

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.

{¶4} Defendant does not contest either the \$150 expense for Hamm's Heating and 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.

{¶9} *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

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MAGISTRATE DECISION

Columbus, Ohio 43215-3130

LH/cmd

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