[Cite as *Whipkey v. Ohio Dept. of Transp.*, 2005-Ohio-7090.]

IN THE COURT OF CLAIMS OF OHIO

LORRAINE WHIPKEY	:	
Plaintiff	:	
v.	:	CASE NO. 2005-06929-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

: : : : : : : : : : : : : : : : :

{¶ 1} On April 6, 2005, at approximately 11:00 a.m., plaintiff, Lorraine Whipkey, tripped and fell over an uneven sidewalk pavement condition at a roadside rest area located adjacent to Interstate 70 near mile marker 211 in Belmont County. Plaintiff related she was walking on the rest area sidewalk near, "the snack building [where] they had worked on the walk," when she tripped on the side of the sidewalk and fell to the ground striking her nose and forehead on the sidewalk pavement. Plaintiff further related there were no signs or other devices posted to warn pedestrians about the condition of the rest area sidewalk. After the described trip and fall incident, plaintiff sought medical treatment at a nearby facility.

{¶ 2} Plaintiff asserted her trip and fall and resulting injury were proximately caused by a defective sidewalk condition maintained on the rest area premises. Consequently, plaintiff filed this complaint seeking to recover $2,500.00 for medical expenses and pain and suffering from facial injuries received when she tripped over the rest area sidewalk. The Department of Transportation ("DOT"), as the entity bearing responsibilities for roadside rest areas, has been named defendant in this action.

{¶ 3} Defendant denied any liability in this matter. Defendant

argued plaintiff failed to produce evidence proving her injuries were the result of any negligent act or omission on the part of DOT staff. Defendant offered that plaintiff, as a user of the roadside rest area, was classified under the law as a licensee and DOT, therefore, owed her a duty to only refrain from willful or wanton conduct causing injury. *Provencher v. Ohio Department of Transportation* (1990), 49 Ohio St. 3d 265. DOT contended continued maintenance of a sidewalk area with a minor height deviation did not amount to actionable negligence in a claim of this type.

{¶ 4} Defendant also denied any individuals working at the rest area had any knowledge of the sidewalk condition. Defendant noted, DOT, as the entity in control of the rest area premises, "is not liable to a licensee for injury caused to the licensee by ordinary negligence of the landowner. *Light v. Ohio University* (1986), 28 Ohio St. 3d 66. Rather:

{¶ 5} '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 the risk involved, and *** (c) the licensees do not know or have reason to know of the condition and the risk involved. 2 Restatement of the Law 2d, Torts (1965), Section 342.'"

{¶ 6} Additionally, defendant submitted a photograph of the sidewalk portion which caused plaintiff's injuries. This photograph depicts a height deviation of less than one inch at the sidewalk site where plaintiff tripped. Defendant related that, "[u]nder Ohio Law, a plaintiff is generally barred from recover[y] if the uneven walkway in question has less than a two inch

differential." *Cash v. Cincinnati* (1981), 66 Ohio St. 2d 319, 330; *Blain v. Cigna Corp.*, Franklin Co. App. No. 02AP-1442, unreported, 2003-Ohio-4022.

{¶ 7} Plaintiff insisted defendant should bear liability for her injuries because she was not warned of the minor sidewalk defect. Plaintiff reasoned defendant should be held liable despite the fact the minor sidewalk defect constituted an open and obvious condition.

{¶ 8} Ohio law classifies an individual using a public roadside rest area as a licensee. *Provencher*, supra, 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. Id. at 266.

{¶ 9} Under exiting 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, at paragraph two of the syllabus; *Hannan v. Ehrlich* (1921), 102 Ohio St. 176, at paragraph four of the syllabus.

{¶ 10} "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 the risk involved, and *** (c) the licensees do not know or have reason to know of the condition and

the risk involved." 2 Restatement of the Law 2d, Torts (1965), Section 342. In the instant claim, evidence has shown defendant probably had knowledge about the uneven sidewalk condition prior to plaintiff's injury. A caretaker, an agent of defendant, is present at the rest area site for significant time. The fact an attendant is regularly on duty at the rest stop renders the notice issue irrefragable. Despite notice of a minor uneven sidewalk pavement variance, a defendant cannot be found liable for injuries caused by a slip and fall over a slight sidewalk height variation imperfection. *Helms v. American Legion, Inc.,* (1966), 5 Ohio St. 2d 60. 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 and consequently, plaintiff's claim is denied.

IN THE COURT OF CLAIMS OF OHIO

LORRAINE WHIPKEY	:	
Plaintiff	:	
v.	:	CASE NO. 2005-06929-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	ENTRY OF ADMINISTRATIVE DETERMINATION
Defendant	:	

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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. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Lorraine Whipkey
502 Decatur Avenue Apt. 305
Connellsville, PA 15425

Plaintiff, Pro se

Gordon Proctor, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

For Defendant

DRB/RDK/laa
11/17
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