

breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

{¶4} "Duty," as used in Ohio tort law, refers to the relationship between plaintiff and defendant from which arises an obligation on the part of defendant to exercise due care toward plaintiff. *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210. In this case, the obligation that arises when coming into contact with the property of another is to refrain from conduct that would likely do damage to such property. *Cincinnati & Suburban Bell Tel. Co. v. Eadler* (1944), 75 Ohio App. 258; 1944 Ohio App. LEXIS 372; *Ohio Gas Co. v. DeGoff*, 1988 Ohio App. LEXIS 4816.

{¶5} In support of his claim, plaintiff offered his own testimony and that of his son, Trustan Detty. Additionally, plaintiff submitted photographs of the damage to his basement. (Exhibits 1A-1V.)

{¶6} Plaintiff was not present when the incident occurred; however, he stated that he observed the water damage to his basement when he arrived home from work that day. He also stated that he had contacted ODOT three times prior to June 7, 2002, requesting that the catch basin by his home be cleaned. According to plaintiff, the material that was pumped from the basin, a combination of sludge and water, flowed into his basement and clogged the drain, causing water to back up in the basement and around his furnace. He testified that the furnace ceased to operate and had to be repaired. He further testified that sludge attracted black flies both inside and outside the residence. Plaintiff stated he had lived there for approximately 13 or 14

years and that he had never previously had standing water in his basement.

{¶7} Although plaintiff was not at home when ODOT performed the vactor-jetting, his son arrived in time to observe the process. Trustan stated that the ODOT truck was in the driveway, approximately 15 to 20 feet away from the Detty residence. He stated that there was "sewage" lying on the ground, and that he observed three ODOT employees, two men and one woman, standing alongside a stream of water, watching as it flowed toward plaintiff's basement. Trustan also testified that he was present when the photographs offered by plaintiff were taken, and that it was within one or two days of the incident.

{¶8} In response to plaintiff's allegations, defendant offered the testimony of Aaron Mitten, the Ross County Transportation Administrator and a licensed civil engineer with 10 years experience working for ODOT. Defendant also presented a copy of an inter-office communication between Mitten, and Vaughn Wilson, the Highway Management Administrator, and copies of the department's customer complaint logs for the months of January through June 2002.

{¶9} According to ODOT's inter-office communication (Defendant's Exhibit G), vactor-jetting was performed on June 7, 2002, on several catch basins in the vicinity of plaintiff's residence. The memo goes on to state: "While cleaning these basins some water was allowed to escape the rear of the vactor jet during the cleaning, to allow for the collection of only the sediment and other material. Bill Pickerell states some mud and other material around the basin in the yard on the driveway was present. The material was covered with #57 stone the next day to alleviate Mr

Detty's concern." Further, because plaintiff's residence was positioned upon a low point of the property and had a foundation vent at ground level that could allow surface water to enter the basement, it was Mitten's opinion that it was unlikely that ODOT's actions caused plaintiff's problems.

{¶10} Defendant further maintains that the work it performed was necessary to remove water that had accumulated after several days of heavy rain, that it performed the work with due care and that plaintiff's problems would have been worse if ODOT had not cleaned the catch basin when it did. Moreover, defendant claims that its only record of contact with plaintiff was on June 10, 2002, when, according to the customer complaint log, he called to complain that "ODOT pumped out culvert in front of house & the water washed under house into basement." (Defendant's Exhibit A.)

Defendant's records show that ODOT responded to the complaint the day it was made, and that plaintiff's driveway was raked, stone was placed, and lime was spread over the material that remained there.

No work was done in the basement; the complaint log shows that plaintiff was referred to this court regarding those concerns.

{¶11} Upon review of the evidence and testimony presented, the court finds that plaintiff has proven his negligence claim by a preponderance of the evidence. Specifically, the court finds that ODOT breached the duty of care owed in this case when, in the otherwise efficient performance of necessary services, it engaged in conduct that was likely to cause damage to plaintiff's property.

The court is persuaded by the testimony and photographic evidence that shows that ODOT allowed sludge and water to drain from the vector jet into plaintiff's basement. However, the court agrees with defendant's arguments that all of the erosion and water damage

shown in plaintiff's photographs cannot be attributed to ODOT's actions. Accordingly, as in all negligence cases, the damages recoverable here are limited to the damage proximately caused by ODOT. In so holding, 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 the walls must have occurred over a period of time. With this limitation, judgment is hereby recommended for plaintiff.

{¶12} As a final matter, the court notes that plaintiff testified at trial that he had not yet incurred any of the expenses alleged in his complaint, nor had he submitted his claims to his homeowner's insurance carrier. Thus, plaintiff is reminded that pursuant to R.C. 2743.02(D), any damages recoverable in this case are subject to a reduction based upon the amount obtained from a collateral source, to include insurance. The decision on damages will take place at a separate proceeding.

{¶13} *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

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