

[Cite as *Ohio Dept. of Transp.*, 2005-Ohio-176.]

IN THE COURT OF CLAIMS OF OHIO

KATHRYNE KIRKUM	:	
Plaintiff	:	CASE NO. 2004-03217
	:	Judge Fred J. Shoemaker
v.	:	
	:	<u>DECISION</u>
OHIO DEPARTMENT OF	:	
TRANSPORTATION	:	
	:	
Defendant	:	
	:	
: : : : : : : : : : : : : : : :		

{¶ 1} Plaintiff brought this action against defendant, Ohio Department of Transportation (ODOT), alleging that defendant negligently performed highway construction activities that resulted in damage to her home and property. On December 2, 2004, defendant filed a motion in limine seeking to prevent plaintiff from introducing photographs and other demonstrative evidence that had not been provided or disclosed to defense counsel. The court denied defendant's motion and the case proceeded to trial on the issues of liability and damages.

{¶ 2} Plaintiff testified that her home was built approximately 100 years ago and that it showed evidence of normal wear and tear. Nevertheless, plaintiff maintained that after defendant commenced construction of the Maumee Crossing Project in 2003, approximately 75 feet from the property line behind her home, the number and size of cracks in the walls and the foundation had increased at an alarming rate. Plaintiff's companion, James Adkins, testified that he was a union bricklayer by trade and that he had performed repairs to the home over the past several years. He stated that he too had seen a significant increase in the cracking of the interior

ceilings and walls; that bowing of the foundation was apparent from outside the home; and that there was separation between the walls and the floors in some rooms. Both witnesses attributed the escalated deterioration of the home to the construction activity performed by ODOT. Plaintiff testified that large trucks travel behind her property carrying very large pieces of construction equipment and that the resulting vibrations create constant movement within her home and its foundation. Over defendant's objections, plaintiff submitted photographs which the court admitted into evidence.

{¶ 3} On cross-examination, plaintiff acknowledged that ODOT had offered to document the condition of her home prior to the construction project by videotaping the interior and exterior of the home; however, plaintiff refused to grant ODOT permission to do so. Plaintiff also admitted that she did not obtain an opinion from an expert to substantiate her position that the damage to her home was caused either by vibrations from the movement of heavy machinery or by ODOT's alleged negligent construction activities.

{¶ 4} Plaintiff presented her cause of action under a theory of negligence. In order for plaintiff to prevail upon such claim, she must prove by a preponderance of the evidence that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

{¶ 5} Defendant maintains that plaintiff failed to meet her burden of proof that ODOT was negligent in its construction activity or that the highway construction was a proximate cause of the damage to her home. Defendant relies on the holding of *Ryan v. Ohio Department of Transportation*, Court of Claims No. 2003-09297-AD, 2004-Ohio-900, which reads, in pertinent part, as follows: "plaintiff has not presented any evidence other than his own

assertion to prove his property was damaged as a proximate result of activity under the control of ODOT. As a necessary element of his claim, plaintiff was required to prove proximate cause of his damage by a preponderance of the evidence."

{¶ 6} Upon review of all the testimony and evidence presented, the court finds that plaintiff has failed to prove by a preponderance of evidence that defendant committed any negligent act during the Maumee Crossing construction project that would have proximately caused damage to her property. The court notes that inasmuch as plaintiff refused to have her home videotaped, the court does not have an objective standard by which to measure any existing damage shown in the photographs against the condition of the home prior to commencement of the construction project. In addition, plaintiff did not present any evidence to show that ODOT "failed to use proper care, or that the manner in which it performed the work was inconsistent with generally accepted construction practices." *Slack v. Fort Defiance Construction & Supply, Inc.*, Franklin App. No. 03AP-1268, 2004-Ohio-6520. Although James Adkins had professional status as a bricklayer and personal knowledge of the condition of plaintiff's home, the court finds that not only did he have a strong bias in favor of plaintiff but also he was not qualified to state an opinion as an expert that any damage to plaintiff's home was proximately caused by some negligent act or omission on the part of ODOT.

{¶ 7} For the foregoing reasons, the court finds plaintiff has failed to prove any of her claims and accordingly, judgment shall be rendered in favor of defendant.

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	:	Judge Fred J. Shoemaker
v.	:	
	:	<u>JUDGMENT ENTRY</u>
OHIO DEPARTMENT OF	:	
TRANSPORTATION	:	
Defendant	:	
: : : : : : : : : : : : : : : :		

This case was tried to the court on the issues of liability and damages. The court has considered the evidence and, for the reasons set forth in the 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.

FRED J. SHOEMAKER
Judge

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SJM/cmd
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