[Cite as *Eckert v. Ohio Dept. of Transp.*, 2002-Ohio-4261.]

IN THE COURT OF CLAIMS OF OHIO

RUTH ECKERT, et al. :

Plaintiffs : CASE NO. 2001-05987

v. : DECISION

DEPARTMENT OF TRANSPORTATION : Judge Fred J. Shoemaker

Defendant :

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{¶1} This case was tried to the court on the issue of liability. Plaintiffs assert claims of negligence and loss of consortium.

{¶2} On June 6, 1999, plaintiff[1] and her husband were traveling on I-90 from Cuyahoga Falls, Ohio heading towards Pennsylvania to attend a car show. It was a clear day and there were no adverse weather conditions. At approximately 10:30 a.m., plaintiffs stopped at Rest Area 1213 in Lake County, Ohio. Plaintiff testified that she intended to use the restroom and to walk around because of circulation problems in her legs. Plaintiffs did not use the vending machines or concession stands at the rest area.

{¶3} Plaintiffs parked their car at the eastern end of the parking lot and walked together up the eastern sidewalk to the restroom facilities. When they arrived, they discovered that the women's restroom was temporarily closed for cleaning. Plaintiff's husband used the men's restroom and walked back to the vehicle alone while plaintiff waited for the women's restroom to be reopened. Plaintiff took a longer route back to the vehicle via the western sidewalk before turning east on the main sidewalk. While doing so, she looked for her husband. As she took a step, she noticed that the expansion joint

[1] "Plaintiff" shall be used to refer to Ruth Eckert throughout this decision.

between two sections of pavement in her path was not level. She raised her foot to account for the difference in height but caught her toe on the sidewalk and fell, injuring her arm. Plaintiff testified that nothing had obstructed her view of the sidewalk, that she did not know the size of the defect in the pavement, and that the gap in the pavement was more pronounced on the south end of the sidewalk where she was walking.

{¶4} After plaintiff's husband came to her aid, he went to the rest area and reported the incident to the custodian who had been cleaning the women's restroom.

{¶5} In order for plaintiffs to prevail upon their claim of negligence, they must prove by a preponderance of the evidence that defendant owed them a duty, that it breached that duty, and that the breach proximately caused their injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

{¶6} Plaintiffs assert that they were business invitees at the rest area. Defendant argues that plaintiffs were licensees because their presence at the rest area did not confer any benefit, economic or otherwise, to defendant.

{¶7} "The distinction between an invitee and a licensee is dependent on whether the guest enters the land for personal benefit or for the benefit of the owner. A guest who enters an owner's premises, with permission or acquiescence, for personal benefit, is a licensee. *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68. A guest, who enters an owner's premises, with permission, for some purpose that is beneficial to the owner, is an invitee. Id. An owner has a duty to exercise ordinary care to protect an invitee. Id. In contrast, an owner merely owes a licensee a duty to refrain from wantonly or willfully causing injury. Id." *Heffern v. Univ. of Cincinnati Hosp.* (2001), 142 Ohio App.3d 44, 52.

{¶8} "Individuals who use public roadside rest area facilities are, as a general rule, licensees for purposes of establishing the duty of care owed to them by the state or its agencies. (*Light v. Ohio University* [1986], 28 Ohio St.3d 66, approved and followed.)" *Provencher v. Ohio Dept. of Transp.* (1990), 49 Ohio St.3d 265, syllabus. However, the Tenth District Court of Appeals has noted that "[r]oadside rest areas on interstate highways *** 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." *Talley v. Ohio Dept. of Transp.* (Feb. 6, 2001), Franklin App. No. 00AP-1037.

{¶9} Dennis Kratchovil testified that he had worked for defendant in District 12 for 20 years. As the administrative assistant for facilities maintenance, he maintains two rest areas, including Rest Area 1213. Kratchovil testified that Goodwill Industries of Ashtabula provides the custodians for Rest Area 1213, and that they are not employees of defendant.

{¶10} Christine Hunt testified that her job duties include budgeting and programming for rest areas. She stated that defendant works with the Bureau of Services for the Visually Impaired (BSVI) to determine whether a vending machine should be placed at a rest area. If it is determined that there is a need for a vending machine, BSVI posts an invitation to bid for visually impaired independent owner/operators to install, maintain and operate a machine. Defendant does not operate or maintain the vending machines and receives no income from them. Hunt further stated that BSVI does not receive a direct benefit from the machines because the owner/operator retains the profits.

{¶11} Based upon the evidence presented at trial, the court finds that even if plaintiffs had used the vending machines, no tangible or economic benefit was conferred upon defendant. Consequently, the court concludes that plaintiffs were licensees at the rest area.

{¶12} "The licensor is not liable for ordinary negligence and owes the licensee no duty except to refrain from wantonly or willfully causing injury." *Provencher* supra, citing *Hannan v. Ehrlich* (1921), 102 Ohio St. 176, paragraph four of the syllabus. Defendant was under no duty to warn plaintiffs about the alleged defect in the sidewalk. Therefore, plaintiffs have failed to prove that defendant breached any duty of care owed to them.

{¶13} Moreover, even if plaintiffs were afforded the legal status of business invitees, they still would not prevail. In order to recover from the occupier of a premises for personal injuries claimed to have been caused by the condition of those premises, an invitee must

allege and prove that the fall was proximately caused by some unreasonably dangerous condition on the premises. *Baldauf v. Kent State University* (1988), 49 Ohio App.3d 46. If the difference in elevation between two sidewalk slabs is two inches or less, there is a rebuttable presumption that the defect is insubstantial and, as a matter of law, not an unreasonably dangerous condition. *Cash v. Cincinnati* (1981), 66 Ohio St.2d 319. Plaintiffs failed to produce any evidence of the size of the alleged height deviation in the sidewalk.

{¶14} Furthermore, even if defendant were negligent, plaintiffs would not prevail as invitees. Ohio's Comparative Negligence Statute, R.C. 2315.19, bars plaintiffs from recovery if their contributory negligence is greater than defendant's negligence. Plaintiff testified that she saw the gap in the sidewalk before she tripped over it; that she attempted to step over it, but that she misjudged her own step; and that there were no obstructions blocking her view of the sidewalk. Thus, the court finds that plaintiff's own negligence was greater than any negligence attributable to defendant.

{¶15} In the final analysis, the court concludes that plaintiffs have failed to prove that defendant breached any duty owed to them. Accordingly, judgment is rendered in favor of defendant.

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FRED J. SHOEMAKER
Judge

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