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

FILED
TN CLAIMS COMMISSION
CLERK'S OFFICE

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MANEEL BHARADWAJ,)
Claimant,)
v.) Claims Commission No. T20140414
STATE OF TENNESSEE,)
Defendant.)

ORDER DISMISSING CLAIM

This is a claim for \$31,652.68 filed by Mr. Bharadwaj following an incident which occurred on June 9, 2013, in the Student Activities Center at the University of Tennessee at Knoxville. Mr. Bharadwaj was a student at the time.¹

On January 2, 2014, the claim was transferred from the Division of Claims Administration (DCA) to the undersigned for resolution. Subsequently, on February 27, 2014, the State filed a Motion to Dismiss along with a supporting Memorandum of Law.² Although Mr. Bharadwaj has not responded to the State's Motion, the Commission will decide the claim on the merits since Claimant is not an attorney and is proceeding *pro se*.

FACTS

Mr. Bharadwaj's claim is precisely worded and clearly presented. The claim reveals that

¹ Documents subsequently filed by the Commission indicate that Claimant is now an employee of the University.

² Claims Commission Rule 0310-1-1-.01(5)(c) provides in relevant part as follows:

"Each party opposing a motion shall serve and file a response no later than fifteen (15) days after service of the motion, except that in case of motions for summary judgment the time shall be thirty (30) days after service of the motion. Failure to file a response shall indicate that there is no opposition to the motion."

on June 9, 2013, at approximately 3:15 p.m., Claimant was playing ping-pong with a Mr. Pradhan at the Student Activities Center. When Claimant bent over to pick up a ping-pong ball, he slipped in water on the floor and fell into a glass window which broke. Unfortunately, Claimant was injured by broken glass resulting in two large cuts and two smaller cuts to his shoulder. Additionally, glass shards were “scattered through [his] hair, back and arms.” Because of his injuries, Claimant was taken to the University of Tennessee Medical Center for treatment. Extremely clear photographs depict workmen cleaning out the glass from the window through which the Claimant fell. Additionally, one photograph shows what appears to be pieces of glass in a waste can. In addition to the facts set out in Mr. Bharadwaj’s claim, an affidavit and photographs attached to the State’s Motion provide additional information. According to a Ms. Locke’s affidavit, the second floor of the Student Activities Center, or Aquatic Center, has a patio/deck which is covered by a canopy. According to the affidavit, water on that deck, because of the deck’s configuration, normally drains off the front of the patio or deck area. Ms. Locke goes on to state that on June 19, 2013, Knoxville experienced “a brief intense rain storm, accompanied by strong winds”. Because of those winds, rain blew under the glass double doors shown in the photographs attached to the State’s Motion. Once past the doors, the water spread into other areas of the second floor lobby. Ms. Locke states that she has worked at the Center for eleven (11) years and that nothing like this had occurred during her tenure there.

The affidavit goes on to state that no University employee became aware of water on the floor until Claimant’s unfortunate fall. She estimated that one hour intervened between the commencement of the storm and Mr. Bharadwaj’s fall. The affidavit concludes that no one had alerted employees of the University regarding the water leak prior to Claimant’s fall nor had any employee had time to discover the water before Mr. Bharadwaj fell.

The State's defense proceeds on two fronts. First, the State argues that we cannot make an award in this case since Claimant has failed to prove all of the requirements found in Tenn. Code Ann. § 9-8-307(a)(1)(C). The State also alleges that Mr. Bharadwaj's own fault in failing to take proper precautions when water made its way into the area where he was playing ping-pong was greater than any negligence which might be assessed against the State. Consequently the State argues that under Tennessee's system of comparative fault, damages could not be awarded against it and in Claimant's favor.

APPLICABLE LAW

This claim is properly considered under Tenn. Code Ann. § 9-8-307(a)(1)(C) which contains a two part requirement before damages can be awarded, i.e. foreseeability of the risk and advance notice to proper state officials within sufficient time for the State to have had an opportunity to take appropriate measures to avoid the risk.

a. Limited Jurisdiction of the Commission.

This Commission has jurisdiction over damage claims against the State only to the extent that the legislature or General Assembly has granted us such jurisdiction. Our powers are constrained by that grant.

For the edification of the Claimant, the Commission provides a brief history of the Commission and its powers.

This Commission has a limited jurisdiction which represents a partial waiver of the State's innate common law sovereign immunity. Sovereign immunity is a principle of law immunizing a governmental body against suit. It has long been a part of the jurisprudence of every state in the Union. The thought behind the concept is the protection of the government against a wide variety of legal claims which could, without sovereign immunity, cause a state

severe financial problems to the detriment of the population as a whole.

“[A]t common law, the [S]tate was absolutely immune from tort liability, as were cities and counties”³ *Lucas v. State*, 141 S.W.3d 121, 125 (Tenn. 2004). “This doctrine of sovereign immunity ‘has been a part of the common law of Tennessee for more than a century[,] and [it] provides that suit may not be brought against a governmental entity unless that governmental entity has consented to be sued.’” *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000) (quoting *Hawks v. Westmoreland*, 960 S.W.2d 10, 14 (Tenn. 1997)) (second alteration in original). Hence, “[i]t is now a well-settled principle of [both] constitutional and statutory law in this state that ‘[t]he State of Tennessee, as a sovereign, is immune from suit except as it consents to be sued.’” *Stewart*, 33 S.W.3d at 790 (quoting *Brewington v. Brewington*, 387 S.W.2d 777, 779 (Tenn. 1965)) (third alteration in original).

The doctrine of sovereign immunity against suit in Tennessee derives from the common-law as it developed in North Carolina and subsequently in this state. *Lucas v. State*, 141 SW3d 121, 125 (Tenn. Ct. App. 2004).

With that principle in mind, the drafters of the Constitution of Tennessee embedded as a paramount principle of governance the concept that only the Legislature of the State could determine those circumstances in which the shield of sovereign immunity would be lowered and suit against the State permitted. Article I, Section 17 of our Constitution provides as follows:

Section 17. That all courts shall be open; every man, for an injury done him and his lands, goods, person or reputation, shall have remedy by due course of law and right and justice administered, without sale, denial or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct. (Emphasis supplied.)

³“The immunity of the [S]tate and the separate immunities of cities and counties developed along different paths through statutory modifications and partial abrogations of immunity.” *Lucas*, 141 S.W.3d at 125.

The General Assembly enacted statutory law which reiterates the concept of the sovereign immunity of this State. Tennessee Code Annotated, Section 20-13-102(a) reads as follows:

20-13-102. Actions Against State Prohibited. – (a) No court in the state shall have any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, property, and all such suits shall be dismissed as to the state or such officers, on motion, plea or demurrer of the law officer of the state, or counsel employed for the state. See also *Brewington v. Brewington*, 387 SW2d 777, 778-779 (1965).

However, in 1984, the General Assembly made a significant change to the law of sovereign immunity with the enactment of The Tennessee Claims Commission Act, Tennessee Code Annotated, Section 9-8-301, *et seq.* In Tennessee Code Annotated, Section 9-8-307(a)(1), the Legislature set out very clearly those areas in which the State has relinquished its immunity to the financial extent permitted by other provisions of that Act.

An adjunct principle to the State's decision, through its Legislature, to partially waive its sovereign immunity rights is the rule that statutes waiving immunity, because they are in derogation of the common-law, must be strictly construed. *State ex Rel Allen v. Cook*, 106 S.W.2d 858, 860 (1937); *Stokes v. University of Tennessee*, 737 S.W.2d 545, 547 (Tenn. Ct. App., 1987); *Daley v. State*, 869 S.W.2d 338 (Tenn. Ct. App. 1993).

The Supreme Court has made it abundantly clear that if a particular cause of action is not enumerated in Tennessee Code Annotated, Section 9-8-307, *et seq.*, this Commission does not have jurisdiction since sovereign immunity has been waived only in the

areas set out therein.⁴ *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000).

“Pursuant to [this] constitutional power to provide for suits against the [S]tate, the legislature created the Tennessee Claims Commission in 1984 to hear and adjudicate certain monetary claims against the State of Tennessee.” *Stewart*, 33 S.W.3d at 790.⁵ However, the Claims Commission’s “jurisdiction is limited only to those claims specified in Tennessee Code Annotated, Section 9-8-307(a). If a claim falls outside of the categories specified in Section 9-8-307(a), then the [S]tate retains its immunity from suit, and [the] claimant may not seek relief”⁶ *Id.*

“[T]he entire statutory purpose of the Tennessee Claims Commission Act is to establish the state's liability in tort based on the traditional tort concepts of duty and the reasonably prudent persons' standard of care.” *Lucas*, 141 S.W.3d at 130. The statute, however, works as a limitation on liability; it provides, “For causes of action arising in tort, the [S]tate shall only be liable for damages up to the sum of three hundred thousand dollars (\$300,000) per claimant and one million dollars (\$1,000,000) per occurrence.” *Id.* (quoting Tenn. Code Ann. § 9-8-307(e)). Moreover, “[t]he [S]tate may assert any and all defenses, including common law defenses, [and] any absolute common law immunities available.” *Id.*

“The courts of this [S]tate have [also] held that any statute granting jurisdiction to hear a claim against the [S]tate must be strictly construed, as any such statute is in derogation of

⁴ Briefly, the Commission did have jurisdiction of cases involving alleged negligent deprivation of constitutional rights. However, in 1989, the words “or constitutional” were deleted from Tenn. Code Ann. § 9-8-307(a)(1)(N). See *Shell v. State*, 893 S.W.2d 416, 418-420 (Tenn. 1995).

⁵ “An enabling statute that grants a court subject matter jurisdiction to hear claims against a state will likewise constitute an explicit legislative waiver of sovereign immunity.” *Colonial Pipeline Company* at fn. 17.

⁶ “We are not concerned in this case with the separate statutory development of the limited abrogation of sovereign immunity made applicable to cities and counties by the Tennessee Governmental Tort Liability Act [since t]his act is not and never has been applicable to the State of Tennessee or its agencies and departments.” *Lucas*, 141 S.W.3d at 126 (citing *Tenn. Dep't of Mental Health v. Hughes*, 531 S.W.2d 299 (Tenn. 1975)).

the common law rule of sovereign immunity.” *Stewart*, 33 S.W.3d at 790; *see also State ex Rel Allen v. Cook*, 106 S.W.2d 858, 860 (1937); *Daley v. State*, 896 S.W.2d 338, 340 (Tenn. Ct. App. 1993); *Stokes v. University of Tennessee*, 737 S.W.2d 545, 546 (Tenn. Ct. App., 1987); and *Beare Company v. Olsen*, 711 S.W.2d 603, 605 (Tenn. Ct. App. 1986). However, the legislature amended Section 9-8-307(a) in 1985 to reflect “its intention as to the jurisdictional reach of the Claims Commission” *Id.* at 791. The provision established “the intent of the general assembly that the jurisdiction of the Claims Commission be liberally construed to implement the remedial purposes of this legislation.” Tenn. Code Ann. § 9-8-307(a)(3). Therefore, “courts [must] defer to this expressed intention in cases where the statutory language legitimately admits of various interpretations.” *Stewart*, 33 S.W.3d at 791. This “policy of liberal construction of statutes, however, only requires th[e] court to give ‘the most favorable view in support of the petitioner’s claim,’ and . . . ‘does not authorize the amendment, alteration[,] or extension of its provisions beyond [the statute’s] obvious meaning.’” *Id.* (quoting *Pollard v. Knox County*, 886 S.W.2d 759, 760 (Tenn. 1994); *Brady v. Reed*, 212 S.W.2d 378, 381 (Tenn. 1948)). A liberal construction in favor of jurisdiction should be given “only so long as (1) the particular grant of jurisdiction is ambiguous and admits of several constructions, and (2) the ‘most favorable view in support of the petitioner’s claim’ is not clearly contrary to the statutory language used by the [g]eneral [a]ssembly.” *Stewart*, 33 S.W.3d at 791.

b. Negligence and Premises Liability Laws in the State of Tennessee.

Of course, every negligence case filed in this state- including premises liability or “slip and fall” cases such as this- requires the claimant to prove five separate, discrete elements by a preponderance of the evidence. Those elements are:

- 1) A duty of care owed by the defendant to the claimant;

- 2) Conduct by the defendant breaching that duty;
- 3) Injury or loss (i.e. damages);
- 4) Causation in fact (the “but for” test);
- 5) Proximate or legal cause (the “substantial factor” test).

Coln v. City of Savannah, 966 S.W.2d 34, 37 (Tenn. 1998); *Bradshaw v. Daniels*, 854 S.W.2d 865, 869 (Tenn. 1993); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).

Although the concept of duty in the context of a premises liability case is discussed at much greater length later in this decision, we set out here a general discussion of duty. Further, the mere fact that an injury occurred does not automatically raise a presumption of the defendant’s negligence. *Mullins v. Seaboard Coastline Railway Co.*, 517 S.W.2d 198, 201 (Tenn. Ct. App. 1974); *Fulton v. Pfizer Hospital Products Group, Inc.*, 872 S.W.2d 908, 911 (Tenn. Ct. App. 1993); *see also Armes v. Hulett*, 843 S.W.2d 427, 438 (Tenn. Ct. App. 1992).

Duty has been defined as “the legal obligation a defendant owes to a plaintiff to conform to a reasonable person standard of care in order to protect against unreasonable risks of harm.” *Staples v. CBL Ass’n*, 15 S.W.3d 83, 89 (Tenn. 2000). Whether a duty is owed to a Claimant by the Defendant State “is entirely a question of law to be determined by reference to the body of statutes, rules, principles, and precedents which make up the law; and it must be determined only by the court.” *Bradshaw v. Daniel*, 854 S.W.2d 865,870 (Tenn. 1993); *Staples*, 15 S.W.3d at 89. Whether a duty is owed to the Claimant by the Defendant requires the fact finder to consider the delicate balance between the “foreseeability and gravity of harm [as compared to] the commensurate burden imposed on the [defendant] to protect against [that] harm.” *Id.* at 89. Therefore, a court must consider “whether the interest of the plaintiff which has suffered

invasion was entitled to legal protection at the hands of the defendant.” *Bradshaw*, 854 S.W.2d at 869 (quoting *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856, 859 (Tenn. 1985)).

Of course, once a duty is established, a claimant must prove that the defendant State somehow breached that duty and that such a breach resulted in damages.

Finally, if she is to be successful with her claim, claimants such as Mrs. Shaver must prove both cause in fact and legal (or proximate) cause by a preponderance of the evidence. Cause in fact “is a very different concept from . . . proximate cause” and “refers to the cause and effect relationship between the tortious conduct and the injury.” *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993) (quoting Joseph H. King, Jr., *Causation, Evaluation, and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences*, 90 Yale L.J. 1353, 1355 n.7 (1981)). The concept involves an evaluation of the “but-for” consequences of an act, meaning that “[t]he defendant’s conduct is a cause [in fact] of the event if the event would not have occurred *but for* that conduct.” *Id.*, (quoting Prosser & Keeton, *The Law of Torts*, 266 (5th ed. 1984) (emphasis added)).

Legal cause, on the other hand, is recognized as the “ultimate issue” in negligence cases. *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991). As then Judge Koch wrote in *Rains v. Bend of the River*, 124 S.W.3d 580 (Tenn. Ct. App. 2003), “the concept of ‘legal cause’ was formerly known as ‘proximate cause’ . . . [and] connote[s] a policy decision made by the judiciary to establish a boundary of legal liability.”⁷ *Id.* at 592.

⁷ Prosser & Keeton have explained legal cause as follows:

Once it is established that the defendant’s conduct has, in fact, been one of the causes of the plaintiff’s injury, there remains the question whether the defendant should be held legally responsible for the injury. Unlike the **fact of causation**, with which it is often hopelessly confused, **this is primarily a problem of law**. It is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in legal policy, so that they depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences that have, in fact, occurred The legal limitation on the scope of

Courts in Tennessee have developed a three part test used when evaluating legal cause:

(1) the tortfeasor's conduct must have been a 'substantial factor' in bringing about the harm being complained of; (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.⁸ *McClenahan*, 806 S.W.2d at 775.

This test does not require that the exact manner in which an injury occurred be foreseen as long as the tortfeasor could have, or through the exercise of reasonable diligence should have, foreseen the general manner in which the injury occurred. *Id.* at 775. "If the plaintiff's injuries are of a type that could not have been reasonably foreseen, a duty of care never arises." *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 178 (Tenn. 1992).⁹

Also significant in any discussion of cause in fact and legal or proximate cause are two decisions from the Middle Section Court of Appeals. In *Waste Management, Inc. of Tennessee v. South Central Bell Telephone Co.*, 15 S.W.3d 425 (Tenn. Ct. App. 1997), Judge Koch held that the inquiry in a cause in fact analysis "is not a metaphysical one, but rather a common sense

liability is [thus] associated with policy – with our more or less inadequately expressed ideas of what justice demands, or for what is administratively possible and convenient.

Prosser & Keeton, *supra*, at 36 (emphasis added); *see also George v. Alexander*, 931 S.W.2d 517, 521 n.1 (Tenn. 1996).

⁸ The term "substantial" has been explained as follows:

The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense', which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called 'philosophic sense' yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes. *Lewis v. State*, 73 S.W.3d 88, 93 (Tenn. Ct. App. 2001) (*quoting Quaker Oats v. Davis*, 232 S.W.2d 282, 289 (1949)).

⁹ The Eastern Section Court of Appeals, in a September 10, 2013, decision, *Huskey v. Rhea County, Tennessee*, No. E2012-02411-COA-R3-CV, 2013 WL 4807038 (Tenn. Ct. App. Sept. 10, 2013), contains a thorough discussion of cause in fact and legal or proximate cause at pages *11-13. In that decision, the Court significantly relies on decisions in *Hale v. Ostrow*, 167 S.W.3d 713 (Tenn. 2005); *Burgess v. Harley*, 934 S.W.2d (Tenn. Ct. App. 1966); and *McClenahan v. Cooley*, 806 S.W.2d for a thorough discussion of these concepts.

analysis of the facts that laypersons can undertake as competently as the most experienced judges.” *Id.* at 430.

Later, in 2003, that same court in *Rains v. Bend of the River*, 124 S.W.3d 580 (Tenn. Ct. App. 2003)(perm. app. d’nd Nov. 24, 2003), again speaking through Judge Koch, said that a determination of proximate cause “ ... connotes a policy decision made by the judiciary to establish a boundary of legal liability, These decisions are based on consideration of logic, common sense, policy, precedent, and other more or less inadequately expressed ideas of what justice demands or of what is administratively possible and convenient.” *Id.* at 593.

The State “ ... will not be held liable unless the circumstances are such that a private individual in the State’s place would also be liable. *Byrd v. State*, 905 S.W.2d 195 (Tenn. Ct. App. 1995).

It is also well established that “[t]he State is not an insurer of those who enter upon its facilities.” *Byrd*, 905 S.W.2d at 197 (citing *Atkins v. City Finance Co.*, 683 S.W.2d 331, 332 (Tenn. Ct. App. 1994)); and *Paradiso v. Kroger Co.*, 499 S.W.2d 78, 79 (Tenn. Ct. App. 1973); *Blair v. West Town Mall*, 130 S.W.3d 761, 764 (Tenn. 2004). In fact, property owners are not insurers of the safety of persons who may come onto their property. *Smith v. Inman Realty Co.*, 846 S.W.2d at 822; *Jones v. Zayre’s Inc.*, 600 S.W.2d at 732; *Blair v. West Town Mall*, 130 S.W.3d at 764; *Byrd v. State of Tennessee*, 905 S.W.2d at 197. “Because of their superior knowledge of the condition of the premises, owners and occupiers of property, including owners and occupiers of public property, owe persons lawfully on their property the duty of reasonable care under all the circumstances.” *Sears v. Metro. Nashville Airport Auth.*, 01A01-9307-CV-00138, 1999 WL 536341, at * 4(Tenn. Ct. App. July 27, 1999)(citing *McCormick v. Waters*, 594 S.W.2d 385, 387 (Tenn. 1980)).

Before an owner or operator of a premises can be held liable for negligence in allowing a dangerous or defective condition to exist on his property, the condition must have (1) been created by the owner or operator or his agent; or (2) if the condition was created by someone other than the owner or operator or his agent, there must be actual or constructive notice on the part of the owner or operator that the condition existed prior to the accident. *Gargaro v. Kroger Grocery and Baking Co.*, 118 S.W.2d 561 (1938).

As suggested above, a significant consideration in every premises liability case is the supposedly superior knowledge of the owner of the property regarding the condition which allegedly caused the injury or damage. *Eaton v. McLain*, 891 S.W.2d 587, 594 (Tenn. 1994); *Ogle v. Winn-Dixie Greenville, Inc.*, 919 S.W.2d 45, 46 (Tenn. Ct. App. 1995). This superior knowledge factor brings into play the foreseeability and notice requirements found in Tenn. Code Ann. § 9-8-307(a)(1)(C) which in turn mandates that we consider the nature and scope of the duty, if any, owed to a visitor to the property by the defendant and whether that duty has been breached.

The Eastern Section Court of Appeals in *Rouse v. State*, No. E2004-02142-COA-R3-CV, 2005 WL 2217050 (Tenn. Ct. App.), neatly tied together the various concepts just discussed when it said the following:

This statute [Tenn. Code Ann. 9-8-307(a)(1)(C)] essentially codifies the common law, which imposes upon an owner or occupier of land an obligation to exercise reasonable care and diligence in maintaining its premises in a safe condition. *Sanders v. State*, 783 S.W.2d 948, 951 (Tenn.Ct.App.1989). Since the statute codifies the common law obligation, any discussion of the statutory concept of “negligently created or maintained dangerous conditions,” the mandate of “reasonable care,” and the principle of “foreseeability of risk” necessarily focuses on traditional principles of negligence: (1) whether a duty of care is owed to a claimant; (2) whether the facts reflect conduct falling below the applicable standard of care, resulting in a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) legal causation. *Hames v. State*, 808 S.W.2d 41, 44 (Tenn.1991). Whether a condition is defective, unsafe or dangerous is a question

of fact. *Cornell v. State*, 118 S.W.3d 374, 378 (Tenn.Ct.App.2003). *Id.* at *2.(Emphasis supplied).

Accordingly, the initial burden for every claimant in a tort case such as this is to establish that the State owed her a duty at the time of her fall. “Duty ... is the legal obligation [the State] owes to a plaintiff to conform to [a] reasonable person standard of care in order to protect [others] against unreasonable risk of harm.” *Green v. Roberts*, No. M2012-00214-COA-R3-CV, 2012 WL 4858992 (Tenn. Ct. App. Oct. 11, 2012). “... Put another way, the duty owed by the State “... includes the obligation to maintain [its] premises in a reasonably safe condition, and to remove, or warn against latent or hidden dangerous conditions of which the owner is aware or should be aware through the exercise of reasonable diligence.” *Id.* The Western Section Court of Appeals in *Smith v. Inman Realty Co.*, 846 S.W.2d 819 (Tenn. Ct. App. 1992), described this duty as follows:

Possessors of property and those acting on their behalf owe a duty of reasonable care to patrons and invitees. *McCormick v. Waters*, 594 S.W.2d at 387; *Benson v. H.G. Hill Stores, Inc.*, 699 S.W.2d at 562. This duty includes (1) the duty to maintain the premises in a reasonably safe condition, *Haga v. Blanc & West Lumber Co.*, 666 S.W.2d 61, 64 (Tenn.1984); (2) the duty to inspect the premises to discover dangerous conditions reasonably recognizable by common experience and ordinary prudence, *Illinois Cent. R.R. v. Nichols*, 173 Tenn. 602, 612–13, 118 S.W.2d 213, 217 (1938); and (3) the duty either to remove or to warn of the dangerous condition the possessor knows or should reasonably know about. *Dawson v. Sears, Roebuck & Co.*, 217 Tenn. 72, 78, 394 S.W.2d 877, 880 (1965); *Buckeye Cotton Oil Co. v. Campagna*, 146 Tenn. 389, 394, 242 S.W. 646, 647 (1922). *Id.* at 823. (Emphasis supplied).

The duty owed is one of “ordinary care in respect to the condition,” and in exercising that level of care, the owner has an obligation to inspect his premises to identify threatening conditions. *Osborne v. State of Tennessee*, 1990 WL 58734, *4 (Tenn. Ct. App.).

That court also identified several factors which may be used in the analysis of whether

the State owed a duty to the claimant. Some of those factors are as follows:

[T]he foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct. *Id.* at 39 (citing *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)). (Emphasis supplied).

A key element in that analysis is determining whether a risk was actually foreseeable.

The Supreme Court, in *Doe v. Linder Construction Co.*, 845 S.W.2d 173, 178 (Tenn. 1992) said the following in that connection:

The risk involved is that which is foreseeable; a risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable. Foreseeability is the test of negligence. If the injury which occurred could not have been reasonably foreseen, the duty of care does not arise, and even though the act of the defendant in fact caused the injury, there is no negligence and no liability. See *Spivey v. St. Thomas Hospital*, 31 Tenn. 12, 211 S.W.2d 450, 456 (1948). “[T]he plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote possibility, and that some action within the [defendant's] power more probably than not would have prevented the injury.” *Tedder[v. Raskin]*, 728 S.W.2d at 348. Foreseeability must be determined as of the time of the acts or omissions claimed to be negligent.

[I]n short, ...if the foreseeability and gravity of harm posed [by] a defendant’s conduct, even if open and obvious, outweigh[] the burden on the defendant to engage in alternative conduct to avoid the harm, there is a duty to act with reasonable care.” *Coln v. City of Savannah*, 966 S.W.2d 34, 43 (Tenn. 1998)(Emphasis supplied).

That court also identified several factors which may be used in the analysis of whether the State owed a duty to the claimant. Some of those factors are as follows:

[w]hether the danger was known and appreciated by the [claimant], whether the risk was obvious to a person exercising reasonable perception, intelligence and judgment, and whether there was some other reason for the [State] to foresee the harm. *Coln v. City of Savannah*, 966 S.W.2d 34, 43 (Tenn. 1998).

Coln, of course, is a watershed decision in terms of its explication of the principles which apply in a case involving what arguably might be considered an “open and obvious” danger. In

that case, our Supreme Court adopted for application in Tennessee a provision from the Restatement (Second) of Torts § 343A:

Nearly every jurisdiction has also relied upon the Restatement (Second) of Torts, § 343A, which states the rule as follows:

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*

(Emphasis added). The word “ ‘known’ denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves,” and the word “ ‘obvious’ means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.” Restatement (Second) of Torts, § 343A (comment b). The restatement further provides that the premises owner's duty exists if the harm can or should be anticipated notwithstanding the known or obvious danger:

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. Restatement (Second) of Torts, § 343A (comment f). *Id.* at 41. (Emphasis supplied).

The duty owed with regard to foreseeable problems at a particular situs is to ensure reasonably safe conditions and to remove or warn against either latent or hidden dangerous conditions of which the owner is already aware or should be aware of “through the exercise of reasonable diligence.” *Id.* The duty owed by the owner of the premises is “a duty of reasonable care under [the] circumstances.” *Jones v. Exxon Corp.*, 940 S.W.2d 69, 71 (Tenn. Ct. App. 1996); *Dobson v. State of Tennessee*, 23 S.W.3d 324, 330-331 (Tenn. Ct. App. 1999).

In fact in identifying both the existence and scope of a duty, all of the relevant

surrounding circumstances, including foreseeability of harm to the plaintiff and others in the same situation, must be evaluated. *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 433 (Tenn. 1994); *Dobson v. State of Tennessee*, 23 S.W.3d 324, 329 (Tenn. 1999).

In order to prevail in this premises liability suit Mrs. Shaver must establish that her injury was a reasonably foreseeable probability and "...that some action within the defendant's power more probably than not would have prevented the injury." *Dobson v. State of Tennessee*, 23 S.W.3d at 331. In meeting its obligations, a property owner must "... exercise due care toward invitees on their land under all [the] circumstances." *Mathews v. State of Tennessee*, No. 2005-01042-COA-R3-CV, 2005 WL 3479318, *3 (Tenn. Ct. App.).

Once a duty has been identified and established, the second element which must be established by the claimant by a preponderance of the evidence is whether the State breached that duty. *Winkler v. Pinnacle Properties*, No. M2011-02616-COA-R3-CV, 2012 WL 2989135 (Tenn. Ct. App. July 20, 2012).¹⁰

Case law in this context is instructive. *Cooperwood v. Kroger Food Stores, Inc.*, No.02A01-9308-CV-00182, 1994 WL 725217 (Tenn. Ct. App. Dec. 30, 1994), involved an injury which occurred in an entrance alcove to a food market in Shelby County, Tennessee. The evidence showed that the tile floor of the alcove was in all likelihood wet since rain was present in the area both prior to and at the time claimant fell. The claimant fell in what the Court described as "a watery-oily substance." A substantial jury verdict was rendered in that case which the Court of Appeals affirmed. The Court's decision discussed at length the concepts of duty, notice of a dangerous condition, and the so called "open and obvious" rule.

The *Byrd* case, discussed above involved an injury to the claimant's leg when she stepped

¹⁰ Foreseeability plays a role not only in determining if a duty is present and has been breached but also in discerning whether or not a claimant has proved proximate or more properly legal cause.

into a hole while leaving a Christmas event at Cove Lake State Park in Campbell County. Commissioner Lacy ruled against the claimant on the grounds that the State had neither actual or constructive notice of the hole which caused the claimant's injuries. The Court of Appeals, speaking through Judge Susano, affirmed Commissioner Lacy's decision.

Three years later, in *Herbison v. Hansen Chrysler-Plymoth, Inc.*, No. 01A01-9710-CV-00594, 1998 WL 485668 (Tenn. Ct. App.), the claimant tripped on a 15/16th inch to 1-1/2 inch metal strip which had been placed on a concrete floor at an automobile dealership. The claimant there was himself in the automotive repair business and intended to visit the parts department at the dealership which had been moved. The metal stripping was located at the entrance to the shop area of the dealership, but Mr. Herbison did not notice it since he was looking around in an attempt to find the relocated parts department. In affirming the trial court's dismissal of the action, the Court of Appeals emphasized that although the plaintiff's attention may have been diverted because of his search for the location of the parts department, "...he had adequate opportunity to familiarize himself with the nature of his pathway in his previous visits and, on the day of his injury as he approached the doorway from the parking lot." *Id.* at *3.

Coln v. City of Savannah and *Van Cleave v. Markowski*, 966 S.W.2d 34, 43 (Tenn. 1998) discussed above, were consolidated on appeal and are well known in Tennessee because of their modification of the "open and obvious" rule.

In *Coln*, the plaintiff had fallen while attempting to enter City Hall in Savannah, Tennessee. Her path leading to City Hall crossed over what are known as paving bricks (which are typically laid in a bed of sand). These "pavers" ended just short of a concrete surface which led into City Hall. A gap between the top of the concrete surface and the "pavers" had developed because of the settlement of the bricks into the sand. The Supreme Court reinstated the judgment

of the Trial Court in the plaintiff's from which had been reversed by the Court of Appeals, and held that even though the condition of the pathway leading into the City Hall may have arguably been "open and obvious," that finding alone did not preclude recovery by the plaintiff.

Likewise in the companion *Van Cleave v. Markowski* case, the fact that Mrs. Van Cleave did not take notice of an 18 inch by 3 foot long opening in the deck area of a swimming pool at the Markowski home (where a skimmer used to clean the pool was usually stored) did not categorically preclude recovery by plaintiffs. The Court of Appeals had affirmed the Trial Court's award of summary judgment in favor of the defendants in that case. However, again, the argument that the condition was "open and obvious" did not exclude the possibility of recovery.

These two cases resulted in a Supreme Court decision which contains a good discussion of various aspects of premises liability law in Tennessee.

The upshot of these two decisions is that although plaintiffs or claimants are expected to be aware of their surroundings, their failure to appreciate a dangerous defect on the premises does not automatically preclude recovery in a case. *Coln* is frequently discussed in premises liability decisions from our appellate courts.

Dobson v. State of Tennessee, 23 S.W.3d 324 (Tenn. Ct. App. 1999), involved a situation in which a visitor to the campus of the University of Tennessee-Martin tripped over a metal bar which had been placed along a walkway to prevent mud from washing onto that walkway. The Court applied the analysis set out in *Coln* in finding that the State had not breached any duty which it owed to Mrs. Dobson. The Court emphasized factors which would suggest that the defendant State had breached no duty owed to Mrs. Dobson since it could not foresee actions on her part which had not taken into account the configuration of the area in which her admittedly serious injuries took place. The Court wrote:

The commissioner found that Ms. Dobson was not using the path in its ordinary use and that the path was not dangerous in terms of common experience as there had been no previous injury there. The evidence does not preponderate against the commissioner's finding that the state did not create a dangerous condition when it installed the border to prevent mud from washing across the sidewalk and the consequential slip hazard. In applying the *Coln* Court's analysis to the instant case we do not think that the State breached its duty to Ms. Dobson as the gravity of harm which befell her was not foreseeable. Ms. Dobson was not using the sidewalk in its customary manner. The State could not foresee that Ms. Dobson would park in a no parking zone and proceed across the lawn in a hurried manner with little regard for her own safety to enter the south entrance when the main entrance was the closest entrance to where she parked. Upon review of the record the main entrance appears to us to be the most obvious selection between the two entrances to the Health Center. *Id.* at 330.

Two years later in *Nee v. Big Creek Partners*, 106 S.W.3d 650 (Tenn. Ct. App. 2002) (perm. app. d'nd September 9, 2002), the Western Section Court of Appeals affirmed the Trial Court's decision directing a verdict against a golfer who walked up a grass slope to an elevated tee but fell while descending wooden stairs leading to and from the tee. Again, the appellate court discussed basic principles of premises liability law and held, using language of significance for present purposes, is the following:

The owner or occupier has a duty to exercise reasonable care to prevent injury to persons lawfully on the premises. *Rice v. Sabir*, 979 S.W.2d 305, 308 (Tenn.1998). The duty of an owner or occupier to exercise reasonable care includes the responsibility to remove or warn against latent or hidden dangerous conditions on the premises that the owner or occupier is aware of or should have been aware of through the exercise of reasonable diligence. *Id.* "The duty imposed on the premises owner or occupier, however, does not include the responsibility to remove or warn against 'conditions from which no unreasonable risk was to be anticipated, or from those which the occupier neither knew about nor could have discovered with reasonable care.' " *Id.* (quoting W. Page Keeton, *Prosser & Keeton on Torts*, § 61 at 426 (5th ed. 1984)). Further, "mere existence of a defect or danger is generally insufficient to establish liability, unless it is shown to be of such a character or of such duration that the jury may reasonably conclude that due care would have discovered it." *Id.* (quoting Keeton, *supra* at 426–427). *Id.* at 653.

The *Nee* Court simply pointed out that the plaintiff had failed to present evidence of a

condition presenting an unreasonable risk of harm to him.

On the other hand, the Western Section Court of Appeals in *Allman v. Hut's, Inc.*, No. W2000-01829-COA-R3-CV, 2001 WL 523953 (Tenn. Ct. App.) reversed the dismissal of a claim involving a fall by Mrs. Allman which occurred when she tripped on a three inch curb while entering a convenience market. According to the proof in that case, the curb itself was not well differentiated from the area around it.

The real thrust of the Court's decision in *Allman* was that harm to a visitor to a property may be anticipated from "known or obvious dangers" when "... the [visitor's] attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." *Id.* at 43 (quoting *Jackson v. Bradley*, 987 S.W.2d 852, 854 (Tenn. Ct. App. 1998)). The import of this decision seems to the Commission to be that a property owner must take into account distractions to visitors to the property which may contribute to the occurrence of an injury.

In 2005, in *Mathews v. State*, No. W2005-01042-COA-R3-CV, 2005 WL 3479318 (Tenn. Ct. App.), the Western Section Court of Appeals once again addressed a slip and fall case. This case arose when the Claimant suffered a serious injury resulting in three separate knee surgeries when she tripped over a 13/16th to 1 inch "irregularity in the sidewalk" at a State Park archeological site in Shelby County. The case was brought pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(C) and contains some discussion of generally applicable principles in premises liability cases. However, the overriding issue in *Mathews* was whether the recreational use statute found at Tenn. Code Ann. § 70-7-102 (2001) applied.

We have previously cited and discussed *Rouse v. State*, a case involving a fall at the Brushy Mountain Prison by a mother who was visiting her son at the prison. Commissioner

Cheek heard the case and at the conclusion of the proof had decided against Mrs. Rouse who had suffered a broken a hip as a result of the fall. The Eastern Section Court of Appeals, this time speaking through Judge Susano, held that a 1 ½ inch difference between the elevation of the floor of a previously demolished building and the concrete surface later put in place adjacent to that floor, did in fact constitute a dangerous condition under subsection (C). The Court characterized “the crux” of the question before it as what prison officials “reasonably knew or should have known of the probability of an occurrence such as the one which caused [the Claimant’s] injuries.” *Id.* at *4 (citing *Eaton v. McLain*, 891 S.W.2d at 594 (quoting *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 178 (Tenn.1992))).

Summarizing the basis of its decision, the Court said the following factors were important:

When one considers what the State knew and what it should have known about (1) the uneven surface of the floor of the picnic area, (2) how the picnic area was utilized, by whom and under what circumstances, and (3) the environmental factors impacting one's ability to discern the uneven surface, it is clear to us that the State “reasonably knew or should have known of the probability of an occurrence such as the one which caused [the Claimant's] injuries.” *Doe*, 845 S.W.2d at 178. Accordingly, we conclude that the evidence preponderates against the Commissioner's factual determination that the uneven surface did not constitute a “dangerous condition[.]” *Id.* at *7.

The *Rouse* court seems to have undertaken an intensive analysis of various factors at play at the time of Mrs. Rouse’s fall.

The Middle Section Court of Appeals addressed the “distraction” factor mentioned in *Allman, supra*, in *Curry v. City of Hohenwald*, 223 S.W.3d 289 (Tenn. Ct. App. 2007) (perm. app. d’nd May 14, 2007). There Mr. Curry had a defective water meter cover located in the front yard of his home in Hohenwald. Mr. Curry had brought this defect to the attention of the utility in that city on several occasions. City officials did not respond to this notification and Mr. Curry

had placed a plank over the broken cover so that no one would step into the hole which it covered. One year later, Mr. Curry decided to install a flagpole in his front yard and during the course of that endeavor, stepped backward and was injured when he stepped into the hole covered with the broken water meter cover. In its decision, the Court quotes at length from Prosser and Keaton on Torts for the following proposition:

[I]n any case where the occupier as a reasonable person should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required. This is true, for example, where there is reason to expect that the invitee's attention will be distracted, as by goods on display, or that after a lapse of time he may forget the existence of the condition, even though he has discovered it or been warned; or where the condition is one which would not reasonably be expected, and for some reason, such as an arm full of bundles, it may be anticipated that the visitor will not be looking for it. W. Keeton, *Prosser & Keaton on Torts* § 61 (5th ed.1984). *Id.* at 293.

Again, an appellate court directs us to take into account the fact that individuals, because of distracting factors, may turn a blind eye to dangerous conditions which in some cases they are already aware of.

Another case from the Middle Section Court of Appeals decided by the Eastern Section, sitting by interchange and speaking through Judge Franks, *Berry v. Houchens Market of Tennessee, Inc.*, 253 S.W.3d 141 (Tenn. Ct. App. 2007), involved a case in which a shopper in a Save-A-Lot store in Davidson County fell in a puddle of oil in a parking lot outside the store. Apparently someone had changed the oil in their vehicle at this location. The Court of Appeals affirmed the Trial Court's grant of a Motion for Summary Judgment filed by the defendant. Again, the Court discussed various general principles applicable in a slip and fall setting and makes a point of the fact that Mrs. Berry "... was looking straight ahead and ... never look[ed] down when she was walking." The Court found that "... Mrs. Berry had a duty to see what was

in plain sight, a large, black puddle of what was clearly slippery oil and to avoid walking into it.” *Id.* at 148.

Thus, while a distracted visitor must be anticipated by a premises owner, the visitor also has a duty to appreciate the environment in which she is walking.

For example, in a case decided three years later, *Young v. First Bank of Tennessee*, No. E2010-01434-COA-R3-CV, 2011 WL 332700 (Tenn. Ct. App.), a bank customer had fallen over a curb at a bank which she regularly visited in Dayton, Tennessee. In affirming the Trial Court’s grant of a Motion for Summary Judgment in defendant’s favor, Judge Susano echoed Judge Franks’ reasoning in *Berry*, when he stated:

These undisputed facts compel the conclusion that if the plaintiff had looked—which she admittedly did not—she would have seen the curb, and that the cause of her injury was not the bank’s alleged failure to paint the curb or otherwise call attention to it, but the plaintiff’s failure to look where she was stepping. *Id.* at *4.

That same year, the Middle Section Court of Appeals decided *Norfleet v. Pulte Homes Tennessee Ltd. Partnership*, No. M2011-01362-COA-R3-CV, 2011 WL 5446068 (Tenn. Ct. App.). *Norfleet* involved injuries to an individual who while visiting a model home in the Brentwood community of Davidson County when she fell at a four inch step leading from the foyer of the home to the living room. While acknowledging that premises owners have a responsibility to remove or warn of latent, dangerous conditions, the Court, citing *Young v. First Bank of Tennessee, supra*, held that the home builder had not breached any duty owed to Mrs. Norfleet since it was not reasonably foreseeable that she “... would fail to pay attention to where she was walking in a home she had never been [in] before and, instead, chose to walk forward from the foyer into the living room while looking up and to the right and left to view the amenities.” *Id.* at *5.

However, in 2012, Senior Judge Ben H. Cantrell, speaking for the Middle Section Court of Appeals in *Winkler v. Pinnacle Properties*, No. M2011-02616-COA-R3-CV, 2012 WL 2989135 (Tenn. Ct. App.), reversed the dismissal of a case filed in Warren County involving a fall suffered by the plaintiff while entering a Kroger store in McMinnville, Tennessee. The trial judge had dismissed the action but the Middle Section Court of Appeals reversed the Trial Court and remanded the case to the Circuit Court for Warren County for further action. In the course of the decision, the Court of Appeals pointed out that the small ramp which the plaintiff alleged caused her fall, went from a total height of zero inches to six inches at the curb and that there was a three inch difference between the level of the parking lot and where the ramp began. Additionally, the plaintiff had alleged that there were “inadequate visual clues” at the ramp which would have put her on notice of the tripping hazard. In reaching its decision, the Court of Appeals cited *Rice v. Sabir*, 979 S.W.2d 305 (Tenn. Ct. App. 1998) for the proposition that a property owner has a duty to “... warn against ... latent or hidden dangerous conditions on the premises of which [it] was aware or should have been aware through the exercise of reasonable diligence.” *Id.* at 308. The Court also held that once the plaintiff has established a duty was owed, a determination of whether there had been a breach of the same and whether that breach was the “proximate cause” of the Mrs. Winkler’s injuries was a question of fact. *Winkler* at *4.

Another decision from 2012, rendered this time by the United States District Court for the Middle Division of Tennessee, involved a fall by a customer over a pallet which was at the end of an aisle. *Foster v. Wal-Mart Stores East, LP.*, No. 3–11–0367, 2012 WL 3027843 (M.D.Tenn. 2012). The plaintiff was “smelling” Lysol products on one side of the “endcap” of the aisle. As she walked “ ‘to the other side of the endcap, she tripped over [a] pallet on the floor.’” According to the Memorandum decision of the Judge, Mrs. Foster neither saw the pallet

nor looked down at the floor before walking from one side of the endcap to the other side. In granting defendant Wal-Mart's Motion for Summary Judgment, the Court held that it was not reasonably foreseeable that the plaintiff would trip over a pallet located in close proximity to her and that she had "... simply failed to look down as she quickly moved to the other side of the endcap." *Id.* at *4.

The Western Section Court of Appeals recently decided yet another slip and fall case in 2012. That case is styled *Green v. Roberts*, No. M2012-00214-COA-R3-CV, 2012 WL 4858992 (Tenn. Ct. App.). In *Green*, the plaintiff fell over a steel post in a parking lot owned by the defendant. The plaintiff there worked at an office located at this commercial site. On the day of her injury, she walked across the parking lot to speak with a cousin who had parked in the lot. After approximately 10 minutes, plaintiff stepped back from her cousin's vehicle, according to the allegations of the Complaint and fell over a metal post protruding from the concrete area of the parking lot injuring her Achilles tendon. The post was approximately 8 inches X 8 inches and had been filled with concrete and extended up some $\frac{3}{4}$ th inch above the surface of the parking lot. Accordingly, vehicles could drive over the post since it was nearly flush with the surface of the parking lot. The post was located in a small concreted area, but the remainder of the parking lot was covered with black asphalt such that there was a clear differentiation between the majority of the lot and the limited area where the post was located. The facts also revealed that Mrs. Green had been by this area previously which is not surprising in light of the fact that she worked at a business located on the property.

Eventually, the Trial Court granted the defendant's Motion for Summary Judgment. In affirming the Trial Court's decision, the Western Section Court of Appeals, sitting for the Eastern Section, discussed many of the decisions we have highlighted here and emphasized at

least seven reasons why the plaintiff had ample opportunities to avoid injury by simply taking into account the many cues which should have made her aware that the ¾ inch protrusion was in the area where she fell.

These cases inform the Commission regarding the recurrent themes which crop up in this sort of case on a regular basis in Tennessee appellate court decisions.

Finally, the Commission must note what was said by our Supreme Court in a case which has been cited several times through the years. In *Forrester v. City of Nashville*, 169 S.W.2d 860 (Tenn. 1943), the Court, quoting 7 Quillin on Municipal Corporations, section 2956 for the following:

‘To be actionable the obstruction must be dangerous, and the danger must be such as a reasonably prudent person would have anticipated as a natural and probable result. Expressed otherwise, the well settled rule applicable to cases of this character is that to establish negligence it must be shown that the injury sustained is one that would probably flow from allowing the obstruction as it existed.’

Probability, not possibility, governs; that it is “possible” for some one out of many to trip over so slight a projection in the sidewalk as is here involved does not make it dangerous. *Id.* at 861. (Emphasis supplied).

Forrester involved injuries to a plaintiff caused by his tripping over a city water meter “embedded in ... pavement and projecting about an inch above [the] pavement.” *Id.* at 860. In acknowledging that the plaintiff was walking along a street on a windy and blustery day, the Court in reversing the decision of the trial court, wrote that weather conditions “... did not relieve plaintiff from the exercise of ordinary care for his own safety; but rather called for that degree of ordinary care exercised under such conditions” *Id.* at 861.

The Middle Section Court of Appeals, in a recent case, *Christian v. Ebenezer*, No. M2012-01986-COA-R3-CV, 2013 WL 3808210 (Tenn. Ct. App.) also cited the *Forrester* decision for the proposition that it is the probability of harm rather than its mere possibility

which will determine, in part, whether a viable cause of action may be stated. *Id.* at *5. *Christian* involved a case in which plaintiff was struck by a windowless door through which she was leaving the facility following a visit with her father.¹¹ *Id.* at *3.

c. Tennessee's Comparative Fault System

Under Tennessee's system of modified comparative fault developed after the Supreme Court's decision in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), the fault or negligence of the plaintiff in causing the event must be less than the combined fault of the defendant(s). A separate consideration discussed later here is the effect of any negligence on the part of Ms. Shaver which might diminish her recovery.

In *Eaton v. McLain*, 891 S.W.2d 587 (Tenn. 1994), the Supreme Court set out several considerations for the fact finder to consider in reaching its assessment of the percentages of comparative fault attributable to each party:

[T]he percentage of fault assigned to each party should be dependent upon all the circumstances of the case, including such factors as: (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff; (4) the existence of a sudden emergency requiring a hasty decision; (5) the significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another's life; and (6) the party's particular capacities, such as age, maturity, training, education, and so forth. *Id.* at 592; *see also Coln v. City of Savannah*, at 44).

Again, it must be emphasized that these are not exclusive factors and we believe that other considerations unique to a particular fact pattern may be considered in divvying up fault between the parties.

¹¹ It is worth noting that the trial court cited the *Forrester* case in the decision affirmed by the appellate court in *Christian*.

Finally, in a case such as this where the parties are one claimant and one defendant, the Court of Appeals in its recent decision in *Huskey v. Rhea County*, *supra*, citing *Grandstaff v. Hawks*, 36 S.W.3d 482 (Tenn. Ct. App. 2000), explained the difference between how the negligence of the claimant should be compared with the fault of the defendant:

The Tennessee Supreme Court has distinguished between “comparative negligence” and “comparative fault.” See *Coln v. City of Savannah*, 966 S.W.2d at 40 n. 6; *Owens v. Truckstops of Am.*, 915 S.W.2d at 425–26 n. 7. Comparative negligence measures the plaintiff’s negligence for the purpose of reducing the plaintiff’s recovery. Comparative fault encompasses the allocation of recovery among multiple or joint tortfeasors according to their percentage of fault. The Court made this distinction on the theory that a plaintiff’s recovery may only be reduced because of the plaintiff’s negligence, whereas a defendant’s liability may be based on theories of liability other than negligence, for example, strict liability. *Huskey*, 2013 WL at *10 (citing *Grandstaff*, 36 S.W.3d at 491 n. 12 (citing *Owens v. Truckstops of Am.*, 915 S.W.2d at 426 n. 7.))

DECISION

With these principles in mind, the Commission is able to make a determination concerning liability in this case.

The proof is extremely clear that for a long period before Claimant’s fall, flooding events such as this had never occurred at the Aquatic or Student Activities Center at the University of Tennessee. Ms. Locke, who has worked at the Center as Assistant Director of Recreational Sports for eleven years, states in her affidavit that she had never experienced during that period, water actually traveling under the double doors shown in the photographs found in this record. According to her affidavit, not only was the rain on July 19, 2013, “intense”, it was also “accompanied by strong winds”. Additionally, apparently the architectural work done at the time of the building’s construction was done in a fashion designed to drain water off the patio or deck of the Center. Evidently, these steps were not adequate in the face of an unexpectedly strong wind and rain storm like that which took place on June 5, 2013.

As stated by the Court in *Doe v. Linder Constr. Co.*, supra, “[f]oreseeability is the test of negligence. If the injury which occurred could not have been reasonably foreseen, the duty of care does not arise, and even though the act of the defendant in fact caused the injury, there is no negligence and no liability. ...” *Id.* at 178.

Given the fact that the un rebutted evidence in this case shows that no similar event had ever occurred at the Center, we simply cannot and do not find that the State breached the “duty of reasonable care” owed to individuals such as Claimant who used the Center for recreational purposes.

Additionally, as pointed out above, a second requirement for a successful claim under subsection (C) requires that Mr. Bharadwaj prove that appropriate University officials had sufficient advance notice of a dangerous condition for the University to have had an opportunity to take those measures which would remedy the alleged problem. In this case the State has presented affidavit proof through Ms. Locke that prior to Claimant’s fall, no University employee either discovered or was advised that water had made its way through the double glass doors and into the area of the building where Claimant was playing ping-pong. The affidavit goes on to state that less than an hour transpired between the start of the brief, intense rainstorm and Mr. Bharadwaj’s fall raising serious questions about any opportunity University officials might have had to address the wet floors in the area where claimant fell.

In our discussion of various principles of premises liability law in this state, we cited a case captioned *Gargaro v. Kroger Grocery and Baking Co.*, 118 S.W.2d 561 (1938). That case, in part, held that a property owner or operator of a premise can only be held liable for negligence where the defect or condition was created by the owner or operator of the site or if the condition had been created by someone other than one of those individuals, that the owner/operator had

actual or constructive notice of the problem prior to the accident. That case law, applicable in claims filed with the Commission, see Tenn. Code Ann. § 9-8-307(c) provides the legal basis for the notice requirement set out in Tenn. Code Ann. § 9-8-307(a)(1)(C). Unless the Claimant is able to meet the notice requirement, the claim must be denied even in situations where a Claimant has been able to prove foreseeability of the risk. In this case, unfortunately Mr. Bharadwaj has failed to establish either foreseeability of the risk or advance notice, either actual or constructive, of water on the floor creating a fall hazard thus negating the possibility of an award in this case.

For these reasons alone, we are compelled to dismiss this claim.

However, the State also raises a comparative fault defense arguing that Claimant himself should have avoided the water that had gathered in the area where he was playing ping-pong and thereby eliminated the possibility that he might slip and fall into the glass windows located in that area of the Center. The State's position in that regard is also well taken and merits a dismissal of this claim. This somewhat dangerous condition should have been readily apparent to Mr. Bharadwaj who is quite obviously an intelligent and articulate individual.

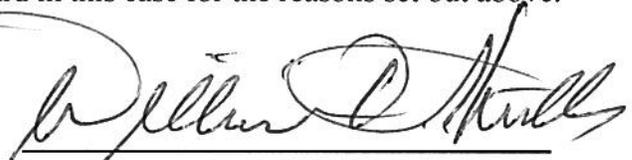
The State's Motion to Dismiss is brought pursuant to the Tennessee Rules of Civil Procedure, Rule 12.02(6) which requires us to examine the Complaint and to admit the truth of everything set out therein which is relevant and material to the determination of liability. If having done that we find that there are insufficient allegations to support the claim, we have no alternative but to dismiss the case. *Cook By and Through Uithoven v. Spinnaker's of Rivergate Inc.*, 878 S.W.2d 934, 938 (Tenn.1994).

In light of what we have just written regarding Claimant's failure to establish negligence on the part of the University in avoiding a foreseeable risk to Claimant, as well as the lack of

advance notice to the State and Claimant's own negligence in failing to use reasonable care for his own safety, a judgment for Mr. Bharadwaj cannot be made.

In closing, the Commission would note that Mr. Bharadwaj's injuries could have been even more serious than they actually were given the fact that he apparently fell through a glass window. He is indeed fortunate that those injuries were not more severe. However, based on the materials before us we simply cannot make an award in this case for the reasons set out above.

Entered this the 5th day of April, 2014



William O. Shults, Commissioner
P.O. Box 960
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(423) 613-4809

CERTIFICATE

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

**Manceel Bharadwaj
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**Joshua R. Walker, Esq.
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This the 14th day of April, 2014.

Paula Swanson

Paula Swanson, Claims Commission Clerk