[Cite as *Kahlig v. Dept. of Transp.*, 2008-Ohio-5163.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

RUTH KAHLIG

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-01022-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Ruth Kahlig, filed this complaint against defendant, Department of Transportation ("DOT"), asserting she suffered personal injury allegedly caused by a hazardous condition at the rest area premises on US Route 33 at milepost 7.94 in Auglaize County, a facility maintained by DOT. Plaintiff recalled she and her husband stopped at the particular US Route 33 rest area at approximately 12:00 p.m. on April 26, 2007. Plaintiff related as she was walking on the sidewalk leading from the parking area to the restroom building she "stepped where there was a chunk of concrete that had come out of the sidewalk (next to a grate)." Plaintiff further related she lost her balance and fell as she stepped upon the uneven sidewalk pavement. Plaintiff asserted she immediately experienced "great pain" in her wrist and arm when she fell to the ground after tripping over the uneven pavement. Plaintiff explained she filed an accident report with the DOT attendant at the rest area within minutes of her trip and fall incident and subsequently (May 3, 2007) sought medical attention for the continuing pain in her arm. Plaintiff pointed out it was discovered she had fractured her arm as a result of the trip and fall incident. Plaintiff contended the injury to her arm was proximately caused by a hazardous sidewalk condition on the rest area premises. Consequently, plaintiff filed this complaint seeking to recover $1,532.00, for medical expenses incurred, mileage, loss of services, and pain and suffering. The filing fee was

paid.

{¶ 2} Plaintiff submitted photographs depicting the sidewalk area where she tripped and fell on April 26, 2007. The photographs depict the particular point where two concrete sidewalk slabs adjoin and one slab displays an eroded area at this adjoining point which creates a noticeable height deviation between the intact slab and the eroded slab. The trier of fact, from a review of the photographs, estimates that the height deviation between the two adjoining sidewalk slabs is less than two inches. The area of erosion shown covers several inches at variable depths with the greatest height deviation present at the actual juncture point of the two sidewalk slabs. The photographs further depict sidewalk imperfections that are clearly visible.

{¶ 3} Defendant denied any negligent act or omission on the part of DOT caused plaintiff's injury. Additionally, defendant asserted plaintiff failed to produce sufficient evidence to establish the necessary elements of liability in a claim of this type. Defendant pointed out that plaintiff as a user of a rest stop, "was classified under the law as a licensee and, therefore, the defendant owed her a duty to refrain from wanton or willful conduct, which may result in injury." See *Provencher v. Ohio Dept. of Transp.* (1990), 49 Ohio St. 3d 265, 551 N.E. 2d 1257. Defendant contended plaintiff failed to prove DOT engaged in wanton or willful conduct and that such conduct proximately caused her injury.

{¶ 4} Defendant also pointed out that a licensee generally is barred from recovery for injuries caused by ordinary negligence of an owner or occupier of premises. See *Light v. Ohio University* (1986), 28 Ohio St. 3d 66, 28 OBR 165, 502 N.E. 2d 611. Defendant did

{¶ 5} note there are factual circumstances obviating the general rule of no liability for injuries to licensees caused by a landowner's negligence by citing 2 Restatement of the Law 2d Torts (1965), Section 342. The Restatement advises:

{¶ 6} "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, *** (a) the possessor knows or has

reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and *** (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and *** (c) the licensees do not know or have reason to know of the condition and the risk involved."

{¶ 7} Defendant denied having any knowledge of any problem with the paved sidewalk at the US Route 33 Auglaize County rest area. Defendant denied receiving any complaints about the condition of the sidewalk prior to plaintiff's April 26, 2007 incident. Defendant pointed out plaintiff's complaint was the only complaint received regarding the condition of the rest area sidewalk, despite the fact hundreds of motorists use the rest area facilities and walk upon the sidewalks. Although plaintiff filed an injury incident report (copy submitted) with the rest area caretaker on April 26, 2007, defendant maintained the report was not forwarded to DOT Auglaize County Facility Manager, Lonnie Falknor, until July 2007. Defendant submitted a copy of a document titled "CIMS Complaints in Aug County Between 11/1/06 and 7/15/07." A listing in this DOT record notes a customer identified as Dale G. Finkner notified DOT on April 25, 2007 of a problem with a rest area in Auglaize County. The complaint/problem was referred to DOT employee, Lonnie Falknor. The precise location of the rest area and the nature of the complaint/problem reported were not listed on the DOT record, although an entry indicates the complaint/problem was completed on April 25, 2007.

{¶ 8} Defendant observed repairs were made to the particular rest area sidewalk on July 13, 2007. An e-mail (copy submitted) from Lonnie Falknor points out that "[t]here was less than a cup full of material used and less than a half hour of time involved" to complete the repair on the sidewalk. Falknor described the pre-repair sidewalk condition noting: "[t]he chips that were in the sidewalk were small (and) [t]he largest one was less than two inches wide, maybe three to four inches long and probably about a half inch deep or so shaped in the form of an elongated D." Defendant insisted the sidewalk condition that caused plaintiff's trip and fall and resulting arm injury

constituted a minor insubstantial defect. Defendant observed that a plaintiff is generally barred from recovery for injuries received in tripping over an uneven sidewalk containing minor height differentials. Citing *Cash v. Cincinnati* (1981), 66 Ohio St. 2d 319, 330, 20 O.O. 3d 300, 421 N.E. 2d 1275; *Blain v. Cigna Corp.*, Franklin Co. App. No. 02AP-1442, unreported, 2003-Ohio-4022. Defendant argued plaintiff's trip and fall, according to the facts presented, and without evidence of any attendant circumstances beneficial to plaintiff's action shown, was caused by minor height deviation of the sidewalk and therefore, no liability shall attach.

{¶ 9} Ohio law classifies an individual using a public roadside rest area as a licensee. *Provencher*, 49 Ohio St. 3d 265, 551 N.E. 2d 1257, at the syllabus. Accordingly, plaintiff was a licensee while at defendant's rest area. Therefore, defendant generally owed plaintiff a duty to refrain from wanton and willful conduct which might result in injury to her. *Provencher,* at 266.

{¶ 10} Under existing case law, a licensor does not owe a licensee any duty except to refrain from wilfully injuring her and not to expose her to any hidden danger, pitfall, or obstruction. If the licensor knows such a danger is present, the licensor must warn the licensee of this danger which the licensee cannot reasonably be expected to discover. *Salemi v. Duffy Construction Corporation* (1965), 3 Ohio St. 2d 169, 32 O.O. 2d 171, 209 N.E. 2d 566*,* at paragraph two of the syllabus; *Hannan v. Ehrlich* (1921), 102 Ohio St. 176, 131 N.E. 5004, at paragraph four of the syllabus.

{¶ 11} "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, *** (a) the possessor knows or has reason to know of the condition and should realize that it involved an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and *** (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and risk involved, and *** (c) the licensees do not know or have reason to know of the condition and risk involved." 2 Restatement of the Law 2d, Torts (1965), Section 342.

{¶ 12} Based on the information presented plaintiff's status under a premises liability analysis was that of a licensee. See *Light*. Plaintiff's cause of action is grounded in negligence. In order to prevail on a negligence action, plaintiff must establish: (1) a duty on the part of defendant to protect her from injury; (2) a breach of that duty; and (3) injury proximately resulting from the breach. *Huston v. Konieczny* (1990), 52 Ohio St. 3d 214, 217, 556 N.E. 2d 505; *Jeffers v. Olexo* (1989), 43 Ohio St. 3d 140, 142, 539 N.E. 2d 614; *Thomas v. Parma* (1993), 88 Ohio App. 3d 523, 527, 624 N.E. 2d 337; *Parsons v. Lawson Co.* (1989), 57 Ohio App. 3d 49, 50, 566 N.E. 2d 698. The mere fact plaintiff tripped does not prove negligence on the part of defendant. *Green v. Castronova* (1966), 9 Ohio App. 2d 156, 161, 38 O.O. 2d 176, 223 N.E. 641; *Kimbro v. Konnie's Supermarket, Inc.* (June 27, 1996), Cuyahoga App. No. 69666, unreported; *Costidakis v. Park Corporation* (Sept. 1, 1994), Cuyahoga App. No. 66167, unreported. It is incumbent upon a plaintiff as a licensee to show that there was not only a dangerous or latent condition on the premises that was the cause of the fall, but that defendant knew of the hidden danger and either exposed her to such danger or failed to warn her of the danger. Evidence has shown plaintiff's injury occurred in an open sidewalk area during daylight hours when visibility was optimal. The sidewalk area plaintiff tripped over contained a minor imperfection between paved slabs and was readily observable. It has been previous held that a defendant cannot be found liable for injuries caused by a slip and fall over a slight sidewalk height variation imperfection. *Helms v. Am. Legion, Inc.* (1966), 5 Ohio St. 2d 60, 34 O.O. 2d 124, 213 N.E. 2d 734. The facts of the present claim clearly show plaintiff's injuries were caused by tripping over a minor insubstantial height difference between concrete sidewalk slabs. Maintaining such a slight disparate condition cannot constitute negligence. Under the particular evidence presented, the court finds plaintiff's injury was not caused by a hidden dangerous condition, but by an open and obvious condition that was not particularly hazardous. Consequently, plaintiff has failed to prove elements necessary to invoke liability. Plaintiff's claim is denied.

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ENTRY OF ADMINISTRATIVE DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa

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