



the contractors that the work was shaking his house. The contractors immediately stopped their work pending a review by Mike Spoor, general engineer for USACE. Spoor arrived on the scene to inspect the project and to discuss plaintiff's complaints. After meeting with plaintiff, Spoor ordered that the reconfiguring of the rocks be stopped in the vicinity of plaintiff's property.

{¶ 5} Plaintiff testified that once the work was stopped, he showed the workers from USACE that his concrete block garage, built in 1961, had a half-inch-wide crack in it. Plaintiff asserts that as a result of the project, the foundation of his garage has dropped three inches. Plaintiff admitted that his garage had some pre-existing cracks before the project, but asserted that defendant's work on the project exacerbated the old cracks and caused new cracks to form.

{¶ 6} Dan Brown, plaintiff's father-in-law, took photos of plaintiff's garage and testified that the cracks in the garage became worse as a result of defendant's project. (Plaintiff's Exhibits 1-6.)

{¶ 7} Robert Roush, P.E., testified that he had worked as an engineer for defendant for more than 24 years and that, at the time of the project, he was a highway management specialist in charge of all "slips and slides." Roush explained that slips and slides occur when an embankment recedes from the roadway. Roush testified that he took photos of the area before the project began and that the photos show embankment slippage below the highway, shoulder loss, and dipping in the pavement. (Defendant's Exhibits A and B.)

Roush opined to a reasonable degree of engineering probability that the Ohio River, coupled with the ground water seeping through underground coal mines, caused the embankment to recede south of SR 124. Roush also opined that the embankment slippage was the cause of the damage to plaintiff's garage.

{¶ 8} Michael Spoor, an environmental engineer, testified that he had worked for USACE for almost 40 years; that he had earned a masters degree in environmental science; that he had worked on bank stabilization projects along the Ohio River since 1968; and that he was personally involved in this particular project. Spoor testified that the use of a bucket on a crane to reconfigure rocks in a bank stabilization project was the industry standard. Spoor opined to a reasonable degree of engineering probability that the work performed on the project did not cause damage to plaintiff's garage. Spoor testified that he ordered the work to be stopped near plaintiff's property when plaintiff complained, even though he had not found plaintiff's complaints to be factually supported.

{¶ 9} Spoor further testified that the nature of the land where plaintiff's garage was built had pre-existing problems. According to Spoor, when the Ohio River flooded, the ground around plaintiff's garage would become saturated with water; later, when the river receded, the garage foundation would become weaker. Spoor added that the adjacent coal mine with its numerous seeps and springs also weakened the foundation of plaintiff's garage. Spoor opined that the damage to plaintiff's garage was most likely caused by the "mine spoil" that the garage was built on and the lack of an appropriate foundation.

{¶ 10} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶ 11} Upon review of the evidence, the court finds that plaintiff has failed to prove by a preponderance of the evidence that defendant's actions during the stabilization project were the

proximate cause of the damage to his garage. The evidence shows that plaintiff's garage had pre-existing cracks. Moreover, the court is persuaded by the testimony of both Roush and Spoor regarding the characteristics of the land under plaintiff's garage and the effect that the Ohio River and groundwater had on plaintiff's property.

{¶ 12} In addition, plaintiff did not present any evidence to show that defendant "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 Constr. & Supply, Inc.*, Franklin App. No. 03AP-1268, 2004-Ohio-6520, at ¶20. "A party having the burden of proof must produce evidence furnishing a reasonable basis for sustaining his claim, and, if the evidence only suggests a choice among different possibilities, the burden of proof has not been met." *Collins v. Ohio State Racing Comm.*, Franklin App. No. 03AP-587, 2003-Ohio-6444, at ¶25, citing *Stevens v. Indus. Comm.* (1945), 145 Ohio St. 198. (Additional citations omitted.) The court finds that neither plaintiff nor his father-in-law was qualified to state an opinion as an expert whether any damage to plaintiff's garage was proximately caused by some negligent act or omission on the part of defendant.

{¶ 13} For the foregoing reasons, the court finds that plaintiff has failed to prove his claim by a preponderance of the evidence and accordingly, judgment shall be rendered in favor of defendant.

**IN THE COURT OF CLAIMS OF OHIO**  
www.cco.state.oh.us

MARK ANTHONY CLAY

:

Plaintiff

:

CASE NO. 2004-07191  
Judge Joseph T. Clark

v. :  
JUDGMENT ENTRY  
OHIO DEPARTMENT OF :  
TRANSPORTATION :  
Defendant :

: : : : : : : : : : : : : : : :

This case was tried to the court on the issue of liability. 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.

\_\_\_\_\_  
JOSEPH T. CLARK  
Judge

Entry cc:

Mark Anthony Clay Plaintiff, Pro se  
42916 State Route 124  
Pomeroy, Ohio 45769

John P. Reichley Attorney for Defendant  
Assistant Attorney General  
150 East Gay Street, 23rd Floor  
Columbus, Ohio 43215-3130

HTS/cmd  
Filed November 14, 2005  
To S.C. reporter November 23, 2005