COMMONWEALTH OF KENTUCKY
53rd JUDICIAL CIRCUIT
SHELBY CIRCUIT COURT
CIVIL ACTION NO. 07-CI-00402

XXXXXXXXX PLAINTIFF
XXXXXXXXXXX

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

YYYYYYYYYYY., ET AL. DEFENDANTS

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Plaintiff, XXXXXXXXXXX, mother and next friend of XXXXXXX, through undersigned counsel, hereby moves this honorable Court to deny Defendant YYYYYYYYY's Motion for Summary Judgment, and states in support thereof:

I. INTRODUCTION

This is a premises liability case in which a retail store's automated exit door, equipped with motion sensors, closed on and trapped the foot of an 8-year-old girl standing on the door's threshold, injuring her foot. Defendant's single argument for summary judgment, *i.e.*, that "a premises owner does not owe a duty to warn or otherwise protect its invitees from open and obvious conditions" (Motion of Defendant, YYYYYYYYYYYYYYY, for Summary Judgment, *hereinafter* "Defendant's Motion," at 1), ignores numerous genuine issues of material fact that remain in controversy, misapplies the "open and obvious" case law doctrine to the facts of this case, and is insufficient to support summary judgment under Kentucky law.

II. 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].

III. ARGUMENT

A. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE THERE REMAIN GENUINE ISSUES OF MATERIAL FACT REGARDING:

(1) THE CONDITION AND RISK POSED BY THE DOORS BASED ON THE DOORS' DOCUMENTED HISTORY OF MALFUNCTION,

(2) WHETHER THE DOORS CONSTITUTED AN "OPEN AND OBVIOUS" HAZARD, AND

(3) WHETHER DEFENDANT BREACHED ITS DUTY TO MAINTAIN ITS BUSINESS PREMISES IN A REASONABLY SAFE CONDITION

1. There are Several Genuine Issues of Material Fact regarding the Condition and Risk Posed by the Doors Based on the Doors' Documented History of Malfunction

Defendant is well aware that the doors of its Shelbyville store periodically malfunction, that the door that injured Plaintiff had had several malfunctions in the 15 months prior to Plaintiff's injury, and that its malfunctioning doors will occasionally return to normal operation without the intervention of a service technician.

a. There are numerous documented safety issues with the doors of Defendant's Shelbyville store

According to the maintenance records provided by Defendant, the doors of the Shelbyville store have been known to malfunction by "closing on people" [Exhibit 1, Bates

stamp WM-000096], to open and close on their own [Exhibit 1, Bates stamp WM-0000111], to close "too fast" [Exhibit 1, Bates stamp WM-0000149], to not open when approached [Exhibit 1, Bates stamp WM-0000140, WM-0000138], to not open all the way [Exhibit 1, Bates stamp WM-0000113], to drag on the ground and not shut [Exhibit 1, Bates stamp WM-0000143], and to require replacement of bad operators [Exhibit 1, Bates stamp WM-0000151], bad transformers [Exhibit 1, Bates stamp WM-0000138], a smashed superscan [Exhibit 1, Bates stamp WM-0000116], bad pivots [Exhibit 1, Bates stamp WM-0000147, WM-0000144], a broken thumblock [Exhibit 1, Bates stamp WM-000099], a loose motor coupling [Exhibit 1, Bates stamp WM-000087], and numerous sensor adjustments where the sensors malfunctioned because they were not in compliance with nationally-recognized standards and [Exhibit 1, Bates stamp WM-00007, WM-000064, WM-000070, WM-000071, WM-0000105, WM-0000114, WM-0000124].

b. The specific door that injured Plaintiff has a documented history of malfunction

In particular, the specific door that caused injury to XXXXXXX [Door No. W18016, *see* Exhibit 1, Bates stamp WM-000063] has a documented history of malfunction in the 15 months prior to Plaintiff's injury. On May 3, 2005, the bodyguard sensor was malfunctioning, causing the door to open improperly [Exhibit 1, Bates stamp WM-0000114]. On June 2, 2005, (1) the "latch angle timing" and (2) the "closing time to latch" functions were out of compliance with nationally-recognized standards and needed correction, and a bad pivot had to be replaced [Exhibit 1, Bates stamp WM-0000105, WM-0000122]. On September 30, 2005, the activating sensor and the safety sensor were once again malfunctioning and required correction [Exhibit 1, Bates stamp WM-0000124]. On December 20, 2005, the door would not close and required a replacement of its swing operator [Exhibit 1, Bates stamp WM-000082]. On January 9, 2006, the door was dragging when opened and was "not stable." [Exhibit 1, Bates stamp WM-000077].

The examining technician determined that the door had slipped down because the door arm bracket was loose. *Id*. On May 24, 2006, less than two months before Plaintiff was injured, the sensors on door No. W18016 had to be corrected for pattern size, sensitivity, and "Safety Operation – Open/Closed" functions [Exhibit 1, Bates stamp WM-000071], requiring a bodyguard adjustment [Exhibit 1, Bates stamp WM-000069]. Significantly, none of the other doors on the grocery side of the store required such adjustment at that time [Exhibit 1, Bates stamp WM-000070, WM-000071].

No safety check was performed on Door No. W18016 until five days after Plaintiff was injured by it. [Exhibit 1, Bates stamp WM-000063], thus its operating condition on the day of Plaintiff's injury is unconfirmed as of yet. Further, the maintenance records show that, in the 15 months prior to Plaintiff's injury, the door that injured Plaintiff had had a malfunctioning sensor in May 2005, September 2005, and May 2006. Further still, the accident report that was finally submitted by the door technician five days after Plaintiff's injury indicates that service seals were not present on the equipment, and that it was unknown whether the door had been adjusted by another company between May 24, 2006, and July 10, 2006. [Exhibit 1, Bates stamp WM-000063]. Given the above history of malfunction, the issues of both (1) the safe operating condition of Door No. W18016 on July 5, 2006, and (2) whether Defendant maintained its business premises in a reasonably safe condition remain genuine issues of material fact for a jury to consider, precluding summary judgment.

c. Defendant is aware that its doors may occasionally malfunction and then return to normal operation without a technician observing any malfunction

Defendant's maintenance records also indicate that Defendant is aware that its doors may have a documented malfunction one day and appear to be working properly the next. On

October 5, 2005, the Shelbyville YYYYYYYY made a service request for repair to the general merchandise entry door (Door No. W18019) because that door was "closing on people." [Exhibit 1, Bates stamp WM-000095]. The service report, dated October 6, 2005, indicates that a technician "[m]onitored door, checked all other doors. All doors are working correctly at this time. Made adjustments to pressure sensor on W18024." [Exhibit 1, Bates stamp WM-000096]

Thus, by Defendant's own admission, Door No. W18019 had been "closing on people" (otherwise YYYYYYYY would not have filed its service request form), yet on observation the next day the door appeared to be functioning properly, and the technician made no adjustments to it to keep it from further "closing on people." *Id*. Viewing the facts of this case in the light most favorable to the Plaintiff, and given the documented malfunction history of Door No. W18016, a jury could reasonably conclude that a similar incident led to Plaintiff's injury on July 5, 2006. As argued further below, a properly functioning automated door will not close on the foot of a patron standing on the threshold.

2. There are Genuine Issues of Material Fact Regarding Whether the Doors Constituted an "Open and Obvious" Hazard

a. The facts of this case do not comport with the "open and obvious" case law doctrine in Kentucky

The cases Defendant cites in support of its contention that the exit doors of a retail store constitute an "open and obvious" hazardous condition are inapposite as they bear no relevant factual relation to this case. There is nothing in the record to indicate that the door was an "open and obvious" hazard as that term is used in Kentucky law. There is no evidence in the record that Door No. W18016 bore any indication whatsoever that it was malfunctioning or was otherwise hazardous: to anyone looking at it, it was an ordinary automated exit door, the kind used by countless thousands of Kentuckians every day. There is nothing in the record to suggest

that Plaintiff XXXXXXXXXX had any warning whatsoever that the door could cause her injury, other than defense counsel's suggestion that an "open and obvious" hazardous condition sprang into existence for an instant prior to the door's closing on Plaintiff's foot.

Kentucky law is quite clear that "open and obvious" hazards do not suddenly spring into existence, but necessarily require that an invitee have a reasonable time to observe them and ascertain any danger they pose, otherwise such hazards could not logically be "open and obvious." Below, Plaintiff discusses each case cited by Defendant in support of its argument in relation to this case.

i. *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431 (Ky.2003)

Lanier involved a customer who slipped and fell on a clear liquid substance that had been spilled on the floor. *Lanier*, 99 S.W.3d at 434. The injury in *Lanier* resulted from a transitory substance, an out-of-the-ordinary aberration that would have been a known hazard to anyone observing it. *Id*. The injury in the instant case resulted from the exit door: a permanent, automatically moving, unavoidable fixture of the store, moving at high speed toward the Plaintiff. In sharp contrast to the "open and obvious" spill in *Lanier*, nothing in the record indicates that there was anything out of the ordinary about this door, other than that it closed on Plaintiff's foot.

ii. *Smith v. Smith*, 441 S.W.2d 165 (Ky.1969)

Smith concerned a mother suing her son after she tripped on a box of tile the son had left in the hallway in his home. *Smith*, 441 S.W.2d at 166. Again, the box of tile was not a permanent, automatically moving, unavoidable fixture of the son's home, unlike the exit doors of the retail business in this case. Anyone who looked at a box of tile in a hallway would recognize the hazard it posed, while nothing in the record here indicates that the exit door that injured Plaintiff was anything other than an ordinary-looking, automated door at the exit of a retail store.

iii. *Horne v. Precision Cars of Lexington, Inc.,* 170 S.W.3d 364 (Ky. 2005)

In *Horne*, a customer tripped over a concrete parking barrier on a car lot while listening to the sales pitch of an employee. *Horne*, 170 S.W.3d at 366. Unlike in *Horne*, however, where the concrete barrier was stationary, in the instant case XXXXXXXXXX' foot was trapped by a moving door that was speeding towards her, a door that ordinarily would stop upon detecting her presence. Anyone can understand why an obscured concrete barrier might present a hazard that would, if not obscured, be readily observable and thus "open and obvious." Here, however, Defendant presents no evidence that anyone looking at this exit door, which was equipped with safety motion sensors, would reasonably perceive such a door to be a "hazardous condition." Such doors, when functioning properly, ordinarily cease to close where the presence of a patron on the threshold is detected. By both logical and legal reasoning, there is no reason that the door in this case would have closed on Plaintiff's foot unless Defendant breached its duty to maintain its business premises in a reasonably safe condition by maintaining an automated exit door that would close on invitees standing on its threshold. And even where an invitee such as Plaintiff could conceivably instantaneously perceive a sudden danger, the "open and obvious" nature of a hazard does not relieve the premises owner of its duty of reasonable care. *Horne*, 170 S.W.3d at 367. Plaintiff argues this last point in extensive detail in Section B, below.

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

In *Lone Star*, the plaintiff had been observing other patrons discard peanut shells on the floor for "around two hours" before she slipped on the shells, thus she "had ample time to view Lone Star's practice of allowing its patrons to toss peanut shells on the floor of the restaurant." *Id*. at 492 [emphasis added]. In contrast, in the instant case, Plaintiff testified that she had

always known the doors of the Shelbyville YYYYYYYY to operate properly. [XXXXXXXXXX depo., at 11:18-25; 28:4-6.] The record does not indicate the length of time between the moment XXXXXXXXXX realized the doors were closing and the moment she was injured, and that length of time is inarguably a genuine issue of material fact in this case. Nevertheless, in sharp contrast to the two hours afforded to the plaintiff to observe the hazard in *Lone Star*, on the facts now in the record, Plaintiff cannot have had more than a second or two to observe the door swinging at her, which is not "ample time" to for Plaintiff to determine (1) that the door was in fact malfunctioning, (2) that the door would not cease to close, as such a motion-sensor-equipped door ordinarily would do, (3) whether Plaintiff would be injured if the door in fact did not cease to close, and (4) whether Plaintiff had sufficient time to step back from the approaching door safely, without risking injury from some other hazard. Viewing these facts under Kentucky law in the light most favorable to Plaintiff, summary judgment is precluded here.

v. *Bonn v. Sears, Roebuck & Co.*, 440 S.W.2d 526 (Ky.1969)

Bonn involved a plaintiff walking into an automotive repair business who observed, but then failed to walk around, an open grease pit. *Bonn*, 440 S.W.2d, at 529. Thus, "the risk was inherent in the nature of the activity itself." *Id.* An open pit in an automotive shop is a clear hazard to anyone observing it, unlike the ordinary-looking exit door in a retail store here. Further, the *Bonn* court noted that "[i]n 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." *Id.* The instant case involves not an adult entering an auto repair shop, but the ostensibly un-risky activity of a child leaving a retail store, where the premises owner could reasonably anticipate hazards that may harm exiting invitees, including a door that closes on patrons who happen to pause on the threshold.

In sum, all of the cases cited by Defendant are unavailing under the facts of the instant case. Under Kentucky law, an "open and obvious" hazard does not suddenly spring into existence; the invitee must have had a reasonable opportunity to observe the potentially dangerous condition and then fail to take reasonable precautions against it. The facts of this case suggest no such reasonable opportunity was available to Plaintiff, who had no more than an instant to determine whether the ordinary-looking exit door posed a hazard to her safety.

b. Nothing in the record supports Defendant's contention that the automated doors of Defendant's store posed an "open and obvious" hazard under Kentucky law

Applied to the Kentucky case law examined above, the facts do not support Defendant's contention that the exit doors posed an "open and obvious hazard" to Plaintiff XXXXXXXXXX. XXXXXXXXXX, then age 8, approached the exit doors of the Shelbyville YYYYYYYY store on July 5, 2006. [Deposition of XXXXXXXXXX, cited portions attached as Exhibit 2, *hereinafter* "XXXXXXXXXX depo.", at 18:3-9.] XXXXXXXXXX came to a stop on the threshold of the door [XXXXXXXXXX depo., at 18:12-13], looking to see whether her grandmother had pulled her car up to the store entrance. [XXXXXXXXXX depo., at 18:14; 32:23-25.] After standing on the threshold for "a couple of seconds" [XXXXXXXXXX depo., at 17:22-24], the right door closed on her foot, trapping it under the door. [XXXXXXXXXX depo., at 19:7-20.] Nothing in the record indicates that XXXXXXXXXX had a reasonable opportunity to observe whether the doors presented a hazardous condition and remove herself from them, nor is there any indication that there was any warning to XXXXXXXXXX that Door No. W18016 was anything other than an ordinary exit door that stops when detecting the presence of a person on the threshold.

Countless thousands of Kentuckians go in and out of automatic swinging doors every day. Properly functioning doors will not swing shut on patrons. Patrons can safely assume that a closing automatic door will stop when the presence of a person standing on the threshold is detected. To support its contention that the doors posed an "open and obvious" hazard, Defendant relies solely on the following exchange between defense counsel and Plaintiff XXXXXXXXXX:

Q. While you were standing there did you see the doors start to close?

A. Yes.

Q. Okay. And when you saw the doors start to close did you think well, maybe I ought to step back or anything like that, or step forward?

A. Step back, I think.

Q. Okay, but you didn't step back?

A. No.

[XXXXXXXXXX depo. at 33:15-23; Defendant's Motion, at 4.]

Applying Kentucky's "open and obvious" case law doctrine to this exchange, the evidentiary defects in Defendant's "open and obvious" defense abound: Precisely how long did XXXXXXXXXX have to observe whether the doors posed a threat to her safety? One second? A fraction of a second? Did she have a reasonable amount of time to ascertain the danger and then step back safely before the door hit her? Did XXXXXXXXXX contemplate that this door speeding at her might not stop closing, even though her experience at the Shelbyville YYYYYYYY had always been that automated doors do not shut on people? [XXXXXXXXXX depo., at 11:18-25; 28:4-6.] Defense counsel did not inquire into these issues, and now seeks to prevent further discovery through its summary judgment motion. These genuine issues of

material fact go directly to Defendant's conclusory "open and obvious" defense, yet they cannot be answered if discovery is now halted.

Nothing in the above exchange, nor anything else in the record, provides any indication that a patron such as Plaintiff could reasonably determine whether a door that is closing will stop, as it should do in normal operation, or continue to close, which it would only do if it were malfunctioning. Defense counsel is concluding that an 8-year-old girl who failed to make an instantaneous determination that exit door of a YYYYYYYY may have been malfunctioning thereby failed to reasonably protect herself against an "open and obvious" hazard. Plaintiff discusses Kentucky's "open and obvious" case law in detail in Section III.A.2.a. above, but notes again here that Kentucky case law requires that an invitee have a reasonable opportunity to observe any potentially hazardous condition in order to take precautions to prevent injury, otherwise the hazard cannot be, logically or legally, "open and obvious." Such a reasonable opportunity was not present on these facts.

c. Further discovery and trial will provide answers to remaining legal and factual issues

Based on the facts now in the record, the genuine issues of material fact in this premises liability case concern not whether an exit door is an "open and obvious" hazard, but <u>why the door did not stop closing</u>. Why should an invitee standing on the threshold of an automatic door, equipped with motion sensors, assume that the door will not stop closing, as it normally would do? Why should an invitee assume that an ordinary-looking automated exit door has a threshold that is not safe to step on? It is understandable that Defendant is not eager to ask a jury of Kentuckians whether a YYYYYYYY patron, standing on the threshold of an automated door equipped with motion sensors, can reasonably expect that door not to close on the patron's foot. Nevertheless, that is precisely the jury question here.

These facts all combine to indicate not only that the door was not functioning properly, but also that its hazardous nature was not apparent. An ordinary-looking, properly functioning exit door does not close on the foot of a patron standing on its threshold. Moreover, these facts beg further questions regarding several genuine issues of material fact, which can be determined through further discovery, concerning (1) whether the Plaintiff had sufficient time to step back from the door as it swung towards her, and (2) whether Plaintiff could reasonably anticipate any harm from standing in the threshold of the exit door, where she had only known such doors at the Shelbyville YYYYYYYY to function properly and to stop closing upon detecting the presence of a person. Further discovery is needed to determine these genuine issues of material fact.

3. There are Genuine Issues of Material Fact Regarding Whether Defendant Breached its Duty to Maintain its Business Premises in a Reasonably Safe Condition

The fact of XXXXXXXXXX's injury speaks for itself: a properly-operating automated door should not swing shut on a patron who is standing on that door's threshold. However, if Defendant contends that its exit doors posed an "open and obvious" hazard to Plaintiff, then Defendant also necessarily contends (1) that its doors will ordinarily close on patrons who pause on the threshold, and (2) that all of its patrons are ordinarily fully aware that the doors will close on them if they pause on the threshold.

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. YYYYYYYY 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 retail store, an eminently foreseeable use of which will be children and adults leaving the store and pausing on the threshold.

"Breach and injury are questions of fact for the jury to decide." *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). Thus, in addition to the genuine issues of material fact outlined above, there remain at least two additional questions for a jury to consider here: (1) whether Defendant breached its duty to Plaintiff by maintaining on its business premises an exit door that closes on patrons who stop on the door's threshold, and (2) whether invitees leaving the Shelbyville YYYYYYYY can reasonably be expected to be fully aware that, if they pause on the threshold of an automated door equipped with bodyguard sensors, they risk personal injury.

B. "OPEN AND OBVIOUS" IS NOT A BAR TO RECOVERY IN NEGLIGENCE UNDER KENTUCKY LAW

Even if Plaintiff were to concede (which she does not) that the exit doors of a retail store somehow constitute an "open and obvious" hazard, under Kentucky law, a hazardous condition's being "open and obvious" is <u>not a bar</u> to finding Defendant liable for negligence. Specifically, 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).

By asserting that its doors posed an "open and obvious" hazard to Plaintiff, Defendant is also necessarily asserting that its doors, when functioning properly, ordinarily can be expected to close on invitees who pause on the threshold. It follows that that if its doors ordinarily close on invitees who pause on the threshold, Defendant has reason to anticipate harm to its invitees, even if all of its invitees are presumed to have full knowledge that the doors pose a threat to their safety.

In *Horne v. Precision Cars of Lexington, Inc.,* 170 S.W.3d 364 (2005), the Kentucky Supreme Court clarified that otherwise obvious hazards still give rise to a duty of reasonable care

if the circumstances are such that the landowner "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*, 170 S.W.3d, at 367. In *Horne*, the 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.

> 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).

Under Kentucky law, then, the jury question then becomes, "Should Defendant YYYYYYYY have anticipated that its exit doors, which Defendant contends ordinarily will close on invitees who pause on the threshold, might cause injury to invitees such as Plaintiff, whom Defendant could reasonably expect to be distracted by their errands (or by looking out for their grandmothers), such that those invitees foreseeably might fail to protect themselves against any threat posed the bodyguard-sensor-equipped doors?"

In the instant case, Defendant was <u>not</u> relieved of its duty of care simply because Plaintiff, in the instant prior to her injury, could conceivably have determined the doors of Defendant's stores, which she had previously known only to stop closing when a person was present on the threshold, to be hazardous. "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, supra*, at 367, citing *Restatement (Second) of Torts*, § 343A(2) (1965). The relevant jury question is whether Defendant could reasonably be expected to anticipate that an invitee might pause on the threshold of an exit door of a retail store to look out for her grandmother at the curb, and become foreseeably distracted by that task, such that the invitee might forget that the store's exit doors ordinarily close on the feet of patrons standing on the threshold.

C. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE DEFENDANT HAS NOT MET ITS DUTY UNDER THE BURDEN-SHIFTING STANDARD OF *LANIER*

Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431 (Ky.2003) created a burden-shifting standard in premises liability cases. The Kentucky Supreme Court 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 prove the exercise of reasonable care and thus has failed to rebut the presumption of negligence proven by Plaintiff under the *Lanier* burden-shifting standard. Indeed, by relying solely on the "open and obvious" defense, Defendant necessarily concedes the creation and maintenance of a hazardous condition, *i.e.*, the automated swinging doors, on its business premises. By conceding the creation of a hazardous condition and failing

to prove that it exercised reasonable care toward invitees endangered by the hazard, Defendant has not met its burden under *Lanier*, and summary judgment cannot be granted under Kentucky law.

IV. CONCLUSION

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 maintained a malfunctioning door in its retail store (or, in the alternative, a door that Defendant knew would close on invitees who paused on the threshold), (2) Defendant breached its duty to Plaintiff by failing to maintain its business premises in a reasonably safe condition, (3) the door was a substantial causative factor in Plaintiff's injury, and (4) Plaintiff took all reasonable care to avoid injury from the hazardous condition created and maintained by Defendant.

There remain at least three primary genuine factual issues that are in the province of a jury here under Kentucky law: (1) whether the doors were in a safe operating condition on July 5, 2006, (2) whether the doors constituted an "open and obvious" hazard, including whether Plaintiff had adequate time to observe any such hazard, and (3) whether Defendant breached its duty of care toward Plaintiff by failing to maintain its business premises in a reasonably safe condition. These material factual questions are within the province of the jury rather than the trial court. Additionally, the legal issues precluding summary judgment include that fact that (1) Defendant's arguments concerning the "open and obvious" doctrine under Kentucky law are unavailing, leaving no other defense, and (2) Defendant has failed to meet its burden to prove the exercise of reasonable care toward its invitees, as imposed by the Kentucky Supreme Court in *Lanier v. YYYYYYYY Stores, Inc.*, 99 S.W.3d 431 (Ky.2003). For all of these reasons, Defendant is not entitled to summary judgment as a matter of law.

Wherefore, Plaintiff moves this honorable Court to deny Defendant's Motion for Summary Judgment and allow discovery to continue.

Respectfully submitted,

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Attorney for Plaintiff