



depict a distinct drop-off of several inches between the milled section and the untouched paved portion of Smithsonian. Two raised exposed covered manholes were present toward the center of the driving lanes on the milled section of Smithsonian. Plaintiff maintained in her attempt to avoid parked cars on Smithsonian she had to drive over an exposed manhole situated on the milled street section. Plaintiff stated: "I had to drive over the manhole and a severe ledge damaging my car. When I hit the ledge the drop was severe that my tires dropped off and I hit the ledge with the underside of car." The raised edge of the manhole caught on the underside of plaintiff's car damaging the vehicle's oil pan and transmission bell housing.

{¶ 3} After sustaining this property damage, plaintiff explained she pulled the automobile off the road and phoned the Girard Police Department to report the incident. Officer Siegal of the Girard Police Department arrived on the scene as well as DOT Project Engineer, John Mesmer. A report of plaintiff's property damage occurrence was compiled and Mesmer took measurements around the manhole and the milled roadway surface. Plaintiff related that when she returned to the site of her property damage incident after parking her car, she saw Soda personnel paving asphalt on the milled area of Smithsonian, paving the entire milled roadway. Plaintiff estimated this paving operation commenced about fifteen minutes after her property damage event. Plaintiff submitted photographs of the area, which she referenced as shot in the, "first fifteen minutes after my accident," occurred and presumably before the paving began. These photographs depict a milled roadway surface and asphalt ramping material spread around the two exposed manhole covers on Smithsonian. The trier of fact considers these photographs represent facsimile depiction of the roadway area at the intersection of Smithsonian and U.S. Route 422 at the time of

plaintiff's property damage incident.

{¶ 4} As a result of the July 1, 2004, event, plaintiff has asserted she incurred expenses in the amount of \$2,500.00, representing automotive repair costs, towing expenses, storage fees, and loss of use of her vehicle. Plaintiff filed this complaint asserting defendant should bear liability for expenses incurred. Plaintiff suggested defendant permitted a dangerous condition to exist on the roadway which proximately caused her property damage. The requisite material filing fee was paid.

{¶ 5} Defendant explained the site where plaintiff's damage occurred was located within a construction zone under the control of DOT contractor, Soda. Defendant contended Soda, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Soda is the proper party defendant in this action. Defendant implied all duties, such as the duty to inspect, the duty to warn, the duty to maintain, and the duty to repair defects, were delegated when an independent contractor takes control over a particular roadway section. The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. DOT may bear liability for the negligent acts of an independent contractor charged with roadway construction. See *Cowell v. Ohio Department of Transportation* (2004), 2003-09343-AD, jud, 2004-Ohio-151.

{¶ 6} Furthermore, defendant stated neither Soda nor DOT knew about any previous property damage incidents at the intersection of Smithsonian and U.S. Route 422 prior to plaintiff's damage event. Defendant contended plaintiff failed to produce evidence to prove the manhole cover on the milled roadway was unsafe or presented a hazardous condition. Plaintiff's photographs depict asphalt ramping around the manhole. Defendant's employee, John Mesmer,

took measurements around the manhole within minutes of plaintiff's damage event. Mesmer related: "The manhole in question was within the ramping limits that are allowed by the ODOT standards (12 to 1). I measured the grade difference with a 6 foot level and a ruler and was witnessed by a City of Girard police officer. The manhole was within specification." As a result of these measurements, defendant asserted the manhole was adequately maintained within specifications and did not present a hazardous roadway condition.

{¶ 7} Defendant argued plaintiff has not established her damage was proximately caused by any negligent act or omission attributable to DOT or Soda. Defendant suggested plaintiff's own acts in operating her vehicle may have caused her property damage.

{¶ 8} Defendant must exercise due care and diligent in the proper maintenance and repair of highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. This duty encompasses the repair and maintenance of roads. Defendant has the duty to maintain its highway in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation* (1976), 49 Ohio App. 2d 335. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶ 9} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285. Plaintiff has the burden of proving, by a preponderance of the evidence, that she suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD. However, "[i]t is the



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.

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DANIEL R. BORCHERT  
Deputy Clerk

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