PLAINTIFFS' PRETRIAL BRIEF

This is a trip and fall case arising at a welcome center owned and operated by the State of Tennessee. On the way to a vacation on August 23, 2012, XXX was walking her small dog in the designated "pet rest area" of the welcome center on Interstate 65 South from Kentucky. In the middle of the pet rest area, there was a deep rut obscured by grass growing in and around it. The State had been aware of the rut for nearly two years, but had not fixed it or done anything to warn guests about the rut. XXX tripped in the rut, fracturing both of her legs. For the past year and a half, XXX and her husband, XXX, have dealt with weeks of hospitalization, surgeries, and complications. Both Mr. and Mrs. XXX will continue to struggle from XXX's pain and lost mobility for the rest of their lives.

At trial, Claimants will prove:

1. The rut was a dangerous condition that created a foreseeable risk of injury to visitors like XXX.

2. The State was aware of the rut for nearly two years before XXX was injured.

3. The State did not take reasonable measures to prevent injury to a visitor from the tripping hazard.
4. The tripping hazard caused the fall and injuries to XXX.

5. The fall resulted in debilitating, permanent injuries to both of XXX's legs.

6. XXX is entitled to a significant recovery for the drastic, lifelong change in his life.

Premises Liability Claims Against the State

Under TENN. CODE ANN. § 9-8-307(a)(1)(C), the State may be liable for negligently created or maintained dangerous conditions on state controlled real property. For purposes of deciding the State's liability, the statute codifies the common law obligation of owners and occupiers of land. *Hames v. State*, 808 S.W.2d 41, 44 (Tenn. 1991); *Sanders v. State*, 783 S.W.2d 948, 951 (Tenn. Ct. App. 1989); Tenn. Code Ann. § 9-8-307(c) ("The determination of the state's liability in tort shall be based on the traditional tort concepts of duty and the reasonably prudent person's standard of care."). The claimant must show that the injury was a reasonably foreseeable probability and that some action within the defendant's power more probably than not would have prevented the injury. *Dobson v. State*, 23 S.W.3d 324, 330-31 (Tenn. Ct. App. 1999) (citation omitted). In addition to those basic elements of negligence, the law requires a claimant in a premises liability case to prove that the premises owner had actual or constructive notice of a dangerous condition on the premises. *Blair v. W. Town Mall*, 130 S.W.3d 761, 764 (Tenn. 2004); *see also* Tenn. Code Ann. § 9-8-307(a)(1)(C) (requiring a claimant to "establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures.").

1. The rut was a dangerous condition that created a foreseeable risk of injury to visitors like XXX.

The scope of the premises owner's duty is grounded upon the foreseeability of the risk involved. *Dobson v. State*, 23 S.W.3d 324, 330-31 (Tenn. Ct. App. 1999) (citation omitted). The crux of the issue is whether the State reasonably knew or should have known of the probability of an occurrence such as the one which caused the claimant's injuries. *Rouse v. State*, E2004-02142-COA-R3CV, 2005 WL 2217050, *5 (Tenn. Ct. App. Sept. 13, 2005) (quoting *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 178 (Tenn. 1992)). A trip and fall hazard in an area trafficked by people on foot is exactly the type of "dangerous condition" from which a landowner has a duty to protect its guests. *See Rouse*, 2005 WL 2217050 (concluding that a one to one and one-half inch rise between concrete surfaces at a prison visiting area constituted a dangerous condition under Tenn. Code Ann. § 9-8-307(a)(1)(C), and vacating Claims Commissioner's ruling to the contrary); *see also Williams v. Linkscorp Tennessee Six, L.L.C.*, 212 S.W.3d 293, 296 (Tenn. Ct. App. 2006) (finding that a slippery condition on steps constituted a dangerous condition and that reasonable minds could conclude the defendant should have known of the hazard). A trip and fall injury is more foreseeable – and thus the premises owner's corresponding duty greater – when the danger is not "open and obvious" to unfamiliar guests. *See Coln v. City of Savannah*, 966 S.W.2d 34, 43-44 (holding that the openness and obviousness of a danger must be analyzed with regard to the foreseeability and gravity of harm).

In this case, the State's Welcome Center Manager candidly acknowledged in deposition testimony that the rut was a tripping hazard that should not have been there. The State knew that any elevation change of a half inch or more is a tripping hazard, and that this particular rut was at least three times that size. The State knew that a tripping hazard like this rut poses a danger of injury.

With this rut, a tripping injury was even more foreseeable because the rut was not readily visible to guests. The rut had grass growing up in it, which the State had mowed evenly with the rest of the grass around it. Because the grass in the rut was roughly even with the surrounding area, the rut was not apparent to a visitor like XXX.

Left: Photo of "pet rest area" at welcome center. Right: Photo of rut.

In short, this rut posed a danger of a trip and fall injury in an area that the State designated for guests to walk around with their pets. The rut was obscured by grass growing in and around it. It was eminently foreseeable that someone could suffer injuries from a fall as a result of this dangerous condition.

2. The State was aware of the rut for nearly two years before XXX was injured.

An essential element of a premises liability case is notice, either actual or constructive. *Byrd v. State*, 905 S.W.2d 195, 197 (Tenn. Ct. App. 1995); Tenn. Code Ann. § 9-8-307(a)(1)(C) (requiring claimants to establish that the proper state officials had notice of the dangerous condition "at a time sufficiently prior to the injury."). A property owner has constructive notice if either: (1) the condition existed for such a length of time that the property owner, in the exercise of ordinary care, should have known of its existence; or (2) the dangerous condition occurred often in the past. *See Blair v. W. Town Mall*, 130 S.W.3d 761, 766 (Tenn. 2004); *Bowman*, 206 S.W.3d at 473 (citation omitted). With dangerous conditions that reappear repeatedly,

> [t]he question is whether the condition occurs so often that the premises owner is put on constructive notice of its existence. The condition could be caused by the owner's method of operation, by a third party, or by natural forces. A premises owner is put on constructive notice of a dangerous condition that is "a recurring incident, or a general or continuing condition" regardless of what caused the condition, and regardless of whatever method of operation the owner employs.

Blair at 766.

In this case, the State knew the rut was in the pet rest area for nearly two years leading up to XXX's fall, and the rut had reappeared frequently during that time period.

In 2010, the State completed renovations to the welcome center. During the renovations, an orange plastic safety fence was installed in the pet rest area. When the welcome center personnel moved into the newly-renovated building in October 2010, the State discovered this rut formed in the line where the fence had been.

For the next twenty-two months, the State's employees repeatedly tried to patch the rut with dirt and grass. The rut was so omnipresent that, according to the State's Welcome Center Manager, the State tried filling the rut about once a week. Nonetheless, the State watched the patches fail to fix the problem, and saw the rut reappearing on a weekly basis.

In every sense of the word, the State had "notice." The State saw the rut beforehand, the rut had been there for nearly two years, and the rut recurred dozens of times over that period. Whether deemed actual or constructive, the State had ample notice of the condition before XXX fell.

3. The State did not take reasonable measures to prevent injury to a visitor from the tripping hazard.

A premises owner has "a duty of reasonable care under all the circumstances." *Eaton v. McLain,* 891 S.W.2d 587, 593–94 (Tenn.1994). That duty includes "the responsibility of either removing or warning against any latent dangerous condition on the premises […]." *Id.* (citations omitted). The premises owner must "help[] persons avoid injury by warning them of conditions that cannot, as a practical matter, be removed or repaired." *Bowman*, 206 S.W.3d at 473 (citations omitted).

To that end, the State's initial attempt to patch the rut in October 2010 might be viewed as reasonable. By August 2012, however, the State was aware that patching the rut had been repeatedly unsuccessful for nearly two years. The State knew that its efforts were not going to protect anyone walking through the pet rest area from a fall injury, at least in the short run.

At that point, the State could have blocked off the rut with fencing or a small barrier to pedestrian traffic. The State could have closed the pet rest area completely. At a minimum, the State could have put down stakes or signs to warn guests of the rut's presence. Any of those steps would have been reasonable, and would have prevented a fall injury like the one XXX suffered. Nonetheless, the State did nothing to protect its guests from tripping in the rut.

The State's response to this tripping hazard was anything but reasonable, and accordingly, the State breached its duty of care.

4. The tripping hazard caused the fall and injuries to XXX.

Although the State has alleged that XXX is somehow at fault for her injuries, the Commissioner will hear no evidence to support that allegation. XXX was walking her small, three-year-old dog on a leash. XXX will testify that the dog was not pulling her haphazardly, that she was watching where she was going, and that she did not see the rut before fell. No one says anything to the contrary; indeed, no one even saw her fall. The State's comparative fault defense is an absolute non-starter.

As a practical matter, a finding that XXX was partially at fault for the fall would not reduce XXX's already capped recovery, but would affect XXX's recovery for loss of consortium. The State's financial responsibility limit of $300,000 is applied *after* apportioning a claimant's damages. *See Ki v. State*, 78 S.W.3d 876, 880-81 (Tenn. 2002). Put another way, a reduction for a claimant's fault is based on a percentage of the claimant's actual damages, not on a percentage of the $300,000 cap amount. *See id.* Because XXX's damages far exceed the statutory cap for claims against the State, any finding of less than 50% fault by XXX would still result in her receiving the maximum $300,000 recovery. Apportionment of fault to XXX would, however, reduce XXX's recovery for loss of consortium. *Tuggle v. Allright Parking Sys., Inc.*, 922 S.W.2d 105, 109 (Tenn. 1996).

Again, the State has neither articulated nor uncovered any factual basis for its comparative fault defense, despite having the burden to do so. *See Association of Owners of Regency Park Condo.*, 878 S.W.2d 560, 566 (Tenn. Ct. App. 1994) ("The burden of proof for an affirmative defense is placed upon the party who raises it."). However, a finding of fault against XXX would have the practical effect of further reducing the Abbotts' already drastically limited recovery. The State's comparative fault defense must be rejected outright to avoid that unwarranted result.

5. The fall resulted in debilitating, permanent injuries to both of XXX's legs.

XXX was a very active sixty-one-year-old before the fall injury. She kept the home for herself and her husband, and spent her free time doing yoga when she was not surrounded by family. Mr. and Mrs. XXX traveled frequently and otherwise enjoyed retirement. Indeed, they were en route to a vacation in Florida when this injury cut short their plans for vacation, as well as their plans for the rest of their lives.

XXX spent a week hospitalized in Nashville with multiple fractures in both legs. On her right side, her lower leg was broken in both the tibia and fibula. On her left, her heel and ankle bones were fractured and dislocated. She underwent surgery for her injuries. While recovering with a catheter into her bladder, she developed a secondary urinary infection.

When XXX left the Nashville hospital, she was transported by ambulance to a rehabilitation hospital in XXX that was closer to her home. She was still completely non-weight-bearing on both legs. While in the rehabilitation hospital, she went through grueling therapy to regain her ability to walk. On one occasion, changing a cast on XXX's left leg caused her so much pain that she was rushed from the rehabilitation hospital to an emergency room.

After being hospitalized for five weeks, XXX was finally discharged to her home. Her left foot was still in a boot, and her right ankle and leg were still taped up. She had months of follow up with her orthopedic surgeon.

Even now, XXX continues to experience pain in her legs, particularly in her ankles, on a daily basis. She experiences a throbbing sensation that often keeps her up at night. She also experiences pain in her ankles, sometimes sharp and at other times dull and aching. She often has a cramping feeling in her left foot, which now turns inward. She is uncomfortable when anything touches her ankles and is generally unable to cover them with blankets or clothing without discomfort. Riding in a car for anything more than a short distance is now painful, let alone driving herself and having to press the pedals.

XXX has also lost mobility. Her ankles are much weaker than they once were. She now has difficulty climbing stairs and is unable to climb them at all without some sort of railing to assist her. She is no longer able to dance, an activity which she once enjoyed. She also finds herself staying in when it is rainy or when there is the possibility of ice on the ground because she fears the risk of falling. She will wear custom orthotic shoes for the rest of her life.

XXX has a life expectancy of 21.5 years. Her treating orthopedic surgeon testified by proof deposition that her injuries, pain, and mobility loss will be permanent. To date, she has incurred $165,804.68 in medical expenses.

6. XXX is entitled to a significant recovery for the drastic, lifelong change in his life.

XXX is entitled to a recovery for his loss of consortium as a separate claimant under the Claims Commission Act. *Ki v. State*, 78 S.W.3d 876, 880 (Tenn. 2002) (holding that in a spousal injury action, two "claimants" may exist because the non-injured spouse may maintain a separate cause of action or claim for loss of consortium pursuant to the statute); *see also Swafford v. City of Chattanooga*, 743 S.W.2d 174, 178-79 (Tenn. Ct. App. 1987) (holding a non-injured spouse may recover for loss of consortium even though the injured spouse's recovery has already exhausted the financial limits of the Governmental Tort Liability Act). Thus, under Tenn. Code Ann. § 9-8-307(e), XXX may recover up to the State's financial responsibility limit of $300,000 per claimant, regardless of the amount recovered by XXX.

Loss of consortium damages include all affected benefits of marriage – love, affection, aid, companionship, and services – "all welded into a conceptualistic unity." *Swafford v. City of Chattanooga*, 743 S.W.2d 174, 178 (Tenn. Ct. App. 1987) (internal quotations omitted). In this case, the State's negligence has significantly impacted XXX, and will continue to do so for the rest of his life.

XXX and XXX have been married since 1977. In 2011, XXX took semi-retirement from his career as Vice President of Operations for a manufacturing company. The couple planned to travel extensively in retirement, and within a year they had driven to multiple vacations within the United States and taken cruises abroad. Mr. and Mrs. XXX celebrated their thirty-fifth wedding anniversary together in May 2012.

Three months later, and less than a year into XXX's retirement, he found his wife lying helplessly at the welcome center with two shattered legs. He watched an ambulance rush her to the hospital. He spent the next five weeks worrying over her in hospitals in Tennessee and XXX as the gravity of XXX's injuries set in.

When XXX finally came home with him, the seventy-two-year-old XXX had to act as her caretaker. XXX was under doctor's restrictions from regular activities for four months after the fall, until December 30, 2012. XXX dutifully helped his wife with her basic needs, making her meals and helping her toilet and bathe. XXX had to lift XXX for her to get in and out of bed. XXX supported XXX as she struggled to get between the rooms of their home, even with a walker.

Although XXX can walk again, the life XXX had planned to share with his wife is diminished forever. For even a simple trip to a local restaurant, XXX does everything he can to minimize the amount of time that XXX will have to be on her feet. The XXXs still travel, but stay close to their room or a couch for XXX to rest on. Around the home, XXX graciously does more than his fair

share of housework to avoid any additional strain on XXX. XXX can no longer be the one to walk the family dog; that is now XXX's responsibility.

XXX does all of these things quietly, without complaint – but he should not have to sacrifice his finest years with his spouse at all. The State's negligence has cost XXX dearly, and will continue to do so throughout his ten year life expectancy.

Conclusion

The State knew it had a tripping hazard in an area for people to walk. The State knew that patching the hazard was not working, yet did nothing to warn guests of the welcome center as the problem persisted for nearly two years. The dangerous condition ultimately caused XXX to suffer multiple fractures in both legs and left her permanently impaired. She has required more than $165,000 in medical treatments. Despite that medical care, both XXX and XXX will spend the rest of their lives compensating for XXX's resulting pain and reduced mobility.