[Cite as *Carlson v. Ohio Dept. of Transp.*, 2011-Ohio-5973.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Dolores Carlson,	:	
Plaintiff-Appellant,	:	
		No. 11AP-175
v.	:	(C.C. No. 2009-06834)
Ohio Department of Transportation,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on November 17, 2011

Chuparkoff Law Office, and *Mark A. Chuparkoff*, for appellant.

Michael DeWine, Attorney General, *Stephanie Pestello-Sharf*, and *Eric A. Walker*, for appellee.

APPEAL from the Court of Claims of Ohio.

BROWN, J.

{¶1} Dolores Carlson, plaintiff-appellant, appeals from a judgment of the Court of Claims of Ohio, in which the court, pursuant to a bench trial, granted judgment in favor of the Ohio Department of Transportation ("ODOT"), defendant-appellee.

{¶2} On May 8, 2009, appellant was traveling with her daughter, Pamela Wilcox, in an automobile northbound on Interstate 75 in Hancock County, Ohio. The two decided to stop at a rest area. The rest area is comprised of restrooms, vending machines, and

newspaper machines. ODOT maintains the restrooms and grounds, while the vending and newspaper machines are maintained by unrelated, non-governmental entities. While walking back to her vehicle after using the restroom facilities at the rest area, appellant fell on an uneven portion of the sidewalk in front of the restroom building and sustained injuries.

{¶3} On August 7, 2009, appellant filed a complaint against ODOT, alleging negligence in maintaining the sidewalk at the rest area. The issues of liability and damages were bifurcated, and a trial on liability only was held before the trial court on July 12, 2010. On January 25, 2011, the trial court issued a decision in favor of ODOT. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> I. The Court of Claims erred as a matter of law when it classified the Plaintiff as a "licensee" under Ohio Law when she was on the premises of a Rest Area which provided financial gain to the State thereby providing her "invitee" protection.
>
> II. That, in the event the Plaintiff was a "licensee[,"] the Court of Claims erred when it applied too strict a standard to the protection provided to the Plaintiff. The law requires that the Defendant warn of hazards it "knows" of while the Court required the Plaintiff to establish that the Defendant acted "wantonly" and/or "willfully[."]

{¶4} Appellant argues in her first assignment of error that the Court of Claims erred when it classified her as a "licensee" instead of an "invitee." In order to establish a negligence claim, appellant must show the existence of a duty, a breach of that duty, and an injury proximately resulting from the breach. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 1998-Ohio-602. The failure to prove any element is

fatal to her negligence claim. *Whiting v. Ohio Dept. of Mental Health* (2001), 141 Ohio App.3d 198, 202.

{¶5} In cases of premises liability negligence, the scope of the duty owed to a visitor depends upon her status. *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 417, 1994-Ohio-427. In determining the duty of a property owner or occupier, Ohio adheres to the common-law classifications of invitee, licensee, and trespasser. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137.

{¶6} In the present case, appellant contends she was an invitee, while the trial court found she was a licensee. An invitee is one who enters property by invitation and for the benefit of the property owner or occupier. *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68. Thus, to be an invitee, one must establish that the premises owner received a tangible or economic benefit from the visit. See *Roesch v. Warren Distrib./Fleet Eng. Research*, 146 Ohio App.3d 648, 2000-Ohio-2694; *McAllister v. Trumbull Properties Co. Ltd. Partnership* (Feb. 11, 1994), 11th Dist. No. 93-T-4891; *Wheeler v. Am. Legion Community Home Co., Inc.* (June 28, 1991), 11th Dist. No. 90-A-1571. By contrast, a licensee is one who enters property with the permission or acquiescence of the owner or occupier and for the benefit of the individual instead of the owner or occupier. *Provencher v. Ohio Dept. of Transp.* (1990), 49 Ohio St.3d 265, 266.

{¶7} Appellant argues that she was an invitee because ODOT receives a financial and tangible benefit from rest area users through vending machine sales, newspaper sales, and safer roadways. We disagree. Several courts have addressed similar issues and have concluded that those members of the motoring public who stop at

a facility solely to use the restroom facilities are licensees. In *Mostyn v. CKE Restaurants, Inc.*, 6th Dist. No. WM-08-018, 2009-Ohio-2934, while en route from Ohio to New York traveling via the Ohio Turnpike, the appellant stopped at a turnpike travel plaza. The sole and undisputed purpose of this stop was for appellant to utilize the restroom facilities. Appellant tripped and fell on a floor mat while proceeding through a set of glass doors at the entryway of the plaza leading to a restaurant and the restroom facilities. The court of appeals concluded appellant was a licensee, finding that the record demonstrated that appellant had entered the premises purely to use the restroom facilities and had not entered the area of the incident for any business purpose beneficial to appellee.

{¶8} In *Provencher*, upon which the trial court relied, the plaintiff brought a negligence action against ODOT after she fell and fractured her right ankle while descending steps located at a rest area. The Supreme Court of Ohio rejected the plaintiff's argument that she had been invited to use the public rest area and that they were on the premises for purposes in which ODOT had a beneficial interest. The court indicated that the pivotal issue before it was the economic benefit received by ODOT. Id. at 266. The court found no conduct on the part of ODOT that justified persons in believing that the agency desired them to enter the land; thus, no invitation had been made. At most, the court found, ODOT's conduct constituted a willingness to permit entry if such persons desired to do so, and the entry provided no tangible benefit to ODOT. The court rejected the notion that the increased safety of Ohio's highways that results from highway travelers' use of the rest areas is a tangible benefit sufficient to the State of Ohio to confer invitee status upon all highway travelers who stop at rest areas. See id. Thus, the court concluded that individuals who use public roadside rest areas are generally licensees.

{¶9} In *Hoover v. State* (Mar. 31, 1993), 10th Dist. No. 92AP-1529, the plaintiff was walking across the public parking lot of a rest area on State Route 2 in Vermillion, Ohio, when she stepped into a break and depression in the pavement, causing her to fall to the ground and sustain serious injuries. The rest area was owned by the state and maintained by ODOT, who were both defendants. The trial court sustained the defendants' motion for judgment on the pleadings, relying on *Provencher* to find the plaintiff was a licensee. In the plaintiff's subsequent Civ.R. 60(B) motion, the plaintiff attempted to distinguish the case from *Provencher* because the state had designated the roadside rest stop here as a "scenic overlook," thereby inducing and inviting her to stop at the rest area. The trial court denied the Civ.R. 60(B) motion, finding *Provencher* still controlling. This court affirmed the trial court, finding that, because the plaintiff was an individual using a roadside rest area facility, she was a licensee to whom defendants owed no duty of ordinary care, relying upon *Provencher*. We also found the fact that the rest area was designated as a "scenic overlook" did not distinguish it from *Provencher*, and the advantage to the state gained from highway travelers enjoying scenic beauty in Ohio at roadside overlooks was not tangible enough to confer invitee status upon the plaintiff. This court concluded that the plaintiff failed to set forth any facts under the benefit test that would indicate that her activities at the roadside rest area in question were made for the purpose of conducting business with defendants, and she set forth no tangible benefit received by defendants by virtue of her visit to the scenic overlook. This court reiterated the finding in *Provencher* that the advantage to highway safety garnered from having highway travelers stop at the roadside rest area is too intangible of a benefit to confer invitee status.

{¶10} In the present case, appellant's claim that she was an invitee because ODOT receives a financial and tangible benefit from rest area users through safer roadways can be dismissed at the outset. The Supreme Court in *Provencher* specifically addressed this argument. The court found that increased safety on the highways is not the type of benefit intended by prior case law, and any advantage to highway safety measured in this sense is intangible and not easily calculated. The Supreme Court's determination on this issue is controlling. Therefore, appellant's argument, in this respect, is without merit.

{¶11} As for appellant's argument that she was an invitee because ODOT receives a financial and tangible benefit from rest area users through vending machine and newspaper sales, this argument is also without merit. Appellant relies upon this court's case in *Talley v. Ohio Dept. of Transp.* (Feb. 6, 2001), 10th Dist. No. 00AP-1037. In *Talley*, the plaintiff stopped at a rest area at northbound Interstate 75, near Bowling Green, Ohio. While in the process of walking out of the entrance of the building, she was injured when she tripped and fell due to inadequate lighting. The plaintiff brought a negligence action against ODOT, and the trial court granted ODOT's motion for judgment on the pleadings. On appeal, this court reversed, noting that the Supreme Court in *Provencher* indicated that individuals who use public roadside rest area facilities are, "as a general rule," licensees; thus, the presence of the phrase "as a general rule" implied that people who visit a public roadside rest area facility may on occasion be able to demonstrate that they are an invitee, not merely a licensee. As a result, we found that judgment on the pleadings is inappropriate in such cases until after discovery. This court further noted:

> [M]any changes have occurred since 1985 when * * * Provencher fell and fractured her ankle at a roadside rest stop alongside a state route. Roadside rest areas on interstate highways such as Interstate 75 now routinely provide vending machines from which the state of Ohio apparently receives an economic benefit. Signs along the highways announce the availability of the rest stop miles in advance. The state of Ohio and ODOT do not merely tolerate the presence of the motoring public at rest areas on interstate highways. The state of Ohio and ODOT actively encourage the motoring public to stop. The state of Ohio receives financial and other benefits in return. In short, the general rule for a roadside rest area for Route 23 in Pike County in 1985 may not be the general rule for rest areas on interstate highways in the 21st century.

{¶12} In the present case, however, appellant conceded that she neither utilized nor intended to utilize the vending and newspaper machines at the rest area. Appellant's sole purpose for traveling to and from the rest area was to use the restroom facilities. Thus, in this instance, the state received no benefit from appellant's visit, and appellant was at the rest area solely for her own benefit. That vending machines and newspaper sales were present at the rest stop was insufficient to find ODOT was derived some benefit, given appellant did not intend to use them. See *Mostyn* (even though the plaintiff tripped while proceeding through doors that led to a rest stop restaurant, the fact that the sole and undisputed purpose of her stop was to utilize the rest area restroom facilities, rendered her a licensee).

{¶13} Importantly, in *Talley*, this court stated that the state "apparently" receives an economic benefit from the vending machines. In the present case, this is not true. Vicki Ashley, an ODOT employee, testified that the vending machines are managed and maintained by the Ohio Bureau of Services for the Visually Impaired ("OBSVI"), and the

state receives no economic benefit from the vending machines and newspapers. Thus, our basis in *Talley* for distinguishing *Provencher* is not applicable to the present case.

{¶14} The Court of Claims has before addressed the economic benefit of vending machines in light of our decision in *Talley* in *Eckert v. Ohio Dept. of Transp.*, Ohio Ct. Cl. No. 2001-05987, 2002-Ohio-4261. In *Eckert*, the plaintiff was traveling on Interstate 90 from Cuyahoga Falls, Ohio, heading toward Pennsylvania, when she stopped at a rest area maintained by ODOT. The plaintiff intended to use the restroom facilities and to walk around. The plaintiff did not use the vending machines or concession stands at the rest area. Upon returning from the restroom facilities, she tripped and fell over an expansion joint between two sections of the sidewalk. The plaintiff brought a negligence action against ODOT. ODOT argued that plaintiff was a licensee because her presence at the rest area did not confer any benefit, economic or otherwise, to ODOT. Relying upon *Provencher*, the Court of Claims found the plaintiff was a licensee. The court then addressed our decision in *Talley*. The court found that OBSVI locates visually impaired independent owner/operators to operate and maintain the vending machines and these operators retain all profits. ODOT receives no income from the machines. Thus, the Court of Claims concluded that, even if the plaintiff had used the vending machines, no tangible or economic benefit was conferred upon ODOT. Such rationale is equally applicable to the present case.

{¶15} We also noted in *Talley* that signs along the highways announce the availability of the rest stop miles in advance, thereby actively encouraging the motoring public to stop. However, it was not the mere presence of signs announcing an upcoming rest stop that we suggested might turn a licensee into an invitee; rather, we stated that a

motorist might be an invitee if the state actively encourages the motoring public to stop so that it could receive financial and other benefits in return. As explained above, appellant failed to identify any financial or other benefits ODOT received in the present case by her stopping at the rest area. Appellant used the restroom facilities only, thereby conferring no benefit upon ODOT. Therefore, based upon *Provencher*, we find appellant was a licensee when she stopped at the rest area to use the restroom facilities. Appellant's first assignment of error is overruled.

{¶16} Appellant argues in her second assignment of error that, even if she was a licensee, ODOT was liable because it knew of the hazardous condition of the sidewalk and should have warned her. The duty of care owed to a licensee is a duty to avoid wanton or willful misconduct. *Gladon* at 317. To constitute willful and wanton misconduct, an act must demonstrate heedless indifference to or disregard for others in circumstances where the probability of harm is great and is known to the actor. *Salmon v. Rising Phoenix Theatre*, 12th Dist. No. CA2005-11-491, 2006-Ohio-4328, ¶14; *Rinehart v. Fed. Natl. Mtge. Assn.* (1993), 91 Ohio App.3d 222, 229. A licensee takes the premises subject to the attendant perils and risks. *Brown v. Rechel* (1959), 108 Ohio App. 347, 353-54, citing *Hannan v. Ehrlich* (1921), 102 Ohio St. 176. Ohio courts have held that, if the licensor knows of the presence of any such danger, the licensee must be alerted to any danger which the licensor has reason to believe the licensee will not discover. *Salemi v. Duffy Constr. Corp.* (1965), 3 Ohio St.2d 169, paragraph two of the syllabus; *Soles v. Ohio Edison Co.* (1945), 144 Ohio St. 373, paragraph one of the syllabus; *Chadwick v. Ohio Collieries Co.* (1928), 31 Ohio App. 311, 313; *Ehrlich* at paragraph four of the syllabus; *Wheeling & L.E. R.R. Co. v. Harvey* (1907), 77 Ohio St. 235.

{¶17} In the present case, appellant contends ODOT knew of the hazardous condition and failed to warn her. In support of this argument, appellant points to the testimony of Tony Lotz, the building maintenance superintendent for the district that includes the rest area at issue. Unfortunately, appellant merely cites a large passage from Lotz's testimony without specifically pointing out how that testimony supports her claim that ODOT knew of the hazardous condition. In the excerpt cited by appellant, Lotz testified that he completed building assessments of rest areas about once per year. For the assessments, he walks through the site and looks at the condition of everything for maintenance and upkeep. He completed an assessment of the rest area at issue in 2009, prior to the incident in question, and indicated on the assessment that it needed to "replace concrete walk in front of building." Lotz said that ODOT does not replace "good concrete" that is in "good shape." Lotz said that, based upon the fact that appellant fell, he replaced the concrete in the area of her fall. He said he would call it a "safety thing," given someone had fallen there.

{¶18} However, we agree with ODOT that, when viewing Lotz's testimony on the whole, appellant did not establish notice on ODOT's behalf. Lotz testified that he inspects the rest areas every year, and either he or other ODOT personnel would report any problems. He specifically testified that he had never been notified about any problems with the concrete in the area appellant had fallen, and an incident report would have been generated if someone had fallen. Lotz also stated that, when he indicated in his annual assessment of the rest stop in question that he needed to replace "concrete block" in front of the building, he was referring to the "concrete area in front of the building," meaning the "whole front section." He further clarified that, when he stated in the assessment they

were going to replace the concrete walkway in front of the building, he was referring to the entire walkway area and not just the specific spot where appellant fell. Lotz also called the building assessment a planning note for the future, and includes items that are not necessarily in need of immediate repair or replacement. He also said ODOT replaces cement when it gets older as the budget allows, so the department does not have to keep patching aging cement. Although Lotz did agree that ODOT did not replace "good" concrete that was in "good shape," he said this specific portion of concrete at issue was "fine" in terms of maintenance, and ODOT was going to replace it based upon its age. Therefore, contrary to appellant's argument, Lotz never testified that he saw uneven pavement or a hazard at this particular spot in the walkway prior to the fall. Instead, he said he never noticed any hazard posed by the concrete, had no knowledge of any incidents involving the concrete, and ODOT planned to replace the concrete only due to its age. Thus, appellant's argument, in this respect, fails.

{¶19} Appellant also argues that ODOT had notice of the dangerous condition because a worker at the rest area told her that another individual had fallen at the exact same location one week prior to appellant's fall. In support of her argument, appellant relies solely on the following passage from the testimony from her daughter, Pamela Wilcox:

> Q. What did [the rest area worker] say to you?
>
> A. She told us that someone else, a gentleman, had fallen there a week or so ago.

{¶20} However, we find Wilcox's testimony fails to demonstrate knowledge on ODOT's behalf for several reasons. Contrary to appellant's characterization of Wilcox's testimony, Wilcox did not state that the worker told her that the gentleman had fallen at

the "exact same" location. In fact, Wilcox's statement is vague on this point. Wilcox said that the worker specified only that the gentleman had fallen "there," which is too ambiguous to establish ODOT's prior notice of the specific defect over which appellant tripped. Importantly, Wilcox's testimony does not reveal that the worker told her what caused the gentleman to fall in that location. Furthermore, as mentioned above, Lotz stated that he was never previously notified about anyone falling on the concrete in the same area prior to appellant's fall, and an incident report would have been generated had someone fallen. For these reasons, Wilcox's testimony, in this respect, failed to establish that ODOT had notice of the alleged hazardous condition based upon a prior incident involving the same cement crack. Thus, the trial court did not err when it found appellant failed to prove that ODOT knew of the hazardous condition on the sidewalk prior to her fall. Also, given our finding that appellant failed to establish ODOT's prior notice of the defect, it could not have warned her of the defect prior to her fall. Therefore, appellant's second assignment of error is overruled.

{¶21} Accordingly, appellant's two assignments of error are overruled, and the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.

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