

[Cite as *Yulish v. Ohio Dept. of Transp.*, 2005-Ohio-642.]

IN THE COURT OF CLAIMS OF OHIO

SHARYN YULISH :
Plaintiff :
v. : CASE NO. 2004-09525-AD
OHIO DEPT. OF TRANSPORTATION : MEMORANDUM DECISION
Defendant :

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{¶ 1} On October 23, 2001, defendant, Department of Transportation ("DOT"), entered into a contract with Smith & Johnson Construction Co. ("Smith & Johnson") to reconstruct a portion of U.S. Route 33 in Athens, Ohio. This roadway construction operation was referenced as the U.S. Route 33 Athens Bypass Project.

{¶ 2} Plaintiff, Sharyn Yulish, is the owner of a residence at 529 Richland Avenue in Athens. Plaintiff's home is located approximately .2 of a mile from U.S. Route 33. A small stream, Coates Run, flows adjacent to plaintiff's property with the stream bed located about fifteen feet from the nearest side of plaintiff's residence. Plaintiff asserted the construction activity on the U.S. Route 33 Athens Bypass Project has caused substantial continuing damage to her property beginning in June 2003 and carrying on to the present date. Specifically, plaintiff alleged the roadway construction operation, "has caused my concrete to crack, the streams to rise, and my house to flood." Plaintiff asserted the highway improvement project, which involved blasting, had rendered her property unsafe. Plaintiff elaborated, stating,

"the concrete pad which connected the properties at 529 and 531 Richland had cracked down the middle, causing water to flow into the foundations of the two houses." Plaintiff insisted the roadway construction operation directly led to flooding in the area, alleging, "the volume of water was increased by the overflow of streams resulting from increased water flow."

{¶ 3} Plaintiff maintained that due to the flooding occurrences, she incurred expenses for required repairs to her property. Plaintiff explained she had the broken concrete pad at her home removed and replaced. As a remedial measure, the shards from the removed concrete pad were placed on the Coates Run stream bank adjacent to plaintiff's home to inhibit soil erosion. Additionally, plaintiff related she paid to have flood water pumped from the crawl space below her house and had a waterproof door installed to protect the crawl space from further flooding. Plaintiff also related she had a new stone pathway built next to her home to replace one that had washed away in a previous flood. According to plaintiff, the crack in her concrete pad and other property damage associated with flooding were directly related to the roadway construction project under the supervision of DOT. Consequently, plaintiff filed this complaint seeking to recover \$2,500.00,¹ representing costs incurred to repair property damage allegedly attributed to work performed on the U.S. Route 33 Athens Bypass Project. The requisite material filing fee was paid.

{¶ 4} DOT acknowledged entering into a contract with Smith & Johnson on October 23, 2001, to make improvements on U.S. Route 33 in Athens, Ohio. This roadway improvement operation identified as the U.S. Route 33 Athens Bypass Project included plans to construct

¹ Plaintiff's total expense for repairs amounted to \$3,847.00. Plaintiff requested \$2,500.00 in damages in order to have her claim determined administratively in accordance with R.C. 2743.10.

three bridges. Projected completion date of all construction was set for June 30, 2004. Blasting procedures for bridge construction were performed by Smith & Johnson subcontractor Austin Powder Company ("Austin"). According to submitted records, plaintiff's residence is located a little over 1000 feet from the closest point where Austin conducted blasting operations. The U.S. Route 33 Athens Bypass Project area was designed to drain into Coates Run, the small waterway which runs past plaintiff's property. Defendant has asserted all necessary precautions were utilized to minimize or inhibit drainage problems associated with the construction project.

{¶ 5} Defendant denied any blasting on U.S. Route 33 performed by Austin caused any structural damage to plaintiff's home or surrounding property. Defendant contended plaintiff failed to produce sufficient evidence to establish any blasting operation in connection with the U.S. Route 33 Athens Bypass Project resulted in the property damage claimed. Plaintiff did not submit any evidence other than her own assertions to show her property damage was caused by blasting activity on U.S. Route 33 in Athens.

{¶ 6} On June 3, 2003, a damage claim investigation was conducted in response to plaintiff's allegations regarding blasting damage to her property. At the time, plaintiff claimed blasting had buckled the floors in her residence and cracked the concrete pad outside her home. Photographs depicting the damaged areas of plaintiff's twenty-five year old home were submitted along with investigation findings.

{¶ 7} In accordance with the property damage investigation, DOT authorized a blasting report done by Geo Sonics, Inc. The offered report was authorized by Geo Sonics, Inc. Area Manager, Janice L. Reed. Reed expressed the opinion, "that ground vibrations from blasting operations during construction of the U.S. Route 33 Athens Bypass did not cause any damage to the structure owned by Sharyn

Yulish." Reed's opinion was based on seismographic readings of ground vibrations produced from blasting activity near plaintiff's residence. The recording device was located at the intersection of Richland Avenue and Pomeroy Road, approximately 360 feet from a detonation site. Plaintiff's home stands an additional 680 feet from the recording site and about 1040 feet from the nearest blast area. Reed noted vibrations recorded by the seismograph did not attain sufficient velocity to cause structural damage to plaintiff's property, although vibrations produced by the blasting could readily be perceived by individuals in the area. According to Reed, the blasting around plaintiff's home did not generate vibration velocity of great enough magnitude to damage the Yulish property such as the concrete pad.

{¶ 8} Additionally, defendant denied the Route 33 Athens Bypass Project inhibited storm drainage and thereby increased the potential for flooding with accompanying soil erosion. In fact, defendant asserted the Route 33 construction increased surface water drainage. Furthermore, defendant professed DOT and Smith & Johnson exercised "every precaution available while working on this project and have used erosion control." Defendant suggested any flooding of Coates Run and resulting soil erosion was likely due to above average precipitation falling in the Athens area during 2004.

Defendant submitted a document showing rainfall readings of 7.85 inches above normal had occurred in Athens between January 1, and October 14, 2004. Total rainfall for the period of record reached 40.12 inches. From these readings, defendant surmised any property damage from soil erosion plaintiff sustained was in all probability due to increased precipitation as opposed to construction activity.

{¶ 9} Both plaintiff and defendant submitted photographs of the area around Coates Run depicting, among other things, structures, flooded areas, and the course of Coates Run itself. Plaintiff

related the photographs she filed show soil erosion in the Coates Run neighborhood. Plaintiff further related this soil erosion was caused by the overflow of Coates Run. Plaintiff contended Coates Run overflows as a direct result of construction activity performed on U.S. Route 33. Defendant attributes the flooding and resulting soil erosion to acts of nature and other causes not related to DOT projects.

{¶ 10} In order to recover on a claim of this type, plaintiff was required to prove defendant or its agents owed her a duty of care, that defendant or its agents breached that duty, and that the breach of duty proximately caused plaintiff's damages. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75. Plaintiff insisted all damages to her property were caused by construction work in completing the U.S. Route 33 Athens Bypass Project. However, plaintiff has not presented any evidence other than her own assertions to prove her property was damaged as a proximate result of activity under the control of DOT. No evidence was offered to raise an inference that plaintiff's property damage occurred because of a failure to exercise ordinary care in performing construction work. As a necessary element of her claim, plaintiff was required to prove proximate cause of her damage by a preponderance of the evidence. See, e.g. *Stinson v. England* (1994), 69 Ohio St. 3d 451. In a situation such as the instant claim, plaintiff is required to produce expert testimony regarding the issue of causation and that testimony must be expressed in terms of probability. *Id.* at 454. Plaintiff, by not supplying the requisite testimony to state a prima facie claim has failed to meet the burden of proof. See *Kirkum v. Ohio Dept. of Transp.* (Jan. 3, 2005), Court of Claims No. 2004-03217; also *Ryan v. Ohio Department of Transportation*, Court of Claims No. 2003-09297-AD, 2004-Ohio-900. Therefore, plaintiff's claim is denied.

IN THE COURT OF CLAIMS OF OHIO

SHARYN YULISH	:	
Plaintiff	:	
v.	:	CASE NO. 2004-09525-AD
OHIO DEPT. OF TRANSPORTATION	:	<u>ENTRY OF ADMINISTRATIVE</u>
Defendant	:	<u>DETERMINATION</u>

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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:

Sharyn Yulish
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Plaintiff, Pro se

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For Defendant

RDK/laa
1/12
Filed 1/20/05
Sent to S.C. reporter 2/16/05