

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
WESTERN DIVISION

FILED

OCT 19 2009

Tennessee Claims Commission
CLERK'S OFFICE

MALINDA JONES,

Claimant,

CLAIM NO. T 20-061-502

STATE OF TENNESSEE,

Defendant

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JUDGMENT

This premises liability claim arises from Claimant's fall in a restroom in Manning Hall, hereinafter referred to as Manning, on the campus of the University of Memphis, hereinafter referred to as U of M. The Claimant filed suit against the State for personal injuries. This matter comes before the Commission pursuant to Tennessee Code Ann. § 9-8-307 (a)(1)(C), which concerns dangerous conditions on state controlled real property.

I.

ISSUES PRESENTED

The issues presented are: (1) whether the State negligently created or maintained a dangerous condition in Manning by failing to post signs regarding the location of the handicapped accessible restrooms; (2) whether the State's negligence, if any, was the proximate cause of Claimant's injuries; (3) whether the Claimant's negligence, if any, was equal to or greater than any negligence on the part of the State; (4) if the Claimant's negligence, if any, was less than the State's, how the negligence should be apportioned among the parties, and (5) the amount of damages if any, suffered by Claimant.

II.

INTRODUCTION

Claimant Malinda Jones, who suffers from muscular dystrophy and scoliosis, uses a wheelchair and handicapped accessible bathrooms. Ms. Jones was a student at U of M on June 27, 2005, and had a class on the fourth floor of Manning. The handicapped accessible bathrooms in Manning are on the second floor. While

attempting to use the non-handicapped accessible bathroom on the third floor, Ms. Jones fell and was injured.

III.

FACT TESTIMONY

Claimant Malinda Jones, age 33, testified in support of her claim. She stated that she is in a wheelchair because she suffers from muscular dystrophy, which was diagnosed before she was a year old. (Tr., p. 22, lines 20-24) A personal assistant paid through Social Security disability lives with her. (Tr., p. 22, lines 4-15)

Claimant testified that she did not complete twelfth grade because of illness, but she now has her GED. (Tr., p. 25, line 18) She also received a pharmacy tech diploma from Tennessee Technology Center in 2002. (Tr., p. 26, lines 22-24; p. 31, lines 13-17) However, she has not worked as a pharmacy tech. (Tr., p. 31, lines 18-20)

Claimant testified that before her fall in June, 2005, she was using her wheelchair while shopping or attending school, but not at home. (Tr., p. 27, lines 14-20) She further stated she had a lift on the back of her car in 2005, and she could walk from the car back around to the lift. (Tr., p. 27, line 24- p. 28, line 5) Claimant stated

that before the fall, she also could do some limited walking with a walker. (Tr., p. 28, lines 6-8)

Claimant testified that she began attending the U of M in January, 2004. (Tr., p. 31, lines 21-24) (Ex. 3)

Claimant testified that there is one handicapped-accessible entrance to Manning. (Tr., p. 35, lines 2-5) Claimant further testified that she had a class in Manning in the spring of 2005. (Tr., p. 35, lines 12-13) She stated that while she was taking Cultural Anthropology in Manning that spring, she looked for a handicapped-accessible bathroom, but never found one. (Tr., p. 35, lines 19-20) She stated she went to other buildings to use the rest room. (Tr., p. 35, lines 20-22)

Claimant testified that prior to her fall, she did not see any signs directing disabled students to the accessible bathroom. She also did not recall seeing the "Accessible Directory" on Manning's main floor. (Tr., p. 36, lines 3-14)

Claimant reiterated that, prior to going to class, she usually used "the bathroom in places that I know that's wheelchair accessible since I knew I could never find anything in Manning." (Tr., p. 40, lines 17-20)

Claimant stated that on June 27, 2005, she had been “drinking a lot of coffee” and had to use the restroom. (Tr., p. 40, lines 21-23) She stated she was told by some students on the day of her fall that they only knew of one bathroom in Manning, and it was on the third floor. (Tr., p. 36, line 23- p. 37, line 2) Claimant took the elevator down to the third floor. (Tr., p. 41, lines 3-4)

Claimant stated she saw that the stalls in the third floor restroom were not handicapped accessible and did not have handrails. (Tr., p. 41, lines 8-10)

Claimant left her wheelchair outside of the stall and got to the commode by holding onto the wall. (Tr., p. 41, lines 13-14) After she used the restroom, she had difficulty getting up from the low toilet because “there wasn’t anything to hold onto.” (Tr., p. 41, lines 17-20)

As she was getting up, she fell back and hit her left shoulder on the commode. (Tr., p. 41, line 21- p. 42, line 1) Claimant said someone came into the restroom while her pants were still down around her knees. (Tr., p. 42, lines 3-6) Once the person left the room, Claimant crawled to her wheelchair and pulled herself up. (Tr., p. 42, lines 11-13)

Claimant stated she then washed her hands and went back to her class. (Tr., p. 42, lines 15-16) Claimant went home after class, “aching a little bit,” (Tr., p. 42, lines 22-23) but still thinking she would be okay. (Tr., p. 42, line 22)

Claimant stated that she was awake all night because of the pain. (Tr., p. 42, line 24- p. 43, line 1) She said she couldn’t afford to miss school and went on to class the next day. (Tr., p. 43, lines 6-8)

She said during her first class, her pain “was getting worse and worse and worse.” (Tr., p. 43, lines 10-11) So she went to the Student Health Center and told them about her fall the day before. (Tr., p. 43, lines 13-19) A health center employee instructed her to go to the emergency room for treatment and to campus police services to fill out an accident report. (Tr., p. 43, line 20- p. 44, line 3)

Claimant stated she went to police services and filled out a report, then drove herself to the emergency room so she could take her wheelchair with her. (Tr., p. 44, lines 5-16) She said after she got her wheelchair on the lift in back of her car, she “could barely make it to the driver’s seat.” (Tr., p. 45, lines 8-11)

Claimant stated that after she got home from the emergency room, she was in “extreme pain” (Tr., p. 46, lines 16-17) and “couldn’t even get out of bed.” (Tr., p. 46, line 18)

Claimant stated she followed up with Donna Freeman, her primary health provider, on July 6, 2005, about a week after the fall. (Tr., p. 46, lines 4-11) She said by that time she was “able to get out of bed, but I was still in pain.” (Tr., p. 47, lines 1-2)

She characterized her pain as ten out of ten and “off the chart.” (Tr., p. 47, lines 6-7)

Claimant stated that after the July, 2005 visit, she saw Ms. Freeman again in October and November of 2005. (Tr., p. 49, lines 15-17) Claimant testified:

I started having like depression probably in the fall of 2005. And the pain just increased, increased, increased. And that’s when she started putting me on narcotic, you know, medication. (Tr., p. 50, lines 1-4)

Claimant said Freeman started her off on Percoset. (Tr., p. 50, line 6) She took one of those at bedtime, and Naproxen and Tylenol during the day. (Tr., p. 50, lines 15-16)

When asked to describe her pain, Claimant stated:

A: I’m hurting really bad, like mostly where I hit my back, it’s like a sharp pain. I’m burning all

over my back, you know. And then I get like pains all over, like shooting pains. It's all day, all night, every day.

Q: And has that continued from the date of the fall to the present time?

A: Yes. (Tr., p. 51, lines 10-18)

Claimant further stated she "still hurt through the morphine."
(Tr., p. 52, lines 3-4)

Claimant said she went to physical therapy only once because "it just aggravated it even more, you know, and I couldn't stand it."
(Tr., p. 52, lines 23-24)

Claimant has had counseling to help her deal with depression and pain. (Tr., p. 54, lines 13-15) She stated that she stopped taking the antidepressant because it was making her sleepy. (Tr., p. 55, line 19- p. 56, line 9) Claimant stated that she still suffers from depression. (Tr., p. 56, lines 10-11)

Claimant stated that she is currently taking Naproxen Sodium, Tylenol and Kadian, a time-released morphine. (Tr., p. 56, lines 12-15) She also testified that she has gain 45 pounds since the fall (Tr., p. 56, lines 21-22) and that she now has to use her wheelchair 100% of the time. (Tr., p. 56, line 23- p. 57, line 4)

She stated that the pain she had before the fall was milder and was "in my pubic area." (Tr., p. 57, lines 13-14) She testified she also had joint pain before the fall. (Tr., p. 57, lines 16-19) She emphasized that her back pain "wasn't like this." (Tr., p. 57, lines 20-21)

On cross-examination, she estimated that her pre-fall pain had been a 3 on a scale of 10. (Tr., p. 95, lines 6-10)

Claimant testified that her grades really fell after her fall. (Tr. p. 58, lines 4-5)

Claimant testified that she went to Manning with her lawyer a year after the fall. She noted that there were no signs on the men's handicapped accessible bathroom on the second floor. (Tr., p. 61, line 17- p. 62, line 1) She stated that when she went to the third floor bathroom on June 27, 2005, there were no signs directing her to second floor bathrooms. (Tr., p. 62, lines 14-19)

On cross-examination, Claimant conceded that she had a fall out of her wheelchair in 2001. (Tr., p. 64, lines 2-7) She also stated that in 1990 she had back surgery all the way from the top of her spine to the bottom. (Tr., p. 70, line 21- p. 71, line 10) She

acknowledged that she had “mild back pain” beginning in 2000. (Tr., p. 71, line 17)

When asked why she testified in her deposition that she had not fallen prior to June 27, 2005, she said she forgot. (Tr., p. 93, lines 15-22) She also said she did not understand the deposition question. (Tr., p. 94, line 5)

Claimant stated that her plan had been to obtain a biology degree at the U of M, then go to pharmacy school. (Tr., p. 68, lines 13-24) She acknowledged that to accomplish these goals, she would have to take courses in chemistry, biology and calculus. (Tr., p. 69, lines 15-19)

Claimant acknowledged that prior to her fall she had taken English composition, general psychology, an introductory film course, a communication course and a course on African-American history. After the fall, she took Anatomy & Physiology I, A & P I lab, chemistry, calculus and microbiology. She stated that, except for the labs, the courses she took after the fall were no more difficult than those she took before the fall. (Tr. 87, line 14- p. 88, line 24; Ex. 3) She stated that her grades fell because she was in pain and had difficulty staying awake. (Tr., p. 89, lines 1-5) She acknowledged

that she had brought an EEOC complaint alleging that her grades had fallen because the labs at U of M were not handicapped accessible. (Tr., p. 91, lines 13-17)

Claimant testified that she had taken a course in Manning in the spring of 2005. (Tr., p. 73, lines 6-15) She acknowledged that she had been in Manning through the handicapped entrance on the second floor many times before June 27, 2005. (Tr., p. 73, lines 16-22)

Claimant testified that she had gotten drinks or snacks out of the machines on the second floor of Manning. (Tr., p. 74, lines 21-24) She agreed she had used the handicapped telephone on the second floor of Manning prior to her fall. (Tr., p. 75, lines 8-10)

Claimant testified that, prior to the site visit on the morning of trial, she had never seen the handicapped directory on the second floor of Manning. She acknowledged that it is near the handicapped telephone now, but insisted it was not there before her fall. (Tr., p. 76, lines 7-14)

Claimant stated she tried to find a handicapped restroom when she was taking a class in Manning in the spring. (Tr., p. 76, lines 19-

22) Because she never found one, she went to the library or to Wilder Tower to use the restroom. (Tr., p. 76, line 23- p. 77, line 3)

When asked what steps she took to find the restroom, she stated that she “would roll around and, you know, look for signs and different things like that.” (Tr., p. 77, lines 8-9)

She stated that she never asked her professors or people who worked in Manning the location of the bathroom. (Tr., p. 77, line 20- p. 78, line 4) She said she had once looked into the hallway where the women’s accessible restroom was and thought it was a stairwell, so she didn’t go down the hall. (Tr., p. 96, lines 13-15) She went on, “I had no idea it had another hallway around there, and it wasn’t any signs saying it was a restroom through there.” (Tr., p. 97, lines 15-17) The doorway even had a sign which read: “Keep Door Closed.” (Tr., p. 97, lines 8-12)

Claimant acknowledged that it was clear once she entered the third floor restroom in Manning that it was not handicapped accessible. (Tr., p. 80, lines 20-23) She said she decided to go ahead and use the third floor restroom because “[e]ither I was going to use it or use it on myself.” (Tr., p. 81, lines 5-6)

Claimant conceded that she told campus police that she used the restroom on the third floor because she urgently needed to go to the bathroom and it was the closest location. (Tr., p. 84, line 24- p. 85, line 4)

Claimant stated that when she went to the emergency room the day after the fall, she was diagnosed with "back sprain." (Tr., p. 84, line 6)

David Jamison, architectural designer and CAD manager for the U of M, testified on behalf of the state. (Tr., p. 104, lines 16-19) Jamison, a civil engineer, stated that his job includes addressing accessibility issues at U of M. He emphasized this job includes the Americans with Disabilities Act, hereinafter referred to as the ADA, and that he sits on U of M's ADA Committee. (Tr., p. 105, lines 5-14)

Jamison testified that the bathrooms in Manning were modified in 1981 or 1982 in accordance with the North Carolina Accessibility Code, which had been adopted by Tennessee. (Tr., p. 106, lines 9-15) Jamison stated that the Americans with Disabilities Act was not in effect in the early 1980's. (Tr., p. 106, lines 16-17)

Jamison testified that an ADA review was done by the U of M around 1997; this review surveyed campus buildings, including

Manning, and noted deficiencies which might exist under the ADA. (Tr., p. 107, lines 12-18) Jamison stated he received a settlement agreement instructing his department to make certain modifications in the buildings. (Tr., p. 108, lines 6-9; Ex. 15) Jamison testified that with respect to Manning, the agreement "mandates no specific action other than campus-wide we had to install accessibility signage at entrances." (Tr., p. 109, lines 7-9)

Jamison testified that the accessibility directory had not been modified since it was installed in 1997. (Tr., p. 110, lines 19-22)

Jamison testified that when he visited Manning in October, 2006, there were signs at the accessible restrooms on the second floor. (Tr., p. 111, lines 19-20) Jamison identified Ex. 16 as an accurate depiction of the sign he saw outside the women's accessible restroom in October, 2006. (Tr., p. 112, lines 15-18)

Jamison also stated that there was a fire evacuation plan posted on each floor of Manning, including the second floor, which includes a floor plan with room numbers and identification of the restrooms. (Tr., p. 113, lines 17-21) These fire evacuation plans were posted in the late 70's or early 80's. (Tr., p. 114, lines 3-4)

Jamison stated that while the fire evacuation plan doesn't identify which restrooms are accessible, the accessibility directory near the entrance on the second floor indicates that both public restrooms on the second floor are accessible. (Tr., p. 115, lines 13-22)

On cross-examination, Jamison acknowledged that he did not remember any directional signs pointing the way to the restrooms, although at some point "some people in the building had put up paper signs." (Tr., p. 120, lines 11-14) He did not know if those paper signs were put up before June 27, 2005. (Tr., p. 120, lines 19-21)

Jamison also acknowledged that a 2006 email from Susan TePaske indicated complaints that the restrooms in Manning were hard to find. (Tr., p. 122, line 13- p. 123, line 10)

Jamison testified that neither the North Carolina Code nor the ADA retrospectively apply to certain older buildings unless there are "major renovations or substantial renovations." (Tr., p. 125, lines 17-19)

When asked what the codes require with regard to "directional signs for accessible bathrooms," Jamison explained: "They require

certain directions to accessible restrooms if the restroom is inaccessible.” (Tr., p. 125, lines 23-24)

Jamison stated that on June 27, 2005, applicable codes did not require U of M to place a sign on or near the third floor women’s restroom directing persons to the second floor accessible bathroom because Manning had not undergone a substantial renovation and was not new construction. (Tr., p. 129, lines 13-22)

Susan TePaske, Director of Student Disability Services at the U of M, also testified on behalf of the State of Tennessee. She has served on the ADA Committee at U of M for six years. (Tr., p. 138, lines 22-24) TePaske has a master’s degree in guidance counseling. (Tr., p. 155, lines 18-22)

TePaske testified that disabled students at U of M are not allowed accommodations without registering with her office. (Tr., p. 135, line 24- p. 136, line 2) She stated that Claimant is registered with her office. (Tr., p. 136, lines 11-13)

TePaske stated that her office receives students’ complaints regarding accessibility, including complaints about bathrooms. (Tr., p. 136, lines 14-18; p. 137, line 18- p. 138, line 4) She was not aware

of complaints about the handicapped accessible bathrooms in Manning prior to Claimant's fall. (Tr., p. 136, lines 19-22)

TePaske acknowledged that students with disabilities can make complaints to other offices, but stated that students generally would be referred to her office. (Tr., p. 150, lines 7-10)

TePaske testified that after Jones made the complaint in 2006, TePaske visited Manning. TePaske stated that the accessibility directory was on the wall in Manning. (Tr. 139, lines 19-22)

She noted there were "informal signs," paper signs not posted by the university, throughout the building. (Tr., p. 153, line 24- p. 154, line 5) TePaske does not know when these informal signs were put there. (Tr., p. 154, lines 13-16)

TePaske stated that part of her job is to help students prepare their academic schedules. (Tr., p. 140, line 24- p. 141, line 3) She stated that the Anatomy & Physiology course Claimant took in the fall of 2005 is "very difficult." (Tr., p. 145, lines 11-14) She also noted that half the students drop or fail the calculus course Claimant was taking that semester. (Tr., p. 145, lines 21-22) She characterized Claimant's fall, 2005 schedule as "fairly difficult." (Tr., p. 145, line 24- p. 146, line1)

In the fall of 2006, Claimant took microbiology, a tough course, and repeated A & P and general chemistry. (Tr., p. 147, lines 1-3) TePaske characterized that semester as a “really tough load.” (Tr., p. 147, line 8) In the spring of 2006, Claimant took the second level of A & P, also a difficult course, according to TePaske. (Tr., p. 146, lines 3-6)

TePaske went on to characterize the spring, 2007 term as “very tough,” even though it contained a lot of repeated courses. (Tr., p. 147, lines 15-19) TePaske stated that the entire fall, 2007 semester was a “withdraw.” (Tr., p. 147, line 22)

TePaske noted that in the summer of 2008, Claimant apparently changed her major to social work. (Tr., p. 148, lines 1-2)

TePaske opined that, in general, Claimant’s academic schedule was harder after the summer of 2005. (Tr., p. 148, lines 15-21)

TePaske noted that she has counseled students suffering from chronic pain and stated that it can affect their grades. (Tr., p. 158, line 24- p. 159, line 5) She conceded that courses generally get progressively harder, (Tr., p. 160, lines 12-18) but noted that “all of the science classes are fairly difficult on the pre-professional level.” (Tr., p.160, lines 10-11)

IV.

MEDICAL EVIDENCE

Family Nurse Practitioner Donna Freeman, FNP, RN, testified on behalf of Claimant by deposition on May 15, 2009. (Ex. 11) Freeman stated that she was employed at the Guthrie Loop Clinic, later renamed the Guthrie Health Clinic, hereinafter referred to as Guthrie, for 14 years until she left to take another job in September, 2008. (Ex. 11, p. 9, lines 6-14) Freeman further testified that Guthrie was overseen by the Regional Medical Center. (Ex. 11, p. 9, lines 8-11)

Freeman testified that she was Malinda Jones' primary care provider for several years. (Ex. 11, p. 10, lines 8-13) Freeman stated that Jones suffered from muscular dystrophy, "an inherited condition that is characterized by progressive weakness of the muscles." (Ex. 11, p. 12, lines 2-5)

Freeman testified that prior to her fall, Jones had chronic back pain "most likely related again to her muscular dystrophy." (Ex. 11, p. 12, lines 16-17) Freeman stated Claimant took nonsteroidal anti-inflammatory medications for this back pain in 2003 and 2004. (Ex.

11, p. 13, lines 1-4) Claimant also began taking the drug Tramadol in 2004. (Ex. 11, p. 13, lines 11-12)

Freeman stated that she had reviewed Jones' medical records and the last exacerbation of her pain prior to the June, 2005 fall was in January, 2005. (Ex. 11, p. 14, lines 14-17) At that time, Jones was taking both Ibuprofen and Naprapac (another NSAID) for pain. (Ex. 11, p. 14, lines 24-25) She also was taking the muscle relaxer Flexeril. (Ex. 11, p. 17, lines 5-7)

Freeman stated she saw Claimant on July 6, 2005. Claimant reported that she had a fall at school and had been to the emergency room for pain, where they prescribed Lortab and Flexeril. Jones said she was told by the emergency room staff to follow up with her primary care provider. (Ex. 11, p. 17, lines 16-20)

Freeman testified that in the months after July, 2005, Claimant took stronger medication. Specifically, she stated Claimant began taking Percoset in March, 2006. (Ex. 11, p. 19, lines 21-25)

Freeman stated that after July 6, 2005, Claimant's next visit to Guthrie was October 6, 2005, when her Naproxen was refilled. (Ex. 11, p. 22, lines 2-5) Claimant visited the clinic again on November 17, 2005. (Ex. 11, p. 22, lines 13-16) The next visit after that was

March 14, 2006, when Percoset was added. (Ex. 11, p. 22, lines 20-25)

After March 14, 2006, Claimant's next clinic visit was May 2, 2006, when Freeman refilled the Percoset and gave her another NSAID. (Ex. 11, p. 23, lines 13-15) Claimant also visited Guthrie on June 8, 2006, and again on July 13, 2006, when she reported a three medication regime controlled her back pain. (Ex. 11, p. 24, lines 8-19) Freeman saw Claimant on August 25, 2006, and noted that she would not have refilled Claimant's Percoset without a monthly office visit. (Ex. 11, p. 25, lines 3-6)

During an October 11, 2006 visit, Freeman referred Claimant to a pain clinic at Claimant's request, though Claimant had difficulty getting an appointment. (Ex. 11, p. 26, lines 14-16) Freeman stated that during a visit on November 21, 2006, Claimant reported she was "having bad back pain all the time." (Ex. 11, p. 27, lines 1-2) She also reported she had finally gotten an appointment with a pain clinic. (Ex. 11, p. 27, lines 2-4)

During a March 9, 2007 office visit, Claimant was referred to Frayser Counseling Center to be treated for depression. The diagnosis noted on the chart is "lumbago, which is low back pain."

(Ex. 11, p. 28, lines 1-6) Freeman noted that the diagnosis was included in the referral to let the psychiatrist know “that this patient is dealing with chronic pain which might be a source of the depression.”

(Ex. 11, p. 28, lines 6-9)

Freeman testified that Claimant called in wanting a Percoset refill on April 27, 2007, but was given a prescription for Tramadol until she could come in for a visit. She was not seen by the clinic again until June 26, 2007. (Ex. 11, p. 28, lines 11-16)

On September 20, 2007, Claimant reported to Freeman that she was having “breakthrough pain in the middle of the night.” (Ex. 11, p. 28, lines 20-22) Claimant came in for a refill of Percoset on November 6, 2007. (Ex. 11, p. 29, lines 19-22)

Freeman stated that when a new physician began working at Guthrie, Claimant’s medicine was changed to the non-narcotic Balacet. (Ex. 11, p. 29, line 24- p. 30, line 8) Her pain medication then was changed to Darvocet in July, 2008. (Ex. 11, p. 30, lines 22-24) Darvocet is the strongest prescription the new doctor allowed to be written at the clinic. (Ex. 11, p. 31, lines 2-5)

Freeman was asked whether the increase in Claimant’s pain after the fall was a result of the fall or to the progression of her

medical condition. Freeman said with Claimant's history of chronic pain she could not say, though she noted that, in the months following the fall, Claimant's "pain got worse and required, you know, more management." (Ex. 11, p. 34, lines 6-11)

On cross-examination, Freeman acknowledged that when Claimant called the clinic for a refill on April 12, 2004, Claimant stated that, on a scale of one to ten, her pain was a two. (Tr. Ex. 11, p. 36, lines 16-19) Freeman also testified that when Claimant came for an office visit on June 17, 2004, she reported pain of seven out of ten. (Ex. 11, p. 37, lines 7-16)

Freeman stated that Claimant reported back pain of five out of ten on December 15, 2004 and six out of ten on January 13, 2005. (Ex. 11, p. 38, lines 6-23)

During a March 10, 2005 visit, Claimant reported LBP (lower back pain) of eight out of ten. (Tr. Ex. 11, p. 39, lines 10-13) On April 28, 2005, she reported pain of four out of ten and on June 13, 2005, she reported pain of four out of ten, but it may have been abdominal pain. (Ex. 11, p. 42, lines 1-19)

Freeman also testified that in the notes on the June 13, 2005 call, it was noted that Claimant made an appointment for July 6,

2005. (Ex. 11, p. 42, line 22- p. 43, line 4) So the appointment was made before her fall on June 27, 2005.

Freeman acknowledged that when Claimant reported the fall on July 6, 2005, she said she was much better and that her pain was two out of ten. (Ex. 11, p. 43, lines 8-13)

Freeman also testified that Claimant apparently made no complaint of back pain on either her October 6, 2005 visit or her November 17, 2005 visit. (Ex. 11, p. 43, lines 14-24) On November 17, 2005, she rated her pain one out of ten. (Ex. 11, p. 43, line 20- p. 44, line 1)

Freeman acknowledged that when Claimant came in complaining of back pain on March 14, 2006, the Assessment Plan in her chart notes that "the patient is beginning to show progression of the disease [muscular dystrophy]." (Ex. 11, p. 44, lines 5-10) It is also noted that her "condition is likely to continue to deteriorate." (Tr. Ex. 11, p. 44, line 17)

Freeman stated that records for May 2, 2006, June 8, 2006, July 13, 2006, August 25, 2006, October 11, 2006, November 21, 2006, June 26, 2007, September 20, 2007, December 14, 2007,

March 25, 2008, and July 8, 2008 indicate “no unusual anxiety or evidence of depression.” (Ex. 11, p. 45, line 14- p. 48, line 12)

Freeman further testified that these notations on anxiety and depression are related to signs that might be visible during a physical exam, such as crying. She said this does not mean the patient is not experiencing depression. (Ex. 11, p. 50, lines 2-13)

Ms. Jones’ Psychosocial Diagnostic Assessment from the Comprehensive Counseling Network indicate that Claimant reported that in the past two years, since injuring herself in a fall, she had become increasingly depressed by her chronic pain. (Ex. 4)

On November 14, 2008, she reported to providers at the May Family Clinic that she had had chronic pain since a fall in 2005, and that her current medications “only take the edge off.” (Ex. 6, p. 10)

Claimant is treated for her muscular dystrophy by physicians at Campbell Clinic where she had a spinal fusion several years ago. Records from the Campbell Clinic for March 5, 2009, April 6, 2006 and November 2, 2006 indicate “some intermittent back pain.” (Ex. 7, pp. 1-3) Dr. Warner attributes a lot of her symptoms to her “underlying neurological problems.” No mention is made of the June, 2005 fall. (Ex. 7, p. 1)

Dr. Warner's note from March, 2009 indicates that she continues to have "intermittent back pain." (Ex. 7, p.1) It notes she will continue to have intermittent pain "due to her underlying neurological problems and due to her having the fusion." (Ex. 7, p. 1)

Ms. Jones' Med Plex records (Ex. 9), where she received a physical therapy evaluation in December, 2006, includes the following history: "Back pain started about 2000 soon after laparoscopic surgery." (Ex. 9, p. 1) She told the providers at Med Plex that her orthopedic surgeon attributed the pain to "'gap' 'in the bottom' of the Harrington Rod." (Ex. 9, p. 1) No mention was made of the fall in June, 2005.

The notes from Claimant's visit to the Muscular Dystrophy Association Clinic on November 9, 2005, October 3, 2007 and March 4, 2009 do not mention Claimant's fall. An earlier note, dated June 12, 2003, does mention a fall which occurred around 2002. (Ex. 5)

V.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commissioner has thoroughly reviewed the record in this case, including the testimony of the witnesses who appeared at the hearing of this cause, the testimony of those whose depositions were

introduced for proof, the arguments of counsel and, indeed, the entire record as a whole. After carefully weighing the credibility of each of the witnesses, the Commissioner makes the following findings of fact and conclusions of law.

A. DUTY AND BREACH OF DUTY

Under Tennessee law, a negligence claim requires that plaintiff prove:

- (1) a duty of care owed by the defendant to the plaintiff;
- (2) conduct by the defendant falling below the standard of care;
- (3) an injury or loss;
- (4) causation in fact; and
- (5) proximate or legal cause.

Coln v. City of Savannah, 966 S.W. 2d 34, 37 (Tenn. 1998).

Duty is simply the legal obligation, based on the reasonable person standard, that the State owes a claimant to protect her against unreasonable risks of harm. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995) As stated by the Tennessee Supreme Court in *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 365-366 (Tenn.2008):

A duty arises when the degree of foreseeability of the risk and the gravity of the harm outweigh the burden that would be imposed if the defendant were required to engage in an alternative course of conduct that would have prevented the harm. *West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d, 551,551; *Burroughs v. Magee*, 118 S.W.3d at 329;

McCall v. Wilder, 913 S.W.2d at 153. The foreseeability and gravity of the harm are linked insofar as the degree of foreseeability needed to establish a duty is inversely proportional to the magnitude of the foreseeable harm. *Turner v. Jordan*, 957 S.W.2d at 818. The greater the risk of harm, the less degree of foreseeability is required. *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 433 (Tenn. 1994). During the balancing process, it is permissible for courts to consider the contemporary values of Tennessee's citizens.

In cases involving premises liability, the premises owner has a duty to maintain the premises in a reasonably safe condition and to remove or warn against latent or hidden dangerous conditions on the property of which the owner is aware or should be aware through the exercise of reasonable diligence. *Eaton v. McLain*, 891 S.W.2d 587, 593-94 (Tenn.1994)

At the start of the trial in this cause, the parties made a site visit to Manning Hall. The Commissioner was able to see for herself how difficult it is to find the handicapped accessible restrooms on the second floor of Manning. The proof was uncontroverted that, at the time of Claimant's fall, there were no directional signs posted by the university indicating their location. There was evidence that as early as 2006, people who worked in the building posted their own hand-

written directional signs. There was, however, no proof those signs were there in June, 2005.

With the possible exception of the fire evacuation plans posted on each floor, it would be difficult for a visitor to Manning to find the second floor restrooms without either finding and asking someone in the know or conducting a hallway by hallway search.

Clearly, the cost to the university of posting directional signs would have been minimal, as it is clear that persons who use the building subsequently posted their own signs using single pieces of paper, a marker or pen and a couple of pieces of tape.

With regard to the foreseeability and gravity of harm, it is no stretch to assume that a wheel chair bound person who can't find an accessible bathroom might be injured in a fall while attempting to use a non-accessible one.

In the case at bar, the Commission **FINDS** that Defendant breached a duty to Claimant by failing to provide directional signs to the handicapped accessible restrooms on the second floor.

B. DAMAGES

With regard to the issue of damages, the Commission did not find Claimant's testimony about a permanent injury resulting from this

fall to be credible. For example, Ms. Jones characterized her pain as ten out of ten and “off the chart.” (Tr., p. 47, lines 6-7) In fact,

Claimant stated:

A: I’m hurting really bad, like mostly where I hit my back at, it’s like a sharp pain. I’m burning all over my back, you know. And then I get like pains all over, like shooting pains. It’s all day, all night, every day.

Q: And has that continued from the date of the fall to the present time?

A: Yes. (Tr., p. 51, lines 10-18)

Claimant went on to say that she “still hurt through the morphine.” (Tr., p. 52, lines 3-4)

Unfortunately, Claimant’s testimony about *pain related to this fall* simply is not consistent with her medical records. For example, Claimant’s primary health provider, Nurse Practitioner Donna Freeman, acknowledged that when Claimant reported the fall on July 6, 2005, she said she was much better and that her pain was two out of ten. (Ex. 11, p. 43, lines 8-13)

Freeman also testified that Claimant apparently made no complaint of back pain on either her October 6, 2005 visit or her November 17, 2005 visit. (Ex. 11, p. 43, lines 14-24) On November

17, 2005, she rated her pain as one out of ten. (Ex. 11, p. 43, line 20-
p. 44, line 1)

Claimant's trial testimony that her pain has been consistently "off the charts" since the June, 2005 fall is not credible in face of medical records indicating that, less than two weeks after the fall, her pain was much better and only two out of ten and that she did not even mention pain from the fall during her October 6, 2005 visit or the November 17, 2005 visit.

While Claimant's pain may well have increased since June 27, 2005, it seems much more likely than not that her current pain is caused by the underlying muscular dystrophy and spinal fusion and not by the fall. Freeman acknowledged that when Claimant came in complaining of back pain on March 14, 2006, the Assessment Plan in her chart notes that "the patient is beginning to show progression of the disease [muscular dystrophy]." (Ex. 11, p. 44, lines 5-13)

In addition, the physical therapy notes from MedPlex indicate Ms. Jones gave a history of back pain from laparoscopic surgery back in 2000 and not from the fall in June, 2005. She apparently told the providers at Med Plex that her orthopedic surgeon attributed the

pain to a “gap’ ‘in the bottom’ of the Harrington Rod.” (Tr. Ex. 9, p. 1)
No mention was made of the fall.

The Commission **FINDS** that Claimant has proved by a preponderance of the evidence that she did experience some additional pain and suffering in the days immediately following her fall.

The Commission **FURTHER FINDS** that Claimant’s pain *resulting from the fall* did not last long enough to affect Claimant’s grades, although the pain she experiences as a result of her underlying health issues and the increasing difficulty of her academic schedule have resulted in a drop in her grades.

The Commission **FURTHER FINDS** that the medical proof proffered by Claimant does not establish a permanent injury resulting from the fall on June 27, 2005.

C. CAUSATION

It is uncontroverted that the women’s accessible bathroom on the second floor of Manning is extremely difficult to find. There was even evidence that the women’s accessible bathroom was behind a door that said, at the time of Claimant’s fall, “Keep Door Closed.” (Tr. p. 97, lines 8-12)

The Commission **FINDS** that Defendant's failure to post directional signs for the accessible restroom in Manning is a proximate cause of Claimant's fall.

D. COMPARATIVE FAULT

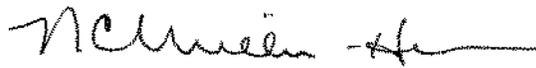
Claimant apparently decided to use the third floor restroom on June 27, 2005, which she could see was not accessible, because she had an urgent need to use the restroom. This decision was, in part, responsible for the fall. It also seems to be a reasonable decision in light of the circumstances. The Commission, therefore, declines to apportion any of the fault for the fall to Claimant.

E. CONCLUSION

It is **ORDERED, ADJUDGED and DECREED** that Claimant, Malinda Jones, is awarded a judgment against Defendant, State of Tennessee, for all damages including, but not limited to, pain and suffering and loss of enjoyment of life, in the amount of six thousand dollars (\$6,000.00).

Costs of this cause are taxed pursuant to TCA §9-8-307 (d).

IT IS SO ORDERED.



**NANCY C. MILLER-HERRON
COMMISSIONER**

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing order has been mailed
to:

Mr. Stanley H. Less, Esq.
100 N. Main St.
Memphis, TN 38103

Ms. Martha A. Campbell, Esq.
Ms. Stephanie Bergmeyer, Esq.
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202

on this the 19th day of October, 2009



**Marsha Richeson, Clerk
Tennessee Claims Commission**