

# Court of Claims of Ohio

The Ohio Judicial Center  
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Columbus, OH 43215  
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CASE LEASING & RENTAL, INC.

Plaintiff

v.

OHIO DEPARTMENT OF NATURAL RESOURCES

Defendant

Case No. 2005-08034

Judge J. Craig Wright

## DECISION

{¶ 1} Plaintiff filed this case alleging claims of negligence, nuisance, absolute nuisance/ nuisance per se, trespass, and unconstitutional taking without just compensation. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.<sup>1</sup>

{¶ 2} Plaintiff, Case Leasing and Rental, Inc., is an Ohio corporation and owner of 21 acres of land in Mercer County, Celina, Ohio. The property is located adjacent to Beaver Creek and several hundred yards downstream from the intersection of Beaver Creek and the western shoreline of Grand Lake St. Marys (GLSM). In 1976, plaintiff completed construction of, and opened, the Lake Front Racquet and Health Club (RecPlex) on that property. The RecPlex was an 87,500 square foot facility that provided a wide variety of indoor and outdoor fitness and recreational activities for the

general public. Plaintiff owned the RecPlex continuously, except for a period from October 2001 to September 2003.<sup>2</sup> In early July 2003, a severe storm passed through the GLSM area. As a result, an extensive amount of water was discharged from the lake into Beaver Creek, flooding plaintiff's property and thousands of other acres along the creek. The first floor of the RecPlex flooded to a depth of approximately three feet. The lower level facilities were completely submerged.

{¶ 3} Since 1949, both GLSM and approximately 500 surrounding acres have been owned and operated as a state park by defendant, the Ohio Department of Natural Resources (ODNR). The lake was created in the mid-1800s by damming the headwaters of the Wabash and St. Marys rivers and flooding the area between. The earthen dam is approximately 5,540 feet long and 22 feet high. GLSM is 8.2 miles long and has a surface area of approximately 13,500 acres extending through both Mercer and Auglaize Counties. The lake has two outlets for the discharge of water. One is a spillway discharging into Beaver Creek, which was constructed in 1914; it is located on the western shoreline. There is also an eastern-outlet structure that discharges into a feeder canal. From the time that it obtained control of the lake in 1945, ODNR has used the western spillway as the outlet for virtually all water flow out of GLSM.

{¶ 4} The central issue in this case involves the replacement of the 39.4-foot

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<sup>1</sup>The trial adjourned on the second day, then reconvened at a later date to allow the parties to re-depose their expert witnesses regarding lake-level data that was not revealed until the day of trial and to submit supplements to the expert reports.

<sup>2</sup>Defendant has argued that plaintiff lacks standing to assert its claims because it did not own the property at the time of the July 2003 flood. The court finds that argument to be without merit inasmuch as plaintiff financed the purchase and received a mortgage on the property as security. Ohio law permits mortgagees to sue third parties for damage to their security interest. *City of Toledo v. Brown* (1936), 130 Ohio St. 513, 519. See also *Trip Agency, Inc. v. R. G. Akkihal* (Nov. 4, 1991), Lawrence App. No. 1790; *RFC Capital Corp. v. Earthlink, Inc.*, Franklin App. No. 03AP-375, 2004-Ohio-7046. Moreover, at the time of the flood, the purchasers had made only one payment of \$100,000 on the \$3,000,000 they financed, and they had no insurance on the property. They threatened to file bankruptcy if plaintiff pursued them for the balance of the mortgage. Plaintiff never released the mortgage and the property was conveyed back to it on September 1, 2003.

western spillway with a 500-foot spillway that was completed in 1997. ODNR approved the design for, and both directed and oversaw the construction of, the replacement spillway.

{¶ 5} Plaintiff contends, among other things, that ODNR was negligent in the design and management of the 500-foot spillway, that it did not comply with accepted engineering practices, and that it failed to consider other economically feasible designs. Plaintiff further maintains that, based upon data that was available at the time, ODNR knew or should have known that the installation of the replacement spillway would result in more frequent and more severe flooding to downstream landowners, including plaintiff. Plaintiff asserts that the damage that occurred in July 2003 would not have happened if the 1914 spillway were still in existence. Although plaintiff has asserted other claims, the focus of its evidence and post-trial memorandum is upon its claim of negligence.

{¶ 6} In response, ODNR contends that the replacement spillway met with all applicable standards. Furthermore, ODNR argues that plaintiff's focus on the differences between the 1914 spillway and the 1997 spillway is misguided inasmuch as there is no dispute either that the old spillway structure did not meet prevailing safety standards, or that a failure of the dam could have had catastrophic consequences, including loss of life and flooding of the city of Celina. ODNR maintains that the 1997 spillway design was reasonable under the circumstances, and that its duty to prevent a dam failure outweighed any potential risk of increased flooding to downstream landowners.

{¶ 7} In order to prevail upon a claim of negligence, plaintiff must prove by a preponderance of the evidence that defendant owed it a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused its injuries. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573,

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citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶ 8} Upon review of the evidence, arguments, stipulations, and proposed findings of fact and conclusions of law, the court finds for the following reasons that plaintiff has proved its claim of negligence by a preponderance of the evidence.

{¶ 9} In resolving surface water disputes, Ohio courts apply the “reasonable use” rule. *McGlashan v. Spade Rockledge Terrace Condo Dev. Corp.* (1980), 62 Ohio St.2d 55, paragraph one of the syllabus. Thus, a breach of duty can be found only if defendant’s interference with surface water flow is unreasonable, which is determined by “balancing the gravity of the harm caused by the interference against the utility of the [defendant’s] conduct.” *Ringel v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2006-02081AD, 2006-Ohio-7279 quoting *McGlashan*, supra, at 60, adopting 4 Restatement on Torts 2d (1979), 146, Section 833.

{¶ 10} ODNR’s Division of Water is charged with enforcement of Ohio’s dam safety statutes as set forth under R.C. 1521.06-1521.99. Both newly constructed and existing dams must conform to such law with the goal of ensuring the stability of dams and their ability to withstand certain design floods. The dam at GLSM is classified as a Class I dam and, as such, must be able to pass 100 percent of the volume of water generated by a “probable maximum flood (PMF).”

{¶ 11} A PMF is the flood that may be expected from the most severe combination of critical meteorological and hydrologic conditions that are reasonably possible in a particular drainage area. In order to meet the PMF standard, rainwater must flow entirely through a spillway rather than over the top of the dam. The purpose of such requirement is to prevent destruction of the earthen dam and catastrophic flooding.

{¶ 12} In 1978, the United States Army Corp of Engineers (ACE) performed an inspection of GLSM and determined that if a PMF were to occur, GLSM would likely overtop its western embankment and flood the city of Celina. The ACE issued a report recommending that ODNR develop and implement a plan to safely convey the PMF

through GLSM. (Plaintiff's Exhibit 44.)

{¶ 13} Funds for replacement of the western spillway were not allocated until the 1990s and construction did not begin until 1996.

{¶ 14} However, in 1987-1988, ODNR did receive a fund allocation and did make modifications to an eastern outlet structure. Although ODNR's consultant recommended that the structure and the feeder canal into which it discharged be modified to permit the discharge of flood waters during significant storms, ODNR opted for a structure that had no flood management capability. (Parties' Stipulations ¶11; Plaintiff's Exhibit 45.)

{¶ 15} In the early 1990s, ODNR's design plans for replacement of the western spillway became known to the public. From the outset of the project, concern was expressed by federal and local agencies, as well as local land owners, regarding the possibility of greater flooding downstream along Beaver Creek. (Parties' Stipulations ¶20, Plaintiff's Exhibits 6, 12, 23, 27.)

{¶ 16} Keith Earley, the Mercer County Engineer, was among the most strident of concerned parties. In addition to other activities, Earley sent letters dated November 19, 1991; February 12, 1992; September 24, 1993; and February 15, 1994 to ODNR warning that the proposed 500-foot spillway would cause increased and extensive flooding along Beaver Creek. (Plaintiff's Exhibits 7, 11, 17, 21.) At least two of those communications, the February 12, 1992 and September 24, 1993 letters mentioned plaintiff's RecPlex structure as one that would likely be flooded as a result of the new spillway.

{¶ 17} The Board of Supervisors for Mercer County Soil and Water Conservation District (MCSWCD) also expressed a number of concerns to ODNR, beginning November 1991. (Plaintiff's Exhibits 6 and 12.) In a November 1991 letter, the MCSWCD noted "much heated discussion on the proposed west bank spillway" and "[m]uch of the heat comes from the fact that the Division of Water has not had a good answer or any answer to questions the landowners along Beaver [Creek] have."

{¶ 18} The GLSM Lake Improvement Association also expressed concerns regarding the proposed spillway and ODNR's potential plans for lake level management. In a letter to ODNR dated August 15, 1994, the association questioned whether ODNR intended to lower lake levels to satisfy the concerns of property owners west of the spillway, to the detriment of local businesses such as marinas, restaurants, and lodging facilities that depended on sufficiently high lake levels to attract recreational users, boaters and sportsmen. (Plaintiff's Exhibit 23.)

{¶ 19} Shortly before construction began in 1996, the ACE communicated to ODNR that there were continuing concerns regarding the proposed spillway design and instructed ODNR that it needed "either calculations to show there would be no additional flooding in Beaver Creek or agreements from the property owners along the creek saying they accept additional flooding." (Plaintiff's Exhibit 26.) ODNR did not comply with either of those options.

{¶ 20} However, ODNR did respond to all of the public and private concerns expressed in connection with the proposed spillway. ODNR held public meetings, wrote response letters, and considered the input it received. Although ODNR did not deviate from its plans, it did consistently explain and support the reasons for its decisions and frequently reiterated that it had "attempted to balance the concerns of all the local interests in the planning and design for the spillway, but necessarily, dam safety [had] remained the most important concern." (See, e.g., Plaintiff's Exhibits 8, 13, 20.)

{¶ 21} With regard to plaintiff's property, ODNR stated in a December 10, 1992 memo that: "[a] tennis/racquetball business is in the floodplain downstream but there's not much justification to modify the design or our operations \* \* \* just to satisfy this one business which knowingly built in a flood prone area \* \* \*." (Plaintiff's Exhibit 15.) However, the evidence demonstrates that plaintiff's property was not identified as being situated in a designated floodplain until 2004, after the spillway was replaced, and after the 2003 flood. Rather, on March 18, 1986, plaintiff's property was designated as being within "Zone C, i.e., located in an area of minimal flooding." (Plaintiff's Exhibit 1,

48.)

{¶ 22} In the end, ODNR considered only two potential replacement spillway designs, both 500-foot spillways. (Plaintiff’s Exhibit 4.) The design that was ultimately selected was a 500-foot long spillway, at 450 feet of elevation and 871.5 feet above mean sea level (msl), with a 50-foot notch at the center at an elevation of 870.6 feet above msl, and two 60-inch diameter outlets near the bottom of the structure, which could be opened to lower the level of GLSM by releasing water into Beaver Creek. (Parties’ Stipulations, ¶¶15, 17.)

{¶ 23} Prior to 1997, ODNR regulated GLSM by periodically lowering lake levels, thereby minimizing the frequency and severity of flooding that GLSM could otherwise cause. Since 1997, GLSM has been considered a “self-regulating lake”; neither of the 60-inch outlets has been opened for management of lake levels.<sup>3</sup> (Parties’ Stipulations ¶19.)

{¶ 24} Both parties presented expert testimony regarding ODNR’s spillway design choice and lake-level maintenance decisions. Plaintiff presented the testimony of Pressley Campbell, PhD, P.E., with Conestoga Rovers & Associates (CRA). Defendant presented the testimony of Doyle Hartman, P.E. Both experts were highly qualified and presented detailed analyses of the issues. However, the court found the testimony of Dr. Campbell to be better reasoned. In addition, the court is persuaded by the data that Dr. Campbell relied upon as well as the conclusions set forth in his testimony and written reports. (Plaintiff’s Exhibits 1, 1A.) Of significance were the following facts, which were established through Dr. Campbell’s trial testimony and written analysis, and which were not contradicted by ODNR:

- 1) ODNR did not investigate, examine or evaluate historical storm events in the GLSM watershed to determine the potential flooding impact that

would be caused by a 500-foot spillway. (See Plaintiff's Exhibit 1.);

- 2) ODNR did not examine actual historical lake levels to determine the potential flooding impact of a 500-foot spillway design. (See Plaintiff's Exhibit 1.);
- 3) ODNR conducted only simulations of the effect of the 500-foot spillway using hypothetical events, and did not use its model to predict the impact of the spillway during such hypothetical storms along the first several of miles of Beaver Creek. Had it done so, it would have learned that the effect was substantial. (Plaintiff's Exhibit 1A.);
- 4) CRA's analysis of the historical lake levels and historical storm events demonstrated that, during the entire period of record for which data is available, the RecPlex would not have flooded had the 1914 spillway been in place, not even during the most severe historical-storm events. However, had the 500-foot spillway been in existence during that time, plaintiff's property and substantial additional areas would have flooded multiple times. (Plaintiff's Exhibit 1A.)

{¶ 25} As noted above, and as confirmed by Hartman's testimony, ODNR's primary objective was safely passing the PMF through GLSM so as to avoid the western embankment overtopping and the flooding of the city of Celina. However, there were several feasible alternatives available to achieve such objective without causing increased flooding of the RecPlex and other downstream property. For example: 1) by employing a different, less destructive, spillway design; 2) by modestly raising the height of the western embankment; 3) by instituting a manual lake level draw down policy; 4) by widening/deepening Beaver Creek near the spillway; and 5) by using the eastern outlet structure to discharge flood waters during significant storm events. According to

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<sup>3</sup>The only exception is that, on several occasions after the replacement spillway was completed, the 60-inch outlets were opened in order to clear away masses of dead fish that had flowed over the



Dr. Campbell, each of those alternatives would have been cost-effective, but none was properly considered by ODNR. ( Plaintiff's Exhibit 1.) Moreover, Dr. Campbell established that if any of those alternatives had been implemented, the RecPlex would not have flooded in July 2003.

{¶ 26} Applying the "reasonable use" analysis to the facts established in this case, the court does not dispute utility of ODNR's dam safety objective; however, balanced against the gravity of the foreseeable and avoidable harm caused, the court finds that the manner in which ODNR implemented its objective was unreasonable and negligent.

{¶ 27} Specifically, the court finds that standard hydrologic-engineering practices required that ODNR undertake a thorough investigation of the historical storm and lake-level data before designing and installing the replacement spillway. ODNR's failure to do so, or to require its consultants to do so was unreasonable. In addition, the court finds that standard hydrologic-engineering practices required that ODNR perform a sensitivity analysis to determine the best spillway design. ODNR's failure to conduct such an analysis was unreasonable. Further, the court finds that ODNR's failure to adequately consider cost-effective alternative measures that would also have met its safety objectives was unreasonable in light of the known potential for increased flooding and significant property damage that could have been avoided had it done so. Similarly, the court finds that ODNR's post-1997 management of lake levels was unreasonable in light of the foreseeable damage that could have been avoided had it utilized manual draw-down alternatives.

{¶ 28} In short, the court concludes that, based upon the data that was available to it at the time, ODNR knew or should have known that the installation of the replacement spillway as designed would result in more frequent and more severe flooding to downstream landowners. Therefore, its design choice and subsequent lake

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spillway into Beaver Creek and had accumulated at the base, in water that lacked sufficient oxygenation.

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level management were unreasonable. Accordingly, judgment will be rendered in favor of plaintiff on its claim of negligence.





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JUDGMENT ENTRY



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 plaintiff. The case will be set for trial on the issue of damages.

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J. CRAIG WRIGHT  
Judge

cc:

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