IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

MARY HYLAND Plaintiff, v. **EPQ MANAGEMENT (MARYLAND), LLC,** Defendants.	Civil Action No.: 12A34567

PLAINTIFFS' BRIEF IN SUPPORT OF HER MOTION FOR SANCTIONS AGAINST DEFENDANT FOR THE SPOLIATION OF EVIDENCE

COMES NOW, Plaintiff in the above-styled action, by and through her attorney of record, and files this brief in response to Defendant's Motion for Summary Judgment, showing this Court as follows:

I. INTRODUCTION

Defendant's entire argument for summary judgment is a brazen attempt to benefit from its illegal spoliation of evidence. Defendant dedicates its entire brief to emphasizing Plaintiff's lack of evidence while conveniently failing to mention *why* Plaintiff lacks the evidence that Defendant demands: because Defendant intentionally (and admittedly) destroyed evidence relevant to this highly foreseeable lawsuit. Specifically, Defendant unlawfully destroyed documents evidencing daily, weekly, monthly, quarterly, and yearly inspections of Plaintiff's room – documents that would have proven unequivocally whether a staff member had previously called attention to the increasingly dangerous condition of the bedframe that injured Plaintiff, or whether the inspections had even been carried out at all.

To support its argument that it did not have constructive or actual knowledge of the dangerous condition in Plaintiff's room, Defendant relies on an assortment of "would have" statements. Defendant's corporate representative, Sharon Kilpatrick, testified that housekeeping staff "*would have* lifted up the skirt" of Plaintiff's bed while cleaning her room before she checked in. (Deposition of Sharon Kilpatrick, hereinafter "Kilpatrick Depo." 204:18-19). She said the housekeeping staff "*would have* seen" the dangerous condition. (Kilpatrick Depo. 204:21). She maintained that if housekeeping saw an issue, "they *would have* reported it." (Kilpatrick Depo. 204:21-22). She then admitted that all of these statements are assumptions because, after Defendant illegally destroyed the evidence related to these inspections, she has no way of knowing who inspected the room, when they did it, *if* they did it, and if they did it, what they saw. (Kilpatrick Depo. 213:20-24). Unfortunately for Defendant, "assumptions – even reasonable ones – are not evidence." *Cobb Dev. V. McCabe,* No. 03-21-00524-CV (Tex. App. Jun. 15, 2023). *See also In re Ignacio G. & Myra A. Gonzales Revocable Living Trust,* 580 S.W.3d 322, 331 (Tex. App. 2019) ("An assumption is not proof").

Despite Defendant's attempt to evade justice by illegally destroying documents related to Plaintiff's claim, the record still doesn't support its motion for summary judgment. As this Court will learn, Defendant's employees' continuous close proximity to the dangerous bed frame over a significant period of time supports the conclusion that Defendant had constructive knowledge of this hazard. This Court will also learn how Texas law supports the conclusion that Defendant is vicariously liable under the theory of respondeat superior because its employees negligently performed duties within their work responsibilities. The facts of this case also support the conclusion that Defendant negligently trained and supervised its employees, resulting in a condition that was allowed to grow more and more dangerous by the day. Finally, this Court will

see that this case is not suitable for adjudication by summary judgment because Texas law supports the conclusion that Defendant was negligent under the theory of *res ipsa loquitor*.

Because Defendant has failed to show that there are no genuine issues of material fact in this case, it is not entitled to judgment as a matter of law. Plaintiff respectfully requests that this Court DENY Defendant's motion for summary judgment.

II. STATEMENT OF RELEVANT FACTS

On December 22, 2019, Mary Hyland checked into her room at Defendant's hotel between 10:30 and midnight. (Deposition of Mary Hyland, hereinafter "Hyland Depo." 10:6-8). Plaintiff subsequently went to sleep. When she woke up the following day and prepared to go to breakfast, Plaintiff bumped into the bedframe of the bed she had slept in the night before. Plaintiff immediately noticed that her jeans were wet and looked down to discover that she was bleeding. She then realized that the bedframe was damaged, and its rubber protective coating had broken away to expose a sharp metal frame. When Plaintiff bumped into the metal frame, the sharp edge cut through her jeans, through her compression stockings, and split her leg open. (Hyland Depo. 15:20-25). Plaintiff's daughter called the front desk for help, and a security guard, Matt Vari, came to assist Plaintiff. (Hyland Depo. 16:5-25). Vari attempted to stop Plaintiff's bleeding and eventually suggested she seek treatment at an emergency room. (Hyland Depo. 17:2-3). Vari helped Plaintiff to the lobby in a wheelchair. (Kilpatrick 115:21-23). From the lobby, Plaintiff went to the nearest emergency room. (Kilpatrick Depo. 117:11-118:5).

Importantly, **Defendant admits that Plaintiff cut her leg on the bed frame**. (*See* Deposition of EPQ Corporate Representative Sharon Kilpatrick, hereinafter "Kilpatrick Depo." 104:21-105:3) ("[EPQ] doesn't know that the edge was so sharp that it cut through the comforter, the jeans, the socks, the compression stockings. IGH *does know it cut into her leg*"). Defendant

also acknowledges that Plaintiff sought immediate emergency medical care for the injury. (Kilpatrick Depo. 117:11-118:5).

Defendant claims to have performed daily, weekly, monthly, quarterly, and yearly inspections of its rooms to ensure they were clean and safe. (Kilpatrick Depo. 21:5-9). These regular inspections included inspecting the rooms' beds and other furnishings. (Kilpatrick Depo. 81:6-12). Hotel employees who performed these inspections completed checklists to document their work. (Kilpatrick Depo. 90:10-91:3). These checklists were stored in the hotel. (Kilpatrick Depo. 90:23-24). In November 2020, the hotel changed management companies. (Kilpatrick Depo. 100:6-10). The new management company instructed the hotel only to retain documents related to pending litigation. (Kilpatrick Depo. 110:15-18). Despite this instruction unequivocally running afoul of countrywide laws requiring potential litigants to retain documents relating to reasonably foreseeable litigation, Defendant – one of the largest hospitality companies in the world with over 200 years of experience in the hotel business – destroyed all the records relating to the cleaning, housekeeping, and inspecting of Plaintiff's room. (Kilpatrick Depo. 110:19-24).

III. STANDARD FOR MOTION FOR SUMMARY JUDGMENT

> When a court considers a motion for summary judgment under OCGA § 9-11-56 (c), it must view the pleadings and evidence in the light most favorable to the nonmoving party, it must accept the credibility of the evidence upon which the nonmoving party relies, it must afford that evidence as much weight as it reasonably can bear, and to the extent that the moving party points to conflicting evidence, it must discredit that evidence for purposes of the motion. Thus, if a defendant in a [medical malpractice case] moves for summary judgment and points to the favorable testimony of a dozen winners of the Nobel Prize for Medicine (all of whom say that he did not deviate at all from the accepted standard of medical care), but the plaintiff responds with the admissible testimony of a barely qualified medical expert (who shows that the defendant substantially and grossly deviated from the accepted standard of medical care), the trial court must assume — as unlikely as it may be — that the jury will believe the plaintiff's expert and disbelieve the expert array offered by the defendant. For purposes of the motion for summary judgment, the trial court would consider the testimony of the plaintiff's expert, but not the conflicting testimony of the Nobel Prize winners.

Nguyen v. Sw. Emergency Physicians, P.C., 298 Ga. 75, 84 (2015) (internal citation and punctuation omitted). “Even slight evidence will be sufficient to satisfy the plaintiff's burden of production of some evidence on a motion for summary judgment; such evidence may include favorable inferences drawn by the court from evidence presented.” *Garrett v. Nationsbank, N.A. (south)*, 228 Ga. App. 114, 114 (1997).

IV. ARGUMENT AND CITATION TO AUTHORITY

A. This case cannot be properly adjudicated through a no-evidence motion because EPQ spoliated evidence.

"When a party demonstrates an entitlement to a spoliation presumption, the presumption precludes a court from granting a summary judgment." *Garcia v. Sellers Bros., Inc*., No. 14-05-00954-CV. (Tex. App. Nov 21, 2006). *See also Aguirre v. S. Tex. Blood & Tissue Center,* 2 S.W.3d 454, 457 (Tex. App.CSan Antonio 1999, pet. denied).

On October 11, 2023, Plaintiff took a Rule 30(b)(6) deposition of Defendant’s corporate representative, Sharon Kilpatrick. In her deposition notice, Plaintiff requested that Defendant provide her with the documents including:

- All daily or periodic logs from dates of service for two (2) years prior of InterContinental Austin’s Subject Room;
- All room inspection checklists, including daily/routine housekeeping checklists, “deep clean” or periodic checklists, and maintenance/inspection checklists in use at the InterContinental Austin
- All document or electronically stored data containing information or reference to any of the following: (1) when the mattress in the subject room was last flipped or reset (2) when the bed frame in the subject room was last moved out of the room (3) when the bed frame in the subject room was last disassembled, (4) the management personnel who oversaw this task, and (4) the personnel/crew who performed this task.
- All document or electronically stored data referencing when the carpet in the subject room was changed in the five years preceding December 22, 2019, and the personnel involved in performing this task, as well as what personnel oversaw this task.
- All EPQ manuals, checklists, logs, or other documents used for employees regarding proper documentation of broken, worn, or defective InterContinental hotel room furniture or items;

- All documents used to verify that InterContinental Austin complied with procedures for maintaining safe conditions in relation to Plaintiff during her subject stay;
- All manuals, logs, notes, or other documents relating to the inspection of InterContinental Austin's Subject Room within two (2) years prior to the subject incident;
- All manuals, logs, notes, or other documents relating to service and/or maintenance of the bed or bed frame in InterContinental Austin's Subject Room;
- All manuals, documents, or guidelines pertaining to monitoring rooms for hazards in Intercontinental rooms;
- All document or electronically stored data that in any way references how the gash guard and the bed frame in Mary Hyland's room was damaged prior to Mary's stay;
- All document or electronically stored data that in any way references why the gash guard and the bed frame in Mary Hyland's room was not repaired with a new gash guard prior to her stay;
- All work orders or maintenance reports for any issue in the subject room for the two years prior to December 2019, including any work order or housekeeping write up of the bedframe.
- All work orders, punch lists or punch process documents, and all other documents pertaining to damaged or defective metal bed frames or bed frame repair and maintenance in the entire hotel in the two years prior to December 2019.

Plaintiff's Third Amended Notice of Video Recorded Deposition of PHG Management (Maryland); LLC's Designees Pursuant to O.C.G.A. §§ 9-11-30(b)(5); 9-11-30(b)(6) and 9-11-34, (Plaintiff's Ex. 1). **These documents existed**. *See* **(**Kilpatrick Depo. 234:17-20) ("We don't know who made the bed because we don't have any of that information for all of the reasons that I explained before about the transition to a different management company"); *See also* (Kilpatrick Depo. 213:20-22) ("If you went to a hotel that was still managed by EPQ, yes, you would be able to determine that. We would keep housekeeping records"). However, Defendant deliberately destroyed the above-listed documents upon changing management companies. In defense of this indefensible behavior, Defendant states that it blindly followed the direction of its new management company to destroy any documents not related to *pending* litigation.

As this Court knows, Defendant does not only have a duty to maintain documents related to pending litigation.

> [The] duty to preserve evidence arises when a party knows or reasonably should know that (1) there is a substantial chance that a claim will be filed, and (2) evidence in its possession or control will be material and relevant to that claim. When a party demonstrates an entitlement to a spoliation presumption, the presumption precludes a court from granting a summary judgment.

Costley v. H.E. Butt Grocery Company, No. 10-07-00337-CV (Tex. App. 7/29/2009), No. 10-07-00337-CV. (Tex. App. Jul 29, 2009) (internal citations omitted). *See also Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003); *Aguirre v. South Tex. Blood & Tissue Ctr.*, 2 S.W.3d 454, 457 (Tex. App.-San Antonio 1999, pet. denied). As Defendant surely knows, direction from a new management company does not override this duty.

1. It was clear that there was a substantial chance that Plaintiff would file a claim.

In *Heredia v. Wal Mart Stores, Tex., LLC*, the Texas Court of Appeals addressed a case where a Wal-Mart customer slipped and fell on an unknown fluid on the floor, ultimately bringing a premises liability suit against Wal-Mart. Wal-Mart filed a no-evidence motion for summary judgment on the basis that Heredia could not provide evidence that Wal-Mart had actual or constructive knowledge of the dangerous condition. Heredia responded and argued that by cleaning up and disposing of the spill, Wal-Mart had spoliated evidence, thereby "preventing Heredia from obtaining evidence of Wal-Mart's constructive knowledge." *Heredia v. Wal Mart Stores, Tex.*, LLC, NUMBER 13-16-00129-CV at 3 (Tex. App. Jul 27, 2017).

Holding that Wal-Mart had not spoliated evidence, the court highlighted Heredia's actions immediately after she fell. Specifically, Heredia declined to file a report, declined Wal-Mart's offer to call an ambulance, continued shopping, and eventually left the store unassisted. Heredia didn't file a complaint until hours later. "When Heredia filed the report with Wal-Mart later in the day, the spill had been cleaned up and disposed of in the normal course of business." *Id.* at 12. The court pointed out that, to show spoliation, Heredia had to show that, before it

cleaned up the spill, Wal-Mart knew or should have known "that there was a substantial chance there would be litigation and that the spill would be material to it." *Id*. The court held that because Heredia initially refused to file a report and declined Wal-Mart's offer to call an ambulance, Walmart was not on notice of a potential claim when it cleaned up the spill. The court also noted that Wal-Mart cleaned the spill in the "ordinary course of business." *Id.*

Unlike, Heredia, Plaintiff immediately accepted first aid care from Defendant's security manager, Matt Vari. (Hyland Depo. 16:5-25; Kilpatrick Depo. 115:10-23). Vari assisted Plaintiff with her wound and attempted to stop Plaintiff's bleeding. (Kilpatrick Depo. 117:11-15). After administering first aid, hotel staff placed Plaintiff into a wheelchair to assist her to the hotel lobby. (Kilpatrick 115:21-23). Plaintiff immediately went from the hotel lobby to the nearest emergency room to seek medical care, which the hotel staff was aware of. (Kilpatrick Depo. 115:21-23). Vari immediately wrote a report detailing Plaintiff's injuries. (Kilpatrick Depo. 115:13-16). In the report, Vari noted that the bedframe had injured Plaintiff. (EPQ Loss and Incident Report Completed by Matt Vari, attached hereto as Plaintiff's Exhibit 1). Notably, unlike the facts in *Heredia,* Defendant did not immediately dispose of the dangerous condition – after Plaintiff was hurt, Vari simply instructed hotel housekeeping to "place the frame back in place." (EPQ Loss and Incident Report Completed by Matt Vari). Regarding the documents that might have shown evidence of the slow erosion of the bed's rubber cover, those documents were also not disposed of on that day, but nearly one year later.

The facts of the instant case stand in stark contrast to those in *Heredia.* Unlike in *Heredia,* where the plaintiff rejected health care and left the premises without filing a report, Plaintiff in the instant case was injured acutely enough to not only seek and receive medical assistance from hotel staff, but immediately sought emergency medical care. These actions

support the conclusion that, at the time that Defendant destroyed the bed on which Plaintiff was injured and all of the documents related to the safety, maintenance and housekeeping inspections of Plaintiff's room, Defendant knew that there was a substantial chance that a claim would be filed and also knew that the above-listed documents could be material to Plaintiff's claim. Further, Defendant did not destroy any of this information "in the ordinary course of business." Plaintiff was cut by Defendant's bed on December 22, 2019. Defendant did not destroy the evidence until November 2020, at the alleged behest of a new management company that illegally instructed Defendant only to keep documents relating to pending litigation – an instruction that Defendant claims to have followed blindly.

2. Defendant also knew that evidence that the bed had been inspected would be material to Plaintiff's claim.

The documents that Defendant destroyed included *all* of the information regarding who cleaned and inspected Plaintiff's room before check-in. Defendant even destroyed information that would have provided the name of the person who cleaned the room before Plaintiff checked in. Plaintiff cannot emphasize enough that this is not Defendant's first rodeo – Defendant has been in this business for over two hundred years. Defendant knew that information documenting the inspections of the rooms would be material to this suit, and it also knew that this lawsuit was highly foreseeable.

B. <u>The record supports the conclusion that Defendants had constructive knowledge of the bed frame's sharp edge.</u>

Even considering Defendant's illegal destruction of relevant evidence, the record still supports the conclusion that Defendant had constructive knowledge of the bedframe. To support its argument that Defendant had no constructive knowledge of dangerous condition, Defendant relies on a heavily redacted quote from *Wal-Mart Stores, Inc. v. Reece* (81 S.W.3d 812).

> Constructive notice demands a more extensive inquiry. Without some temporal evidence, there is no basis upon which the factfinder can reasonably assess the opportunity the premises owner had to discover the dangerous condition . . . there must be some proof of how long the hazard was there before liability can be imposed on the premises owner for failing to discover and rectify, or warn of, the dangerous condition. Otherwise, owners would face strict liability for any dangerous condition on their premises, an approach we have clearly rejected.

Defendant' Memorandum in Support of its Motion for Summary Judgment at 6. As usual, the devil is in the deliberately deleted details.

The paragraph of this case that Defendant has replaced with ellipses is particularly relevant to the standard for determining constructive knowledge. Specifically, the court notes,

> What constitutes a reasonable time for a premises owner to discover a dangerous condition will, of course, vary depending upon the facts and circumstances presented. And proximity evidence will often be relevant to the analysis. Thus, if the dangerous condition is conspicuous as, for example, a large puddle of dark liquid on a light floor would likely be, then an employee's proximity to the condition might shorten the time in which a jury could find that the premises owner should reasonably have discovered it. Similarly, if an employee was in close proximity to a less conspicuous hazard for a continuous and significant period of time, that too could affect the jury's consideration of whether the premises owner should have become aware of the dangerous condition. But in either case, there must be some proof of how long the hazard was there before liability can be imposed on the premises owner for failing to discover and rectify, or warn of, the dangerous condition.

Wal-Mart Stores, Inc. v. Reece, 81 S.W.3d 812, 816 (Tex. 2002).

1. *EPQ employees were in close proximity to the dangerous bedframe for a continuous and significant period of time.*

Conceding the fact that the deteriorated cover of the bedframe was less conspicuous than "a large puddle of dark liquid on a light floor," Defendant's employees were in continuously close proximity to the bedframe, giving them countless opportunities to discover and remedy the dangerous condition. As Defendant's corporate representative, Sharon Kilpatrick, testified, someone made the bed in the room in which Plaintiff was injured before Plaintiff checked in. **(**Kilpatrick Depo. 234:17-20). Kilpatrick also testified that, per EPQ's Way of Clean,

housekeeping staff was tasked with thoroughly inspecting rooms for safety conditions, including inspecting the beds and furniture. (Kilpatrick Depo. 80:8-17; 81:6-12). Per the EPQ Way of Clean, rooms were inspected "daily, weekly, monthly, quarterly, and annually […] to ensure a clean and safe hotel." (Kilpatrick Depo. 21:5-9). These inspections included quality audits, mattress flipping, preventative maintenance, deep cleaning, and safety inspections. (Kilpatrick Depo. 177:4-17). EPQ's implementation of not only daily housekeeping but numerous periodic inspections means that a host of people had countless opportunities to discover and remedy this dangerous condition, and their failure to do so resulted from either a negligent inspection or a reckless disregard for the danger that the bedframe posed.

2. *Plaintiff's picture of the deteriorated bed frame is temporal evidence relevant to the inquiry of constructive notice.*

In *Reed v. Home Depot U.S.A., Inc.,* 2011 U.S. Dist. LEXIS 50332, the District Court for the Southern District of Texas addressed a premises liability case in which the plaintiff was injured "while walking in a Home Depot parking lot when he stepped into a gap in a metal grate covering a drain." *Reed v. Home Depot U.S.A., Inc.*, No. H-10-2059, 2011 U.S. Dist. LEXIS 50332, at *1 (S.D. Tex. May 11, 2011). Home Depot moved for summary judgment on the basis that the plaintiff could show neither actual nor constructive knowledge. In response, the plaintiff proffered two pictures taken of the grate after the plaintiff's fall. One picture showed multiple gaps in the grates that appeared to have been patched up "supporting an inference that the missing section was absent long enough that someone noticed its absence and positioned the remaining sections to compensate for the missing section." *Id.* at *5. The other image showed "a substantial amount of trash had collected in the drain under what appears to be the largest of the gaps in the grate. [The plaintiff asserted] that the items of trash appear[ed] weathered, and [were] too large to have fit through had the missing portion of grate been in place." *Id.* The court held

that both images were temporal evidence of whether and how long the gate had been missing and were relevant to the inquiry of constructive notice. *See Id.* The court held that this evidence was "sufficient to permit a jury to conclude not only that it was possible for Home Depot to discover the condition, but also that Home Depot reasonably *should have discovered* it prior to plaintiff's fall." *Id.* (emphasis added).

Plaintiff's daughter took a picture of the bedframe immediately after Plaintiff was injured. (Hyland Depo. 20:9-23). The picture is reproduced below.

The photo shows the deteriorated state of the rubber encasing of the metal bed frame. The top edge of the rubber guard is broken completely, with the metal frame clearly visible and protruding from the rubber. Loose fragments of the rubber material jut out around the metal edge. Along the vertical side of the bed, a wide gap indicates where the rubber has come undone from the metal. The deterioration is slightly less severe along the bottom side, with parts of the metal clearly visible through the worn rubber padding, but undoubtedly still very worn. This picture illustrates an ongoing state of deterioration – it is clear that, with time and continued use, the bottom side of the bedframe will be as exposed as the side as the rubber continues to erode.

This image does not illustrate an acute injury to the furniture – it shows different stages of gradual deterioration that have obviously happened over months if not years.

The deterioration of the rubber guard illustrated in the photograph is relevant temporal evidence sufficient to permit a jury to conclude that, because of EPQ's housekeeping and other inspections of this room, it was not only possible for EPQ to discover the condition, but also that EPQ reasonably *should have* discovered it prior to Plaintiff's injury. The fact that EPQ employees did not discover such a conspicuous unsafe condition is indicative that they were not conducting reasonable inspections. *See Id.*

C. <u>The fact that Plaintiff injured herself on the bed is proof enough of Defendant's negligence.</u>

> Res ipsa loquitur is a doctrine that permits the fact-finder to infer negligence in the absence of direct proof. A plaintiff who successfully invokes the doctrine of res ipsa loquitur can survive a no-evidence challenge on the issue of negligence. Res ipsa loquitur applies only when (1) the character of the accident is such that it would not ordinarily occur without negligence and (2) the instrumentality causing the injury was under the management and control of the defendant.

Carlson v. Remington Hotel Corporation, No. 01-07-00376-CV (Tex. App. 5/22/2008), No. 01-07-00376-CV. (Tex. App. May 22, 2008) (internal citations and punctuation omitted).

1. *The character of this accident is such that it would not ordinarily occur without negligence.*

The first factor in this test "can be proven with general knowledge or expert testimony that the accident would not ordinarily occur in the absence of negligence." *Id.* In *Carlson v. Remington Hotel Corporation* (No. 01-07-00376-CV), the Texas Court of Appeals addressed a case where a hotel guest slipped and fell on a wet bathroom floor. The plaintiff alleged that during the night the carpet adjacent to the bathroom floor had become soaked with water that had leaked onto the bathroom floor. Neither the carpet nor the adjoining bathroom floor was wet when the plaintiff checked in the night before. The guest alleged that the water had leaked from a

nearby air conditioner but affirmed that she was sharing the room with at least one other guest and did not know if someone else had used the bathroom during the night or otherwise caused the leak. The hotel staff also claimed to be unaware of how the water had collected. The court found that, to show *res ipsa loquitor*, the plaintiff "needed to show that it is generally known that carpet adjacent to a bathroom would not become wet in the absence of negligence." *Carlson v. Remington Hotel Corporation*, No. 01-07-00376-CV. (Tex. App. May 22, 2008). Per the reasoning applied by the *Carlson* court*,* Ms. Hyland must show that it is generally known that a bedframe with its rubber protective covering eroded to the point that a sharp metal edge is exposed would not be left in a guest's room in the absence of negligence.

During her deposition, Defendant's corporate representative, Sharon Kilpatrick, acknowledged that the bedframe had a rubber covering. (Kilpatrick Depo. 105:4-7). Kilpatrick also acknowledged that the rubber was placed on the bedframe as a protective barrier. (*See* Kilpatrick Depo. 139:12-14) ("I can tell you that [the] purpose of the rubber is to protect and that's why the rubber is placed there"). Kilpatrick further acknowledged that the metal frame could be dangerous if the rubber protection was not there. (Kilpatrick Depo. 139:15-20). As this Court can see from the picture embedded above, the bed on which Ms. Hyland was injured was in various stages of deterioration – from relatively minor and cosmetic, to advanced and dangerous. The metal frame is completely exposed in the parts of the bed where the rubber covering has deteriorated the most. As Defendant recognizes that the exposed metal bedframe could be dangerous, and it would not knowingly allow a dangerous condition to exist in one of its rooms, the presence of the bedframe in the room resulted from negligence. (*See* Kilpatrick Depo. 204:21-22).

2. The bed was inarguably under the management and control of Defendant.

> The second factor [in a *res ipsa loquitor* inquiry] connects the negligence to the defendant. The possibility of other causes does not have to be completely eliminated, but their likelihood must be so reduced that the jury can reasonably find by a preponderance of the evidence that the negligence, if any, lies at the defendant's door.

Id. In ruling against the appellants, the *Carlson* court held that they had not shown that "the wet carpet, i.e., the instrumentality that caused the accident, was in the control of appellees." *Carlson v. Remington Hotel Corporation*, No. 01-07-00376-CV. (Tex. App. May 22, 2008). In support of its holding, the court emphasized that the hotel staff that responded to Plaintiff when she was injured testified that the leak could have been caused by several factors, including factors that were under the plaintiff's control while she was staying in the room. Specifically, the hotel staff pointed out that the leak could have been caused by an overflowing bathtub, toilet, or sink – three things in the plaintiff's control during her stay in the room. The court emphasized that because these water sources were in the plaintiff's control during the night – when the water accumulated – the plaintiff could not show that the water accumulation resulted from the hotel's negligence.

In the instant case, there is no evidence – nor does Defendant ever argue – that Plaintiff did something to create the instrumentality that caused the accident, i.e., did something to erode the rubber covering and expose the sharp metal edge of the bedframe. Defendant never points to a pile of torn leather in the room that Plaintiff could have potentially pulled from the bed. Defendant doesn't propound any evidence that Plaintiff moved or repositioned the bed, thereby damaging the frame and exposing the sharp metal. Obviously, Plaintiff did not bring the frame into the room herself. And, again, Defendant has admitted repeatedly that Ms. Hyland cut herself on the bed and only takes issue with the sharpness of the edge that cut her. (*See* Kilpatrick Depo.

104:21-105:3) ("[EPQ] doesn't know that the edge was so sharp that it cut through the comforter, the jeans, the socks, the compression stockings. IGH *does know it cut into her leg.*")

Defendant attempts to argue that the dangerous condition did not exist the day that Plaintiff checked in because she did not see it until the next morning. (Hyland Depo. 12:8-15). However, this is not like the water puddle in *Carson, which* would have been conspicuous and immediately noticeable upon check-in. As Defendant knows, the bed was made when Plaintiff checked in, and the undisturbed bedding likely concealed the sharp edge. It wasn't until the next morning, after Plaintiff had slept in the bed, disturbing the bedding and exposing the sharp edge, that Plaintiff confronted the dangerous condition. Just because Plaintiff had not yet had the opportunity to confront the dangerous condition upon checking in does not mean that it didn't exist at the time that she checked in. In fact, all evidence and all reasonable inferences support the conclusion that the dangerous condition did exist when Plaintiff checked in at around midnight the night before and that she only encountered it after she had the opportunity to traverse the room.

D. <u>Defendant is vicariously liable for the conduct of its staff under the doctrine of respondeat superior.</u>

> Under Texas law […] employers may be held liable for negligent acts by their employees under a theory of respondeat superior if the employee's actions were within the course and scope of their employment. To show that an individual acted within the course and scope of his employment, a plaintiff must show that the act was: (1) within the general authority given him; (2) in furtherance of the employer's business; and (3) for the accomplishment of the object for which the employee was employed.

Smith v. Universal Electric Construction, 30 S.W.3d 435 (Tex. App. 2000) (internal citation and punctuation omitted.

1. *EPQ employees had general authority to inspect its rooms for safety hazards, including inspecting the condition of the furniture***.**

It is inarguable that identifying and correcting the dangerous bedframe was within the general authority of IGH housekeeping staff and those employees tasked with carrying out health and safety inspections. During her deposition, Kilpatrick referred specifically to the EPQ Way of Clean, "a comprehensive document that outlines daily, weekly, monthly, quarterly [and annual] procedures to ensure a clean and safe hotel." (Kilpatrick Depo. 21:5-9). Kilpatrick explained that this document presents the standards the hotel expects its employees to utilize in daily operations. (Kilpatrick Depo. 21:1-4). Kilpatrick testified that part of EPQ's Way of Clean standards is to ensure that hotel employees "inspect the room for safety conditions." (Kilpatrick Depo. 80:13-15). Kilpatrick confirmed that keeping the room safe "includes inspecting the beds and furniture." (Kilpatrick Depo. 81:10-12). Because the EPQ way of clean set the standards by which the hotel staff performed their jobs, and because this document explicitly references inspecting beds and other furnishings, it is absolutely inarguable that EPQ employees had general authority to inspect Plaintiff's room for safety hazards.

2. Ensuring that EPQ's rooms are safe is central to EPQ's business.

EPQ is one of the world's leading hotel companies. Its core business is the provision of hospitality services. From EPQ's perspective, providing true hospitality "means offering a warm and welcoming environment, *clean and safe.* Life safety is of paramount importance." (Kilpatrick Depo. 34:8-11). It follows that an employee's proper inspection of a room to ensure its cleanliness and safety is in furtherance of EPQ's business. Inspecting the rooms and ensuring that old furniture is not dangerous or defective goes to EPQ's primary objective: keeping their guests and visitors safe. (Kilpatrick Depo. 82:13-17).

3. The object of EPQ's staff's employment is to maintain safe conditions at the hotel.

An EPQ employee's non-negligent inspection of hotel rooms is done to accomplish the object for which the hotel employee was employed – to provide a safe environment for EPQ's guests and visitors. These objectives are reinforced in IGH's Way of Clean standards, which encompass the inspection of rooms for safety conditions. (Kilpatrick Depo. 80:13-15; 81:10-12). Housekeeping staff, specifically, are tasked with performing daily inspections, one component of which is to inspect the room's headboard, mattress, and frame. (*See* Kilpatrick Depo. 107:2-6) ("[EPQ] has a standard of daily inspections and cleaning of rooms as part of EPQ Way of Clean. And one of the components of that is inspecting the headboard, the mattress, and the frame").

4. Defendant's argument does not address any of the factors relevant to this claim.

Defendant argues that the fact that EPQ "had policies in place to train its employees to properly clean, inspect, and alert any potentially dangerous conditions to management" somehow absolves it of liability in this context. Defendant's Memo in Support of its Motion for Summary Judgment at 8. It does not. As outlined in detail above, it is not just Defendant's duty to implement policies – they must also manage their employee's implementation of those policies to ensure that their guests do not confront a dangerous condition.

Based on the factors outlined above, EPQ is responsible for the negligent furniture inspections of their staff under Texas law. EPQ staff was tasked with inspecting the furniture in the hotel's rooms to ensure that it was in safe condition. Their failure to find and correct the broken and dangerous bedframe that injured Plaintiff is evidence of their negligent inspection of the room. EPQ is vicariously liable for its staffs' negligent inspection of Plaintiff's hotel room under the theory of respondeat superior.

E. Defendant negligently trained and supervised its employees.

1. Defendant negligently supervised its employees.

"To successfully prosecute a negligent supervision claim against an employer, a plaintiff must show that (1) the employer owed the plaintiff a legal duty to protect the plaintiff from the employee's actions, and (2) the plaintiff sustained damages proximately caused by the employer's breach of that legal duty." *Green v. Ransor, Inc.,* 175 S.W.3d 513 (Tex. 2005). "[A]n element of a claim for negligent supervision and retention is that the employee committed an actionable tort." *Waffle House, Inc. v. Williams*, 313 S.W.3d 796 (Tex. 2010) (internal citations and punctuation omitted).

i. EPQ had a duty to ensure that its employees were conducting safety inspections of its rooms in a non-negligent manner.

> In determining whether to impose a duty of care, courts consider related social, economic, and political questions and their application to the facts. Courts conduct a balancing test and weigh the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. Courts also consider whether one party generally would have superior knowledge of the risk or a right to control the actor who caused the harm.

Douglas v. Hardy, 600 S.W.3d 358, 368 (Tex. App. 2019). Whether a duty exists is a matter of law to be determined by a judge. *Id.*

The instant situation presents a special case because of the unique service that hotels offer. Homes away from home, guests stay in hotels under the assumption that risks – both obvious and covert – have been eliminated. Avoiding both conspicuous and inconspicuous dangers is, ostensibly, why EPQ conducts so many different room inspections – to ensure that guests can relax in a safe space. Regarding the specific type of danger that Plaintiff confronted – the dangerous metal bedframe – Defendant knew that the rubber padding was placed on the bed to protect guests from being injured on the potentially dangerous metal frame. (Kilpatrick Depo. 139:12-14). Defendant knew or should have known that the rubber guard on the bedframe erodes over time. Generally speaking, Defendant knew that furniture in poor condition could present a

dangerous condition – which is why its staff was also tasked with inspecting the condition of the furniture in the rooms. (Kilpatrick Depo. 107:2-6). It was highly foreseeable that a guest, confronted with an exposed metal edge of an eroded bed frame that it was not expecting, would injure themselves on the sharp edge.

Preventing the type of injury that Plaintiff suffered would not have significantly burdened EPQ. During her deposition, Sharon Kilpatrick discussed the importance of "inspecting what you expect." "That means that it's not enough to just tell people to do safety checks of hotels. You need to ensure that those checks are being done. So you need to make sure that those inspections are actually taking place." (Kilpatrick Depo. 78:6-14). In other words, Defendant imposed upon its managers a duty to review their employees' work and ensure that it was being done effectively, i.e., to supervise them. By imposing upon Defendant a duty of care to "inspect what they inspect" this Court would only be reinforcing IGH's own managerial policies.

Finally, it is inarguable that Defendant had superior knowledge of the room, its condition, and its potential risks. Defendant's employees are tasked with cleaning and inspecting the room daily – these daily inspections included inspecting furniture. Plaintiff had never even been inside of the room before the day she checked in.

ii. Defendant's negligent supervision of its employees proximately caused Plaintiff's injury.

Defendant admits that it is important to ensure that those employees tasked with inspecting the rooms actually perform the inspections. Defined by Kilpatrick, inspecting what you expect "means that it's not enough to just tell people to do safety checks of hotels. You need to ensure that those checks are being done. So you need to make sure that those inspections are actually taking place." (Kilpatrick Depo. 78:10-14). Kilpatrick acknowledged that "inspecting

what you expect" also means ensuring that the hotel has a general manager who can oversee employees' duties. (Kilpatrick Depo. 78:25-79:8).

As this Court can see from the picture embedded *supra*, the degraded state of the bedframe was obvious and conspicuous and should have been immediately noticeable to someone in the process of inspecting what they expect – i.e., of reviewing the work that the EPQ housekeeping staff conducted to ensure that the room was in a safe and habitable condition. The fact that a bed in that condition was allowed to remain in Plaintiff's room is illustrative of either no supervision or, at the very least, negligent supervision. If Defendant's employees were being properly supervised, the bed would not have been in that condition and it would not have injured Plaintiff. Defendant's negligent supervision of its employee's is the proximate cause of Plaintiff's injury.

iii. Defendant negligently trained its employees.

"To establish a claim for negligent training, a plaintiff must prove that a reasonably prudent employer would have provided training beyond that which was given and that failure to do so caused his injuries." *Douglas v. Hardy*, 600 S.W.3d 358, 367 (Tex. App. 2019) (internal citation and punctuation omitted). Defendant supports its argument that it did not negligently train its employees by incorrectly asserting that Defendant's implementation of safety and training policies absolves it of being found liable for negligently training its employees. This is an incorrect recitation of the law. As this Court has read, *supra*, the issue at hand is not whether Defendant trained its employees, but whether training *beyond* what Defendant offered would have prevented Plaintiff's injury. The answer to this question is – unequivocally – yes.

In her deposition, Kilpatrick stated that housekeeping would have performed a 25-point inspection on Plaintiff's room before she checked in, which would have included lifting the skirt

of the bed to vacuum under the bed – an action that would have revealed the bedframe. Kilpatrick maintained that "[i]f there was an issue [with the bed frame], they would have reported it." (Kilpatrick Depo. 204:18-22). Based on the condition of the bed frame at the time that Plaintiff checked in, Defendant clearly failed to properly train their staff about what is considered a dangerous or unsafe "issue" in regard to the condition of the furniture. A reasonably prudent hotelier would have trained its employees to ensure that potentially dangerous metal edges were either properly covered or removed from the room – especially if that metal edge would be in close proximity to the guest during their stay. In this case, the primary purpose for which a guest stays in a hotel is to sleep, so a dangerous edge on a bed would be especially prone to cause injury as the guest will have close and constant contact with the bed throughout their stay. Had Defendant's employees been adequately trained, they would have alerted their managers about the frame's condition and its potential to injure a guest. Defendant's employees' failure to do so shows that the training they received from Defendant was inadequate.

F. <u>Punitive damages are proper in this case.</u>

The instant case concerns a hotel that allowed a dangerous condition to exist in one of its rooms until that dangerous condition injured a guest and then destroyed all evidence associated with the inspection of that room. This willful and wanton behavior exemplifies the "conscious and deliberate disregard of the interests of others" that Georgia courts require to award punitive damages. As this Court can tell from the picture of the bedframe taken by Plaintiff's daughter, the danger was open and conspicuous, and Plaintiff believes that Defendant's knowledge of this increasingly dangerous condition was documented in the spoliated evidence. This act of allowing this dangerous condition to not just remain, but become increasingly more dangerous, was more than mere negligence. It is clear from the picture that someone who conducted the daily,

monthly, quarterly, or yearly inspections of this room would have noticed the increasingly dangerous condition of the bed's frame and reported it to management. These documents that would have evidenced such a report, documents which Defendant admits existed, were illegally destroyed. Defendant now points to Plaintiff's failure to produce these documents as evidence that this blatant and obvious defect went unnoticed.

The purpose of punitive damages is to punish, penalize, and deter. O.C.G.A. § 51-12-5.1(c). The events of this case, in combination with Defendant's position in the hospitality industry, make its actions particularly worthy of sanction. EPQ is one of the world's largest multinational hospitality companies, with over twenty hotel brands and a corporate history spanning two hundred years. Thousands of people stay in EPQ hotels every *day* – thousands of guests for which EPQ bears the responsibility of protecting and keeping safe. EPQ *must* be sanctioned to punish this willful and wanton behavior, to penalize them for sacrificing the safety of their guests for their bottom line, and to deter other companies in the hospitality industry from following EPQ's lead.

V. CONCLUSION

Summary judgment is not appropriate in this case. The assumptions and inferences on which Defendant relies are not evidence, and do not make its case. The evidence in the record supports the conclusion that there are genuine issues of material fact surrounding whether Defendant knew or *should have known* of this dangerous condition. The record supports the conclusion that Defendant's had every opportunity to discover the degraded condition of its bedframe and either negligently failed to notice it or recklessly chose not to replace it. The undisputed evidence also supports the conclusion that Defendant spoliated evidence in this case.

For these reasons, Plaintiff requests that this court DENY Defendant's Motion for Summary Judgment.