CASE NO. 07-CI-05834 JEFFERSON CIRCUIT COURT

DIVISION TWELVE (12)

[redacted] PLAINTIFF

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

[DEFENDANT HOSPITAL] DEFENDANT

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

STATEMENT OF THE CASE

On June 25, 2006, Plaintiff slipped and fell on a transparent foreign substance on a tile floor while visiting a friend who was a patient at [redacted] Hospital. Plaintiff, an invitee of the Defendant under Kentucky law at the time of the incident, has brought this negligence claim against Defendant for failure to keep the premises in a reasonably safe condition and to warn her of dangers that were known to Defendant but not obvious to Plaintiff.

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].

ARGUMENT

1. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE THERE EXIST GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE TRANSPARENT HAZARD WAS "OPEN AND OBVIOUS"

Where there is conflicting testimony as to the obviousness of a hazard, the issue of whether the hazard is "open and obvious" is a jury question. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky.App. 2006). Plaintiff first addresses (A) Plaintiff's **knowledge or awareness** of the hazardous foreign substance at the time of her fall, and (B) the **visibility** of the hazardous foreign substance, both of which are factual issues in controversy.

A. The Plaintiff's Knowledge of the Foreign Substance is At Issue

In her deposition, Plaintiff repeatedly states that she did not see any water on the tile floor prior to her fall. *Plaintiff's Deposition at 42, 43, 46*. These statements from the record directly contradict Defendant's assertions, which are unsupported by the record, that Plaintiff "had knowledge of the existence of water on the floor" (*Defendant's Memorandum of Law in Support of Defendant's Motion for Summary Judgment, at 5*) and that Plaintiff was "fully aware of […] the water situated on the floor" (*Id., at 6*). The record shows instead that Plaintiff was aware of a wet spot on the ceiling, which was not leaking or dripping water "at all" at the time of her fall. *Plaintiff's Deposition, at 38, 39*. Plaintiff had also seen, "all the way on the other side" of the room from where she slipped and fell, two towels on the floor, one dry and one wet. *Id., at 41*. Before she attempted to leave the hospital room, Plaintiff looked down at the tile floor, yet she still did not see any water. *Id., at 45*.

The weight of the evidence thus shows Plaintiff was not aware of the foreign substance prior to her fall. Defendant's conclusory assertions that Plaintiff had knowledge or awareness of the foreign substance prior to her fall contradict the clear testimony in the record, do not constitute evidence, and should not be considered by the Court, or by a jury, without substantiation in the record. Plaintiff's awareness of the transparent foreign substance goes directly to the issue of whether the clear water on the tile floor was "open and obvious," a genuine issue of material fact that precludes summary judgment here.

B. The Visibility of the Foreign Substance is At Issue

"In pedestrian fall-down cases arising out of defects in or obstructions on the walking surface **the visibility factor is vital**." *Horne v. Precision Cars of Lexington, Inc*., 170 S.W.3d 364, 369 (Ky. 2005), *citing Jones v. Winn-Dixie of Louisville, Inc.,* 458 S.W.2d 767, 769 (Ky. 1970) [emphasis added].

Defendant analogizes (A) clear water on a hospital's tile floor to (B) clods of mud on the ground near a construction site, citing *Morrison & Conklin Const. Co. v. Cooper,* 256 S.W.2d 505 (Ky. 1953). *Defendant's Memorandum, at 6*. In sharp contrast to *Morrison & Conklin*, where the plaintiff did testify to seeing the foreign substance (mud), Plaintiff in the instant case has testified repeatedly that she did not see the foreign substance (clear water), and further testified that she was aware only of (1) a wet spot on the ceiling that was not leaking, and (2) two towels, one of which appeared wet, on the floor on "all the way on the other side" of the room from where she fell. *Plaintiff's Deposition, at 38, 39, 41*.

Defendant concludes, without citing to the record, that because Plaintiff was aware of (1) the wet spot on the ceiling and (2) the wet towel on the other side of the room, Plaintiff also "was fully aware of […] the water situated on the floor as a result of the leak." *Defendant's*

Memorandum, at 6. This conclusory assertion directly contradicts Plaintiff's repeated testimony that she did not see any water on the floor prior to her fall (*Plaintiff's Deposition, at 42, 43, 46*), despite looking at the floor before attempting to leave the room (*Id., at 45*).

The visibility of a hazardous foreign substance goes directly to the issue of whether the clear water on the tile floor was "open and obvious." Because the issue of whether a hazard is "open and obvious" remains a jury question where there is conflicting testimony, summary judgment is not appropriate. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky.App. 2006). Moreover, Plaintiff asks the Court to note that Defendant's conclusions that the water was "open and obvious" (*Defendant's Memorandum, at 5, 6*) are not based on testimony or other evidence, but are instead bald, unsubstantiated assertions unsupported by the record.

2. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE THERE EXIST GENUINE ISSUES OF MATERIAL FACT AS TO THE ADEQUACY OF DEFENDANT'S WARNING OF THE HAZARD

A. The Substance of Defendant's Warning is At Issue

Contrary to Defendant's assertions, there is no evidence in the record that a nurse warned Plaintiff "to exercise safety as the floor was wet" (*Defendant's Memorandum, at 5*), nor is there any evidence that a nurse "instructed Ms. [redacted] to be careful as she walked across the floor" (*Id., at 6*). These "facts" are nowhere in the record.

In her deposition, Plaintiff testified that a nurse had told her to "watch out for the leak" in the ceiling. *Plaintiff's Deposition, at 40, line 4*. Defendant's counsel then confirmed that the nurse had told Plaintiff to "watch out for the leak." *Id., at 40, line 15*. Plaintiff had already testified that the ceiling was not leaking or dripping "at all" when she looked at it. *Id., at 38, 39*.

Thus, the record shows that a nurse advised Plaintiff of an overhead hazard, namely, a leak in the ceiling, not that the floor was still wet. Later in the deposition, Defendant's counsel,

in asking Plaintiff whether she had looked at the floor, chose to word his question to Plaintiff in a way that suggested that the nurse had "warned [Plaintiff] of the water on the floor." *Id, at 41, lines 11 to 13.* This remark by Defendant's counsel contradicts the sworn testimony Plaintiff had already made concerning the content of Defendant's warning of the hazard. Plaintiff reserved her objections at the beginning of the deposition (*Plaintiff's Deposition, at 6, line 3*) and objects to the wording of this question now, as it lacks proper foundation. Plaintiff had already made clear, and Defendant's counsel had confirmed, that any warning the nurse gave concerned the possible hazard from overhead (i.e., the ceiling, which was no longer leaking), not the hazard below (a tile floor that was still slick with water).

Further, Defendant, a hospital, provided no visible "Caution: Wet Floor" or other warning signs in the area of the hazard. The substance and adequacy of the Defendant's warning to Plaintiff is a factual issue for a jury to consider, thus summary judgment is not appropriate.

B. Plaintiff Exercised All Reasonable Care to Avoid Any Hazard

Plaintiff took all reasonable precautions to avoid slipping and falling based on the warning she did receive. Per the nurse's warning, Plaintiff looked at the ceiling, but she did not see any dripping water, only a wet spot on the ceiling. *Plaintiff's Deposition, at 38, 39.* She also saw the two towels, one wet and one dry, below the leak "on the other side" of the room from where Plaintiff fell. *Id., at 41, 43*. Most significantly, Plaintiff did look down at the floor before leaving the room (*Id., at 45*), but still did not see any water (*Id., at 42, 43, 46*).

This evidence all suggests that Plaintiff took reasonable care to avoid not only the hazard of which she was actually warned, i.e., the leak in the ceiling, but also any water that could reasonably be expected to remain on the floor after such a leak had been attended to with a few towels, but with no visible warning or caution signs, by Defendant's employees.

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) a hazardous foreign substance of which Defendant had knowledge was on the floor in Defendant's hospital, (2) Defendant owed a duty of care to Plaintiff as an invitee to correct or warn her of known hazards, (3) the transparent water on a tile floor was not "open and obvious," (4) Defendant's warning to Plaintiff to "watch out for the leak" in the ceiling on the other side of the room was inadequate to warn Plaintiff of the hazard she faced from the slick floor, and (5) Defendant's failure to correct or adequately warn Plaintiff of the hazard of which it had knowledge constitutes breach of Defendant's duty of care.

"Breach and injury are questions of fact for the jury to decide." *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003) (internal citations omitted). Because the determinations concerning (A) the obviousness of the hazard and (B) the adequacy of Defendant's warning are material factual questions appropriate for a jury's consideration, 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