this rule states that "a property owner is not liable for injuries resulting from an icy condition which is a natural one."<sup>71</sup> The basis for this rule "does not rest upon the notion that the conditions presented by such accumulations are safe. To the contrary, the hazards presented have always been acknowledged, but the imposition of an obligation to remedy those conditions would be so unreasonable and impractical as to negate the imposition of a legal duty . . . ."<sup>72</sup> The Court of

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<sup>68</sup> See *Associated Insurance Service, Inc. v. Garcia*, 307 S.W.3d 58, 64 (Ky. 2010).

<sup>69</sup> This brief addresses the approaches taken by various states in connection within these two distinct approaches. For a detailed state-by-state overview, see 74 A.L.R. 5th 49 (2013).

<sup>70</sup> *Krywin v. Chicago Transit Authority*, 938 N.E.2d 440, 447 (Ill. 2010).

<sup>71</sup> *Kellerman v. Car City Chevrolet-Nissan*, 713 N.E.2d 1285, 1287 (Ill. App. Ct. 1999).

<sup>72</sup> *Krywin*, 938 N.E.2d at 450.

Appeals of Illinois noted that "snow and ice is a hazard in this part of the country, and that hazard is known to all."<sup>73</sup>

Much like Illinois, Ohio also adheres to a variation of the "natural accumulation" rule, where "an owner or occupier of land ordinarily owes no duty to business invitees to remove natural accumulations of ice and snow from the private sidewalks on the premises, or to warn the invitee of the dangers associated with such natural accumulations of ice and snow."<sup>74</sup> The Supreme Court of Ohio has indicated that the rationale underlying this rule is that "everyone is assumed to appreciate the risks associated with natural accumulations of ice and snow and, therefore, everyone is responsible to protect himself or herself against the inherent risks presented by natural accumulations of ice and snow."<sup>75</sup>

The Supreme Court of Wyoming has offered similar justification for its adherence to the "natural accumulation" rule. After determining that the legislature's adoption of comparative fault<sup>76</sup> did not abrogate the natural accumulation rule,<sup>77</sup> the court indicated that the "natural accumulation" rule was consistent with the general existence of a duty on the part of a landowner:

[t]he justification for the natural-accumulation rule comports with the factors to be considered in determining the existence of a duty. The magnitude of the burden on defendant to prevent injuries from snow or ice is great. As noted above, natural winter conditions make it impossible to prevent all accidents. The plaintiff is in a much better position to prevent injuries from ice or snow because the plaintiff can take precautions at the very moment the conditions are encountered. Even if the plaintiff is unaware of the ice or snow he

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<sup>73</sup> *Kellerman*, 713 N.E.2d at 1289.

<sup>74</sup> *Brinkman v. Ross*, 623 N.E.2d 1175, 1176 (Oh. 1993).

<sup>75</sup> *Id.*

<sup>76</sup> Wyo. Stat. Ann. § 1-1-109 (1988).

<sup>77</sup> *Eiselein v. K-Mart, Inc.*, 868 P.2d 893, 896 (Wyo. 1994).

happens to slip on, he may be charged with knowledge that ice or snow is a common hazard in winter, one which he must consistently guard against.<sup>78</sup>

The Supreme Court of Wyoming was careful to draw a distinction between naturally-occurring conditions and artificial conditions created by the landowner, noting that "[i]f the defendant creates the hazard, then it is within the defendant's control and he is in a better position to foresee and prevent injuries resulting from the hazard. If the condition occurs naturally, the defendant is in no better position than the plaintiff to prevent the injuries."<sup>79</sup>

Wyoming's distinction between naturally-occurring and artificial conditions is sound. A landowner's ability to make the premises safe from snow and ice is far more limited than its ability to make the premises safe from an artificial condition such as a poorly-placed curb. This is especially true in this case, where Bruner's fall happened amidst an ongoing snow and ice storm. The considerations involved with snow and ice do not come into play, however, where the condition is artificial. In that situation, as was the case in *McIntosh*, the landowner is in a superior position to make changes to provide reasonably safe premises.

The Supreme Court of North Dakota has drawn a similar distinction between naturally-occurring and artificial conditions, recognizing that a landowner owes no duty "to remove a natural accumulation of snow and ice from the sidewalk abutting his property, but if he creates an unnatural condition on the sidewalk that is unreasonably dangerous, he may be liable for injuries caused

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<sup>78</sup> *Id.* at 897-98.

<sup>79</sup> *Id.* at 898.

thereby to pedestrians on the sidewalk."<sup>80</sup> Recognizing that it was important to encourage landowners to remove snow and ice in a reasonable manner, the court also observed that a landowner "should not be liable, absent some further act or omission creating an unreasonably dangerous condition, when injuries are sustained in falls where ice forms from melting snow that has been piled as a result of snow removal efforts."<sup>81</sup> Focusing on reasonable removal efforts, the court stated that "[i]t is desirable for landowners to remove snow from sidewalks and they should not be liable for snow removal efforts that do not create an unreasonably dangerous or more hazardous condition."<sup>82</sup> This rationale is nearly identical to the rationale espoused by the Court in *PNC Bank*, where the Court held that the landowner was not liable for snow and ice removal efforts that were done in a reasonable manner.<sup>83</sup>

The "natural accumulation" rule has also been adopted as far south as Texas.<sup>84</sup> In adopting the "natural accumulation" rule as it applied to parking lots, the Court of Appeals of Texas focused on the economic impact that requiring landowners to clear their parking lots of snow and ice would have:

[w]e are reluctant to require a premises owner/operator to expend a great deal of physical and financial effort to protect its invitees from a naturally occurring condition which usually disappears on its own in a short period of time. While the premises owner/operator might avoid this burden by closing its business during times of bad weather, the public is better served if businesses are able to remain open in order to supply consumers with needed goods and services during times of harsh weather conditions.<sup>85</sup>

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<sup>80</sup> *Fast v. State*, 680 N.W.2d 265, 269 (N.D. 2004).

<sup>81</sup> *Id.* at 270.

<sup>82</sup> *Id.*

<sup>83</sup> *PNC Bank*, 30 S.W.3d at 188.

<sup>84</sup> *See Wal-Mart Stores, Inc. v. Surratt*, 102 S.W.3d 437 (Tex. App. 2003).

<sup>85</sup> *Id.* at 443.

This focus on economics makes sense given the transitory nature of snow and ice. Snow and ice are not permanent conditions upon the land like the curb at issue in *McIntosh* or the various illustrations to § 343A of the Restatement. Imposition of a duty that would require a landowner to expend time and money to remove a condition that removes itself in a brief period of time is not the same as requiring a landowner to expend time and money to remove or correct a permanent condition, and would have a substantially greater economic impact, especially where small businesses are concerned. Snow and ice are inherently different from permanent conditions and are unique in their impermanence. A blanket imposition of the same duty that *McIntosh* imposes fails to recognize this fundamental difference. While the law requires stability, it also requires flexibility.<sup>86</sup>

The flexibility required of the law has been recognized by Michigan, which applies a modified version of the "natural accumulation" rule. The Supreme Court of Michigan has "rejected the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability under any circumstances."<sup>87</sup> Michigan's approach encourages the removal of snow and ice by requiring that "a premises owner has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation, requiring that reasonable measures be taken within a reasonable time after an accumulation of ice and

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<sup>86</sup> Oliver Wendell Holmes, Jr., *The Common Law*, 1-2 (Little, Brown, and Company 1909) (1881) ("The substance of the law pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past").

<sup>87</sup> *Hofner v. Lanctoe*, 821 N.W.2d 88, 96 (Mich. 2010) (internal quotation marks omitted).

snow to diminish the hazard of injury to the invitee."<sup>88</sup> Michigan's approach is also consistent with this Court's prior holding in *PNC Bank*, and also recognizes that snow and ice have a temporal element that makes them distinct from artificial conditions, such as the curb at issue in *McIntosh*.

Unlike a permanent condition such as a curb or a rainspout, snow and ice come to be on the premises through no design of the landowner. Additionally, snowfall and ice buildup are unpredictable as to how long they will occur. This creates a thorny situation: if a landowner owes a duty to an invitee to make sure the premises are reasonably safe from open and obvious snow and ice, at what point does this duty arise? Kentucky law has long recognized that a landowner "does not insure [an invitee's] safety."<sup>89</sup> Yet imposition of an absolute duty, as the Court of Appeals would require, places the landowner in exactly this position.

Michigan's imposition of a duty on landowners in the context of snow and ice is not an absolute one, however, as "it is also well established that wintry conditions, like any other condition on the premises, may be deemed open and obvious."<sup>90</sup> At the same time, Michigan also hews closely to § 343A's approach to the open and obvious doctrine. In Michigan, courts must "ask whether the individual circumstances, including the surrounding conditions, render a snow or ice condition open and obvious such that a reasonably prudent person would foresee the danger."<sup>91</sup> If the snow and ice is open and obvious, an invitee can only survive summary judgment if the snow and ice is effectively unavoidable.<sup>92</sup> Snow

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<sup>88</sup> *Id.* (internal quotation marks omitted).

<sup>89</sup> *Scuddy Coal Co. v. Couch*, 274 S.W.2d 388, 390 (Ky. 1954).

<sup>90</sup> *Hofner*, 821 N.W.2d at 96.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 101.

and ice is effectively unavoidable if the risk of harm associated with the ice is so unreasonable that its presence is inexcusable<sup>93</sup> or if the invitee is required or compelled to confront it.<sup>94</sup> The standard for requirement or compulsion is demanding, as "situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so."<sup>95</sup> This approach recognizes the unique issues posed by snow and ice while also adhering to the Restatement (Second) approach concerning open and obvious conditions.

Application of the "natural accumulation" rule to the facts of this case results in one outcome: summary judgment in favor of Wendy's. Under the "natural accumulation" rule, Wendy's owed no duty to Bruner to make its premises safe from the naturally-occurring snow and ice that occurred as part of the ongoing ice storm. Thus, under this approach, the Court of Appeals erred and the Jessamine Circuit Court's entry of summary judgment was proper.

**2.2. Jurisdictions that do not recognize the "natural accumulation" rule recognize the unique issues posed by snow and ice and treat them differently from artificial conditions.**

Summary judgment is also proper under the so-called "Connecticut rule." Many jurisdictions have abandoned the "natural accumulation" rule in favor of a generalized duty on landowners, "a duty to act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk[,]"<sup>96</sup>

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<sup>93</sup> *Id.* at 101-02.

<sup>94</sup> *Id.* at 99.

<sup>95</sup> *Id.* (emphasis in original).

<sup>96</sup> *Papadopoulos v. Target Corp.*, 2, 930 N.E.2d 142, 154 (Mass. 2010).

the so-called "Connecticut rule."<sup>97</sup> Even so, many of the jurisdictions that have adopted the "Connecticut rule" continue to treat snow and ice differently from artificial conditions on the land, and recognize that even this duty is not absolute. Snow and ice are naturally-occurring and cannot be prevented as they are occurring, and many courts have adopted the rule that allows for a reasonable amount of time to remove snow and ice:

in the absence of unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time thereafter before removing ice from outside walks and steps.<sup>98</sup>

Courts that have adopted this approach recognize that requiring a landowner "to keep walks and steps clear of dangerous accumulations of ice, sleet or snow or to spread sand or ashes while a storm continues is inexpedient and impractical."<sup>99</sup> Not only would this requirement be impractical, but "requiring a business proprietor to continually expend effort during a winter storm to remove precipitation from outdoor surfaces would essentially be a requirement to insure the safety of invitees and is a burden which is beyond that of ordinary care."<sup>100</sup>

The rationale behind this rule takes into account the unique challenges snow and ice pose for premises liability. "Since a storm produces slippery conditions as long as it lasts, it would be unreasonable to expect the possessor of

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<sup>97</sup> See generally *Papadopoulos v. Target Corp.*, 2, 930 N.E.2d 142 (Mass. 2010), *Mucsi v. Graoch Associates Partnership # 12*, 31 P.3d 684 (Wash. 2001), *Touchette v. Weis Markets*, 37 A.3d 1241 (Pa. Super. Ct. 2011), *Richardson v. Corvallis Public School District No. 1*, 950 P.2d 748 (Mont. 1997), and *Burrell v. Kwik Shop, Inc.*, 2005 Neb. App. LEXIS 249 (Neb. App. October 18, 2005).

<sup>98</sup> *Kraus v. Newton*, 558 A.2d 240, 243 (Conn. 1989).

<sup>99</sup> *Id.* See also *Berardis v. Louangxay*, 969 A.2d 1288 (R.I. 2009), *Fad Limited Partnership v. Feagley*, 377 S.E.2d 437 (Va. 1989), *Worley v. Bradford Pointe Apartments, Inc.*, 73 P.3d 149 (Kan. App. 2003), *Mattson v. St. Luke's Hospital of St. Paul*, 89 N.W.2d 743 (Minn. 1958).

<sup>100</sup> *Worley v. Bradford Pointe Apartments, Inc.*, 73 P.3d 149, 153 (Kan. App. 2003).

the premises to remove the freezing precipitation as it falls."<sup>101</sup> As a long-standing adherent to this position, Minnesota recognizes that "[r]easonable care requires only that the possessor shall remove the ice and snow, or take other appropriate corrective action, within a reasonable time after the storm has abated."<sup>102</sup> Moreover, "[t]he exercise of reasonable care for the safety of invitees . . . carries with it the necessary implication that the actor shall have reasonable notice of the need for, and a reasonable opportunity to take, corrective action for the safety of invitees."<sup>103</sup> Minnesota's approach is also appealing due to the fact that it does not penalize the landowner for making efforts to remove snow and ice throughout the course of the storm, as was done in this case and in *PNC Bank*. The Supreme Court of Minnesota has recognized that "[t]he fact that the possessor may have attempted to take corrective measures during the storm's progress does not change the situation even though such measures were temporarily effective."<sup>104</sup> This approach encourages removal of snow and ice but also guards against a landowner becoming an insurer of an invitee's safety.

Washington, a jurisdiction that has adopted § 343A, applies a similar approach to Minnesota. Washington also adheres to the rule that a landowner must be given a reasonable period of time in which to alleviate the snow and ice on its property.<sup>105</sup> The Supreme Court of Washington has indicated that four days with snow and ice on the ground is greater than a reasonable time in which to

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<sup>101</sup> *Mattson v. St. Luke's Hospital of St. Paul*, 89 N.W.2d 743, 745 (Minn. 1958).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Mucsi v. Graoch Associates Partnership # 12*, 31 P.3d 684 (Wash. 2001).

remove it,<sup>106</sup> but has not established a floor for what the minimum amount of time is necessary to constitute a reasonable time. This Court need not address this issue. Applying this approach, summary judgment was proper, as Wendy's did not have a reasonable period of time in which to remove the snow and ice at the time of Bruner's fall.

Bruner fell during the early part of a major ice storm that lasted for several days. Wendy's took corrective measures during the storm's progress, but could not stay the elements indefinitely. Nor was it required to do so. Under this approach, the duty that Wendy's owed Bruner would not have arisen until after it had a reasonable time in which to remove the snow and ice from its parking lot. Bruner fell during the early part of this storm that continued for several days, while Wendy's took the corrective action it could to make its premises reasonably safe. In other words, Wendy's did all that it was required to do. Summary judgment was appropriate, and the Court of Appeals must be reversed.

**3. Summary judgment was appropriate because it was not reasonably foreseeable to Wendy's that Bruner would become distracted or would not appreciate the danger posed by snow and ice.**

As noted by Judge Thompson, the Court of Appeals incorrectly applied *McIntosh* to this case. Both *McIntosh* and § 343A of the Restatement adopted in *McIntosh* dealt with the foreseeability to the landowner that the invitee would be distracted and therefore fail to observe the otherwise open and obvious

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<sup>106</sup> *Id.* at 690.

condition.<sup>107</sup> In this case, there was no evidence that Bruner was distracted or that he failed to observe the snow and ice in Wendy's parking lot.

In *Lucas v. Gateway Community Services Organization, Inc.*,<sup>108</sup> the Court of Appeals addressed the issue of whether summary judgment was appropriate where the plaintiff had fallen on crumbling gravel in a parking lot.<sup>109</sup> The Court of Appeals held that summary judgment was appropriate in that instance, as there was no evidence that the plaintiff was distracted.<sup>110</sup> Thus, as Judge Thompson articulated in his dissent in this case, if a condition is open and obvious and it is not foreseeable to the landowner that an invitee would be distracted or would not observe or appreciate the danger, summary judgment is appropriate.<sup>111</sup>

Nothing in the record on appeal indicates that Bruner was distracted; indeed, he testified that immediately before he fell he got out of his vehicle the same way he always would.<sup>112</sup> Similarly, there is nothing in the record to indicate that Bruner would not observe or appreciate the danger posed by snow and ice. Bruner is unlike the plaintiff in *McIntosh*; Bruner was not acting under any sort of emergency situation where his attention was focused elsewhere and where the landowner would reasonably foresee this. Nothing in Bruner's testimony indicated that he was distracted. There was no reason for Wendy's to anticipate that Bruner or any invitee would not observe or appreciate the obviousness of snow and ice on the parking lot. It was not foreseeable that a person would drive

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<sup>107</sup> *McIntosh*, 319 S.W.3d at 394.

<sup>108</sup> *Lucas v. Gateway Community Services Organization, Inc.*, 343 S.W.3d 341 (Ky. App. 2011).

<sup>109</sup> *Id.* at 342.

<sup>110</sup> *Id.* at 346.

<sup>111</sup> *Bruner v. Miami Management Company, Inc.*, 2012 Ky. App. Unpub. LEXIS 315, at \*13-\*14 (Ky. App. April 27, 2012) (Thompson, J. dissenting).

<sup>112</sup> Elgan Bruner Deposition, p. 39, ll. 8-9, previously included as Appendix 4 to Appellees' Brief to Court of Appeals.

through snow and ice to arrive at Wendy's, observe the existence of snow and ice at Wendy's, and then become distracted such that he failed to observe the snow and ice upon exiting his vehicle. To hold otherwise would be at odds with the comments and illustrations to § 343A.

Of the illustrations to § 343A, Bruner's fall most closely resembles that where a plate glass door was well-lit and plainly visible to any person exercising ordinary attention.<sup>113</sup> The drafters of the Restatement indicate that this is a scenario where the landowner is not liable to the invitee when the invitee, lost in his own thoughts, walks into the plate glass door.<sup>114</sup> The comments to § 343A provide guidance as to what constitutes a foreseeable distraction. Comment f indicates that a landowner should expect harm to the invitee from an obvious condition "where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it."<sup>115</sup> The invitee's distraction was foreseeable in *McIntosh*, where the paramedic was focused on providing patient care and getting the patient into the hospital.<sup>116</sup> It was not foreseeable here.

Without a foreseeable distraction, there is nothing to indicate that a landowner should reasonably foresee would cause an invitee to fail to discover what is obvious or fail to protect himself against. There can be no liability on the part of the landowner without a reasonably foreseeable distraction in the face of

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<sup>113</sup> Restatement (Second) of Torts, § 343A, illustration 1.

<sup>114</sup> Restatement (Second) of Torts, § 343A, illustration 1.

<sup>115</sup> Restatement (Second) of Torts, § 343A, comment f.

<sup>116</sup> *McIntosh*, 319 S.W.3d at 387-88.

an open and obvious condition.<sup>117</sup> § 343A(1) does not impose an absolute duty on landowners where open and obvious conditions are concerned. By implication, neither does *McIntosh*. Because there was no distraction on Bruner's part, let alone a foreseeable distraction, the Court of Appeals erred and must be reversed.

### **Conclusion**

Kentucky has historically treated snow and ice differently from other areas of premises liability law, resulting in the development of a separate branch of case law devoted solely to snow and ice. The Court's recent adoption of § 343A(1) of the Restatement (Second) of Torts does not change this. *McIntosh* focused on the duty of a landowner to protect an invitee against unreasonable hazards. Kentucky law has long held that snow and ice do not constitute unreasonable hazards that a landowner has a duty to protect an invitee against.

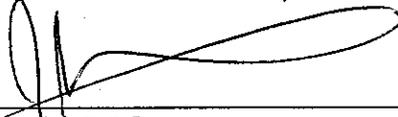
Other courts, including those that have also adopted § 343A(1) continue to treat snow and ice separately in the context of premises liability law. There is no reason for this Court to do any differently. Under any approach that recognizes the inherent differences of snow and ice from artificial conditions on the land, including the approach historically utilized by Kentucky, Wendy's is entitled to summary judgment. The Court of Appeals must therefore be reversed and summary judgment reinstated.

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<sup>117</sup> Restatement (Second) of Torts, § 343A, illustration 1.

Respectfully submitted,

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## **Index to Appendix to Appellants' Brief**

1. Jessamine Journal, January 29, 2009
2. Lexington-Herald Leader, January 27, 2009
3. White House Press Release, February 5, 2009
4. Order From Jessamine Circuit Court, March 18, 2011
5. Opinion From Court of Appeals, April 27, 2012