

COMMONWEALTH OF KENTUCKY
SUPREME COURT

FILE NO: _____
COURT OF APPEALS FILE NO. *****
FAYETTE CIRCUIT COURT ACTION NO. *****

PLAINTIFF S

MOVANT

v.

[HOSPITAL]

RESPONDENT

MOTION FOR DISCRETIONARY REVIEW

Submitted by:

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of this Motion for Discretionary Review have been sent by U.S. registered mail this August 27, 2010, to *****

Attorney for Movant

May It Please the Court,

The Movant petitions for the Court’s discretionary review of the Kentucky Court of Appeal’s decision in Plaintiff S v. [Hospital], 2009-CA-000945-MR, rendered on July 30, 2010, in light of the change in the law concerning the “open and obvious” hazard doctrine effected by this Court’s decision in Kentucky River Medical Center et al. v. McIntosh, 2008-SC-00464-DG, rendered on August 26, 2010.

Pursuant to CR 76.20(3), the Movant states as follows:

1. The Movant’s name is Plaintiff S, and the name and address of her counsel is *****.
2. The Respondent’s name is [Hospital], and the name and address of its counsel is *****.
3. The date of final disposition by the Court of Appeals was July 30, 2010. A copy of the Court of Appeals Opinion is attached as “Exhibit 1.”
4. A supersedeas bond has not been executed.
5. Neither the Movant nor any other party to the proceeding has a Petition for Rehearing or Motion for Reconsideration pending in the Court of Appeals.

STATEMENT OF THE CASE AND THE MATERIAL FACTS

The Movant, Plaintiff S, was injured on the Respondent’s hospital premises on March 29, 2007 when she tripped on some wires strung along the side of her husband’s hospital bed. Ms. Plaintiff S had been visiting her husband in the hospital’s rehabilitation facility for approximately five weeks, and had been aware of the existence of the wires. Ms. Plaintiff S’s daughter had previously complained to hospital personnel that the wires presented a

tripping hazard. At the time of her fall, Ms. Plaintiff S had been putting cream on her husband's back and had just leaned over the bed to kiss him goodbye when her feet unexpectedly became entangled in the wires, causing her to fall to the floor.

Ms. Plaintiff S timely filed a personal injury lawsuit against the Respondent premises owner. The Respondent then moved the Fayette Circuit Court for summary judgment, which the court granted on April 20, 2009, finding that the hazard was "open and obvious," thus the Respondent had no duty to warn of, remove or repair the hazard under Kentucky law.

Ms. Plaintiff S appealed to the Kentucky Court of Appeals, arguing that the "open and obvious" doctrine did not apply on the facts, as the Respondent hospital had reason to anticipate that Ms. Plaintiff S and other visitors to the rehabilitation facility would be foreseeably distracted as they tended to their loved ones at their bedsides. Moreover, Ms. Plaintiff S had no alternative means of approaching her husband's bed except from the right side, along which the hazardous wires were strung.

The Court of Appeals rejected Ms. Plaintiff S's arguments, concluding that Ms. Plaintiff S's tending to her husband and kissing him goodbye just before her feet became entangled in the wires did not constitute evidence that she was distracted at the time she fell. Further, the Court of Appeals opined that Ms. Plaintiff S had no urgent need to kiss her husband goodbye, thus the fact that she had to navigate the hazardous wires to give her husband a goodbye kiss did not overcome the duty she had to avoid the wires under Kentucky's "open and obvious" hazard doctrine. Thus, concluded the Court of Appeals, "the general rule remains that a landowner is not liable for such open and obvious hazards."

QUESTION OF LAW

Pursuant to this Court's decision in Kentucky River Medical Center et al. v. McIntosh, 2008-SC-00464-DG, which effectively nullifies the "open and obvious" hazard doctrine under Kentucky law, should the Movant's case be remanded so that the appropriate court below can reconsider the application of the "open and obvious" doctrine to the facts of the underlying case, and instead decide whether the rendition of summary judgment was appropriate under Kentucky's pure comparative fault law?

SPECIFIC REASONS FOR REVIEW

1. The Timing of the Judicial Decisions in this Case is Noteworthy

This Court's decision in Kentucky River Medical Center et al. v. McIntosh, 2008-SC-00464-DG, was rendered on August 26, 2010, twenty-seven (27) days after the Court of Appeals rendered its decision in the Movant's case, Plaintiff S v. [Hospital], 2009-CA-000945-MR, on July 30, 2010.

Because the Court rendered its McIntosh decision more than twenty (20) days after the Court of Appeal's decision in the Movant's case, the Movant is foreclosed from filing a timely Petition for Rehearing under CR 76.32(2). However, because thirty (30) days have not yet passed since the Court of Appeal's decision, the Movant now seeks to obtain relief through this Court's review of the Court of Appeal's decision in light of the change to Kentucky law enunciated in McIntosh concerning the "open and obvious" hazard doctrine.

2. McIntosh Suggests that the Court of Appeals and/or the Trial Court Incorrectly Applied the Law

This Court's decision in McIntosh effectively nullified the "open and obvious" doctrine under Kentucky law, finding it to be a relic of the contributory negligence era and

incompatible with Kentucky's present law of pure comparative fault as announced in Hilen v. Hays, 673 S.W.2d 713, 720 (Ky. 1984) and codified in KRS § 411.182(11)(a)1-(b). Because the law of Kentucky is now that the "open and obvious" hazard doctrine is incompatible with Kentucky's pure comparative fault law, the Movant submits that the Court of Appeals erred in the application of the "open and obvious" doctrine in finding that the trial court's grant of summary judgment was appropriate on the facts presented. Accordingly, instead of the trial court or the Court of Appeals concluding that, in the instant case, the hazardous wires' being "open and obvious" precluded any recovery to Ms. Plaintiff S for her injuries, a Kentucky *jury* should decide the degree of fault to be attributed to the parties under Kentucky's pure comparative fault law.

3. Changes in Kentucky Case Law are Appropriately Applied Retroactively

The effect of judicial decisions in particular cases on the law of the Commonwealth is appropriately applied retroactively. As this Court has recently noted, the Kentucky Supreme Court "generally embrace[s] the idea that although legislation may only apply prospectively, judicial decisions generally apply retroactively." Branham v. Stewart, 307 S.W.3d 94, 102 (Ky.2010). The Branham decision also cites as support for this proposition United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982), in which the U.S. Supreme Court noted that "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."

WHEREFORE, the Movant respectfully requests that this Court review the Court of Appeal's decision in Plaintiff S v. [Hospital], 2009-CA-000945-MR, in light of the change in Kentucky law effected by Kentucky River Medical Center et al. v. McIntosh, 2008-SC-

00464-DG, and remand this case to the appropriate court so that questions of material fact pertinent to the comparative fault of the parties can ultimately be weighed by the trier of fact.

Respectfully submitted,
