

representative, John Bocchieri. (Plaintiffs' Exhibit 2.) In his letter, plaintiff explained that he had experienced flooding on his property since 1991 and that storm water from the existing catch basin had created "a lake" in his front yard that would "boil" up from his septic tank leach bed. According to plaintiff, he had determined that the clay drainage pipe that ran from the catch basin to Racoon Road had become clogged with mud. Plaintiff testified that he corrected the drainage problem in August 2000 by bypassing the clogged clay pipe with approximately 300 feet of new plastic drain pipe. The drain pipe that plaintiff installed terminated in a bed of gravel that was located at the lowest elevation on his property. Plaintiff testified that he did not extend the new drain pipe to Racoon Road because the owner of the property that adjoined plaintiff's land and Racoon Road would not give him permission to do so.

{¶ 4} On December 31, 2002, Culver sent plaintiff a letter in response to plaintiff's concerns about the project and commented on three proposals that plaintiff had suggested as alternatives to defendant's plans. Culver specifically rejected each of plaintiff's three proposals: to make no changes in the right-of-way; to install a new culvert under Shields Road to divert surface water to the north; or, to construct a swale across plaintiff's property and his neighbor's property to divert water to Racoon Road. After reviewing its construction plans, defendant concluded that its project would not significantly increase the "peak discharge" of storm water and that the natural drainage patterns would not be altered. In his letter, Culver explained that plaintiff's proposals for constructing a means to divert surface water "would generally go against ODOT drainage policy." (Joint Exhibit D.)

{¶ 5} Defendant's preliminary plans for the project included the construction of a second catch basin in the right-of-way that bordered plaintiff's property. The project plans were subsequently modified to add a third catch basin and an additional 80 feet of 12-inch drain pipe in the right-of-way. The project was completed by August 2003. (Joint Exhibit B.)

{¶ 6} Plaintiffs allege that defendant negligently designed and installed the roadway drainage system because it connected the three catch basins to plaintiffs' existing 6-inch drain pipe with 12-inch drain pipe. Plaintiffs contend that the negligent design diverted surface water onto their land, which caused flooding and interference with their private septic system. Plaintiffs also contend that defendant's drainage system created a nuisance by causing an unreasonably excessive accumulation of water on their land. Defendant asserts that it designed and implemented the project in accordance with its Location and Design Manual and that there were no changes to the natural course of drainage as a result of the construction.

{¶ 7} The Supreme Court of Ohio has adopted a reasonable-use rule for surface water disputes: "In resolving surface water disputes, courts of this state will apply a reasonable-use rule under which a possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, and the possessor incurs liability only when his harmful interference with the flow of surface water is unreasonable. ***" *McGlashan v. Spade Rockledge Terrace Condo Dev. Corp.* (1980), 62 Ohio St.2d 55, syllabus. Under the reasonable-use rule, defendant's liability is

determined on a case-by-case basis and measured by principles of common-law negligence, regardless of whether plaintiffs allege nuisance. *Franklin County Dist. Bd. of Health v. Paxson*, 152 Ohio App.3d 193, 2003-Ohio-1331, ¶30; *Ogle v. Kelly* (1993), 90 Ohio App.3d 392, 396.

{¶ 8} In order for plaintiffs to prevail upon their claim of negligence, they must prove by a preponderance of the evidence that defendant owed them a duty, that it breached that duty, and that the breach proximately caused their injuries. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. 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." *McGlashan*, supra, at 60, adopting 4 Restatement of the Law 2d, Torts (1979) 108-142, Sections 822-831.

{¶ 9} Plaintiffs offered the expert testimony of Richard Kraly, a licensed architect, to support their assertion that defendant's construction project unreasonably diverted surface water onto their property. Kraly testified that he met with plaintiff and viewed his property. According to Kraly, the two additional catch basins increased the volume of water that drained onto plaintiffs' property because prior to defendant's construction project, surface water flowed off the roadway and drained onto grass and soil. Kraly testified that the 12-inch pipe that defendant installed "overloaded" the capacity of the existing 6-inch pipe that was located on plaintiffs' property. Kraly further testified that defendant's drainage system caused surface water to back up and "swamp" areas of plaintiffs' property.

{¶ 10} Kraly opined that plaintiff's suggestions to either extend the drain along Shields Road to Racoon Road, or to divert water underneath Shields Road to the other side of the roadway, were reasonable alternatives that would have prevented excessive runoff onto plaintiffs' property. Based upon his observation of the property, Kraly disagreed with defendant's contention that the project did not divert surface water from the natural drainage pattern.

{¶ 11} Robert Rosen, defendant's transportation engineer, performed duties as both a project manager and a hydraulic engineer. Rosen testified that he discussed construction plans with plaintiff during the winter of 2002 before plans were finalized. Rosen explained that the existing drainage system was comprised of an assortment of pipes that varied in size from 4 to 12 inches. According to Rosen, it was defendant's practice to use pipe with a minimum diameter of 12-inches to allow for cleaning and maintenance of the drainage system.

{¶ 12} Rosen also testified regarding the calculations that he used to determine the surface water discharge rate for the system. Rosen explained that he calculated the discharge rate using a topographic map and a formula that yields the volume of water measured in cubic feet per second. Rosen stated that calculation of the discharge rate included three variables; the coefficient of runoff, or the ability of the ground to absorb water; the intensity, which is measured in inches per hour; and, the size of the drainage area. Rosen testified that defendant's construction did not change the discharge rate because there was no significant change in any of the three variables. According to Rosen, the size of the right-of-way was not significant to the calculation because it comprised only three percent of the total drainage area and the value for the coefficient of runoff was not affected because no

additional concrete or asphalt was added during construction. Rosen opined that defendant met all of the applicable design standards for the project.

{¶ 13} The court finds that plaintiff's concerns about the impact of defendant's construction project on the flow of surface water on his property must be viewed within the context of the history of drainage problems that existed prior to the construction. Plaintiff testified that in 1996 rainwater would "boil" out of the ground and cause a "virtual lake" on his property. In addition to plaintiff's testimony, a September 23, 1996, letter from the Mahoning Soil and Water Conservation District reveals the nature of the drainage problems that existed on plaintiffs' property at that time. (Joint Exhibit E.) The 1996 letter documents that the existing clay drain pipes were ineffective and that surface water would "erupt" in plaintiff's front yard and at the low area along Shields Road. A "surface seep" existed in an area of the front lawn that was north of the existing septic system that had "progressively worsened" and was clearly visible. Additionally, the letter notes "the general low topography" in the area and that plaintiffs' front lawn created "a low area to which much of the surrounding properties drain."

{¶ 14} Although plaintiff testified that he had corrected the drainage problems in 2000 by installing approximately 300 feet of drain pipe in a bed of gravel, there was no evidence to show that the topography of plaintiffs' land was significantly changed by the improvements. The testimony and evidence showed that the natural course of drainage from the right-of-way at Shields Road flowed downhill from west to east, across the property owned by plaintiffs and their neighbor, towards Racoon Road. Furthermore, the court finds that Rosen's calculations of the discharge rate were credible and persuasive. Only a small percentage of the drainage area was

modified by defendant's construction project and the court finds that plaintiffs failed to prove that defendant's construction worsened the drainage problems on their property. Although defendant used a larger diameter pipe to drain the catch basins, the testimony and evidence shows that defendant's construction project would not appreciably increase the volume of surface water that flowed to plaintiffs' property or alter the natural flow of surface water across plaintiffs' property. Therefore, the court finds that defendant's construction project was not the cause of the drainage problems that occurred after the project was completed.

{¶ 15} Furthermore, defendant has no duty to upgrade highways to current design standards in the course of maintenance. *Lunar v. ODOT* (1989), 61 Ohio App.3d 143, 149. Maintenance involves the preservation of existing current highway facilities, rather than the construction of major improvements. *Weibelt v. Ohio Dept. of Transp.* (June 24, 1993), Franklin App. No. 93AP-117.

{¶ 16} To the extent that plaintiffs' complaint alleged negligent design and construction, plaintiffs must prove that defendant failed to conform to the standards for design and construction applicable at the time the drainage system was planned and constructed. *Lopez v. ODOT* (1987), 37 Ohio App.3d 69. The court finds that defendant's expert was credible and that the drainage system was in compliance with defendant's design standards at the time it was installed. Plaintiffs failed to prove that the catch basins and drains that were installed in the right-of-way adjacent to his property violated any Ohio Department of Transportation standards or engineering practice at the time of the construction.

{¶ 17} For the foregoing reasons, the court finds that plaintiffs have not proven any of their claims by a preponderance

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