

**IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION
AT JACKSON**

MICHAEL RAY PINSON,)	
)	Tennessee Claims Commission
Claimant/Appellee,)	Claim No. 60971
)	
VS.)	C.A. No. 02A01-9409-BC-00210
)	
STATE OF TENNESSEE,)	
)	
Defendant/Appellant.)	
)	

From the Claims Commission of State of Tennessee, Western Division.
Honorable Martha B. Brasfield, Commissioner of Claims

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Cecil Crowson, Jr. Appellate Court Clerk

OPINION FILED:

AFFIRMED

FARMER, J.

CRAWFORD, P.J., W.S. : (Concurs)

HIGHERS, J. : (Concurs)

The Appellant, State of Tennessee, appeals a final order of the Tennessee Claims Commission, finding Appellant negligent and awarding Appellee, Michael Ray Pinson (Pinson), judgment for \$300,000 for injuries sustained by Pinson while playing football for the University of Tennessee at Martin (UTM).

In 1983, Pinson received a football scholarship to UTM. Pinson decided not to play football that year, and did not enroll at UTM. In August 1984, Pinson enrolled at UTM and reported to football camp for practice. He passed his physical examination and began participating in practice. On August 25, 1984, Pinson suffered a blow to the head during a football practice. He walked to the sidelines, said that he had been "kicked in the head," and collapsed unconscious.

During the time that Pinson was unconscious, the UTM athletic trainer, James Richard Lyon (Lyon), examined Pinson. Lyon's personal notes from the day of Pinson's injury show that Lyon found palsy on the left side of Pinson's face, no control of the left side of his body, unequal pupils and no response to pain, sound or movement. These notes also show that Pinson remained unconscious for a period of ten minutes.

After his examination of Pinson, Lyon summoned an ambulance which transported Pinson to the Volunteer General Hospital in Martin, Tennessee. Lyon did not personally accompany Pinson to the hospital but had a student trainer accompany Pinson. Lyon did not give the trainer any instructions about the information that the trainer should give the emergency room doctor. Hospital records show that the trainer informed an emergency room nurse that Pinson lost consciousness for about two minutes. Although Lyon visited the emergency room shortly after Pinson arrived, Lyon did not speak to a doctor about the neurological signs he had observed on the practice field.

At Volunteer General, Pinson's head was X-rayed and found to be normal. No CT scan was ever done. Pinson was assigned to Dr. O. K. Smith for follow-up care and was admitted to the hospital for observation. Although all neurological checks were normal, hospital records show that Pinson complained of headaches to the hospital staff. Pinson complained that one of these headaches was so severe that it made him sick to his stomach.

On August 26, 1994, Dr. Smith telephoned Lyon and told him that Pinson should not participate in football practice for a week and that, if any further trouble arose, Pinson should return to Dr. Smith or another physician. On that same day, Dr. Smith released Pinson to Lyon, and Lyon transported Pinson from the hospital to UTM.

When Lyon picked up Pinson, he complained to Lyon of a headache. Lyon did not record this headache in the UTM records. On August 27, 1984, Pinson complained of a headache and was given Empirin #4 by Lyon. On August 28, 1984, Pinson told Lyon that he had a headache, but that it was milder than the one he had on the previous day. Lyon's notes of August 30, 1984, which refer to Pinson, contain the statement "Headache!".

On September 3, 1984, Lyon contacted Dr. Ira Porter, the UTM team physician. Lyon told Dr. Porter that Pinson was asymptomatic for a concussion on September 3. Lyon did not tell Dr. Porter about Pinson's headaches on the 26th, 27th, 28th, or 30th. Relying on Lyon's report of Pinson's condition, Dr. Porter concurred with Dr. Smith's prior advice that Pinson could return to practice if there were no further problems.

On September 3, 1984, Pinson returned to practice. He participated in practice, traveled as a member of the team and played in at least two games. Testimony from Pinson's mother, roommate and girlfriend, indicated that Pinson suffered headaches and complained of dizziness, nausea and blurred vision throughout this three week period from September 3 to September 24. Lyon did not report any of these symptoms to Dr. Porter. On September 24, Pinson walked to the sideline during a practice, stated that he had been "kicked in the head" and collapsed unconscious.

Pinson was eventually taken to Jackson-Madison County General Hospital where he underwent brain surgery. Surgeons there found that Pinson had sustained a chronic subdural hematoma of three to four weeks duration of several hundred cubic centimeters and an acute subdural hematoma of approximately 25-30 cubic centimeters and a shift of mid-line structures of almost 1.5 centimeters. Pinson remained in a coma for several weeks and was transferred to the Lamar Unit of Baptist Hospital in Memphis for intensive rehabilitative treatment. As a result of his injuries, Pinson suffered severe and permanent neurological damage.

Pinson brought an action for negligence against Appellant before the Tennessee Claims Commission. A trial upon the merits was held before Claims Commissioner Martha B. Brasfield.

At the time of trial, Pinson was a hemiparetic. He had no use of his left arm and very little use of his left leg. He had a shunt to relieve fluid build-up in his brain. He also suffered from severe cognitive problems and frequent seizures. These maladies rendered him unable to hold a job. Additionally, Pinson and his mother had incurred approximately \$200,000 in medical bills due to his injury.

The expert testimony of Dr. Howard L. Ravenscraft and Dr. Carol Dooley indicated that if any one of the physicians at Volunteer General Hospital had been informed of the neurological symptoms that Pinson exhibited on August 25, 1984 (i.e., palsy on the left side of the face, no control of left side of the body, and the fact that Pinson was hit on the football field, then walked to the sidelines and collapsed unconscious) they would have likely ordered a CT scan in addition to the x-rays and other treatment Pinson received. It is undisputed that a CT scan on August 25, 1984, would have helped to reveal the original subdural hematoma.

Three medical experts, Dr. Ravenscraft, Dr. Dooley and Dr. Harry Friedman testified that Pinson's actions immediately following the blow to his head would have been highly relevant information in Pinson's treatment. The fact that, prior to falling unconscious, Pinson had walked to the sideline and announced that he had been hit in the head indicated that he had experienced a "lucid interval". A lucid interval occurs when there is a neurological sequence that follows the pattern of (1) trauma, (2) consciousness, and (3) loss of consciousness. A lucid interval is usually a sign of a serious head injury.

Expert testimony also revealed that the length of time Pinson was unconscious could have also been important information for the treating physician. Dr. Ravenscraft and Dr. Dooley both testified that a doctor, upon being informed of a five to ten minute loss of consciousness, would have been more likely to schedule a CT scan. Dr. Smith testified that if he had been informed of Pinson's lucid interval and ten minute loss of consciousness, he likely would have ordered a CT scan.

Dr. Friedman, Dr. Ravenscraft and Dr. Dooley testified that if the chronic subdural hematoma had existed from three to four weeks prior to September 24, 1984 it would have caused significant headaches. They further testified that if the chronic subdural hematoma had been properly diagnosed prior to September 24, 1984, Pinson still would have undergone corrective brain surgery, but would have very likely led a normal life.

Commissioner Brasfield found that Lyon had a duty (1) to report Pinson's neurological signs which he observed on August 25, 1984 to a medical doctor, and (2) to report Pinson's subsequent headaches to a medical doctor as Dr. Smith had instructed. She found Lyon negligent (1) in not reporting his observations of Pinson's condition on August 25, 1984, to the emergency room physicians, and (2) in not reporting Pinson's complaints of headaches to Dr. Smith or Dr. Porter, following Pinson's first injury.

Commissioner Brasfield ruled that Lyon's negligence was the proximate cause of Pinson's injuries since Lyon's negligence caused Pinson's chronic subdural hematoma not to be properly diagnosed.

Commissioner Brasfield awarded damages to Pinson in the amount of \$1,500,000. She took notice of the fact that other individuals had been sued in the Circuit Court of Weakley County for their negligence in the treatment of Pinson. Commissioner Brasfield found that Appellant was liable for thirty percent (30%) of Pinson's damages, or \$450,000. She did not apportion any fault to Pinson. Pursuant to T.C.A. § 9-8-307(e), she found that Pinson was entitled to a judgment against Appellant in the amount of \$300,000.

Appellant presents the following issues for review:

I. Did the Claims Commission err in finding that the UT athletic trainer had a duty to initiate a transfer of medical information to Claimant's physicians?

II. Did the Claims Commission err in finding that the UT athletic trainer breached his duty to report head injury symptoms if such duty existed?

III. Did the Claims Commission err in finding that any breach of duty by the UT athletic trainer was the proximate cause of Claimant's injuries?

Under the law in this state, no claim for negligence can succeed in the absence of any one of the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal cause. *Haynes v. Hamilton County*, 883 S.W.2d 606, 611 (Tenn. 1994); *Perez v. McConkey*, 872 S.W.2d 897, 905 (Tenn. 1994); *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993); *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991).

This Court's review of the Claims Commission's decision that the required elements of negligence exist, in this case, must be *de novo* with a presumption of correctness unless the preponderance of the evidence is to the contrary. T.R.A.P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993); *Beare v. State*, 814 S.W.2d 715, 717 (Tenn. 1991). It is the Appellant's burden to establish that a preponderance of the evidence is contrary to the Commissioner's findings. *Beare*, 814 S.W.2d at 717.

First, Appellant argues that Pinson's negligence claim must fail because UTM athletic trainer Lyon had no affirmative duty to inform Pinson's doctors about the neurological signs exhibited by Pinson directly after his first injury. Appellant argues that Lyon had a duty to report these signs only if requested to do so by a physician.

Lyon testified that the standard of care of an athletic trainer was only to accurately report to a physician information which the physician requested, including any observed physical symptoms. Lyon further testified that it was the trainer's duty to follow the physician's orders in treating an athlete. Appellant argues that the record is devoid of any evidence that an athletic trainer has a duty to seek out and volunteer information to a physician or guess what information a physician

might need for purposes of evaluating or treating an injured athlete. Appellant further points out that there is no statutory duty that would require a trainer to volunteer information to an athlete's doctor.

As support for its argument, Appellant cites T.C.A. § 63-24-101(1), a statute dealing with the certification of athletic trainers with the Board of Medical Examiners. T.C.A. § 63-24-101(1) provides in pertinent part:

"Athletic Trainer" means a person with specific qualifications as set forth in this chapter, who is employed by and works with an athletic team and who, upon the advice and consent of his team physician, carries out the practice of prevention or physical rehabilitation, or both, of injuries incurred by participating athletes at his educational institution, . . . In carrying out these functions, the athletic trainer is authorized to use whatever physical modalities as are deemed necessary by a team physician;

T.C.A. § 63-24-101(1) (1990) (emphasis added).¹

To begin our analysis, we note that the trial court typically has the exclusive responsibility to determine whether the law will recognize a duty imposed on the defendant for the plaintiff's benefit. *Roberts v. Robertson County Bd. of Educ.*, 692 S.W.2d 863, 869 (Tenn. App. 1985); *Dill v. Gamble Asphalt Materials*, 594 S.W.2d 719, 721 (Tenn. App. 1979). Here, the Claims Commissioner held that Lyon had a duty (1) to report Pinson's neurological signs which he observed on August 25, 1984 to a medical doctor, and (2) to report Pinson's subsequent headaches to a medical doctor as Dr. Smith had instructed.

¹T.C.A. § 63-24-101 was amended in 1993, and T.C.A. § 63-24-101(2) now states:

"Athletic trainer" means a person with specific qualifications as set forth in this chapter, who, upon the advice, consent and oral or written prescriptions of a physician, carries out the practice of prevention, recognition, evaluation, management, disposition, treatment, or rehabilitation of athletic injuries, and, in carrying out these functions the athletic trainer is authorized to use physical modalities, such as heat, light, sound, cold, electricity, or mechanical devices related to prevention, recognition, evaluation, management, disposition, rehabilitation, and treatment;

While we do not believe either of these statutes was intended by the legislature to define the duty of an athletic trainer, we do believe they are illustrative in determining the role of a trainer in an athletic program.

Upon reviewing the record, we believe that a duty arose from the fact that, as a college athlete, Pinson enjoyed a "special relationship" with UTM. *Kleinknect v. Gettysburg College*, 989 F.2d 1360, 1372 (3rd Cir. 1993). Accordingly, we hold that UTM and its employee, Lyon, had a duty to exercise reasonable care under the circumstances. *See Doe v. Linder Const. Co., Inc.*, 845 S.W.2d 173, 196 (Tenn. 1992). Here, Pinson was not engaged in his own private affairs at UTM at the time of his injury. *Id.* Instead, he was participating in a scheduled athletic practice for an intercollegiate team sponsored by UTM under the supervision of UTM employees.

Whether UTM breached its duty turns upon whether UTM and Lyon exercised the appropriate standard of care in their treatment of Pinson. We believe that the evidence preponderates toward the Claims Commissioner's finding that Lyon did not exercise the appropriate standard of care in his treatment of Pinson. In Tennessee, the applicable standard of care may be established by the defendant's own admissions. *Tutton v. Patterson*, 714 S.W.2d 268, 270 (Tenn. 1986).

Applying the standard of care for an athletic trainer offered by Lyon himself at trial, we find that Lyon breached his duty when, contrary to the instructions of Dr. Smith, Lyon failed to report Pinson's headaches to a physician before allowing Pinson to return to practice. It is undisputed that Dr. Smith instructed Lyon that Pinson was not to return to contact for one week and to report if any further trouble arose. Dr. Smith further instructed Lyon to report any signs of a head injury, including headaches, to Dr. Smith or to another physician.

It is further undisputed that on September 3, Lyon telephoned Dr. Porter, and discussed Pinson's condition. During that telephone conversation, Porter asked Lyon "if [Pinson] was having headaches, visual problems, visual disturbances, vomiting, drowsiness, weakness." Lyon told Dr. Porter that Pinson was asymptomatic for a head injury on September 3.

Appellant contends that Lyon did not breach any duty owed to Pinson because Pinson was asymptomatic for a concussion on September 3. Appellant argues that Lyon did not have a duty to disclose any information about Pinson's previous complaints on August 26th, 27th, 28th or 30th to Dr. Porter because Dr. Porter inquired only as to Pinson's condition on September 3.

We are unpersuaded by Appellant's argument. On August 26, Dr. Smith instructed Lyon to report any further signs of head injury, including headaches, to a physician. Evidence presented at trial showed that Pinson suffered headaches from August 26 until the date of his second injury on September 24. Lyon's testimony and notes from this time period indicate that Lyon was aware of these headaches. On September 3, Dr. Porter asked Lyon if Pinson was experiencing any signs of head injury. Despite overwhelming evidence that Pinson was experiencing headaches and that Lyon knew about them, Lyon responded that Pinson was not exhibiting any signs of a serious head injury. It flies in the face of reason for Lyon, as a certified athletic trainer, to suggest that he had no duty to report Pinson's prior headaches to Dr. Porter on September 3, particularly when he had been instructed by Dr. Smith to inform a doctor of any further symptoms of a head injury.

Appellant contends that Lyon told Dr. Porter that Pinson had a headache on August 27, and that Dr. Porter authorized Lyon to give Pinson Empirin #4 on that date. Appellant further contends that Dr. Porter spoke with Pinson at a football practice on August 30. Dr. Porter denied that he ever had any such conversations with Lyon about Pinson. As such, there was a sharp conflict in the testimony of the witnesses as to whether Lyon had actually informed Dr. Porter of Pinson's headaches. The Claims Commissioner found that Lyon had never contacted Dr. Porter.

Whether Lyon reported Pinson's headache to Dr. Porter prior to September 3 was a question of fact before the trial court. Where issues in a case turn upon the truthfulness of witnesses, the trier of fact in a non jury case has the opportunity to observe the witnesses and their manner and demeanor while testifying and is in a far better position than this Court to decide those issues. *State ex rel. Balsinger v. Town of Madisonville*, 222 Tenn. 272, 435 S.W.2d 803 (1968); *Town of Alamo v. Forcum-James Co.*, 205 Tenn. 478, 327 S.W.2d 47 (1959); *Leek v. Powell*, 884 S.W.2d 118 (Tenn. App. 1994). The weight, faith and credit to be given to any witness' testimony lies in the first instance with the trier of fact and the credibility accorded will be given great weight by the appellate court. *Id.* We do not find that the evidence preponderates against the Commissioner's finding.

Because we have held that Lyon had a duty to convey requested information to a physician, we believe it unnecessary to decide whether Lyon had a duty to convey his unsolicited

observations of Pinson's condition to the emergency room staff immediately after Pinson's first injury.

Appellant, as its final issue, argues that UTM's and Lyon's conduct was not the proximate cause of Pinson's injuries. In Tennessee, a three-pronged test is applied to determine proximate cause:

(1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; and

(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.

Boling v. Tennessee State Bank, 890 S.W.2d 32, 36 (Tenn. 1994) (quoting *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991)).

The court in *Lindsey v. Miami Development Corp*, 689 S.W.2d 856, 861 (Tenn. 1985) cited Dean Prosser with approval stating:

The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant . . .

The plaintiff is not, however, required to prove the case beyond a reasonable doubt. The plaintiff need not negative entirely the possibility that the defendant's conduct was not a cause and it is enough to introduce evidence from which reasonable persons may conclude that it is more probable that the event was caused by the defendant than that it was not . . .

Lindsey, 689 S.W.2d at 861-62 (quoting *Prosser & Keeton, Torts*, § 41, p. 269 (5th ed. 1984)).

In the instant case, Dr. Joseph R. Rowland, a neurosurgeon, testified that on

September 24, 1984 he treated Pinson for a chronic subdural and an acute subdural hematoma. Dr. Rowland testified that the chronic hematoma was of three to four weeks duration and that the acute subdural hematoma was of one to five hours duration. Dr. Rowland testified that the acute clot was caused by direct trauma to the brain or by bleeding from the membrane of the chronic subdural hematoma.

It is impossible and unnecessary to determine from the record whether Pinson's permanent neurological injuries stemmed from damage to his brain from the acute or chronic subdural hematoma. The Claims Commissioner found that Pinson's first injury would have been properly diagnosed and treated if Lyon had reported the neurological symptoms exhibited by Pinson from August 26 to September 24. Dr. Dooley testified that if Lyon had reported Pinson's headaches, Pinson would have been subjected to a neurological consult and a CT scan. It is undisputed that this CT scan would have helped reveal Pinson's injured brain. If Pinson's injury had been properly diagnosed prior to September 24, 1984, it is undisputed that Pinson would likely have had little or no permanent neurological deficit.

It is clear from the record that Pinson's chronic subdural hematoma made the occurrence of an acute subdural hematoma much more probable. Dr. Dooley testified that the state of Pinson's brain due to the chronic subdural hematoma between September 3 and September 24 was "extremely swollen and very fragile." Dr. Dooley explained that a trivial amount of trauma could have caused the acute subdural hematoma to develop. Thus, regardless of whether Pinson's permanent injuries were caused by the chronic or acute subdural, it is clear that Lyon's conduct contributed significantly to Pinson's overall injury.

Accordingly, we hold that Lyon's negligence in not reporting Pinson's headaches to a physician, after having been instructed to do so, was more likely than not a substantial factor in the misdiagnosis of Pinson's head injury. We further believe that Pinson's permanent injuries could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence. It seems extremely foreseeable that withholding requested information from a team physician could result in permanent injury to a football player, who had collapsed unconscious the previous week. Finally, we are unaware of any public policy that would require us to hold a university unaccountable when

the negligence of its employee results in severe injuries to an athlete. Therefore, we hold that Lyon's negligence in not reporting Pinson's headaches was a proximate cause of Pinson's permanent injuries.

In summation, we find that UTM and its employee, Lyon, had a duty to exercise reasonable care under the circumstances in respect to Pinson. We further find that UTM breached this duty when Lyon failed to exercise the appropriate standard of care of an athletic trainer. Finally, we find that UTM's breach of duty is a proximate cause of Pinson's permanent injuries.

The judgment of the Claims Commission is affirmed. Costs are taxed to Appellant, for which execution may issue if necessary.

FARMER, J.

CRAWFORD, P.J., W.S. (Concurs)

HIGHERS, J. (Concurs)