

Arkansas
State Claims Commission

MAY 15 2017

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Please print in ink or type

BEFORE THE STATE CLAIMS COMMISSION
Of the State of Arkansas

- Mr.
- Mrs.
- Ms.
- Miss

Kimberley Ann Graves Claimant

vs.

State of Arkansas, Respondent

University of Arkansas Fayetteville

Do Not Write in These Spaces	
Claim No.	<u>17-0718-00</u>
Date Filed	<u>May 15, 2017</u>
	(Month) (Day) (Year)
Amount of Claim \$	<u>150,000.00</u>
Fund	<u>FIDP</u>
	<u>Negligence & Personal</u>

COMPLAINT Injury

Kimberley Ann Graves the above named Claimant, of 6 River Ridge Ct. Little Rock
(Name) (Street or R.F.D. & No.) (City)

AR 72227 County of Pulaski represented by Brandon W. Lacy
(State) (Zip Code) (Daytime Phone No.) (Legal Counsel, if any, for Claim)

of 630 S. Main Street Jonesboro AR 72401 870-277-1144 870-277-1143
(Street and No.) (City) (State) (Zip Code) (Phone No.) (Fax No.)

State agency involved: State of Arkansas, U of A Amount sought: \$150,000

Month, day, year and place of incident or service: October 24, 2015 Reynolds Razorback Stadium

Explanation: See attached Explanation and Exhibits

As parts of this complaint, the claimant makes the statements, and answers the following questions, as indicated: (1) Has claim been presented to any state department or officer thereof?
No; when? _____; to whom? _____
(Yes or No) (Month) (Day) (Year) (Department)

and that the following action was taken thereon: _____

and that \$ _____ was paid thereon: (2) Has any third person or corporation an interest in this claim? No; if so, state name and address

_____ (Name) _____ (Street or R.F.D. & No.) _____ (City) _____ (State) _____ (Zip Code)
and that the nature thereof is as follows: _____; and was acquired on _____, in the following manner: _____

THE UNDERSIGNED states on oath that he or she is familiar with the matters and things set forth in the above complaint, and that he or she verily believes that they are true.

Brandon W. Lacy
(Print Claimant/Representative Name)

[Signature]
(Signature of Claimant/Representative)

SWORN TO and subscribed before me at Jonesboro AK
(City) (State)

on this 17 day of March, 2017
(Date) (Month) (Year)

Stephanie Crawford
(Notary Public)

My Commission Expires January 14 2018
(Month) (Day) (Year)

Stephanie Crawford
(SEAL) Notary Public
Greene County, Arkansas
COMM. EXP. January 14, 2018
COMMISSION NO. 12364146
SF1-R7:99

EXPLANATION

Claimant, Kimberley Ann Graves, is a resident of Pulaski County. This is a negligence claim against the State of Arkansas, University of Arkansas System. Kimberley Graves was injured as a result of the negligent use and placement of pedestrian barricades to control the directional flow of pedestrian traffic into and out of Reynolds Razorback Stadium prior to a football event in which the University of Arkansas Razorbacks hosted the University of Auburn Tigers on October 24, 2015. Mrs. Graves was injured when her husband became entangled in the elevated footing of a pedestrian barricade that obstructed his pathway and fell over into her, causing her to fall as well. This claim is against the University of Arkansas, and seeks damages for injuries resulting from Mrs. Graves's fall, including medical bills in the past and reasonably certain to be incurred in the future, pain, suffering, and mental anguish experienced in the past and reasonably certain to be experienced in the future, caretaking expenses, damages for scarring, disfigurement and visible injuries, as well as compensatory damages for all consequential and incidental damages arising from her injuries, that were a direct result of the negligence of the University of Arkansas as more fully detailed below.

Kimberley Graves was leaving the University of Arkansas Razorbacks football game at home versus Auburn with her husband, Dr. Gene Graves, on October 24, 2015. Her seats were in the east club section, so she and her husband exited out of gate 16 of the stadium and walked southbound on the sidewalk along Stadium Drive. Attendance for this game was recorded at 72,008 people. Given the number of personnel, employees, volunteers, as well as persons who attend social events around the stadium but did not actually go inside the stadium, it is likely that more than 100,000 people were in the area surrounding the stadium on the day of the event. Mr. and Mrs. Graves walked in the crowd of persons walking southbound away from the stadium and

down Stadium Drive. Along the walkway separating the sidewalk from Stadium Drive, the University of Arkansas personnel had erected pedestrian barricades which essentially resembled bicycle racks. Similar barricades were also placed on the opposite side of the sidewalk between the stadium and the grassy area between the stadium, Stadium Drive, and Barnhill Arena. These barricades were placed in an effort to narrow the flow of pedestrian traffic into a funnel or "bottleneck" as the traffic stretched from the stadium to the area where buses transported attendees to more remote parking lots. Thus, instead of functioning exclusively as a boundary for pedestrians as these barricades are intended to be used, the barricades were actually used to direct the flow of pedestrian traffic away from the stadium. Given the volume of pedestrian traffic exiting the stadium, traffic became very congested as the barricades funneled the pedestrians into a bottleneck. Moreover, the walkway along Stadium Drive declined at a steep grade at this particular area, causing the traffic speed to increase at the same time the traffic congestion increased.

In addition, the footing for these barricades varied. Footing for certain pieces of the barricades lay directly flat on the ground, while footing for other pieces were elevated approximately four inches off the ground. Because the footings were perpendicular to the length of the barricade, and measured in excess of 12 inches of length, the footing extruded into the flow of pedestrian traffic. In the past, these barricades were placed on Stadium Drive and abutted up next to the elevated sidewalk along the road so that the footing did not obstruct the pathway of pedestrians on the sidewalk. On the day in question, however, the barricades were placed on the sidewalk. Consequently, the elevated footings of certain pieces of barricade extruded into the pathway of pedestrians who were following the barricade as a pathway. A photograph of such a

footing is attached hereto as Exhibit 1. Thus, the raised footing extruded into the pathway of the pedestrian traffic and was elevated in such a way as to create a foreseeable risk of harm to pedestrians who were following the traffic from tripping over the elevated footings.

Given the heavy volume of pedestrian traffic, Mr. and Mrs. Graves were forced to walk alongside the pedestrian barricades as they left the stadium. Given the heavy volume of pedestrian traffic and the number of persons around them as the barricade funneled them into the bottleneck heading southbound on the sidewalk along Stadium Drive, Mr. and Mrs. Graves were unable to see that the footings of one of the barricades that extruded into their pathway was raised above grade. Consequently, Mr. Graves became entangled in the footing, tripping him and causing him to fall over and into his wife. In the ensuing fall, he became wrapped up in the rack and fell over on top of his wife causing Mrs. Graves to sustain a severe leg injury.

Mrs. Graves was an invitee upon the premises of the University of Arkansas who was on the premises for a purpose connected with an activity which the University of Arkansas carries on on the premises and by the invitation of the University of Arkansas. Thus, the University of Arkansas owed Mrs. Graves a duty to use ordinary care to maintain the premises in a reasonably safe condition and to use ordinary care for her safety. The University of Arkansas breached this duty by negligently placing a foreign object within the pathway of heavy pedestrian traffic. The University of Arkansas's breach of this duty constitutes negligence for which the University of Arkansas is responsible for all injuries and damages sustained by Mrs. Graves as a result.

Immediately after the fall, Mrs. Graves was transported by CEMS to Washington Regional Medical Center for further treatment. As a result of the fall, Mrs. Graves has sustained a comminuted fracture of her left tibia and fibula. An Open Reduction and Internal Fixation was

performed to screw the bone back in place on October 25, 2015. A removal procedure was performed on December 1, 2016 to remove certain hardware that had been screwed into her ankle. Mrs. Graves has incurred medical expenses associated with this treatment in the amount of \$48,587.81 to date.

The University of Arkansas no longer uses pedestrian barricades to control the directional flow of pedestrian traffic into and out of the stadium for Razorback football game events, instead stringing plastic penant tape along the sidewalk to warn pedestrians against stepping into Stadium Drive at sections other than crosswalks.

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

KIMBERLEY ANN GRAVES

CLAIMANT

V.

CLAIM NO. 17-0718-CC

UNIVERSITY OF ARKANSAS

RESPONDENT

ORDER

Now before the Arkansas State Claims Commission (the “Claims Commission”) is the motion filed by the University of Arkansas (the “Respondent”) for summary judgment as to the claim of Kimberley Ann Graves (the “Claimant”). Based upon a review of the Respondent’s motion, the Claimant’s response, the arguments made therein, and the law of Arkansas, the Claims Commission hereby finds as follows:

1. The Claims Commission has jurisdiction to hear the Claims pursuant to Ark. Code Ann. § 19-10-204(a).
2. The Claims Commission finds that there are genuine issues of material fact in this claim. As such, Respondent’s motion for summary judgment is DENIED pursuant to Rule 56 of the Arkansas Rules of Civil Procedure.
3. This claim is scheduled for hearing beginning at 9:00 a.m. on Thursday, March 15, 2018.

IT IS SO ORDERED.

Henry C. Kinslow

ARKANSAS STATE CLAIMS COMMISSION

Dexter Booth
Henry Kinslow, Co-Chair
Bill Lancaster
Sylvester Smith
Mica Strother, Co-Chair

DATE: February 23, 2018

Notice(s) which may apply to your claim

- (1) A party has forty (40) days from the date of this Order to file a Motion for Reconsideration or a Notice of Appeal with the Claims Commission. Ark. Code Ann. § 19-10-211(b). If a Motion for Reconsideration is denied, that party then has twenty (20) days from the date of the denial of the Motion for Reconsideration to file a Notice of Appeal with the Claims Commission. Ark. Code Ann. § 19-10-211(b)(3). A decision of the Claims Commission may only be appealed to the General Assembly. Ark. Code Ann. § 19-10-211(a).
- (2) If a Claimant is awarded less than \$15,000.00 by the Claims Commission at hearing, that claim is held forty (40) days from the date of disposition before payment will be processed. *See* Ark. Code Ann. § 19-10-211(b). Note: This does not apply to agency admissions of liability and negotiated settlement agreements.
- (3) Awards or negotiated settlement agreements of \$15,000.00 or more are referred to the General Assembly for approval and authorization to pay. Ark. Code Ann. § 19-10-215(b).

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

KIMBERLEY ANN GRAVES

CLAIMANT

V.

CLAIM NO. 17-0718-CC

UNIVERSITY OF ARKANSAS

RESPONDENT

ORDER

Now before the Arkansas State Claims Commission (the "Claims Commission") is the claim of Kimberley Ann Graves (the "Claimant") against the University of Arkansas (the "Respondent"). At the hearing held March 15, 2018, Claimant and her attorney, Brandon Lacy, were in attendance. Joe Cordi appeared on behalf of Respondent.

Background and Witness Testimony

1. Claimant filed her claim seeking compensation for the injuries she sustained in a fall on the Respondent's Fayetteville campus after leaving a football game. Claimant contends that Respondent was negligent in using pedestrian barricades with elevated footings because of the tripping hazard that such barricades presented.

2. Respondent filed an answer denying liability.

3. At the hearing, Dr. Gene Graves, Claimant's husband, testified regarding the incident that led to Claimant's injuries, as well as Claimant's recovery. Dr. Graves testified that Claimant was unable to put weight on her foot for approximately three months and was bedridden those three months. As her recovery progressed, Dr. Graves testified that Claimant used crutches for approximately two months, then one crutch for another couple of months, and then wore a boot for several more months. Dr. Graves testified that, for a year following the injury, there was

concern that Claimant's injury would not heal and that Claimant's foot would have to be amputated.

4. Dr. Graves also testified about the process for receiving his football season tickets from Respondent. Dr. Graves confirmed that he did not have to sign anything and was not given any information regarding a waiver printed on the back of the ticket.

5. On cross-examination, Dr. Graves confirmed that he was walking in a crowd of people trying to keep up with his wife. Dr. Graves stated that he is positive he tripped on the pedestrian barricade and fell onto his wife. Dr. Graves also testified that he was 69 years old at the time of the incident and that his wife was 54 years old at the time of the incident.

6. Michael Cramer, Facilities Operations Supervisor for Respondent, testified that he is in charge of set-up for athletic events, including football games. Mr. Cramer confirmed that Respondent began using the pedestrian barricades in 2012 because of the digital scanning of tickets. Mr. Cramer also testified that he was aware of people tripping over the pedestrian barricades with elevated footings in tight areas, such as the area where students were funneled into to gain entry to the stadium. Mr. Cramer testified that Respondent now uses pedestrian barricades with flat footings.

7. Claimant also testified regarding the incident and her resulting injuries. Claimant testified that after the fall, the pedestrian barricade was lying on top of her and her husband.

Findings of Fact and Conclusions of Law

Based upon a review of the pleadings, testimony, and the law of Arkansas, the Claims Commission hereby finds as follows:

8. The Claims Commission has jurisdiction to hear the Claims pursuant to Ark. Code Ann. § 19-10-204(a).

9. The Claims Commission finds that all witnesses were credible.

10. The Claims Commission finds that Claimant and Dr. Graves were invitees upon Respondent's property.

11. As such, Respondent had a duty to exercise ordinary care to maintain the premises in a reasonably safe condition for the benefit of an invitee. *See Delt v. Bowers*, 97 Ark. App. 323, 325–26, 249 S.W.3d 162, 164-65 (2007).

12. The Claims Commission finds that the preponderance of the evidence shows that Dr. Graves tripped over the pedestrian barricade. The Claims Commission finds Claimant's testimony that the pedestrian barricade had to be pulled off of Claimant and Dr. Graves after the fall to be especially significant.

13. The Claims Commission does not find the ages of Dr. Graves or the Claimant relevant to this proceeding.

14. The Claims Commission finds that the Respondent was on notice that the pedestrian barricades with elevated footings presented a stumbling or tripping hazard. The Claims Commission finds Mr. Cramer's testimony regarding the stumbling or tripping hazard to be especially significant. The Claims Commission does not find it significant that this stumbling or tripping hazard had only been noticed in "very tight areas," such as where the students were admitted into the stadium. *See M. Cramer deposition and testimony*. The Claims Commission agrees with Claimant that it is irrelevant that Respondent was unaware of any injuries that had been caused by the pedestrian barricades with elevated footings, in light of Respondent's knowledge of the stumbling or tripping hazard.

15. The Claims Commission finds that, in utilizing pedestrian barricades that Respondent knew to be a stumbling hazard, Respondent breached its duty to exercise ordinary care to maintain the premises in a reasonably safe condition.

16. The Claims Commission finds that Claimant's injuries were foreseeable. As stated by the Arkansas Supreme Court in *Jordan v. Adams*:

It is well established that if the act is one which the party in the exercise of ordinary care ought to have anticipated was likely to result in injury to others, then such person is liable for the injury proximately resulting therefrom although he might not have foreseen the particular injury which did happen.

259 Ark. 407, 411, 533 S.W.2d 210, 212 (1976) (citing *Missouri Pac. Railroad Co. v. Johnson*, 198 Ark. 1134, 133 S.W.2d 33 (1939)). While Respondent may not have foreseen the exact circumstances in which Claimant was injured, it was foreseeable that someone could be injured after tripping or stumbling on the elevated footing of a pedestrian barricade. As such, under *Jordan*, Claimant's injury was foreseeable.

17. The Claims Commission finds that Respondent's use of the pedestrian barricades with the elevated footings was the proximate cause of Claimant's injuries. The Claims Commission finds that Dr. Graves' tripping on the pedestrian barricade is not an intervening cause sufficient to break the chain of causation because Dr. Graves' act of tripping was not "totally independent of the acts . . . constituting the primary negligence." *Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 208, 600 S.W.2d 1, 9 (1980).

18. As such, the Claims Commission finds that Respondent was negligent in its use of the pedestrian barricades with elevated footings.

19. As to whether the hold harmless provision on the back of the ticket qualifies as an exculpatory agreement, the Claims Commission is unpersuaded by Respondent's argument that Dr. Graves or Claimant were knowledgeable of the potential liability they were releasing by

attending the game. As stated by the Arkansas Supreme Court in *Finagin v. Arkansas Development Finance Authority*, 355 Ark. 440, 455, 139 S.W.3d 797, 806 (2003), when reviewing an agreement, “we are not restricted to the literal language of the contract [] and will also consider the facts and circumstances surrounding the execution of the release in order to determine the intent of the parties.” Citing *Miller v. Pro-Transportation*, 78 Ark. App. 52, 77 S.W.3d 551 (2002). Moreover, as stated by the Arkansas Court of Appeals in *Miller*, “[c]ontracts that exempt a party from liability from negligence are not favored by the law” 78 Ark. App. at 55, 77 S.W.3d at 553.

20. However, pursuant to Ark. Code Ann. § 16-64-122, the Claims Commission must consider the fault of all parties. Although Dr. Graves is not a party to this claim, Respondent has argued that Dr. Graves is responsible for Claimant’s damages. As such, the Claims Commission will also consider the fault of Dr. Graves. See *E-Ton Dynamics Industrial Corp. v. Hall*, 83 Ark. App. 35, 41–42, 115 S.W.3d 816, 820 (2003).

21. The Claims Commission finds it significant that Dr. Graves was walking quickly trying to keep up with Claimant, although the only testimony to explain why Claimant and Dr. Graves were moving so quickly was the testimony of each that they left the game early to avoid the huge crowds leaving after the game. Had Dr. Graves been walking at a more normal pace, he may have seen and avoided the elevated footing of the pedestrian barricade.

22. As such, the Claims Commission assigns fault as follows:

- (a) Claimant: 0%
- (b) Dr. Graves: 30%
- (c) Respondent: 70%

23. As for damages, the Claims Commission finds that there was no specific testimony presented as to Claimant’s out-of-pocket medical damages. Dr. Graves presented rough estimates

regarding physical therapy costs and medical equipment purchased, but neither he nor Claimant were able to give specific numbers to the Claims Commission. As such, the Claims Commission is unable to make an award for out-of-pocket medical expenses.

24. However, the Claims Commission does have sufficient evidence to make a determination as to Claimant's pain and suffering. The testimony presented by Claimant and Dr. Graves regarding Claimant's injury and lengthy recovery process was compelling.

25. As such, the Claims Commission finds that Claimant is entitled to \$25,000.00 in pain and suffering, of which Respondent is liable for 70% of that amount, or \$17,500.00.

26. Pursuant to Ark. Code Ann. § 19-10-215, the Claims Commission herein refers this claim to the Arkansas General Assembly for review, approval, and placement on an appropriations bill.

IT IS SO ORDERED.



ARKANSAS STATE CLAIMS COMMISSION
Henry Kinslow, Co-Chair



ARKANSAS STATE CLAIMS COMMISSION
Bill Lancaster



ARKANSAS STATE CLAIMS COMMISSION
Sylvester Smith

DATE: April 13, 2018

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