

**IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
WESTERN DIVISION**

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CLAIMS COMMISSION
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VIRGINIA MYERS,

Claimant,

CLAIM NO. T20120809

STATE OF TENNESSEE,

Defendant

JUDGMENT

This premises liability claim arises from Claimant's fall on February 14, 2011, in the Department of Motor Vehicle office, hereinafter referred to as DMV, in Paris, Tennessee. 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 the Paris DMV; (2) whether the State's negligence, if any, was the legal 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.

The parties have stipulated that Claimant's medical bills, totaling twelve thousand ninety-nine dollars (\$12,099), were medically necessary and causally related to Ms. Myer's fall. (Tr., Vol. 1, p. 7, lines 10-14; Tr. Ex. 4) In addition, the parties stipulated that Contract Service Cleaning, whose employee Larry Tidwell mopped the DMV on the day of Myers' fall, was an independent contractor and not an employee of the State of Tennessee. (Tr., Vol. 1, p. 8, lines 13-19)

II.

FACT TESTIMONY

Claimant's daughter, Marena Sherill Laws, testified on her behalf. Laws stated that on February 14, 2011, her mother, Virginia Myers, went with her to the DMV in Paris, Tennessee, to proffer proof of Law's residency. (Tr., Vol. 1, p. 19, line 8- p. 20, line 7) Laws testified that she did not notice any wet-floor signs or other caution signs when they entered the DMV. (Tr., Vol. 1, p. 20, lines 16-18) Laws testified that Myers did not immediately come up to the counter with her, but waited until Laws motioned for her to come up. Laws stated that the floor was not wet when either she or her mother walked up to the counter. (Tr., Vol. 1, p. 20, line 25- p. 21, line 16) Laws said there were three state employees behind the counter when she and her mother approached it. (Tr., Vol. 1, p. 21, lines 16-22) Laws further testified that after she and her mother reached the counter, they were facing the counter with their backs to the chairs where they had been waiting for assistance. Laws said she and her mother could not see what was going on behind them. (Tr., Vol. 1, p. 22, lines 1-7)

Laws said after she and her mother spoke to the officials behind the counter, she was directed to the end of the counter to get her picture taken. (Tr., Vol. 1, p. 22, lines 8-12) Laws said that as they walked to where they were directed, she was a couple of steps in front of her mother. Laws said she did not see her mother as she began falling, but saw her when her head hit "a short door that led to the back of the counter." (Tr., Vol. 1, p. 23, lines 18-19) She said her mother was obviously hurting and wanted someone to get her out of the floor. (Tr., Vol. 1, p. 24, lines 8-9) Laws testified that after her mother's fall, she quickly had her picture taken, then took her mother to the emergency room. (Tr., Vol. 1, p. 25, line 12- p. 26, line 15) Laws said her mother did not want to go to the emergency room by ambulance, though DMV employees offered to call one. (Tr., Vol. 1, p. 28, lines 2-8)

When asked if she knew what caused her mother to fall at the DMV, Laws replied, "Yeah, the floor was wet." (Tr., Vol. 1, p. 26, line 18) Laws further stated that her knees were damp from getting her mother off the floor. (Tr., Vol. 1, p. 29, lines 4-5) Laws stated that before her mother's fall, she hadn't seen any caution signs and she had not seen anyone mopping. (Tr., Vol. 1, p. 27, lines 10-17)

Laws said she and another DMV customer helped Virginia Myers out to the car. (Tr., Vol. 1, p. 29, lines 12-18) Laws said when they were on the way to the hospital, her mother "cried when I hit bumps and things like that. She thought I was going faster than I was. She was complaining about a headache." (Tr., Vol. 1, p. 30, lines 1-3) Laws testified that her mother also complained about her neck and shoulder, and was having trouble with her leg as she tried to walk to the car. (Tr., Vol. 1, p. 30, lines 6-8)

Laws testified about how the fall had affected her mother. She said Myers "has a hard time moving the arm up and down." (Tr., Vol. 1, p. 30, lines 16-17) Laws has to help her with heavy lifting and storing things, such as dishes and canned goods, which have to be lifted above her waist. (Tr., Vol. 1, p. 30, lines 17-20) Laws said there are a number of other things which cause her mother discomfort, such as "sweeping, mopping, laundry." (Tr., Vol. 1, p. 31, lines 12-13)

Laws said right after the injury her mother was in pain and grumpy. She also was on medication that made her drowsy. (Tr., Vol. 1, p. 31, lines 19-23) Laws said that for a couple of weeks after the fall Myers needed a lot of help and assistance, even with getting in and out of bed and with personal hygiene and getting a bath. (Tr., Vol. 1, p. 32, line 1- p. 33, line 2)

On cross examination, Laws was asked about a 2009 conviction for "fraudulent check for stop payment." (Tr., Vol. 1, p. 33, lines 24-25; Tr. Ex. 5)

Sandy Higgs also testified for Claimant. She stated that prior to February 14, 2011, she had never met Ms. Myers and that she has not socialized with her or even talked to her since the fall. (Tr., Vol. 1, p. 35, line 24- p. 36, line 5) Higgs said she was at the Paris DMV on February 14, 2011 because her own mother needed to "either renew her license or change of address on it or something." (Tr., Vol. 1, p. 36, lines 14-15) Higgs estimated that she arrived at the DMV "between 4:00 and 4:30, something like that." (Tr., Vol. 1, p. 40, line 19) Higgs stated that when she came in the DMV, she did not see any warning signs about the wet floor. (Tr., Vol. 1, p. 44, lines 16-18)

Higgs said she and her mother were sitting in the chairs talking when a man came in and "started mopping the floor up against our feet; up around the people at the

counter.” (Tr., Vol. 1, p. 45, lines 15-17) Higgs said he was mopping behind the women up at the counter. (Tr., Vol. 1, p. 46, line 7) “And you know, I just looked at my mother, you know, I thought they’d be mopping the floor after it was closed. They were mopping with people standing there.” (Tr., Vol. 1, p. 46, lines 8 - 11) Higgs explained she knew from the places she had worked in that “you’re not really supposed to mop the floor when people’s there, especially not without a wet floor sign.” (Tr., Vol. 1, p. 46, lines 14-15) “Because somebody can fall and get hurt.” (Tr., Vol. 1, p. 46, line 18) Higgs said after the man finished mopping, he took the mop back to the bucket and went outside to get the rug. (Tr., Vol. 1, p. 47, lines 14-16) Higgs stated she saw nothing that would have prevented the DMV manager from seeing the person who was mopping the floor. (Tr., Vol. 1, p. 55, line 22- p. 56, line 5)

Higgs insisted that she saw that the floor was wet before Ms. Myers fell. (Tr., Vol. 1, p. 46, lines 22-24) Higgs estimated only three and a half or four minutes passed between the time she and her mom were sitting in the chairs and Ms. Myers left where she was at the counter. (Tr., Vol. 1, p. 47, line 7) Regarding the fall, Higgs testified: “She slipped; her feet went out from underneath her; the back of her head hit the door [the half door that goes behind the counter] really hard.” (Tr., Vol. 1, p. 49, lines 9-11) Higgs said she actually saw Ms. Myers fall. (Tr., Vol. 1, p. 46, lines 22 -24). Higgs further testified that it did not appear that Myers tripped over her flip-flops and she noticed after the fall that the floor was still wet. (Tr., Vol. 1, p. 50, lines 8-15)

Higgs testified that she could tell Myers was hurt. “She was holding her head and making a noise, you know. You can tell she was in pain.” (Tr., Vol. 1, p. 51, lines

20-22) Higgs said she and Myers' daughter helped Myers up off of the floor. (Tr., Vol. 1, p. 52, lines 19-24)

Higgs testified that even though she witnessed the fall, DMV employees did not ask her to give a statement regarding Myers' fall. (Tr., Vol. 1, p. 53, lines 8-17) Higgs said she gave Myers' daughter her name and number in case they needed her help, but had never been promised anything for her testimony. (Tr., Vol. 1, p. 53, line 18- p. 55, line 18)

Higgs acknowledged that she has a 2008 criminal conviction for fraudulently obtaining TennCare. She said this was the first time she had been in trouble with the law. (Tr., Vol. 1, p. 56, lines 21- p. 57, line 9) She explained that her mother gave her some pills and she gave them to another person she was to give them to. "[T]he State just automatically assumed with me being on them they were my pills . . ." (Tr., Vol. 1, p. 57, lines 13-15)

DMV examiner Terry Bradford also testified in this matter. Bradford, now retired, was a DMV examiner on February 14, 2011. (Tr., Vol. 1, p. 59, lines 10-14) Bradford testified that a wet hard-tile floor can be slippery to walk on. (Tr., Vol. 1, p. 60, lines 20-23) When asked whether such a floor could be slippery even when it's damp, Bradford responded, "I supposed it could be, yes." (Tr., Vol. 1, p. 61, line 1) He further acknowledged that he and other members of the DMV staff have a duty to warn their customers of known dangerous conditions. (Tr., Vol. 1, p. 61, lines 13-18) He also acknowledged that he had an obligation to stop a dangerous condition of which he was aware. (Tr., Vol. 1, p. 63, lines 6-9)

Bradford testified that the hours for the DMV were set by the State of Tennessee and that the cleaning service mopped and cleaned between 8:30 a.m. and 5:00 p.m. (Tr., Vol. 1, p. 61, line 25- p. 62, line 5) He acknowledged that Mr. Tidwell, the cleaning service employee, would mop while he and other DMV employees were behind the counter and that DMV employees could see him mopping on the other side of the counter. (Tr., Vol. 1, p. 62, lines 15-25) Bradford said he was aware that Larry Tidwell had mopped the floor on February 14, 2011. (Tr., Vol. 1, p. 63, lines 10-12)

Bradford said he did not see Ms. Myers fall, but he heard her head hit the door. (Tr., Vol. 1, p. 64, lines 21-22) Bradford said he looked over the counter and asked Claimant if she was okay. He said she looked dazed and uncomfortable and that her head was against the door. (Tr., Vol. 1, p. 65, lines 3-25)

When asked about policies and procedures of the DMV following the injury of a customer, Bradford said it would be standard procedure to get statements from everyone involved. (Tr., Vol. 1, p. 66, lines 14-17) Bradford was shown a copy of the application Ms. Myers filled out that day which contained these hand-written words added by Bradford, "Floor was dry." (Tr., Vol. 1, p. 67, lines 16-18; Tr. Ex. 2) When asked if he had gone on the other side of the counter, Bradford replied, "No, I did not." (Tr., Vol. 1, p. 67, line 21)

Bradford was then asked to identify the witness statement he made and signed the day of Myers' fall. (Tr., Vol. 1, p. 70, lines 3-5; Tr. Ex. 6) Bradford acknowledged that he talked with Larry Tidwell the day of his pre-trial deposition. (Tr., Vol. 1, p. 73, lines 14-24) As requested, Bradford then read from his deposition testimony: "[W]e believe that the reason for her fall was not because of the wet floor because when Larry

finished mopping, it was never wet.” (Tr., Vol. 1, p. 75, lines 15-18) Bradford stated that he “marveled over how [Tidwell] could get the floor so clean and there was never standing water. They were never wet.” (Tr., Vol. 1, p. 80, lines 18-20) When the Commission asked whether standing water and wet could be two different things, Bradford replied simply: “Possibly.” (Tr., Vol. 1, p. 80, line 23)

Bradford agreed hypothetically, that if he had seen Tidwell mopping behind Myers, he probably would have had the duty to warn her about the wet floors. (Tr., Vol. 1, p. 78, lines 1-6) However, it was Bradford's contention that the floors already had been mopped before Myers approached the counter. (Tr., Vol. 1, p. 79, lines 7-10) He also stated the floor was dry when she approached the counter. He said he would have been able to tell if it wasn't dry. When asked what Tidwell was doing when Myers fell, Bradford stated that he believed Tidwell “was in the process of picking up the wet-floor sign.” (Tr., Vol. 1, p. 79, lines 22-23)

Bradford further agreed that he had made a notation on the application that Myers was “wearing flip-flops over white socks.” (Tr., Vol. 1, p. 80, line 1; Tr. Ex. 2) He said he made the notation because he believes “that was the reason for her fall.” (Tr., Vol. 1, p. 80, lines 3-4)

Pansy Page, station manager at the Paris DMV, also testified in this cause. Page agreed that she and her staff have the responsibility to warn customers of dangerous conditions they are aware of. (Tr., Vol. 1, p. 83, lines 18-22) She also acknowledged the cleaning service mopped the floors, including high traffic areas during the same hours the DMV was open for customers. (Tr., Vol. 1, p. 84, lines 8-15)

Page said that if she were behind the counter when Tidwell was mopping the high traffic area, she would be able to see him from behind the counter “[m]ost of the time, probably.” (Tr., Vol. 1, p. 85, lines 18- 21) Page agreed, hypothetically, that if she saw Mr. Tidwell mopping behind Ms. Myers, she had a duty to warn her of the potential danger. (Tr., Vol. 1, p. 97, lines 19-23) However, she testified that she did not see Tidwell mop that day. (Tr., Vol. 1, p. 98, lines 3-5)

Page further testified that she was behind the counter on February 14, 2011, but she did not see Myers fall. (Tr., Vol. 1, p. 87, lines 21-25) “I heard a thud and then I heard somebody say, Are you okay.” (Tr., Vol. 1, p. 88, lines 4-5) Page testified that Myers appeared to be embarrassed and in pain after her fall. (Tr., Vol. 1, p. 90, lines 21-24)

Page said she didn’t know where Tidwell was when Myers fell. “I know he did come in at one point. He was back and forth cleaning.” (Tr., Vol. 1, p. 88, lines 11-13) Page acknowledged testifying during her deposition that she believed Tidwell “came walking up as I was talking to [Myers].” (Tr., Vol. 1, p. 90, lines 10-11)

Page said part of her responsibility as branch manager of the DMV was to report and document incidents like Ms. Myers’ fall. (Tr., Vol. 1, p. 91, lines 6-14) Page said she emailed Doneida Harris about the incident the next day. In that email she said: “The first thing I did is look to see if the floor was still wet and it was dry.” (Tr., Vol. 1, p. 92, lines 16-19; p. 93, lines 2-4) Page said she looked “because the wet-floor sign was still sitting there.” (Tr., Vol. 1, p. 93, lines 11-12) Page further testified that her email to Harris also said, “The janitor was cleaning and he was removing the caution, wet-floor sign when she fell.” (Tr., Vol. 1, p. 99, lines 4-6)

Page said she got signed statements related to this incident. (Tr., Vol. 1, p. 92, lines 5-7) Page acknowledged that the first word on Ms. Myers statement is the word "slipped," and that she agreed with it when she signed it. (Tr., Vol. 1, p. 94, lines 9-14) Page also agreed that the statement she got from Larry Tidwell the day of the fall included the following language: "I was cleaning the Paris drivers' service center. As I walked in the door a lady had fallen." (Tr., Vol. 1, p. 95, lines 8-10; Tr. Ex. 7)

Page testified that she had been branch manager of the Paris DMV for five years preceding Claimant's fall and she didn't know of anyone else who fell because of a wet floor. (Tr., Vol. 1, p. 100, lines 1-8)

Larry Tidwell also testified in this cause. Tidwell stated that he is married to Vicky Tidwell, owner of Contract Service Cleaning. (Tr., Vol. 1, p. 102, line 25- p. 103, line 7) Tidwell stated that he works regularly for his wife's company. (Tr., Vol. 1, p. 104, lines 11-13) Tidwell testified that in 2011, one of the buildings he cleaned was the Paris DMV, which he was required to clean between 8:30 a.m. and 5:00 p.m. each day, Monday through Friday. (Tr., Vol. 1, p. 107, line 14- p. 108, line 11) He indicated he would have come in later to mop if he had been allowed to do so. (Tr., Vol. 1, p. 114, lines 19-22) Tidwell testified that when he is mopping, he can see the DMV employees behind the counter and they can see him. (Tr., Vol. 1, p. 116, lines 12-16)

When asked whether it was dangerous after he wet mopped the floor, Tidwell replied, "You know, I really ring my mop out real tight. ...Get all the water out of it and then I just get over it." (Tr., Vol. 1, p. 111, lines 16-19) He confirmed that he mops with water and soap. (Tr., Vol. 1, p. 112, lines 6-7) When asked whether a dangerous condition can be created even when the floor is damp, Tidwell replied: "Yeah, uh-huh,

yeah.” (Tr., Vol. 1, p. 112, line 10) But Tidwell said there is just one door going into the facility and he has a wet floor sign right where customers walk in. (Tr., Vol. 1, p. 112, line 13-p. 113, line 7)

When asked whether he mopped the floor the day Ms. Myers fell, Tidwell replied: “A little bit earlier I did, yes.” (Tr., Vol. 1, p. 117, line 20) When asked what Myers was doing just before she fell, Tidwell responded, “She was getting up and going straight towards the counter and her flip-flop bent back.” (Tr., Vol. 1, p. 118, lines 13-14) Tidwell then stated that it “looked to me like she fell backwards.” (Tr., Vol. 1, p. 119, line 23) Tidwell was then asked to comment on his deposition testimony where he stated: “Now I guess she fell forward—forward or backwards, I don’t know.” (Tr., Vol. 1, p. 120, lines 16-17)

When asked whether Myers hit anything when she fell, Tidwell replied: “I didn’t see her fall---I didn’t see her do nothing but just her leg bent back and then she fell to the ground.” (Tr., Vol. 1, p. 120, line 25- p. 121, line 2) He said he didn’t see her hit anything when she fell. (Tr., Vol. 1, p. 121, lines 3-7) Tidwell also said he saw Myers get off the floor immediately after she fell. (Tr., Vol. 1, p. 122, lines 22-24) Tidwell summarized, “Alls I’m telling you is I was laying my rug down and I seen her flip-flop turn backwards.” (Tr., Vol. 1, p. 124, lines 21-22) Tidwell said he knew the floor was dry and “[t]hat’s why I went outside to get the rug.” (Tr., Vol. 1, p. 126, line 2) He did acknowledge that he did not get down on the floor and check it with his hand after Myers’ fall. (Tr., Vol. 1, p. 133, lines 12-14)

Tidwell was then asked about the statement he gave to Pansy Page about the incident. The statement reads: “I was cleaning the Paris driver’s service center. As I

walked in the door, a lady had fallen.” (Tr., Vol. 1, p. 127, lines 22-23) Tidwell acknowledged he didn’t tell Page that he saw Myers’ flip-flop bend. (Tr., Vol. 1, p. 128, lines 19-21) Tidwell explained, “She didn’t ask me that.” (Tr., Vol. 1, p. 128, line 24)

When asked on cross-examination what time he mopped the floor on February 14, 2011, Tidwell testified, “I think I get there around 4 o’clock.” (Tr., Vol. 1, p. 130, line 23) “I know it was getting real close to them closing when—when this happened.” (Tr., Vol. 1, p. 131, lines 2-3) He acknowledged that his witness statement was signed around 4:35 p.m. (Tr., Vol. 1, p. 134, lines 2-3) Tidwell was then asked about his deposition testimony in which he stated, “I got there about 3:00, 3 o’clock.” (Tr., Vol. 1, p. 131, lines 17-18) He was also asked about the part of his deposition testimony which indicated he mopped about 3:30 p.m. (Tr., Vol. 1, p. 131, line 25- p. 132, line 2)

Tidwell emphasized that he rings his mop out two or three times. (Tr., Vol. 1, p. 132, line 20) “I don’t have no water on the floor, just real dry mopping.” (Tr., Vol. 1, p. 132, lines 23-24)

Vickie Tidwell, owner of Contract Service Cleaning, also testified in this cause. Vickie Tidwell testified that her contract with the State required cleaning services to be performed between 8:30 a.m. and 5:00 p.m. (Tr., Vol. 2, p. 141, lines 21-25; Tr. Ex. 1) She further testified that most of her state facilities contracts required the work be done after hours. (Tr., Vol. 2, p. 142, lines 4-6) Ms. Tidwell acknowledged that the State wanted the work done during business hours because of security concerns regarding fake IDs. (Tr., Vol. 2, p. 146, lines 15-23) She further acknowledged that someone with the State could have stayed after hours while they cleaned. (Tr., Vol. 2, p. 147, lines 3-6)

Ms. Tidwell further testified that the contract required that the hard surfaces be wet mopped each business day. (Tr., Vol. 2, p. 143, lines 8-11) Ms. Tidwell stated she was aware that a wet tile floor that is being mopped can be slippery and dangerous. (Tr., Vol. 2, p. 144, lines 10-19)

Virginia Myers testified on her own behalf. She stated that at the time of her fall she did not have a full time job. "I cleaned houses, ironed people's clothes, different things." (Tr., Vol. 2, p. 149, lines 7-8) Myers stated that although she had a knee replacement in 2009, she did not have significant restrictions on her physical abilities prior to this fall. (Tr., Vol. 2, p. 149, lines 9-23)

With regard to the incident at the DMV, Myers stated that her daughter asked her to go there to show her ID and state that her daughter lived with her. Unfortunately, Myers couldn't find her own driver's license, so she had to apply for a duplicate license so she could help her daughter. (Tr., Vol. 2, p. 150, lines 4-20)

Myers testified that when she came into the Paris DMV facility through the back door she did not see a wet-floor sign or any kind of caution sign. Nor did she see one in the waiting area. (Tr., Vol. 2, p. 151, lines 8-17) She said the floor appeared to be dry. (Tr., Vol. 2, p. 151, line 19) Myers said when she first got there she got a number to get her picture taken so she could get her duplicate license. After she got it, she sat down in the waiting area until her daughter motioned for her to come up. (Tr., Vol. 2, p. 151, line 25- p. 152, line 9)

Then, Myers said, "I came back up to the counter on the side of her [my daughter] because I had to show my ID and say that she did live with me." (Tr., Vol. 2,

p. 153, lines 20-22) Myers said she stood up at the counter this second time less than five minutes. (Tr., Vol. 2, p. 154, lines 3-8) She said during that time she was facing the counter; she did not see anyone mopping the floor. And no one behind the counter told her to be careful because someone had been mopping the floor. (Tr., Vol. 2, p. 154, lines 9-24)

Myers said she and her daughter left the counter when it was time for her daughter to have her picture taken. “. . . I turned and by the time I took my second step, I felt myself falling.” (Tr., Vol. 2, p. 155, lines 14-15) Myers said she tried to grab her daughter’s arm to keep from falling. (Tr., Vol. 2, p. 155, lines 16-17) Myers indicated that when she fell, her feet slipped out from under her. (Tr., Vol. 2, p. 155, line 25- p. 156, line 2) Myers said she remembered being very embarrassed and that everyone warned her not to move. (Tr., Vol. 2, p. 156, lines 17-21) She said someone helped her daughter get her to a chair. Myers testified she was too embarrassed to ride a mile in an ambulance to the Henry County Medical Center. (Tr., Vol. 2, p. 157, lines 4-21)

Myers said Pansy Page asked her to sign something saying she was refusing an ambulance. Then Page, without asking her what had happened, “wrote something out and brought it over to me and she asked me to sign it.” (Tr., Vol. 2, p. 158, lines 11-12) Myers stated, “I never told her [Page] what happened.” (Tr., Vol. 2, p. 158, line 9) When asked whether she told Page her head and neck were hurting, Myers replied, “I was telling my daughter that my head, my neck and my shoulder was killing me.” (Tr., Vol. 2, p. 159, lines 1-2) Myers acknowledged the statement prepared by Page was signed about 4:45: she said she knew it was “after 4:00” when she was in the DMV. (Tr., Vol. 2, p. 159, line 12)

Myers said she was helped to the car by her daughter and other women. (Tr., Vol. 2, p. 159, lines 20-23) “I remember a lady pulling up as we’re walking to the car and offering to give her phone number and all just in case a case came up or whatever to help.” (Tr., Vol. 1, p. 160, lines 2-4)

Myers stated that her flip flop did not turn up or cause her to fall. (Tr., Vol. 2, p. 160, lines 20-22)

Myers said after the fall she was treated for injuries to “[m]y head, my neck, and my left shoulder, and my left knee and my ankle.” (Tr., Vol. 2, p. 161, lines 11-12) Myers said she was given a neck brace at the ER, but that she took it off after Dr. Cran-Carty told her it might make the pain in her neck even worse. (Tr., Vol. 2, p. 161, lines 15-18) Myers said she wore a leg immobilizer “for almost a month.” (Tr., Vol. 1, p. 161, line 25)

Myers said right before she fell she took care of the three grandchildren who were living with her. She said for two weeks after she fell, she wasn’t able to do much. (Tr., Vol. 2, p. 162, lines 7-16) She said for a while after the fall, she had difficulty sleeping, in part because she couldn’t lay on her side, and immediately after the fall she needed help with bathing and with personal hygiene. (Tr., Vol. 2, p. 162, line 20- p. 164, line 16) Myers testified that her left knee, leg and ankle got back to normal soon after the fall. (Tr., Vol. 2, p. 166, lines 12-25)

However, Myers further testified that activities like reaching, making beds, folding linens continue to make the muscles in her shoulders stiff. (Tr., Vol. 2, p. 165, lines 13-17) “So I do so much and I sit down and take a break.” (Tr., Vol. 2, p. 165, line 18) She also noted that her shoulder continues to be stiff when she first gets up in the

morning. (Tr., Vol. 2, p. 167, lines 17-18) When asked to describe her pain on a day-to-day basis, Myer responded: "It's like a 5 or 6. I mean, it bothers me pretty much once I been up just moving it, doing stuff." (Tr., Vol. 2, p. 168, lines 8-10)

On cross-examination, Myers admitted she was convicted of financial transaction card fraud over \$500 in 2003. (Tr., Vol. 2, p. 169, lines 16-20)

III.

MEDICAL TESTIMONY

Wendy Cran-Carty, M.D., an anesthesiologist and pain management specialist in Paris, Tennessee, testified on behalf of Claimant by deposition on July 12, 2013. Cran-Carty testified that currently 100% of her practice is managing chronic pain. (Tr. Ex. 3, p. 6, lines 5-7)

Dr. Cran-Carty testified that she treated Claimant for some chronic pain issues even before her fall at the Paris DMV. (Tr. Ex. 3, p. 7, lines 10-12) Cran-Carty testified that prior to February 14, 2011, she was treating Myers for pain in the upper back (thoracic) and under the breast on the left side. (Tr. Ex. 3, p. 8, lines 7-14) Dr. Cran-Carty said she had not treated Claimant for neck pain or shoulder strain prior to the fall. (Tr. Ex. 3, p. 8, lines 18-20)

Dr. Cran-Carty testified that the first post-fall appointment with Myers was on February 24, 2011. (Tr. Ex. 3, p. 8, line 25) The nurses' notes from that day indicate Myers had been treated at the emergency room where she was given a Toradol shot and sent to physical therapy and that she was taking hydrocodone previously prescribed by Cran-Carty. (Tr. Ex. 3, p. 9, lines 4-17) Cran-Carty said the February 24th evaluation showed a decreased range of motion in her left shoulder and tenderness

in her thoracic spine, which continued from before the fall. (Tr. Ex. 3, p. 9, lines 19-24) Cran-Carty testified that the pain in her spine was worse, though not significantly so, than before the fall. (Tr. Ex. 3, p. 10, lines 8-14)

Cran-Carty opined that the treatment Myers received at the emergency room was medically necessary and casually related to the fall. (Tr. Ex. 3, p. 12, lines 1-6) She further testified that the physical therapy Myers received was directly related to her fall on February 14, 2011. (Tr. Ex. 3, p. 13, lines 6-7)

Cran-Carty testified that Myers complained of increased discomfort after the fall and she provided her "with additional pain medication coverage. She was on hydrocodone 10 milligrams four times a day before. And I added oxycodone 10 milligrams one per day for additional nighttime discomfort." (Tr. Ex. 3, p. 13, lines 9-13) Cran-Carty stated that the additional pain medication was started on June 30, 2011, and continued until June 11, 2012. (Tr. Ex. 3, p. 14, lines 3-16)

In addition, Claimant came to her office for frequent visits. Dr. Cran-Carty performed some trigger point injections on Claimant on August 11, 2011, but they apparently gave Claimant no relief. (Tr. Ex. 3, p. 15, lines 19-25) Cran-Carty testified that the last visit at which neck or shoulder pain was mention was in February, 2012, a year after the fall. (Tr. Ex. 3, p. 19, lines 11-22)

Dr. Cran-Carty testified on cross-examination she terminated her relationship with Claimant on June 11 because of inconsistencies in taking some pain medications. (Tr. Ex. 3, p. 19, line 23- p. 20, line 15) Dr. Cran-Carty testified that she was 80-90% sure that the trigger point injections were for the "neck and trapezius area versus the middle back, which is at the bra strap area." (Tr. Ex. 3, p. 27, lines 19-21)

IV.

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 Wendy Cran-Carty, M.D., whose deposition was 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).

The proof in this case was highly disputed. Employees for the state and the independent contractor contended that the floor at the DMV was dry when Claimant fell and that her flip-flops were the cause of her fall. Claimant contends that the floor was dry when she walked up to the counter to vouch for her daughter's address, but wet or damp when she turned to walk away from the counter because Larry Tidwell, an employee of Contract Cleaning Service, had been mopping behind her. She claims she slipped on the wet surface and fell, hitting her head against the half door in the counter.

If these conflicting stories were the only proof, this might be a difficult case to decide. However, several other pieces of evidence make it clear that the weight of proof is with the Claimant. First, it was uncontroverted that the contract between the State of Tennessee and the cleaning service required the company to clean the DMV (including wet-mopping the floors) during the hours when with driving center was open and customers were present. Under Tennessee law, this gave the State a duty to warn against latent or dangerous conditions on the property (i.e. wet floors) of which it was aware. Relatedly, there was another customer in the DMV, Sandy Higgs, who did not

know Virginia Myers before February 14, 2011, and who has not talked to her since. (Tr., Vol. 1, p. 35, line 24- p. 36, line 5) Ms. Higgs, whose testimony at trial was extremely credible, has no dog in this fight. Yet her story perfectly fits with the one told by Claimant. Higgs testified that she saw Larry Tidwell mopping behind Claimant and her daughter as they stood up at the counter facing away from Tidwell. (Tr., Vol. 1, p. 45, line 7) She then saw Myers slip on the wet floor and fall backwards, hitting her head on the door in the counter. (Tr., Vol. 1, p. 49, lines 9-11) Higgs said it did not appear that Myers tripped over her flip-flops and that she noticed after Myers' fall that the floor was still wet. (Tr., Vol. 1, p. 50, lines 8-15)

Corroborating Higgs' story, Claimant's daughter, Marena Sherill Laws, testified that her knees were damp from getting her mother up off of the floor. (Tr., Vol. 1, p. 29, lines 4-5)

The story of Larry Tidwell is all over the map. In a statement he signed the day of the fall, Tidwell stated that when he walked into the building, Myers had already fallen. (Tr., Vol. 1, p. 127, lines 22-23; Tr. Ex. 7) At the trial of this cause, he testified he had come back into the building to put the rug back down when he actually saw Claimant fall as her flip-flop bent back while she was walking up to the counter. He first said she fell backwards. (Vol. 1, p. 118, line 13- p. 119, line 23) When asked to comment on his deposition testimony, he said she must have fallen forwards. He finally said he didn't know. (Tr., Vol. 1, p. 120, lines 16-17) He also didn't know what time he mopped. In his deposition, he apparently testified he mopped around 3:30 p.m., which presumably would have allowed time for the floor to dry before Myers arrived. (Tr., Vol. 1, p. 131, line 25- p. 132, line 2) At the trial of this cause, he testified it was between

4:00 and 4:30 p.m. (Tr., Vol. 1, p. 130, line 23) He acknowledged the statement about the fall was signed at 4:35 p.m. (Tr., Vol. 1, p. 134, lines 2-3)

DMV employees Pansy Page and Terry Bradford were in a position from behind the counter to see Larry Tidwell mopping the floor in front of the counter. (Page said she didn't see him mop that day.) They admit they didn't warn the Claimant, in keeping with Bradford's claim that the floor was never wet when Tidwell wet-mopped it (Tr., Vol. 1, p. 80, lines 18-20) and with the position that Tidwell had been finished mopping the floor for a while when Myers and her daughter walked up to the counter. (Tr., Vol. 1, p. 79, lines 7-10) Bradford admitted he had not actually gone over to the customer side of the counter after Myers' fall. (Tr., Vol. 1, p. 67, line 21)

If the proof is clear about anything, it is that Claimant fell backwards and hit the back of her head on the half door in the counter of the DMV. This fact, and the nature of her physical injuries, are much more consistent with Claimant's version of the facts (that her feet slipped out from under her) than with the State's version that has her tripping over her flip-flops.

The Commission **FINDS**, and it is not disputed, that the cleaning service was required to wet mop the floor during business hours when customers were present. (Tr. Ex. 9) The Commission **FURTHER FINDS** that Larry Tidwell mopped the floor of the Paris DMV sometime after 4:00 p.m. on February 14, 2011, while Virginia Myers and her daughter were standing at the counter.

The Commission **FURTHER FINDS** that DMV employees, in the mistaken belief that the floor was never wet after Larry Tidwell mopped it with water and soap, or perhaps because they thought the floor had time enough to dry, failed to warn Claimant

and her daughter that the floor was damp and might be slippery before they directed them away from the counter. The Commission **FINDS** that this failure to warn was a breach of the State's duty to Virginia Myers and legal cause of Claimant's fall and resulting injuries.

B. DAMAGES

It is clear, and the State does not dispute, that Claimant sustained injuries in her fall at the Paris DMV. The parties have stipulated medical expenses in the amount of twelve thousand ninety-nine dollars (\$12,099) (Tr. Ex. 4) All of the witnesses testified that Claimant seemed to be in pain immediately after her fall. Claimant and her daughter testified to everyday activities that gave Claimant a great deal of difficulty in the days and weeks after the fall. Claimant testified that the injuries to her knee, leg and ankle resolved in the weeks following her fall, but not the injuries to her shoulder and neck. Dr. Cran-Carty testified that she increased Claimant's pain medication and gave her trigger point injections several months after the fall. (Tr. Ex. 3, p. 14, line 3- p. 15, line 25) She continued to treat Claimant for neck and shoulder pain for at least a year after the fall. (Tr. Ex. 3, p. 19, lines 11-22) Claimant testified that many activities, such as reaching, making beds and folding linens continue to make her shoulders stiff. (Tr., Vol. 2, p. 165, lines 13-17) She continues to have pain of five or six on a ten point scale when she is up and doing certain activities. (Tr., Vol. 2, p. 168, lines 8-10)

The Commission **FINDS** that the following amounts of damages have been proven by a preponderance of the evidence:

- | | |
|-------------------------------|--------------|
| 1. Medical care/services—past | \$ 12,099.00 |
| 2. Pain & Suffering—past | 10,000.00 |

3. Loss of ability to enjoy life—past	3,500.00
4. Pain & Suffering—future	5,000.00
5. Loss of the ability to enjoy life—future	2,000.00

TOTAL \$ 32,599.00

The Commission further **FINDS** that none of the fault should be apportioned to Claimant. The Commission specifically **FINDS** that Claimant fell not because of the kind of shoes she was wearing but because the floor in the DMV had just been mopped and was still wet and slippery.

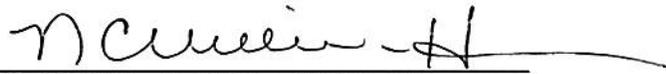
V.

CONCLUSION

It is **ORDERED, ADJUDGED and DECREED** that Claimant, Virginia Myers, is awarded a judgment against Defendant, State of Tennessee, in the amount of thirty-two thousand five hundred ninety-nine dollars (\$32,599.00).

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 hereby certify that a true and correct copy of the foregoing has been mailed by first class U.S. mail, postage prepaid, electronically transmitted, or hand-delivered to:

Mr. Jonathan L. Griffith, Esq.
Mr. Christopher N. Coyne
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Ms. Amanda S. Jordan, Esq.
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Civil Rights and Claims Division
P.O. Box 20207
Nashville, TN 37202

on this the 16th day of December, 2014.



PAULA SWANSON, Clerk