COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
DIVISION 8
CIVIL ACTION NO. [redacted]

[redacted] PLAINTIFF

v. **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

[DEFENDANT] DEFENDANTS
and UNKNOWN DEFENDANT

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Plaintiff, [redacted], through undersigned counsel, hereby moves this honorable Court to deny Defendant [Defendant]'s Motion for Summary Judgment, and states in support thereof:

SYNOPSIS OF LEGAL ISSUES THAT PRECLUDE SUMMARY JUDGMENT

Defendant's single argument for summary judgment, *i.e.*, that "there is no duty to warn of open and obvious hazards" (*Defendant's Motion*, at 4), both misstates the legal issue in this premises liability case and is insufficient to withstand summary judgment under Kentucky law.

First, the Kentucky Supreme Court has ruled that, once a plaintiff has demonstrated that (1) she had an encounter with a dangerous condition on a business's premises, (2) the encounter was a substantial factor in causing the plaintiff's injuries, and (3) by reason of the presence of the condition, the business premises were not in a reasonably safe condition for the use of business invitees, "such proof creates a rebuttable presumption sufficient to avoid a summary judgment." *Bartley v. Educational Training Systems, Inc.*, 134 S.W.3d 612, 616 (Ky.2004), citing *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431, 437 (Ky.2003). Further, such proof "shifts the burden of proving the absence of negligence, *i.e.*, the exercise of reasonable care, to the party who invited the injured customer to its business premises." *Id*.

Here, Defendant has failed to show the exercise of reasonable care and thus has failed to rebut the presumption of negligence proven by Plaintiff. Indeed, Defendant concedes that it created and maintained an open and obvious hazard on its premises. *Defendant's Motion*, at 7.

Second, and more importantly, Defendant has failed to note the exceptions to the "open and obvious" hazards doctrine under Kentucky law. Kentucky law mandates that a "possessor of business premises is not liable to his invitees for physical harm caused to them by any condition on the premises whose danger is known or obvious to them **unless the possessor should anticipate the harm despite such knowledge or obviousness**." *Bonn v. Sears, Roebuck & Co.*, 440 S.W.2d 526, 528 (Ky.1969) (emphasis added). Moreover, in *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 368 (2005), the Kentucky Supreme Court carved out a clear exception to the "open and obvious" doctrine for the category of hazards caused by the owner of business premises where the owner can reasonably be expected to anticipate that invitees may be distracted from known hazards. The facts of the instant case fall squarely into this category.

Thus, there remain at least three genuine factual issues that are in the province of a jury here under Kentucky law: (1) whether Defendant should have anticipated the harm to Plaintiff despite the obviousness of the hazardous condition, (2) whether, if Defendant should have anticipated Plaintiff's harm, Defendant exercised reasonable care toward Plaintiff, and (3) whether Plaintiff exercised reasonable care in her use of Defendant's business premises. Because these are questions of fact for a jury to decide, summary judgment is inappropriate here.

SUMMARY JUDGMENT STANDARD

"[T]rial judges are to refrain from weighing evidence at the summary judgment stage; […] they are to review the record after discovery has been completed to determine whether the trier of fact could find a verdict for the non-moving party." *Welch v. American Publishing Co. of*

Kentucky, 3 S.W.3d 724, 730 (Ky. 1999), *citing Steelvest v. Scansteel*, 807 S.W.2d 476, 482-483 (Ky. 1991). "[A] trial judge **must** view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *First Federal Sav. Bank v. McCubbins*, 217 S.W.3d 201, 204 (Ky. 2006) [emphasis added].

ARGUMENTS

1. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE THE ISSUE OF WHETHER DEFENDANT SHOULD HAVE ANTICIPATED PLAINTIFF'S HARM IS A QUESTION OF FACT FOR A JURY

A. Exception to "Open and Obvious" Doctrine Under Kentucky law

In 2005, the Kentucky Supreme Court codified an exception to the "open and obvious" doctrine in premises liability cases. The Court announced that otherwise obvious hazards may give rise to a duty of reasonable care if the circumstances are such that the owner "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." *Horne v. Precision Cars of Lexington, Inc.,* 170 S.W.3d 364, 367 (2005). In *Horne*, the Kentucky Supreme Court specifically applied § 343A of the Restatement of Torts to that category of hazards caused by the owner of the business premises which may be known or obvious to the invitee. *Id*. at 368. The *Horne* decision was fully in accord with the earlier *Bonn* ruling wherein a possessor is not liable to his invitees for physical harm caused by known or obvious hazards "unless the possessor should anticipate the harm despite such knowledge or obviousness." *Bonn v. Sears, Roebuck & Co.*, 440 S.W.2d 526, 528 (Ky.1969). These rulings make clear that an open and obvious hazard may give rise to a duty of care in circumstances where invitees will encounter the hazard amid distractions and obstacles likely to cause invitees to forget the hazard.

B. Genuine Issues of Material Fact Remain in this Case Regarding Defendant's Reasonable Anticipation of Harm to Invitees

The facts of the instant case fall squarely into the category of hazards for which *Horne* and *Bonn* have carved out exceptions, namely, hazards created by the owner of business premises from which the owner might reasonably anticipate the invitee would be distracted, despite the invitee's being aware of the hazard. Defendant concedes creation and maintenance of an open and obvious hazardous condition, *i.e.*, the wires by Plaintiff's husband's hospital bed, on its hospital premises. *Defendant's Motion*, at 7. Plaintiff has testified that she was aware of the hazardous condition of the wires by her husband's hospital bed. *Deposition of Plaintiff, attached as Exhibit 1*, at 16.

Plaintiff has also testified to ample reasons why the Defendant might anticipate that invitees to its rehabilitation facility would be distracted from the hazard posed by the wires while visiting their bed-bound loved ones. She would have dinner and lunch with her husband at his bedside. *Id*. at 11, 12. She would put cream on his back to soothe his skin irritations. *Id*. at 17. She would have to stand on her toes and lean over the bed to kiss her husband goodbye. *Id*. at 18. In short, it is entirely reasonable for a hospital to anticipate that its patients' visitors might be distracted by the plights of their ailing loved ones, rather than spending their hospital visits looking down at their feet to escape the hazards the hospital had created and maintained.

Any reasonable jury could find that the Defendant hospital owed Plaintiff a duty of care to maintain the premises in a reasonably safe condition, and that Defendant breached that duty by failing to anticipate that a hospital visitor may be momentarily distracted by the purpose of her visit such that she, despite exercising all reasonable care, might be harmed by an open and obvious hazardous condition, created and maintained by the Defendant hospital. The law as it now stands in Kentucky makes this a question of fact for a jury to decide.

C. Genuine Issues of Material Fact Remain in this Case Regarding Whether Defendant Exercised Due Care toward Plaintiff

While a business owner does not insure an invitee's safety, he must "take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use of the property." *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W .3d 431, 433 (Ky.2003) quoting *Prosser and Keeton on Torts,* § 61, at 425-26 (5th ed.1984). Defendant operates a rehabilitation facility, an eminently foreseeable use of which will be senior citizens visiting their recuperating loved ones.

In *Bartley v. Educational Training Sys., Inc.*, 134 S.W.3d 612 (Ky.2004), the Kentucky Supreme Court noted that "[u]nder common law principles of negligence, a possessor of land may be subject to liability for failing to protect his or her invitees against dangerous conditions involving unreasonable risks of harm." *Bartley*, 134 S.W.3d at 614. The Court then noted that

> [t]he occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. **But the obligation of reasonable care is a full one**, applicable in all respects, and extending to everything that threatens the invitee with an **unreasonable risk of harm**.

Id. at 615 (emphasis added).

Thus, in the present case, one among several questions of fact for a jury to decide is whether the tangle of wires alongside Plaintiff's husband's hospital bed constituted an unreasonable risk of harm. That the wires may have been "open and obvious" is <u>not a bar</u> to finding Defendant liable for negligence. As the Kentucky Supreme Court noted in *Horne*,

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee **notwithstanding its known or obvious danger**. In such cases **the possessor is not relieved of the duty of reasonable care** which he owes to the invitee for his protection …. Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, 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.

Horne, supra, at 367, citing *Restatement (Second) of Torts*, § 343A, cmt.(f)(1965) (emphasis added).

As argued in Section I.B., *supra*, Plaintiff provided ample testimony to the effect that her attention was often reasonably distracted from the known hazardous wires. *Deposition of Plaintiff*, at 11, 12, 17, 18. Additionally, Plaintiff testifies that the hazardous condition pre-dated Plaintiff's use of Defendant's business premises, suggesting an ongoing problem Defendant had ignored. *Id*. at 13, 15. Nothing in the record indicates Defendant attempted to reduce the risk of harm to invitees by securing the wires or by other means. Plaintiff also states at several points in her testimony that none of Defendant's hospital staff were willing or able to help her up once she fell. *Id*. at 35-39. These facts combine to suggest yet another question of fact for the jury to decide, namely, whether Defendant breached its duty of reasonable care owed to its invitee.

"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." *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 367 (Ky.2005), citing *Restatement (Second) of Torts*, § 343A(2) (1965). In the instant case, Defendant was <u>not</u> relieved of its duty of care simply because both Defendant and Plaintiff knew the wires could be hazardous. Whether the Defendant exercised reasonable care to prevent harm to its invitees from a known hazard, as well as whether the wires constituted an unreasonable risk of harm, are factual questions for a jury.

D. Plaintiff Exercised All Reasonable Care to Avoid Any Hazard

"In determining the extent of preparation that a business visitor is entitled to expect to be made for his protection, the nature of the premises and the purposes for which it is used are of great importance." *Bonn v. Sears, Roebuck & Co.*, 440 S.W.2d 526, 529 (Ky.1969). *Bonn*

involved an **open grease pit** in an automotive repair business, thus "the risk was inherent in the nature of the activity itself." *Id*. In contrast, the instant case involves the ostensibly less risky activity of a senior citizen visiting her recuperating husband in a **rehabilitation center**, where the owner could reasonably anticipate hazards that may trip elderly or recuperating people.

Plaintiff was not visiting Defendant's business premises as a hospital safety inspector; rather, she was there to visit her ailing husband. Plaintiff has testified that she paid careful attention to her surroundings for the five weeks during which she visited Defendant's premises. *Deposition of Plaintiff*, at 24, 25. That she never became tangled and tripped in these wires previously testifies to the due and reasonable care she had exercised for those five weeks, using the physical agility she had to avoid injury from the hazardous condition created and maintained by Defendant.

Further, Plaintiff had no alternative route to her husband's bed whereby she could avoid the hazardous wires. The left side of the bed by the window was too narrow for Plaintiff to access, thus she had to approach her husband from the right, where the wires were. *Deposition of Plaintiff*, at 35. Plaintiff spent five weeks successfully negotiating the tangle of wires next to her husband's bed. *Id.* at 27. As an invitee, Plaintiff was compelled to use a particular path on the premises, she was not provided with an alternative means of visiting her husband's bedside, she attempted to negotiate the hazardous path herself, she proceeded cautiously, she successfully negotiated the hazard for five straight weeks, and she was injured anyway despite her caution. Plaintiff had no other recourse but to proceed at her peril or refrain from visiting her recuperating husband at his hospital bedside. *See Wallingford v. Kroger Co.*, 761 S.W.2d 621, 624, 625 (Ky.App.1988) (reversing a directed verdict against an employee who was forced to use one particular entryway known to both the employee and the employer to be hazardous).

While Plaintiff was required to exercise ordinary care for her own safety, such did not require her to look directly down at her feet with each step taken. *Humbert v. Audubon Country Club*, 313 S.W.2d 405, 407 (Ky.1958). Nor was she "required to look for danger when there was no reason to apprehend danger." *Winn-Dixie Louisville, Inc. v. Smith*, 372 S.W.2d 789, 792 (Ky.1963). The facts here suggest Plaintiff exercised adequate due care for her safety, but whether or not she did exercise due care remains a jury question precluding summary judgment.

II. THE CASES DEFENDANT CITES IN SUPPORT OF ITS ARGUMENT ARE UNAVAILING UNDER KENTUCKY LAW

Above, Plaintiff has discussed the case of *Bonn v. Sears, Roebuck & Co.*, 440 S.W.2d 526, 528 (Ky.1969) and applied its reasoning to the facts of the instant case. Below, Plaintiff addresses each of the additional cases cited by Defendant in support of its argument.

A. *Rogers v. Prof'l Golfers Ass'n of Am.*, 28 S.W.3d 869, 872 (Ky.App.2000)

Rogers predates the *Horne* decision and thus does not represent the law as it stands today. Moreover, in *Horne*, the Kentucky Supreme Court specifically distinguished *Rogers* as a natural outdoor hazard case, as opposed to an owner-created hazard, therefore the "open and obvious" exception did not apply in *Roger*s. Given the Supreme Court's ruling in *Horne*, *Rogers* is not good law on this point.

B. *Baker v. McIntosh*, 132 S.W.3d 230 (Ky.App.2004)

This Kentucky Court of Appeals decision also predates *Horne*, and it concerns a horse trader injured by a restive horse, not by an owner-created hazard, thus *Baker* is inapplicable here.

C. *Johnson v. Lone Star Steakhouse and Saloon*, 997 S.W.2d 490 (Ky.App.1999)

Lone Star predates *Horne* by six years and thus does not incorporate the law as it now stands in Kentucky. *Lone Star* also predates *Lanier, supra*, by four years and thus does not take into account the burden-shifting analysis now required in premises liability cases under

Kentucky law. In addition, the hazard in *Lone Star* (peanut shells on the floor) was created not by the premises owner but by other invitees.

D. *Booker v. Kentucky Center for the Arts Corp.*, 2006 WL 2578303 (Ky.App.2006)

Booker is the only Kentucky case that Defendant cites that has been decided since the Kentucky Supreme Court handed down its decision in *Horne*. Tellingly, *Booker* is an unpublished decision by the Kentucky Court of Appeals.

Although Defendant provides a footnote stating that this unpublished decision is "[c]ited pursuant to CR 76.28(4)(c)" (*Defendant's Motion*, at 6), Defendant does not provide any explanation as to how "there is no published opinion that would adequately address the issue before the court," a prerequisite in that rule for citing unpublished decisions. CR 76.28(4)(c).

Such justification for citing an unpublished opinion is particularly necessary where Defendant has chosen to ignore not only the cases Plaintiff has cited in the above arguments (especially the Kentucky Supreme Court's rulings in *Horne*, *Bartley*, and *Lanier*), but also several other unpublished Kentucky Court of Appeals decisions that favorably cite the "open and obvious" exception codified in *Horne*. *See, e.g.*, *Gordon v. Norton Hospitals, Inc.*, 2008 WL 5191452 (Ky.App. 2008) (citing the *Horne* exception and concluding that "if a reasonable inference can be made that the [hazardous object] constituted an unsafe condition on the premises, then summary judgment should not have been granted," slip op. at 2, 3); *Moore v. Lincks*, 2006 WL 1510634 (Ky.App.2006) (noting that "[o]ur Supreme Court has recently noted that foreseeable distractions such as these may render an otherwise obvious hazard unreasonably dangerous and thus impose a duty on the possessor to the property to warn or to take other precautions" and that "[w]hether the [owners] breached such a duty in these circumstances is a question for the jury," slip op. at 3); *Crawford v. Extended Stay America, LLC*, 2008 WL

2610456, (Ky.App.2008) (noting that *Horne* applies to hazards caused by the owner, slip op. at 2); *Schaefer v. American Carpet Systems, Inc.*, 2007 WL 1207144, (Ky.App. 2007) (noting that *Horne* applies to invitees, slip op. at 3);. *See also Harper v. Mac's Convenience Stores, LLC*, 2007 WL 4300619 (W.D.Ky.2007) (noting that while the *Horne* exception does not apply to natural outdoor hazards, *Horne* does apply to hazards created by the owner, slip op. at 2.).

Copies of all of the above unpublished opinions are attached to this Response pursuant to CR 76.28(4)(c). Plaintiff cites these opinions not because "there is no published opinion that would adequately address the issue before the court," as CR 76.28(4)(c) requires, but merely to demonstrate that Defendant's use of one unpublished opinion in its favor while ignoring those unpublished opinions that are not in Defendant's favor is inappropriate and unpersuasive.

Most importantly, given the numerous Kentucky Supreme Court cases cited by Plaintiff in Section I, *supra*, that "adequately address the issue before the court," Defendant's lack of justification for citing an unpublished opinion under CR 76.28(4)(c) is glaring.

E. Cases From Other Jurisdictions

Defendant cites decisions from courts in Georgia, Ohio, and Michigan, but none of these cases is controlling under Kentucky law or incorporates the law as announced by the Kentucky Supreme Court in *Bonn*, *Horne*, *Bartley*, and *Lanier*, all of which are discussed in Section I, *supra*. Citations to these out-of-state cases are neither necessary nor applicable here.

In sum, all of the cases cited by Defendant are unavailing under the facts of the instant case.

CONCLUSION

Under Kentucky law, a hazardous condition's being "open and obvious' does not relieve the owner of a business premises from liability to invitees injured where the owner can

reasonably be expected to anticipate that such invitees will be distracted from known hazards. The facts here must be viewed in the light most favorable to the Plaintiff. On the facts now in the record, a jury could quite reasonably conclude that (1) Defendant created a hazardous condition in Defendant's hospital, (2) Defendant could reasonably be expected to anticipate that harm would come to invitees who become momentarily distracted from the known hazardous condition, (3) Defendant breached its duty to Plaintiff by failing to exercise reasonable care in the maintenance of its business premises, (4) the hazardous condition was a substantial factor in Plaintiff's injury, and (5) Plaintiff took reasonable care to avoid injury from the hazardous condition created and maintained by Defendant.

The material factual questions of (1) whether Defendant should have anticipated the harm to Plaintiff despite the obviousness of the hazardous condition, (2) whether, if Defendant should have anticipated Plaintiff's harm, Defendant breached its duty of care toward Plaintiff, and (3) whether Plaintiff exercised reasonable care in her use of Defendant's business premises, are within the province of the jury rather than the trial court, thus Defendant is not entitled to summary judgment as a matter of law.

Wherefore, Plaintiff moves this honorable Court to enter the attached Order denying Defendant's Motion for Summary Judgment.

Respectfully submitted,

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Attorney for Plaintiff