

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE

MIDDLE DIVISION

FILED
IN CLAIMS COMMISSION
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ANGELA CHISM,)	
)	Claim No. T20130628
Claimant.)	
v.)	
)	
STATE OF TENNESSEE)	
)	Regular Docket
Defendant;)	

JUDGMENT FOR CLAIMANT

This matter came to trial before Robert N. Hibbett, Commissioner and Trial Judge of the facts and law, on January 14, 2015 in the City Courtroom of Mount Juliet, Tennessee. This is a regular docket bench trial on the merits. Claimant, Angela Chism, requests damages for injuries sustained when she stepped into a hole on the property of the Tennessee College of Applied Technology (College) in Shelbyville, Tennessee. The State has filed an answer denying liability and asserting affirmative defenses.

Norris A. Kessler, III, Esquire, represented the Claimant. 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 January 28, 2015.

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) 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;

FINDINGS OF FACT

The testimonies of the witnesses are discussed out of order to facilitate understanding of the evidence.

Testimony of Angela Chism

The Claimant, Angela Chism, is a 37-year-old mother of six who was attending the Tennessee College of Applied Technology to become a licensed practical nurse. Before the incident in question, she had never injured her left foot. On November 16, 2011, she had arrived at the College to interview for outstanding student of the year. She had entered the left driving lane of the

College, drove to the end, turned left and parked on the right hand side in the second spot. She was not parked in a handicapped parking space. Once she exited her van, she walked across the driving lane and fell in the pothole. Her left foot went completely into the pothole and she fell back on her rear. She got up and attempted to get the water off her. The weather was terrible because it was raining very hard. She did not see the pothole before she stepped into it.

She identified the pictures of the pothole that were made exhibits as ones that she made shortly after her injury. She stated that she stood in the parking place where she had parked when she took the picture of the pothole in Exhibit number 2. She positively identified the pothole as the one that caused her injury. She identified all the picture exhibits being the same pothole. Exhibit numbers 4 and 5 were identified as showing the parking space she occupied on the day of her injury.

After her fall, she felt extreme pain in her left foot. She was not sure what damage had been done so she went into the building. She was wearing a black dress and black heels. The State of Tennessee stipulated that her shoes were high heels. The Claimant explained that the shoes were high heels and not stiletto

heels.¹ She was comfortable wearing the shoes. She hobbled into the College and entered the restroom to clean off water and evaluate her foot. She then went into the interview that lasted 20 to 30 minutes.

After the interview ended, she was going to stand up but that is when the pain really started. She had to take her shoes off to stand. She explained to the interview committee that she had to remove her shoes to exit. She then left the building and drove back to her home in Winchester. When she arrived home, she made sure her children were fine and went immediately to the hospital. Her pain on the day of the accident was a ten on a scale of one to ten.

At the hospital, they gave her morphine, made x-rays and put a boot on her foot. Hospital personnel told her she had a cuboid three fracture of the left foot. The morphine did help her a little with the pain. She received follow up care from her primary care physician and Dr. Brown. She wore a boot and used crutches for a while. By January, the pain was some better but she could not go without the boot. When she saw Dr. Brown in January, her pain was a six to seven. By March of 2012, the pain was some better and she was able to remove the boot more. However, the pain was still present when she returned to see Dr. Brown in October of 2012. Since her last visit with Dr. Brown, the pain would be

¹ The Claimant showed the shoes in open court. The Tribunal would also describe them as being high, but not stiletto, heels.

better depending on her activity level. If she had more standing, walking or pressure, then the foot would become aggravated, swell and have more pain.

By April 2013, the pain had come back to a level that she could not tolerate or manage. She went back to see Dr. Brown to see if her foot needed fusion or surgery. Her last visit was with Dr. Brown in July 2013. At the time, the foot was still painful but manageable through medication. She spoke with Dr. Brown about surgical options but decided not to do it at the time.

She currently has problems with her left foot. She cannot wear heels for any distance because her foot cannot take the pressure. She can function normally but her foot continues to have nagging pain depending on the circumstance. The Tribunal believes and accredits the testimony of the Claimant.

Testimony of Clyde Bomar

Clyde Bomar is the operations manager, facilities and maintenance supervisor of the Tennessee College of Applied Technology. He held substantially the same position at the time of the incident in question. As part of his responsibilities, he has the duty to maintain the parking lot. This includes trash, safety, and any problems with the lot. He is responsible for the parking spaces and the driving lanes. At the time of the incident, he could not say he knew there was an issue with the parking lot but at the time, he is very sure he

knew there was. At the time of the incident, it was not the right time of year to do repairs because the materials will not bond. He has to wait for two things before he can do repairs: the time of year and the budget.

On a daily basis, he arrives at the College at 5:30 a.m. He walks through the parking lot every day looking for anything out of the ordinary. He would probably notice holes in the parking lot. Currently, he has a hole at the end of the driving lane. Approximately at 6:00 or 6:15 a.m., he physically walks around the building to pick up trash and walks through the entire parking lot.

The College is used by the City almost as a street to access the high school and senior citizens' center behind the facility. Mr. Bomar identified a pothole in the picture exhibit number 2 that was in the driving lane approximately fifteen car widths from the entrance of the building. He agreed the pothole, more likely than not, existed at the time of the Claimant's injury. He also agreed if someone had parked in certain parking spaces that there might be a danger of walking into the pothole on way to the building. However, he did not recall this particular pothole on the day of the incident. He did agree that more likely than not all the pictures showed the same pothole.

Mr. Bomar does not do a written report concerning potholes to his superior, just oral reports. He is sure he reported this to his superior because the

pothole was repaired during warm weather in 2012. Mr. Bomar stated that the pothole in the pictures was on State of Tennessee property. It is used as a city street but it is officially State property. The Tribunal accredits and believes the testimony of Mr. Bomar.

Testimony of Ivan Jones

Ivan Jones is the Director of the Tennessee College of Applied Technology and held that position at the time of the incident in question. He supervises the staff, faculty and programs at the College. The Claimant, Angela Chism, was a student in one of the programs at College.

On November 16, 2011, the Claimant was invited to interview to be chosen as outstanding student of the year. After the committee interviewed her, she hobbled out. The committee asked what had happened and she stated she had stepped out of her vehicle, had stiletto heels, and turned her ankle. It was a rainy day on that day. The committee remarked that it was interesting she did not show any signs of pain or discomfort while they were interviewing her. He watched the Claimant get into her vehicle that was parked in a handicapped space when she exited the building. The distance between the front of the building and the handicapped spot is probably 20 to 25 feet.

Mr. Jones was not familiar, at that time, with any problems with the parking area or street. He was not particularly aware of any potholes in the driving lanes of the parking area. Mr. Jones opined that the pothole in question was not on State property. He stated that it was located on a city street that runs through the College parking lot. He noted that anyone parked in the parking spaces would probably walk past the pothole if they were entering the College. Since he did not usually use that parking lot, he did not recognize the pothole. He further stated that his facilities supervisor, Mr. Bomar, has the responsibility of maintaining and caring for the parking lot. The city street was maintained by the City, and it takes care of the potholes when the weather clears.

He has weekly meetings with Mr. Bomar to discuss problems including potholes. He did not recall issues with the parking lot being discussed prior to the Claimant's injury. Mr. Bomar does inspect the College's property on a daily basis. Mr. Jones was sure that Mr. Bomar was aware that the pothole was there. He did not know whether the pothole in question still exists.

The Tribunal accredits the testimony of Mr. Jones except for his testimony concerning the pothole being the responsibility of the City and that the Claimant was parked in a handicapped parking space. The testimony of Mr. Bomar is contradictory to Mr. Jones' testimony concerning responsibility for the pothole.

Because Mr. Bomar as facilities manager was in a better position to know who had responsibility for the pothole, his testimony is accredited on this issue. The Claimant's testimony that she was not parked in a handicapped space is also accredited.

Testimony of Lloyd K. Brown, M.D. by deposition

Dr. Lloyd K. Brown, M.D. is a board certified orthopaedic surgeon practicing in Winchester, Tennessee. He testified in this trial by deposition. He started treating the Claimant after the incident on January 9, 2012. On his examination of the Claimant, he found that she had left foot tenderness over the lateral aspect of the foot at the cuboid with mild swelling but no bruising. X-rays taken at his office showed an impaction fracture of the cuboid with a piece of the lateral wall displaced with changes at the joint. There are tendons that attach to the lateral side of the cuboid and he felt that the tendon may be continuing to pull off the fracture of the outside of the bone since it was not healing and continuing to hurt.

He had a MRI conducted on the foot. It showed continued edema, or swelling, inside of the bone. She was feeling better at the time and continued to wear the boot. He felt that the fracture needed more time to heal and that the tendon had not pulled loose. He opined that surgery would not make the foot

heal any faster and she should continue wearing the boot. He saw her again in March 2012 and told her he could inject the area but he did not think she needed surgery.

Dr. Brown saw her on April 24, 2013. She continued to complain of pain when she walked, stood, or sat. She also complained of intermittent swelling of the lateral side of her foot. The X-ray showed continued changes and degenerative or arthritic changes at the calcaneocuboid joint. The MRI showed the fracture had healed. There was some mid-foot calcaneocuboid arthritis and arthritis in other joints of the mid-foot. He thought the best treatment would be the modification of her shoe wear and a custom molded orthosis for her foot.

He saw her again in July 2014. She was not able to obtain the orthosis because the cost was prohibitive. He explained some alternative places to obtain a less expensive orthosis. He explained to her that surgery would entail a mid-foot fusion, which would give her a stiff foot and it would probably not alleviate her pain. She indicated to Dr. Brown that she did not want surgery. He told her that she needed comfortable shoes with a good arch and support. If it worsened, she could come back to see him.

He did not assign a permanent impairment directly but opined the impairment for calcaneocuboid fracture with moderate changes with a displaced

fracture is seven percent to the lower extremity. Surgery should be considered the last resort for her foot. Anti-inflammatories or a cortisone type injection for the calcaneocuboid joint can alleviate pain, but it is just temporary.

He testified all the medical bills she received were reasonable and necessary as compared to other medical providers in the area for the same or similar treatment. All the medical treatment charges totaled \$6,914.25. He had testified that the Claimant needs orthotics for her shoes. He stated custom molded orthotics cost between \$400.00 and \$450.00 in the area. The Tribunal finds Dr. Brown's expert testimony aided the Trier of Fact in understanding the evidence and applying the medical facts to the law and therefore accredits his testimony.

Factual Conclusions

1. That the pothole exhibited in the pictures existed at the time of the incident.
2. The pothole is located on property owned and maintained by the State of Tennessee.
3. The Claimant stepped into the pothole and broke her foot.

CONCLUSIONS OF LAW

In order to establish a claim under Tenn. Code Ann. § 9-8-307(a)(1)(C), Ms. Chism 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 there is proof to sustain a 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. 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 pothole that caused the Claimant to fall was “dangerous according to common experience.”

Id. In making this determination, the Court of Appeals, in considering what the State knew and what it should have known about the uneven surface of the floor, how the area was utilized and the environmental factor’s impacting one’s ability to discern the uneven surface, found that the State knew or should have known of the probability of an occurrence that did cause injury to the Claimant. *Id.*

In determining the present case, the Tribunal finds the facts and conclusions of *Rouse* compelling. It is clear the exhibits and the witnesses prove the existence of the pothole in the driving lane. The pothole is not hard to see, except in a flooding situation. Mr. Bomar testified he inspected the College property every day and insinuated that he probably knew of the pothole at the time of the incident. However, according to him, it was the wrong time of year to repair potholes. The Tribunal finds the State should have reasonably foreseen this was a dangerous condition and it could have been addressed in some manner before the incident in question. Therefore, the negligently maintained dangerous condition of the pothole was the proximate, legal and foreseeable cause of the Claimant’s injury.

Now that the liability of the State has been established, comparative fault must be considered. The Claimant testified the incident happened during the day but during a hard rain. Even though a dangerous condition existed, people must take some responsibility for their own personal safety when walking over any property, even in the driving rain. Therefore, the Tribunal shall find the Claimant ten percent culpable for her own injury.

DAMAGES

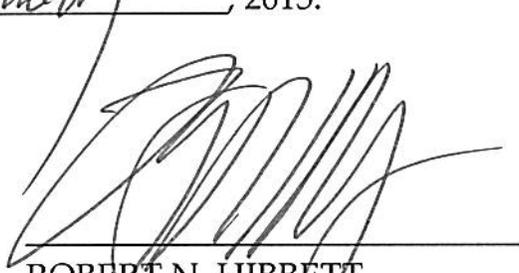
In light of the the medical testimony, the Tribunal finds that the \$6,914.25 in medical expenses was reasonable, necessary and should be awarded. The Tribunal further renders judgment of \$450.00 for the purchase of orthotics. Because Dr. Brown opined the Claimant did not need surgery, the Tribunal shall not award expenses for future surgery.

For past and future pain and suffering, the Tribunal awards \$10,000.00 to the Claimant. For future loss of enjoyment of life, the Tribunal awards \$5,000.00. For the permanent impairment of her left foot, the Tribunal awards \$10,000.00. Total compensable damages total \$32,364.25. When one factors in the comparable fault of the Claimant, her award is reduced to \$29,127.83.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the State of Tennessee is liable for the injuries sustained by the Claimant.
2. That the Claimant bears ten per cent comparative fault for her injury.
3. That the Claimant is awarded \$29,127.83 in compensable damages after subtracting her comparative fault.
4. That each party shall bear its own discretionary costs.
5. That the costs of the trial, including the court reporter, are taxed to the State of Tennessee. The privilege tax of \$25.00 is returned to the Claimant.
6. This is a final judgment.

ENTER this 19 day of February, 2015.



ROBERT N. HIBBETT
Claims Commissioner
Sitting as the Trial Court 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 24 of Feb., 2015.



PAULA SWANSON
Administrative Clerk
Tennessee Claims Commission