IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 11, 2015

TONYA NEWCOMB v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission
No. T20111727 Commissioner Robert N. Hibbett, TN. Claims Commission (Middle Division), Judge

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No. M2014-00804-COA-R3-CV – Filed June 26, 2015

Plaintiff fell down a set of steps while entering a building owned and operated by the State of Tennessee. She filed a claim with the Claims Commission alleging that the stairs were a dangerous condition because the handrail was too low and the steps were not covered with non-skid material. At trial, Plaintiff and her daughter testified about Plaintiff's fall and the resulting injuries. Plaintiff also introduced into evidence photographs of repairs made to the stairs after her fall. The State called two witnesses, the head facilities administrator and a member of her staff, who testified that they were responsible for the maintenance of the steps. Both testified that they did not know of any prior incidents involving the steps. In his written order, the Commissioner found that both Plaintiff and the State's witnesses were credible; however, he dismissed Plaintiff's case because she failed to prove that a dangerous condition existed or that, if such condition existed, the State had notice of a dangerous condition. The Commissioner also concluded that Rule 407 of the Tennessee Rules of Evidence prohibited him from considering Plaintiff's photographs as evidence of the State's liability. Plaintiff appealed. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commissioner Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Tonya Newcomb, Linden, Tennessee, Pro se.

Herbert H. Slatery III, Attorney General and Reporter, Andrée S. Blumstein, Solicitor General, and Joseph Ahillen, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee.

OPINION

On June 9, 2010, Tonya Newcomb ("Plaintiff") fell down a flight of stairs in front of the James K. Polk building. This building is part of the Andrew Jackson building complex, all of which is owned by the State of Tennessee. Plaintiff sustained injuries and was taken to the hospital. On June 2, 2011, she filed a claim with the Claims Commission, alleging that the stairs were a dangerous condition because the handrail was too low for her to reach and because the steps were not covered in non-skid material.[1]

At trial, Plaintiff testified that she was walking with her two-year-old daughter on the day of her injury. It was raining, and a security guard at the James K. Polk building motioned for Plaintiff and her daughter to come inside. While descending the steps leading to an entrance of the building, Plaintiff slipped and fell. Plaintiff testified that she reached out for the handrail, but it was out of reach. She stated that she could have caught the handrail if it had been "up one more step." Plaintiff also introduced into evidence photographs of repairs made to the stairs after her fall.

The State called two witnesses. The first witness, Patti Hoover, was the head facilities administrator for the Andrew Jackson complex at the time of Plaintiff's injury. The second witness, Ben Sanderfur, was a member of Ms. Hoover's staff. Both witnesses testified that their job duties included ensuring that the steps in question were properly maintained. According to both witnesses, the steps in question were one of the main entrances to the James K. Polk building, and any problems would have been quickly noticed and corrected.

Neither witness had personal knowledge of incidents that occurred on the steps in question prior to Plaintiff's injury. Ms. Hoover also testified that she had reviewed a database used for reporting incidents that occurred on the property and that this database did not contain records of any incidents involving the steps in question prior to Plaintiff's injury.

In April 2014, the Commissioner issued a written order stating his findings of fact and conclusions of law. The Commissioner found that Plaintiff was a credible witness and that she had sustained injuries as a result of her fall. The Commissioner also found that both of the state's witnesses were credible. The Commissioner concluded that Plaintiff had failed to prove that the steps and handrail were a dangerous condition or that, assuming they were dangerous, the State knew or should have known that they constituted a dangerous condition. The Commissioner noted that Plaintiff had attempted

[1]Plaintiff's complaint was originally filed with the Division of Claims Administration. It was transferred to the Claims Commission pursuant to Tenn. Code Ann. § 9-8-402(c).

to prove that the State had notice of a dangerous condition by introducing photographs of repairs conducted after her injury. However, he concluded that these photographs could not be used as evidence to prove liability according to Rule 407 of the Tennessee Rules of Evidence, which states that evidence of subsequent remedial measures is inadmissible "to prove strict liability, negligence, or culpable conduct[.]"[2]

The Commissioner dismissed Plaintiff's claims, and Plaintiff appealed. We affirm.

STANDARD OF REVIEW

When decisions of an individual claims commissioner or the entire Claims Commission are appealed to this court, they are governed by the Tennessee Rules of Appellate Procedure. Tenn. Code Ann. § 9-8-403(a)(1). Because the commissioner hears cases without a jury, this court reviews the commissioner's findings using the standard outlined in Tenn. R. App. P. 13(d). *See Bowman v. State*, 206 S.W.3d 467, 472 (Tenn. Ct. App. 2006). We will review the commissioner's findings of fact de novo with a presumption that they are correct unless the evidence preponderates against them. *Id.* We review the commissioner's conclusions of law de novo without any presumption of correctness. *See id.*

Whether a dangerous condition existed is a question of fact. *Helton v. Knox Cnty., Tenn.*, 922 S.W.2d 877, 882 (Tenn. 1996); *Cornell v. State*, 118 S.W.3d 374, 378 (Tenn. Ct. App. 2003). Similarly, whether the State had notice of a dangerous condition is also a question of fact. *Butler v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2012-01863-COA-R3-CV, 2013 WL 3227570, at *3 (Tenn. Ct. App. June 21, 2013).

ANALYSIS

The State of Tennessee is immune from suit except when it consents to be sued. *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000) (quoting *Brewington v. Brewington*, 387 S.W.2d 777, 779 (Tenn. 1965)). The Tennessee Constitution provides that lawsuits "may be brought against the State in such manner and in such courts as the Legislature may by law direct." Tenn. Const. art. I, § 17. Pursuant to this power, the General Assembly created the Claims Commission and vested it with exclusive jurisdiction to hear and adjudicate monetary claims against the State. *Stewart*, 33 S.W.3d at 790. However, the Claims Commission only has jurisdiction to hear the claims specified in Tenn. Code Ann. § 9-8-307(a). *Id.* "If a claim falls outside of the categories specified in

[2]The Tennessee Rules of Evidence are applicable to actions before the Claims Commission. Tenn. Comp. R. & Regs. 0310-1-1-.01(11)(a) ("Unless any other rule of procedure before the Commission or statute is to the contrary, the Rules of Evidence applicable to the Courts of the State of Tennessee shall be applicable to actions before the Commission.").

section 9-8-307(a), then the state retains its immunity from suit, and a claimant may not seek relief from the state." *Id.*

There are two provisions of Tenn. Code Ann. § 9-8-307(a) under which the Claims Commission potentially had jurisdiction of Plaintiff's claim. The first provision affords jurisdiction for claims involving "[n]egligent construction of state sidewalks and buildings." Tenn. Code Ann. § 9-8-307(a)(1)(H). The Commissioner determined that there was no evidence to demonstrate that the steps and handrail were negligently constructed. The record supports this determination because it does not contain any evidence regarding the manner in which these steps were constructed. As a result, we affirm the Commissioner's determination that there was no foundation for a claim under this section.

Jurisdiction for Plaintiff's claim was also potentially available under Tenn. Code Ann. § 9-8-307(a)(1)(C), which applies to claims for "[n]egligently created or maintained dangerous conditions on state controlled real property." Under this section, the claimant "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." Tenn. Code Ann. § 9-8-307(a)(1)(C).

Tenn. Code Ann. § 9-8-307(a)(1)(C) "removes the state's immunity to the same extent as the obligation of a private owner or occupier of land" and imposes upon the State the same duties as private premises owners. *Sanders v. State*, 783 S.W.2d 948, 951 (Tenn. Ct. App. 1989); *see Hames v. State*, 808 S.W.2d 41, 44 (Tenn. 1991); *see also* Tenn. Code Ann. § 9-8-307(d) ("No award shall be made unless the facts found by the commission would entitle the claimant to a judgment in an action at law if the state had been a private individual.").

Like all premises owners, the State is not the insurer of the safety of people who come onto its property. *Bowman*, 206 S.W.3d at 472. Instead, the State has a duty to exercise reasonable care under the circumstances. *See id.*; *see also Parker v. Holiday Hosp. Franchising, Inc.*, 446 S.W.3d 341, 350 (Tenn. 2014). This duty of care "imposes upon a property owner the responsibility of either removing, or warning against, any dangerous condition on the premises of which the property owner is actually aware or should be aware through the exercise of reasonable diligence." *Parker*, 446 S.W.3d at 350. This duty 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 *Rice v. Sabir*, 979 S.W.2d 305, 308-09 (Tenn. 1998)) (internal quotation marks omitted).

The Commissioner dismissed Plaintiff's claim because he found that the steps were not a dangerous condition and that, assuming such a condition existed, the State did not have notice of it. We will address each finding in turn.

EXISTENCE OF A DANGEROUS CONDITION

The duty applicable to premises owners only requires them to remove or warn against conditions that are, in fact, dangerous. *See Parker*, 446 S.W.3d at 350. Thus, in order to hold a premises owner liable for an injury, there must be some evidence that a dangerous condition actually existed on the premises. *Nee v. Big Creek Partners*, 106 S.W.3d 650, 653 (Tenn. Ct. App. 2002). If no such condition existed, then a property owner cannot be held liable for failing to take action to remedy it. *See id.* at 653-54; *see also Sparks v. Knoxville Util. Bd*., No. 03A01-9803-CV-00092, 1998 WL 668719, at *1 (Tenn. Ct. App. Sept. 30, 1998) ("In a premises liability case such as this one, the plaintiff must prove, among other things, that he or she was injured by a dangerous or defective condition on the defendant's property.").

A condition is dangerous "only if it is reasonably foreseeable that the condition could *probably* cause harm or injury and that a reasonably prudent property owner would not maintain the premises in such a state." *Stewart v. Seton Corp.*, No. M2007-00715-COA-R3-CV, 2008 WL 426458, at *4 (Tenn. Ct. App. Feb. 12, 2008) (citing *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)) (emphasis added). The fact that an injury is simply possible, as opposed to probable, does not make a condition dangerous. *See Helton*, 922 S.W.2d at 883 (quoting *Forrester v. City of Nashville*, 169 S.W.2d 860, 861 (Tenn. 1943)). Liability is only imposed when a condition "constituted a danger from which injury might be reasonably anticipated." *Id.* (quoting *City of Memphis v. McCrady*, 124 S.W.2d 248, 249 (Tenn. 1938)).

Here, the evidence does not preponderate against the finding that the stairs and handrail did not constitute a dangerous condition. There is no evidence that the steps and handrail were broken or structurally unsound. There is also no evidence that Plaintiff tripped on a foreign object that had been left on the stairs. Plaintiff did testify that the handrail was too low for her to reach because it started one step down from the top step, and that the steps did not have a non-skid surface; however, there was no evidence that it was unreasonable or even unusual to maintain steps like these in this condition. Instead, the evidence in the record indicates that these steps were commonly used and examined both by the public and by those responsible for their maintenance. The evidence also indicated that, despite the fact that these steps were frequently used, there were no prior incidents involving them. Under these circumstances, the steps were not in a condition from which an injury could be reasonably anticipated. *See Helton*, 922 S.W.2d at 883. Consequently, they were not a dangerous condition that the State had a duty to correct or warn against.

NOTICE OF A DANGEROUS CONDITION

In addition, the evidence does not preponderate against the Commissioner's determination that, assuming the steps were a dangerous condition, the State did not have notice of it.

Standing alone, the existence of a dangerous condition is insufficient to establish liability. *Bowman*, 206 S.W.3d at 473. Instead, plaintiffs must demonstrate that the State had notice of that condition prior to the occurrence of their injury. *See* Tenn. Code Ann. § 9-8-307(a)(1)(C). Notice of a dangerous condition will be imputed to the State if it caused or created the condition at issue. *Sanders*, 783 S.W.2d at 952. If the State did not create the dangerous condition, then the plaintiff must show that the State had actual or constructive notice of it. *Jones v. Zyre, Inc.*, 600 S.W2d 730, 732 (Tenn. Ct. App. 1980). "Actual notice" refers to "knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts." *Kirby v. Macon Cnty.*, 892 S.W.2d 403,409 (Tenn. 1994). Constructive notice can be established through proof that the dangerous or defective condition existed for such length of time that, in the exercise of reasonable care, the owner should have become aware of the condition. *Simmons v. Sears, Roebuck & Co*., 713 S.W.2d 640, 641 (Tenn. 1986).

Here, the record does not contain any evidence concerning the existence of the allegedly dangerous conditions. Additionally, there is no evidence that the State had any reason to "investigate and ascertain" whether these steps were unreasonably dangerous. *See Kirby*, 892 S.W.2d at 409. To the contrary, the proof at trial was that there had not been any incidents on these stairs before Plaintiff's injury occurred. Consequently, the evidence does not preponderate against the Commissioner's determination that the State did not have notice that the steps and handrail constituted a dangerous condition.

On appeal, Plaintiff argues that the pictures she produced at trial demonstrate that the stairs and handrail constituted a dangerous condition and that the State knew or should have known that a dangerous condition existed. However, these pictures only demonstrate that repairs were conducted after Plaintiff's injury occurred, and the Commissioner properly determined that Rule 407 of the Tennessee Rules of Evidence barred their admission for the purpose of proving the State's liability.

Rule 407 prohibits the admission of evidence of subsequent remedial measures "to prove strict liability, negligence, or culpable conduct . . . ." Tenn. R. Evid. 407. In this context, "[t]he word 'subsequent' refers to events that occur after the events giving rise to the lawsuit." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 87 (Tenn. 2008) (quoting *Rothstein v. Orange Grove Ctr., Inc.*, 60 S.W.3d 807, 813 (Tenn. 2001)). Actions are "remedial" when they "chang[e] a situation, usually an unsafe property or product, to prevent the situation from causing further injury." *Rothstein*, 60 S.W.3d at 813.

Accordingly, evidence that repairs were made after an injury occurred is inadmissible to prove that the premises was dangerous before the injury happened. *See* Tenn. R. Evid. 407. Although this rule may appear harsh, it is has an important justification. As our Supreme Court has stated "[t]he purpose of [Rule 407] is to encourage remedial measures in order to serve the public's interest in a safe environment." *Martin*, 271 S.W.3d at 87 (quoting Neil P. Cohen et al., *Tennessee Law of Evidence* § 4.07[2] (5th ed. 2005)) (internal quotation marks omitted).

While evidence of subsequent remedial measures is admissible to prove that a party had ownership or control of a premises, such evidence is relevant only when the party has raised the issue of control or ownership. *See* Tenn. R. Evid. 407; *Thompson v. Thompson*, 749 S.W.2d 468, 471 (Tenn. Ct. App. 1988). Here, the State has never disputed the fact that it owned or controlled the premises in question. As a result, evidence of repairs conducted on these steps after the Plaintiff's injury occurred was irrelevant, and the commissioner properly declined to consider such evidence to prove negligence.

Plaintiff also contends that the State obstructed her efforts to prove her case by preventing her from speaking to certain witnesses or calling them at trial. However, the record does not contain any evidence to support these allegations. Initially, we note that some of the witnesses Plaintiff claims she wanted to speak to, like the security guards in the James K. Polk building, work for a private security company rather than the State. The State has no control over these individuals, and there is no evidence that it prevented Plaintiff from speaking to them.

As to any other witnesses that Plaintiff may have wanted to examine, the record reveals that Plaintiff did not subpoena any witnesses or submit any discovery to the State. We are mindful of the fact that Plaintiff was proceeding pro se, but pro se litigants must adhere to the same standards to which lawyers must adhere. *Cohen v. Clarke*, No. M2012-02249-COA-R3-CV, 2014 WL 107967, at *3 (Tenn. Ct. App. Jan. 10, 2014); *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003). If Plaintiff wanted to have any employees of the State present at trial, she could have issued subpoenas and written discovery to the State.

IN CONCLUSION

The judgment of the Commissioner is affirmed, and this matter is remanded with costs of appeal assessed against Plaintiff, Tonya Newcomb.

FRANK G. CLEMENT, JR., JUDGE