[Cite as *Dechiara v. Ohio Dept. of Transp.*, 2003-Ohio-2967.]

IN THE COURT OF CLAIMS OF OHIO

CARL DECHIARA	:	
Plaintiff	:	
v.	:	CASE NO. 2002-06553-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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{¶1} Plaintiff, Carl Dechiara, is the owner of real property at 9211 Cleveland Avenue N.W. in Greentown, Ohio. Plaintiff's property is located on the west side of County Road 66 (Cleveland Avenue), just north of Highland Park Street in Stark County.

{¶2} In 1998, defendant, Department of Transportation, administered a contract to widen County Road 66 along the area where plaintiff's real property is located. Part of this roadway widening project involved the installation of a new culvert under Cleveland Avenue, through plaintiff's property, exercising the right to use an existing 80 foot wide easement acquired by the Stark County Engineer. Defendant's contractor decided to perform the roadway widening operation in phases. All construction work on the roadway and abutting private property, including plaintiff's real estate was expected to be completed by the early summer of 1999.

{¶3} Plaintiff has asserted his real property was damaged and left unrepaired by defendant's contractor during the course of the roadway widening project. Specifically, plaintiff initially alleged his, "concrete work not replaced, tree that was removed was not necessary, block top damage, and many more miscellaneous items"

were disturbed or damaged by defendant's contractor.

{¶4} On April 5, 1999, plaintiff met with Larry Nemeth, defendant's District 4 Construction Engineer regarding the perceived problems caused to the property at 9211 Cleveland Avenue N.W. Plaintiff related the following issues were discussed: "replacing concrete, replacing headwall, blacktop tore up due to heavy equipment correcting bird baths on blacktop." Plaintiff further related he brought up issues regarding lack of payment for the loss of his tree removed by defendant's contractor and the loss of parking on his property caused by the acts of defendant's contractor. Plaintiff contended he was told by Nemeth that any damage done by the contractor beyond the easement limits on his property would be corrected. However, plaintiff maintained Nemeth said, "no work being done until on-site work is started." The trier of fact is uncertain about the meaning of the previous statement.

{¶5} Plaintiff has asserted perceived corrective work was never done on his property by either defendant's personnel or defendant's contractor. Consequently, on July 8, 2002, plaintiff filed this complaint seeking to recover $2,500.00, the statutory maximum amount of damages recoverable at the administrative determination level. Plaintiff has contended his real property was damaged in the amount claimed by the acts of defendant's contractor in 1998 and 1999. Plaintiff has not introduced any evidence other than his own assertions to show his property was damaged in the amount claimed. Plaintiff submitted photographic evidence of his property before and after the roadway widening construction. These photographs were not particularly helpful to the trier of fact.

{¶6} On September 20, 2000, plaintiff met with several of defendant's engineering personnel to discuss the perceived damage to his property done by the roadway widening and repavement, apparently completed in the summer of 1999. After inspecting plaintiff's property none of defendant's employees could find any

justification for performing any additional corrective work for any damage done to plaintiff's property in 1998 and 1999.

{¶7} Evidence has apparently shown plaintiff's cause of action accrued at some time during 1999 when all ameliorating work on County Road 66 and 9211 Cleveland Avenue N.W. was completed. Plaintiff filed his complaint on July 8, 2002. R.C. 2743.16(A), the statute of limitations for commencing actions in this court states:

{¶8} "Subject to division (B) of this section, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties".

{¶9} It has been previously held the two-year statute of limitations under R.C. 2743.16 applies to claims based on continuing nuisance. See *Brown v. S. Ohio Corr. Facility* (1991), 62 Ohio Misc. 2d 337, *Bays v. Kent State Univ.* (1997), 86 Ohio Misc. 2d 69, *Pope v. Ohio Dept. of Transp.* (1998), 91 Ohio Misc. 2d 230. Additionally, when dealing with any tortious conduct a plaintiff's cause of action generally accrues and the appropriate statute of limitations begins to run whenever a plaintiff has been harmed and has discovered adequate information to conclude the harm derived from defendant's acts or omissions. *Brown*, *supra*. "Absent legislative definition, it is left to the judiciary to determine when a cause, 'arose'." *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St. 3d 84, 87 citing *Harig v. Johns-Manville Products Corp.* (1978), 284 Md. 70, 75. A statute of limitations begins to run from the time the wrongful act is committed. *O'Stricker*, supra. In the instant claim the damage complained of occurred in 1998 and 1999. Plaintiff filed this complaint in July 2002. It would appear plaintiff failed to meet the applicable statute of limitations.

{¶10} However, defendant failed to raise the defense of statute

of limitations at any time after the commencement of this action. Where the bar of statute of limitations is not raised as an affirmative defense then the defense is waived. *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St. 2d 55. Consequently, defendant in the present claim is estopped from asserting a statute of limitations defense and this action will proceed on the merits.

{¶11} Defendant, Department of Transportation, denied any liability for any damage to plaintiff's property. Defendant explained the project to widen County Road 66 in Stark County was financed with federal and county funds. Defendant further explained the work performed on plaintiff's land was within the easement of the Stark County Engineer's office. Therefore, defendant suggested, the Stark County Engineer's Office and not the Department of Transportation should be the proper defendant in this action. Conversely, defendant acknowledged the road widening project on County Road 66 was administered by the Department of Transportation under a contract with the W.G. Lockhart Construction Company who performed the actual work including work on plaintiff's property. Defendant characterized W.G. Lockhart Construction Company as its contractor. Seemingly, defendant has maintained it either is or is not the proper defendant in this matter.

{¶12} Additionally, defendant contended plaintiff failed to produce sufficient evidence to establish that the Department of Transportation or its contractor damaged his property by any activity connected with the road widening project. Although the front of plaintiff's property was affected by the roadway widening, defendant denied this operation left any damage to plaintiff's land. Furthermore, defendant acknowledged a tree was removed from a drainage easement on plaintiff's property and a culvert with a new headwall was installed. However, defendant asserted all corrective work required on plaintiff's property was performed in conjunction with these activities. Defendant denied plaintiff's land was left in a damaged condition after all projects had been

completed.

{¶13} Plaintiff filed a response to defendant's position. Plaintiff criticized the manner and design of the culvert installation on his property. Plaintiff did not approve of the job done with the headwall at the culvert installation site and the laying of riprap at the site. Also, contrary to defendant's contention, plaintiff denied giving permission to anyone to remove the tree growing on the drainage easement. Plaintiff denied authorizing the removal of the tree. Plaintiff did not submit any evidence for assessing the value of the tree, although defendant represented the tree was in an unhealthy state at the time it was removed. Plaintiff complained defendant's contractor scattered a pile of bricks he wanted set into the ground on his land. Plaintiff has not offered evidence of what kind of damage resulted from any activity involving the bricks. Defendant related plaintiff requested the bricks be removed. Plaintiff denied he made any such request. Plaintiff characterized the work of defendant's contractor as a "lousy job," including the repairing of asphalt on his property. Plaintiff reasserted his property was not restored to the same state and condition as it was before the roadway widening operation began in 1998.

{¶14} Plaintiff has failed to prove by a preponderance of the evidence that defendant's contractor did not remedy any damage done incident to the roadway widening project. Plaintiff has not established the corrective measures taken were inadequate. Plaintiff has failed to demonstrate his property was permanently damaged by the acts or omissions of defendant's contractor or defendant. Therefore, all claims concerning asphalt damage, concrete, bricks, culvert installation, and the use of riprap are denied.

{¶15} However, defendant is liable for the value of the tree removed from plaintiff's property. Although defendant has authority to remove trees from roadway easements, the removal of

such property constitutes a taking for which compensation is mandated under Section 19, Article I of the Ohio Constitution. See *Rummel v. Ohio Dept. of Transp*. (1981), 3 Ohio App. 3d 38. The court concludes reasonable damages for the loss of the tree amount to $300.00. Defendant is liable for that amount plus the $25.00 filing fee, which may be reimbursed as compensable damages pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19.

{¶16} Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, plaintiff's claim is GRANTED in part and DENIED in part and judgment is rendered in favor of plaintiff in the amount of $325.00 which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Carl Dechiara
7255 Starcliff N.W.
N. Canton, Ohio 44720-7811

Plaintiff, Pro se

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

For Defendant

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