

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
EASTERN GRAND DIVISION

FILED

JUN 05 2009

Tennessee Claims Commi
CLERK'S OFFICE

ERIN JOHNSON,

Claimants,

v.

STATE OF TENNESSEE,

Defendant.

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Claims Commission No. 20080358
Small Docket

ORDER OF DISMISSAL

THIS MATTER originally came on to be heard before the undersigned on January 12, 2009, in Courtroom Number 5 of the General Sessions Court for Hamilton County, Tennessee, in Chattanooga. Proof was adduced at that time, following which the Commission granted the Parties' additional time within which to conduct additional discovery because of issues raised on the date of the original hearing.

The Parties did, in fact, conduct additional discovery and this matter came on for final disposition on Monday, May 18, 2009.

Present on both dates and representing the Claimant, was Jerrold J. White, Esq., of the Hamilton County Bar, and P. Robin Dixon, Esq., of the office of the Attorney General of Tennessee, representing the State. On January 12, 2009, the Claimant, Erin Johnson, testified in support of her claim. Testifying on January 12, 2009, on behalf of the State of Tennessee was Mr. Rodney Adams, a member of the teaching faculty at Chattanooga State Community College. Testifying for the Claimant on May 18, 2009, was Ms. Nakia Mathis.

As indicated in an earlier Order of this Commission, this claim is before the Commission pursuant to a Notice of Appeal filed by the Claimant on March 12, 2008, and the attached

Complaint Form alleging that Ms. Johnson injured her hip and back on January 29, 2007, when she fell after having completed a pedicure treatment at the cosmetology training center at Chattanooga State in Chattanooga, Tennessee. At the time of her fall, Ms. Johnson was a student at Chattanooga State.

This claim is on the Commission's small claims docket and is being heard at a full hearing rather than on Affidavits alone. To that Complaint, the State filed an Answer generally denying the allegations found in the Complaint and affirmatively pleading that the State did not have notice of the allegedly dangerous condition within sufficient time prior to the injury for it to have taken appropriate measures to avoid the incident and further, that the negligence of the Claimant herself was more than fifty percent (50%) of any and all negligence which may have occurred under the facts set out in this claim.

Based on these allegations and the Answer thereto, it is clear that the Claimant alleges that the Commission's jurisdiction over this claim is found under Tennessee Code Annotated, Section 9-8-307(a)(1)(C), which provides as follows:

9-8-307. Jurisdiction Claims Waiver of actions Standard for tort liability Damages Immunities Definitions Transfer of claims.

(a) (1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of state employees, as defined in 8-42-101(3), falling within one (1) or more of the following categories:

...

(C) Negligently created or maintained dangerous conditions on state controlled real property. The claimant under this subdivision (a)(1)(C) must 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;

Of course, under this particular section of the Tennessee Claims Commission Act, it is incumbent upon the Claimant to prove, by a preponderance of the evidence, that the risk

encountered by Ms. Johnson was foreseeable to State and of particular importance in this case, that “proper state officials” had notice of the dangerous condition within sufficient prior to the injury for the State to have taken appropriate measures to have prevented the injury to the Claimant.

Proof Introduced at Trial.

Ms. Johnson testified that at the time she fell, she was a nursing student at Chattanooga State. On the date of her fall, she signed in at the Cosmetology Department and was escorted to the place where her pedicure would be given. She testified that she stepped up some three feet, in her opinion, to a pedicure stand and rolled up her pants. Apparently, the pedicure chair is mounted on a stand and the actual chair on the stand swivels around in order for the client to place their feet in a bowl of water where the feet can be placed and the pedicure completed. The area around the stand itself, above the floor, is covered with a no-slip surface. The water in the bowl on the pedicure stand bubbles. Ms. Johnson testified that in all, she was on the pedicure stand between 45 minutes and 1 hour, the final portion of which was spent polishing her toenails after which she remained seated for 5 minutes in order for the polish to dry. The area around the pedicure stand where she fell was not covered by rubber mats or rugs. The surface was actually a typical tile floor found in many public buildings. Also the pedicurist had in close vicinity to the stand various creams and lotion which were used during the pedicure process. Following the drying of the toenails, claimant was given a pair of tissue flip-flops made of paper with the consistency of toilet paper after which she stepped down. She characterized these paper slippers as being very thin and unlike the rubber flip-flop type footwear she had seen in other pedicure parlors.

Ms. Johnson testified that she stepped off the stand onto the floor with her left foot. She also testified that at the completion of her pedicure, the bottoms of her feet were dry since Ms. Mathis had toweled them off.

Ms. Johnson attributes her fall to there being no rugs or mats around the pedicure stand; to the fact that she was issued simple paper thin coverings for her feet after the pedicure was complete; that the floor around the pedicure stand was wet; and finally that the floor surface where she fell was smooth and slick.

Ms. Johnson claims she had injuries to her left hip, side, and her low back. Photographs of bruises from those injuries are contained in a group of four photographs marked as Collective Exhibit 1. Collective Exhibit 2 is a collection a medical bills totaling Three Thousand One Hundred Fifty-Nine Dollars (\$3,159.00). With those bills also are various medical records from Drs. Dubeck, Strang, and Lawrence along with test results and physical therapy notes. These bills are admissible in the small claims proceeding pursuant to Rule 0310-1-.01(11)(a)(2) of the Rules of the Commission. Ms. Johnson also attempted at the time to introduce an Affidavit from Nakia Mathis, the technician who rendered services to her on the date of her fall. That Affidavit was not admitted but simply marked for identification. (See Exhibit 3.)

Ms. Johnson testified regarding the black and blue marks shown on Exhibit 1. A CT scan of Ms. Johnson's lumbar spine dated February 20, 2007, shows no acute disorders but does reveal degenerative disc changes, a congenital problem involving incomplete fusion at L5 and a small bilateral L5 pars defect without spondylolisthesis. An x-ray from January 30, 2007, revealed no fractures. On February 27, 2007, Dr. Brooksbank noted that Ms. Johnson was "free of pain", had "excellent range of motion" and "no complaints". As of that date, she was discharged from the care of Med-Therapy of Chattanooga. Records from Med-Therapy also indicate that she was seen there on five occasions. Additionally, records from Benchmark

Physical Therapy indicate that she was seen there on six occasions at the direction of Dr. Dubeck. Medical records reveal that Ms. Johnson began treatment at Benchmark Physical Therapy on July 24, 2007, and that her pain “[had] flared up about three weeks ago.” Ms. Johnson’s medical records revealed she had a baby some seven to eight months before her fall in May of 2006.

Ms. Johnson testified that other places at which she had received pedicures provided clients with rubber slippers as they dismounted a pedicure stand which was located about the same level off the ground as the chair at Chattanooga State. Additionally, she noted that floors in those businesses were covered by carpet and a long black mat leading through the pedicure center on which clients could walk. Ms. Johnson testified that she had no personal knowledge of other falls at Chattanooga State. She also contended that her fall could have been avoided had she been given help coming down from the pedicure stand. On cross examination Ms. Johnson testified that she stepped down from the stand as slowly as possible after her toenails dried for some five minutes. She testified that she came down two steps and then slipped.

On cross examination it was also demonstrated that no mention of wet floors was made by her in her deposition or in her complaint filed with the Commission. Additionally, the State elicited testimony that there was no mention of wet floors in any of the physical therapy reports or in the report made to the Chattanooga State Security Department at the time of her fall. She also testified that following her fall, she had never been back to the cosmetology department nor had she spoken to Rodney Adams, the instructor, after the day of her fall.

Mr. Rodney C. Adams testified on behalf of the State. He has been a cosmetology instructor at Chattanooga State since 2002 and has been at the college since 2001. He testified that there was a nine inch step off from the pedicure stand to the floor and that there was a non-slip surface on the chair after the client steps up from the floor. He also testified that some

clients, perhaps one-half, bring their own slippers to the sessions. He testified that he has probably taught a few hundred students and that Chattanooga State has a 100% pass rate on the state licensing examination. Mr. Adams testified that in his experience since 2001 at Chattanooga State, he can recall no other slip and fall accidents. On the day Ms. Johnson fell, other students informed him of the incident, and he went to assist her. He called security. Ms. Johnson told him that she did not need an ambulance, but that she would seek medical care on her own. Approximately a week later, Mr. Adams saw Ms. Johnson in the department, and she told him that she was doing "fine". On cross examination Mr. Adams testified that on the date of Ms. Johnson's fall, he saw no water on the floor and that he arrived at the scene approximately one minute after her fall. He did not give a statement to security at the time since he was not asked. Mr. Adams testified that between 2001 and 2006, there would be perhaps twenty (20) students enrolled in the class at any particular time and that on average, each student would perform twenty-five (25) pedicures during the course of their training although some students were averse to doing pedicures while others did thirty (30) to forty (40) during training. Even though a large number of pedicures have taken place during his tenure as an instructor, Mr. Adams testified he had neither seen nor heard of a similar slip and fall incident. He did testify that his regular hours were from 8:00 a.m. to 2:30 p.m. Monday through Thursday and that there was another instructor teaching afternoon and evening courses named Rhonda Castleberry. Mr. Adams had personally never witnessed a slip and fall. Also, he stated he is the individual charged with buying supplies for the program, and he purchases booties or the paper flip-flops used at the time of Ms. Johnson's fall.

In closing argument the claimant contends that Mr. Johnson's fall was foreseeable in that it is obvious water and other liquid materials were present in the vicinity of the pedicure stand, and it was also foreseeable that these substances could end up on a floor not covered by either

rugs or rubber matting thereby creating a dangerous condition which caused this claimant to fall. The Claimant argues that a reasonable training institution would have put mats on the floor which would have prevented this fall.

The State argues that Ms. Johnson herself testified her accident occurred when she just fell. The State also observes that Mr. Adams saw no liquid on the floor following the fall and most importantly, that the State had no notice whatsoever of a condition which it could have remedied prior to the fall thereby negating the fulfillment of the notice requirement contained in Tennessee Code Annotated, Section 9-8-307(a)(1)(C).

On February 2, 2009, the State notified counsel for the Claimant that after a review of records at Chattanooga State by a vice president of that institution it was determined that there had been no incident reports filed between 2000 and 2007 regarding slip and fall injuries in the Cosmetology School/Department during that time period.

On May 18, 2009, the Claimant introduced the live testimony of Ms. Nakia Mathis, who had administered the pedicure to Ms. Johnson on the date of her injuries and whose Affidavit had been marked for identification as Exhibit 3 on the day of the first hearing in the matter.

Ms. Mathis testified that she, in fact, had given Ms. Johnson a pedicure on January 29, 2007. She indicated that among the cosmetology students she was one of the few who actually enjoyed doing pedicures, and that she did many of these procedures during her training.

Ms. Mathis testified that following the pedicure, she dried Ms. Johnson's feet with a towel, applied lotion to them, and then placed thin white paper slippers on the Claimant's feet. She testified that the slippers were thin and that an individual could see through them. Ms. Mathis stated Ms. Johnson then dismounted the pedicure stand, and eventually stepped off the stand onto the floor. However, she testified there was an approximate two and one-half foot space between the pedicure stand and a black mat on the floor. In other words, the matting was

not flush with the pedicure stand. Ms. Mathis testified that the floor was a hard surface typical of what is found in many office buildings.

Following the fall, Ms. Mathis stated that Mr. Adams was contacted and that Claimant appeared to be “in shock” but indicated that she thought she was “okay”. Ms. Mathis also stated that Mr. Adams suggested filing an incident report. Ms. Johnson then, according to Ms. Mathis, went to the Chattanooga State Day Care facility.

Ms. Mathis testified that she herself had fallen in the Cosmetology Department as she was getting up from a foot stool she had been seated on while getting a pedicure. She testified that the stool slide out from beneath her. This happened after Ms. Johnson suffered her fall. Ms. Mathis testified that she had a pair of rubber soled tennis shoes on but that she did not “know how it happened”. She claimed that Mr. Adams came by to see how she was, and that she filled out an accident report.

Ms. Mathis testified that another student had fallen, before Ms. Johnson’s fall, in the Cosmetology Department while running to a supply room just prior to an exam. Ms. Mathis stated that there was a no running “rule” in the Cosmetology Department and that Mr. Adams had told this student as much. She could not recall whether an incident report was filed regarding this incident. Mr. Adams was not present that day and the report of the incident was made to a Caucasian gentleman. This incident apparently occurred before Ms. Johnson’s fall.

Ms. Mathis did not recall signing an incident report at the time of her fall or that of her fellow student. She also testified that when she fell, there was water on the floor. When questioned further, Ms. Mathis testified that her fall occurred in March of 2007, which would have been after Ms. Johnson’s fall.

Ms. Mathis testified that the only person she ever saw fall with the paper slippers on her feet was Ms. Johnson. She also testified that the no running rule was in effect since substances

could be on the floor. Usually around the pedicure stands, she stated substances could be found on the floor including hair, nail clippings, and talcum powder. On re-direct examination, Ms. Mathis testified that she could not say positively that there was anything on the floor at the time Ms. Johnson fell and that it was her practice to keep her work area clean.

At the initial hearing in this matter, Claimant introduced as Collective Exhibit 1 graphic photographs of the areas of her body injured and as Exhibit 2, medical records and bills resulting from her fall.

As stated above, Ms. Mathis' Affidavit was marked as Exhibit 3 for identification.

Decision.

As set out above, in order to prevail under Tennessee Code Annotated, Section 9-8-307(a)(1)(C), the claimant must prove by a preponderance of the evidence that the condition causing her injury was foreseeable to the State and secondly, that the State had notice of such condition with sufficient time to have afforded it an opportunity to correct the same thereby avoiding any injury to the claimant. Additionally, determining the State's liability in cases such as this requires the application of "traditional tort concepts of duty and the reasonably prudent person's standard of care." Tennessee Code Annotated, Section 9-8-307(c).

It is well established in Tennessee that the State is not an insurer of the safety of persons who enter onto its various properties. *Byrd v. State*, 905 S.W.2d 195, 197 (Tenn. Court App. 1995). See also *Atkins v. City Finance, Co.*, 683 S.W.2d 331, 332 (Tenn. Court App. 1984); *Paradiso v. Kroger Company*, 449 S.W.2d 78, 79 (Tenn. Court. App. 1973).

As set out above, traditional tort law concepts apply in the Tennessee Claims Commission. To that end, the discussion of premises liability set out in *Dobson v. State*, 23 S.W.3d 324 (Tenn. Ct. App. 1999) is instructive. There, the Court wrote as follows:

In cases involving premises liability, the premises owner has a duty to exercise reasonable care under the circumstances to prevent

injury to persons lawfully on the premises. ... This duty is based upon the assumption that the owner has superior knowledge of any perilous condition that may exist on the property. ... The duty includes the obligation of the owner to maintain the premises in a reasonably safe condition and to remove or warrant against latent or hidden dangerous conditions on the premises of which the owner is aware or should be aware through the exercise of reasonable diligence. ... The duty of a premises owner is ‘a duty of reasonable care under all circumstances’. ... The scope of this duty is grounded upon the foreseeability of the risk involved. ... Thus, in order to prevail in a premises liability action, the plaintiff 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. *Id.* at 330-331 (citations omitted).

In addition to application of the usual common law concept of foreseeability, which of course is a part of Tennessee Claims Commission jurisprudence, there is, as discussed briefly above, a strict requirement that the State have been placed on notice with sufficient time for it to remedy a condition posing an imminent threat. That notice requirement can be satisfied in one of two ways. First, notice may be provided if “the state or its agent(s) created or constructed the offending instrumentality”. (See *Hamby v. State*, No. W2003-02947-COA-R3-CV, 2004 WL 1737390 *6 (Tenn. Ct. App. 2004).) Alternatively, notice may be provided if the State had “actual or constructive notice ... that the condition existed prior to the accident.” *Id.* (See also *Berry v. Houchens*, 253 S.W.3d 141, 147 (Tenn. Ct. App. 2007).)

Additionally, the mere existence of a dangerous condition is not sufficient to create liability “unless it is shown to be of such a character or of such duration [that the fact finder] may reasonably conclude that due care would have discovered it.” *Bowman v. State*, 206 S.W.3d 467, 473 quoting *Rice v. Sabir*, 979 S.W.2d 305, 309 (Tenn. 1998).

Pursuant to Section 9-8-307(c) of the Tennessee Claims Commission Act, the State of Tennessee’s liability in tort actions is to be determined “...based on the traditional tort concepts of duty and the reasonably prudent person’s standard of care.” Well-established principles of

law require a claimant, in a negligence action such as this, to establish the following five elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause. See *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993); *Turner v. Jordan*, 957 S.W.2d 815, 818 (Tenn. 1997); *Byrd v. State*, 905 S.W.2d 195, 196 (Tenn. Court App. 1995).

Foreseeability is the test of negligence. *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 178 (Tenn. 1992). Foreseeability was discussed by our Supreme Court in *Tompkins v. Annie's Nannies, Inc.*, 59 S.W.3d 669 (Tenn. Ct. App. 2000) using the following language:

“Foreseeability is the test of negligence. Everyone has a duty to use reasonable care to refrain from conduct that will foreseeably cause injury to another. No person, however, is expected to protect against harm from events which one cannot reasonably anticipate or foresee or which are so unlikely to occur that the risk, although recognizable, would commonly be disregarded. Specifically, ‘[t]he defendant in order to be liable must have been able to anticipate or reasonably foresee what usually will happen.’

...

‘The general rule in Tennessee is that negligence, to be actionable, must result in damage to the plaintiff which the defendant could reasonably have anticipated or foreseen.’ ... Foreseeability requires an awareness of a general character of injuries similar to those suffered by the plaintiff. ... If plaintiff’s injuries are of a type that could not have been reasonably foreseen, a duty of care never arises.

...

‘[t]he actor’s conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward with the wisdom born of the event.’ The standard is one of conduct, rather than consequences. It is not enough that everyone can see now that the risk was great, if it was not apparent when the conduct occurred.” *Id.* at 673-674. (Citations omitted, Emphasis supplied.) See also *Eaton v. McClain*, 891 S.W.2d 587, 594 (Tenn. 1994).

If a claimant's injury was not reasonably foreseeable, then a duty of care never arises and even though the act of the Defendant may have caused an injury, there is no negligence and, therefore, no liability. The injury must have been a reasonably foreseeable probability and not a remote possibility. It also must be shown that something the Defendant could have done more probably than not would have prevented the injury. *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 178 (Tenn. 1992); *Hamby v. State* at p. 4.

Each of these elements must be proven by a preponderance of the evidence.

Preponderance of the evidence has been well defined in Tennessee law for some time. The term "preponderance of evidence" is bandied about regularly in civil cases but is, in some respects, difficult to firmly grasp. However, several cases may help clarify what proving a proposition by a preponderance of evidence means.

In *Teter v. Republic Parking System, Inc.*, 181 S.W.3d 230 (Tenn. 2005), our Supreme Court used the following language in connection with this concept:

"The standard of proof required in a case 'serves to allocate the risk of error and to instruct the fact finder as to the degree of confidence society expects for a particular decision.' ... Generally, in civil cases, facts are proved by a mere preponderance of the evidence. ... The preponderance of the evidence standard requires that the truth of the facts asserted be more probable than not," *Id.*, at 341 (Internal citations omitted; emphasis supplied.)

A preponderance of evidence can be established through either direct or circumstantial evidence. A well-established "train" of circumstances may even outweigh opposing direct testimony. (See *McConkey v. Continental Ins.*, 713 S.W.2d 901, 904 (Tenn. App. 1984), citing *Aetna Casualty and Surety Company v. Parton*, 609 S.W.2d 518, 520 (Tenn. App. 1980).)

In that same connection, the Court said in *Marshall and Jones v. Jackson Oil, Inc.*, 20 S.W.3d 678 (Tenn. Ct. App. 1999) that:

“It is elemental that a party asserting a lawsuit claim must establish the claim by satisfactory proof convincing to the fact-finder. ... To carry the burden of proof, a party may employ either direct evidence from witnesses with personal knowledge or circumstantial evidence from persons who know and can testify to related facts that reasonably tend to establish the desired facts.” *Id.* at 683.

The Committee on Pattern Jury Instructions (Civil) of the Tennessee Judicial Conference has promulgated T.P.I. – Civil (Charge Number 2.40) regarding the concept of preponderance of the evidence. Paragraphs 3 and 4 of that charge read as follows:

“The term ‘preponderance of evidence’ means that amount of evidence that causes you to conclude that an allegation is probably true. To prove an allegation by a preponderance of the evidence, a party must convince you that the allegation is more likely true than not true.

If the evidence on a particular issue is equally balanced, that evidence has not been proven by a preponderance of the evidence and the party having the burden of proving that issue has failed.”¹ *Id.* at 65.

The Committee based this language on the Western Section Court of Appeals’ decision in *Austin v. City of Memphis*, 684 S.W.2d 624, 634 (Tenn. App. 1984).

The Claimant in this matter is an impressive young woman who is currently pursuing a career in the medical profession. There is no doubt about the sincerity of her claim.

¹ The Committee in the Use Note appended to this instruction set out the following as “other useful phrases”: “The proposition is more probably more true than not true.” [Ill. Pat. Inst., 2d ed., 1971] “The evidence that supports his claim on that issue must appeal to you as more nearly representing what took place than that opposed to his claim.” [New York Pat. Inst. 1965] “The party must persuade you that his claim is more probably true than not true.” [Pat. Inst. For Kansas, 1966]

However, analyzed under the preponderance of evidence standard and based upon the proof, I simply cannot find that the State was negligent in any of its actions in this case or that it had advance notice of any condition which led to Ms. Johnson's fall.

It is true that Ms. Johnson testified that the pedicure process took some forty-five (45) minutes and involved bubbling water in and around the pedicure stand. Following the actual cleansing of the feet, it is also true that the Claimant's feet were dried and that creams and lotions located around the pedicure stand were applied to her feet.

Ms. Johnson claims that her fall was caused by the absence of rugs or mats flush with the pedicure stand; a wet floor area around that stand; the slickness and smoothness of the uncovered floor around the stand; and finally, by the use of thin paper booties instead of rubber soled flip-flops for patrons dismounting the stand. There are several problems with the proof presented by the Claimant in this case.

First, there is absolutely no proof that the two prior slip and fall episodes relied on by Ms. Johnson provided notice to the State of a dangerous condition around the pedicure stand. Ms. Mathis testified on cross examination that, in fact, her fall occurred in March of 2007, after Ms. Johnson's accident in January of 2007. Additionally, there was evidence that Ms. Mathis' and Ms. Johnson's falls occurred under dissimilar circumstances since Ms. Mathis was getting up off the stool in front of the pedicure stand rather than dismounting as was the case with Ms. Johnson. Also, the second notice event relied upon by the Claimant involved a student running across the classroom – contrary to school rules – toward a closet area. This event is completely dissimilar to what occurred in connection with Ms. Johnson's fall and does not provide notice to the State of a dangerous condition.

In this same connection, Mr. Adams, who has been involved with Chattanooga State for some time, testified, without contradiction, that he was not aware of any similar slip and fall

events since he had been with the school. Next, although Ms. Mathis testified that there was hair, talcum powder, and nail clippings on the floor around pedicure stands which could cause a patron to fall, it was her further testimony that she kept her work area clean and, of course, she was the very individual who provided services to Ms. Johnson. In fact, on re-direct examination, Ms. Mathis testified she could not say for sure whether there was anything on the floor at the time of Ms. Johnson's fall.

Additionally, the Claimant testified that her fall could have been avoided if she had received some help in coming down from the pedicure stand. However, Ms. Mathis testified that she, in fact, helped Ms. Johnson down off the stand following completion of the pedicure.

Further, Ms. Johnson claimed there was water on the floor following her fall, although Mr. Adams, who arrived about one minute after the event, testified he saw no water present. Additionally, as mentioned above, Ms. Mathis testified that she kept her work area clean which does not square with the assertion that there was water on the floor.

In addition to these failings in the Claimant's proof regarding foreseeability and the State's notice of such a potentiality, it is also clear that the Claimant herself had significant responsibility to observe the area into which she was stepping as she dismounted from a stand onto the floor. If Ms. Mathis' testimony is to be believed, and she is Ms. Johnson's witness, Ms. Mathis assisted the Claimant down from the pedicure stand to the floor surface. Certainly, the Claimant has a responsibility to observe the area into which she was stepping and secondly, if, in fact, there was water, talcum powder, nail clippings, or any other substance in the area into which she was placing her foot, an obligation to avoid the same to assure her own safety. In other words, if there is fault involved in the circumstances which resulted in Ms. Johnson's fall, a significant share of that fault is hers.

Analyzed under the preponderance of evidence standard set out above, and based upon the considerations just recited, this Commission does not find that Ms. Johnson has established that any actions, or inactions, on the part of the State were negligent or that the State had notice of such a condition with sufficient time to remedy a situation before she fell. Therefore, for these reasons this claim is respectfully **DISMISSED**.

ENTERED this the 1st day of June, 2009.



William O. Shults, Commissioner

P.O. Box 960

Newport, TN 37822-0960

(423) 613-4809

CERTIFICATE

I certify that a true and exact copy of the foregoing Order has been transmitted to:

Jerrold J. White, Esq.
701 Cherry Street, Suite 205
Chattanooga, TN 37402

P. Robin Dixon, Jr., Esq.
Assistant Attorney General
Second Floor, Cordell Hull Bldg.
425 Fifth Avenue, North
Nashville, TN 37243

This the _____ day of June, 2009.
