[Cite as *Harchalk v. Ohio Dept. of Transp.*, 2005-Ohio-1242.]

IN THE COURT OF CLAIMS OF OHIO

JULIE R. HARCHALK	:	
Plaintiff	:	
v.	:	CASE NO. 2004-08979-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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{¶ 1} Plaintiff, Julie R. Harchak, asserted she suffered property damage to her automobile windshield while driving through a roadway construction area on August 13, 2004. Plaintiff related she was traveling east on Interstate 90 west of Geneva, Ohio in Lake County when "a huge chunk of the ground-up concrete flew into" her car windshield damaging the windshield glass. The surface of this particular section of Interstate 90 had recently been milled in preparation for resurfacing. Plaintiff stated she first traveled over this roadway on August 7, 2004, and noted the milled condition. The roadway remained in the same state on August 13, 2004, the date of her property damage occurrence.

{¶ 2} Plaintiff contended, defendant, Department of Transportation ("DOT"), should bear liability for the cost of replacing her windshield. Consequently, plaintiff filed this complaint seeking to recover $326.33, the cost of a new windshield, $116.00 for work loss due to having car repaired, $25.00 for filing fee reimbursement, and $2.30 for long distance phone calls. Any claim for long distance phone calls associated with prosecuting this action is not a recognizable damage element, is denied, and shall not be further addressed. Plaintiff's total damage claim

amounts to $467.33.

{¶ 3} Defendant acknowledged the area where plaintiff's damage event occurred was located within a construction zone where the roadway had recently been milled in preparation for resurfacing. Defendant explained this roadway construction zone was under the control of DOT contractor, The Shelly Company ("Shelly"). Defendant submitted evidence in the form of a Daily Diary Report notes Shelly personnel milled the eastbound lane and shoulder of Interstate 90 in Lake County on August 13, 2004. Eleven trucks were in operation hauling milled roadway grindings from the site. Defendant asserted the milling operation itself along with the removal of the milled particulate was conducted with due care to protect the motoring public from arising hazardous conditions.

{¶ 4} Pursuing an argument promoted in numerous claims, since March 30, 2004, defendant has contended DOT has no responsibility for damage incidents occurring in a construction zone under the control of a contractor. Defendant asserted Shelly, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Shelly 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. Furthermore, despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with a duty to inspect the construction site and correct any known deficiencies in connection

with particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119.

{¶ 5} Alternatively, defendant denied neither DOT nor Shelly had notice of any milling debris left on Interstate 90 after milling and clean up attempts had been conducted on August 13, 2004. Defendant professed liability cannot be established when requisite notice of damage-causing debris conditions cannot be proven. Generally, defendant is only liable for roadway conditions of which it has notice, but fails to correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such condition, as appears to be the situation in the instant matter. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861. Evidence has been shown defendant's agents created a hazardous condition by not adequately sweeping and removing aggregate from the milled portion of the roadway.

{¶ 6} Defendant speculated the debris material which damaged plaintiff's windshield may have been stones displaced by an unidentified third party motorist and not remaining milled aggregate. Conversely, plaintiff maintained the damage-causing debris was a left over portion of the milled roadway, describing the material as a "huge chunk of ground up concrete." After reviewing the evidence available, the trier of fact finds the damage-causing particulate was a piece of milled aggregate which had not been removed from the roadway after the milling process.

{¶ 7} Defendant asserted DOT cannot be held liable under circumstances where an act of an unidentified motorist propelling milled roadway debris into the path of another's vehicle results in property damage. Defendant's denial is based on the premise it had no duty to control the conduct of a third person except in cases

where a special relationship exists between defendant and either plaintiff or the person whose conduct needs to be controlled. *Federal Steel & Wire Corp. v. Ruhlin Const. Co.* (1989), 45 Ohio St. 3d 171. In the instant action, defendant owed a duty to plaintiff and to the unidentified motorist who directly caused plaintiff's damage to maintain the roadway in a safe drivable condition. *Knickel v. Ohio Department of Transportation* (1976), 49 Ohio App. 2d 335. This duty was breached when milled aggregate was not adequately swept and removed from the roadway. Although evidence has been presented to show eleven trucks were used to haul milled grindings away, evidence has also shown not all grindings were removed or swept safely off the roadway. In her response to defendant's investigation report, plaintiff recalled, DOT employee, Emily Kline informed her that DOT received, "other calls and complaints about the very same type of incidents regarding vehicle damage from the job site."

{¶ 8} The proximate cause of plaintiff's damage appears to have been the failure to sufficiently clear the roadway of debris. This court, as trier of fact, determines questions of proximate causation. *Schinaver v. Szymanski* (1984), 14 Ohio St. 3d 51. "{T]he term 'proximate cause' is often difficult of exact definition as applied to the facts of a particular case. However, it is generally true that where an original act is wrongful *** and in a natural and continuous sequence produces a result which would

{¶ 9} not have taken place without the act, proximate cause is established, and the fact that some other act unites with the original act to cause injury does not relieve the initial offender from liability." *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 287, quoting *Clinger v. Duncan* (1957), 166 Ohio St. 216. Even where an act is not the sole cause of the injury, that act can still be sufficient to satisfy the element of proximate cause so long as it put in motion the sequence of events leading to the

injury. *Garbe v. Halloran* (1948), 150 Ohio St. 476, paragraph two of the syllabus.

{¶ 10} "If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone." *Cascone v. Herb Kay Co.* (1983), 6 Ohio St. 3d 155, at 160 quoting *Mudrich v. Std. Oil Co.* (1950), 153 Ohio St. 31. Notwithstanding any intervening act of a third party motorist, negligence on the part of defendant's agent was the foreseeable proximate cause of plaintiff's damage.

{¶ 11} In order to find liability for a damage claim occurring in a construction area, the court must look at the totality of the circumstances to determine whether DOT or its agents acted in a manner to render the highway free from an unreasonable risk of harm for the traveling public. *Feichtner v. Ohio Dept. of Transp.* (1995), 114 Ohio App. 3d 346. In fact the duty to render the highway free from unreasonable risk of harm is the precise duty

{¶ 12} owed by DOT to the traveling public under both normal traffic conditions and during highway construction projects. See e.g. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St. 32d 39, 42; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 729; *Feichtner*, supra at 354. Defendant was charged with a duty to exercise ordinary care to render the roadway free from unreasonable risk of injury. That duty was breached and defendant is, consequently, liable to plaintiff for her ensuing damages.

JULIE R. HARCHALK :

Plaintiff :

v. : CASE NO. 2004-08979-AD

OHIO DEPARTMENT OF TRANSPORTATION : ENTRY OF ADMINISTRATIVE DETERMINATION

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Defendant

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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 plaintiff in the amount of $467.33, which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
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