## IN THE COURT OF CLAIMS OF OHIO

ELMER R. DETTY :

Plaintiff: CASE NO. 2002-06600

Judge J. Warren Bettis

v. : Magistrate Lee Hogan

DEPARTMENT OF TRANSPORTATION : <u>MAGISTRATE DECISION</u>

Defendant :

- $\P 1$  Plaintiff brought this action alleging a single claim of negligence. The issues in the case were bifurcated and, subsequent to the liability trial, the court issued a decision in plaintiff's favor. The case was then tried to the court on the issue of damages.
- {¶2} This claim concerns property damage caused when defendant negligently allowed sludge and water that had been pumped from a nearby catch basin to flow into plaintiff's basement. The material clogged the basement water drain, causing a back-up in the basement where the furnace was located. Plaintiff testified that the furnace ceased to operate and had to be cleaned and repaired. Further, he contends that the water damaged both the foundation of his residence and the adjacent driveway. It is undisputed that defendant covered the driveway debris with stone the day after the incident occurred; however, plaintiff contends that additional gravel was needed to fully remedy the problem.
- {¶3} As a result of the occurrence, plaintiff is seeking compensation for the following expenses, which he claims are proximately related to defendant's negligence: \$150 for Hamm's Heating and Cooling (Plaintiff's Exhibit 2) to clean and repair the furnace; \$4,700 (Plaintiff's Exhibit 1) for Hamilton House Movers to clean and repair the foundation damage; \$100 per hour for Roto-Rooter to clean the basement drain; \$70 for Adam's

Trucking to bring in an additional load of gravel; loss of wages to attend this court's proceedings; and \$25 for the filing fee paid to commence this action.

- Cooling or the request for the filing fee. Although defendant argues that plaintiff is not entitled to reimbursement for his lost wages related to the time he spent in court, defendant does admit that plaintiff is entitled to compensation for the time and labor he expended in cleaning the material out of his basement. Defendant further suggested that plaintiff's hourly work wage be used in calculating this element of damages. With respect to the remaining expenses, defendant denies liability for the \$4,700 claimed for foundation repair. Defendant also noted that the only cost plaintiff had paid out-of-pocket was for the furnace repair; that all the other repair costs were estimates, that only the foundation repair estimate was documented; and that the damage referred to in that estimate could not have been entirely caused by defendant's negligence. It was defendant's opinion that reimbursement for the foundation repair would amount to a "windfall" for plaintiff.
- {¶5} Based upon the testimony and the evidence presented, and upon reviewing the photographic evidence submitted during the liability phase of the trial, the court finds and recommends that plaintiff be awarded damages in the amount of \$3,052.60, to include the \$25 filing fee which plaintiff is unquestionably entitled to recover. The amount also includes the \$150 uncontested furnace repair expense; \$2,350, or one-half of the estimated cost for the foundation work; \$357.60, which represents 16 hours at a rate of \$22.35 per hour for time plaintiff would reasonably have needed to clean backed-up material from his basement; \$70 for additional gravel and \$100 for one hour of drain cleaning expense.
- {¶6} The estimated foundation repair expense is reduced by half since, as stated in the July 28, 2003, liability determination "the court recognizes that plaintiff's basement was not a finished structure, but was more in the nature of a cellar, thus, some of the erosion of the floor and walls must have occurred over a period of time." The court finds that one-half of the estimated cost is reasonable based upon testimony and photographic evidence.

Further, the undocumented estimates for drain cleaning and gravel were allowed because they were reasonable and because the court found plaintiff to be a very credible witness regarding both the actions that led to the filing of this case and the damages that resulted. In determining the issue of witness credibility, this court has frequently stated that the factors to be considered are:

- {¶7} "the appearance of [the] witness upon the stand; his manner of testifying; the reasonableness of the testimony; the opportunity he had to see, hear and know the things about which he testified; his accuracy of memory; frankness or lack of it; intelligence, interest, and bias, if any; together with all facts and circumstances surrounding the testimony." *Adair v. Ohio Dept. of Rehab. & Corr.* (1998), 96 Ohio Misc.2d 8, 11; See 1 Ohio Jury Instructions (1994), Section 5.30.
- {¶8} Based upon the law and the credibility factors set forth above, the court concludes that \$3,052.60 is appropriate compensation in this case and, accordingly, recommends that damages be awarded in that amount.
- $\{\P9\}$  A party may file written objections to the magistrate's decision within 14 days of the filing of the decision. A party shall not assign as error on appeal the court's adoption of any finding or conclusion of law contained in the magistrate's decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).

LEE HOGAN
Magistrate

Entry cc:

Elmer R. Detty 35622 U.S. Rt. 50 Londonderry, Ohio 45647 Plaintiff, Pro se

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