

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

FILED
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TONYA NEWCOMB)
Claimant,) Claim No. T20111727
)
vs.)
)
STATE OF TENNESSEE,)
) Regular Docket
Defendant.)

JUDGMENT FOR THE DEFENDANT

This matter came to trial before Robert N. Hibbett, Commissioner and judge of the facts and the law, on February 20, 2014 in the Ground Floor Hearing Room of the Andrew Jackson Building in Nashville, Tennessee. This is a regular docket claim tried without a jury. Claimant, Tonya Newcomb, requests compensation for injuries sustained when she fell down the steps leading into the James K. Polk Building in Nashville, Tennessee.

The State has filed answers denying liability and asserting affirmative defenses.

The Claimant was self-represented. Assistant Attorney General Joseph P. Ahillen, Esquire, represented the State of Tennessee. The Trial Transcript was filed with the Clerk of the Claims Commission on March 6, 2014.

JURISDICTION

The authority of the Claims Commission to render damages is set forth by statute. If a claim falls outside of the categories specified in Tenn. Code Ann. § 9-8-307(a), then the State retains its immunity from suit, and a claimant may not seek relief from the State. *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000). Tennessee Code Ann. § 9-8-307(a)(1)(C) and (H), provides the basis for the Tribunal's jurisdiction to adjudicate this claim:

- (C) Negligently created or maintained dangerous conditions on state controlled real property. The claimant under this subdivision (a)(1)(C) must establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures;
- (H) Negligent construction of state sidewalks and buildings;

FINDINGS OF FACT

According to the Claimant's more definitive statement and her testimony at trial, she had an accidental fall at the 5th Avenue entrance to the James K. Polk State Building on June 9, 2010. She stated that the building security guards waved their hands to come into the entrance because of the severe thunderstorm that was occurring at the time. She reached the handrail to go down the steps. The handrail was placed too far down the stairs and then she slipped from the top and fell to the bottom of the stairs. She alleges she fell because the steps did not have a non-skid

surface and because she could not reach far enough to grab the handrail. When she felt herself falling, she grabbed her two-year old daughter (to keep her from falling) and they both fell down the steps. The Claimant describes her fall this way:

I reached for the handrail first, and I couldn't get the handrail, and when I couldn't get the handrail, I could see her falling. So I reached for her and just went with her.
Trial Transcript page 45.

Ms. Newcomb suffered bodily injury and was taken by ambulance to Baptist Hospital (now St. Thomas) in Nashville, Tennessee. She suffered injuries to her neck, back, hip, arm and kidneys. She still suffers from these injuries and from post-traumatic stress disorder and because of her injuries, she has lost earnings and her home.

During her testimony, Ms. Newcomb entered several pictures into evidence showing improvements made to the steps some six weeks after her fall. She entered these pictures to show that the State took remedial measures to correct the steps after her fall. The Claimant called her daughter, Cassie Osborn, as a witness who corroborated the Claimant's testimony. The Tribunal believes and accredits the testimony of the Claimant.

The State called Patti Hoover and Ben Sanderfur who were facility managers for the State of Tennessee at the time of the accident. Both testified that they had no personal knowledge of injuries on the steps in question before the accident. Ms. Hoover testified there were no entries in the Security Incident Tracking System (SITS) concerning incidents on the steps in question before the accident. Ms. Hoover admitted that improvements were made to the handrails and steps sometime after the accident. As far as building security, the security guards worked for Walden as a contractor for the State of Tennessee. The Tribunal believes and accredits the testimonies of Ms. Hoover and Mr. Sanderfur.

CONCLUSIONS OF LAW

In order to establish a claim under Tenn. Code Ann. § 9-8-307(a)(1)(C) and (H), the Claimant must prove the elements of common law negligence: (1) a duty owed to the plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) injury or loss; (4) cause in fact; and (5) proximate cause. *Kilpatrick v. Bryant*, 868 S.W.2d 594 (Tenn.1993); *Lewis v. State*, 73 S.W.3d 88, 92 (Tenn.Ct.App. 2001).

The Tribunal will first analyze whether the Claimant has proved that the area where she fell was a negligently constructed steps and handrail under Tennessee Code Ann. § 9-8-307(a)(1)(H). There is nothing in the record's exhibits and testimony that suggests that the steps were constructed in a negligent manner. The only proof that can be ascertained from the witness testimony was not that the handrail was constructed in a defective manner but that it started one step down from the top step. Therefore, there is no foundation for a claim based on this jurisdictional basis.

We now turn to the claim based on Tennessee Code Ann. § 9-8-307(a)(1)(C) of a negligently maintained dangerous condition on state real property. The first question turns on whether a dangerous condition existed. Although the law in this area has continued to evolve, it is probative to look at the most recent cases involving the tort liability of governments. Our Court of Appeals, in a case involving a fall at a state prison picnic shelter, opined:

As we stated in a case brought against a municipality under the Governmental Tort Liability Act, [a]ll the cases recognize that the question of whether the defect is actionable is to be determined not alone from its height or depth, but from all the circumstances. The test is the degree of danger, or possibility of injury, from the defect. Of course, anything that in fact causes harm is to some degree dangerous; but to impose liability, the thing must be dangerous according to common

experience. *Henry v. City of Nashville*, 318 S.W.2d 567, 568 (Tenn.Ct.App.1958).

Rouse v. State, E2004-02142-COA-R3CV, 2005 WL 2217050 (Tenn. Ct. App. Sept. 13, 2005)

In the present case, the Tribunal must determine whether the placement of the handrail and the steps were “dangerous according to common experience.” *Id.* Furthermore, the Claimant must show that if the condition was dangerous, then notice had been given to State officials of the dangerous condition prior to the accident.

The plaintiff has the burden of proof to establish that the State negligently created or maintained a dangerous condition, that the risk presented by the dangerous condition was foreseeable, and that notice had been given to the proper official prior to the injury in time sufficient to take remedial action. *Hames v. State*, 808 S.W.2d 41, 44 (Tenn. 1991).

Dobson v. State, 23 S.W.3d 324, 330 (Tenn. Ct. App. 1999)

The Claimant has attempted to show that the State knew or should have known of a dangerous condition by entering evidence of remedial measures after her accident. Although it is clear to the Tribunal that the State did improve the steps and the handrail after the Claimant’s accident, these remedial measures cannot be used to prove liability according to the Tennessee Rules of Evidence.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove strict liability, negligence, or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving controverted ownership, control, or feasibility of precautionary measures, or impeachment.

Tenn. R. Evid. 407

This is a severe rule of law. It prevents plaintiffs from proving dangerous conditions by entering evidence of changes made after the fact. However, the Tribunal cannot make law; it must follow the law on every point as enacted by the General Assembly and interpreted by our Appellate Courts.

Furthermore, there is no showing by the Claimant of other accidents or injuries that have occurred on the steps in question. There is also no proof that the steps were inherently dangerous.

The Claimant, by preponderance of the evidence, has failed to prove: (1) That the State had negligently created or maintained a dangerous condition and (2) That if such a condition existed, the State knew or should have known of its existence.

The Tribunal recognizes that the Claimant has suffered much personal injury and loss because of this accident. However, because the Claimant has not carried her burden of proof, this claim must be dismissed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That judgment is rendered to the State of Tennessee and this claim is respectfully dismissed.
2. That the court costs, if any, are taxed to the Claimant.
3. That is this a final judgment for purposes of request for an *En Banc* hearing before the entire Claims Commission or appeal to the Court of Appeals.

ENTERED this 31 day of March, 2014.



ROBERT N. HIBBETT
Claims Commissioner
Sitting as the Trial Judge of Record

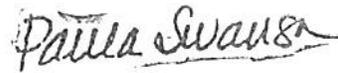
CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 2nd day of April, 2014.



PAULA SWANSON
Administrative Clerk
Tennessee Claims Commission