

costs incurred to repair the damaged pedestal and cable. Plaintiff has asserted the damage to its property was proximately caused by negligence on the part of defendant in performing grass mowing activity along the roadside of State Route 276.

{¶2} Defendant acknowledged its employee, while mowing grass with a bush-hog along State Route 276, struck and damaged a phone box owned by plaintiff. Defendant explained the phone box was obscured from view by high vegetation. Defendant also indicated the phone box was neither marked nor painted which further concealed the phone box from defendant's mower operator. Defendant contended plaintiff was directed by statute to mark the presence of its underground telephone cable. Defendant cited R.C. 3781.29(C) asserting plaintiff was charged with a statutory duty to mark the location of its underground telephone cable with "safety alert orange" color code. Chapter 3781 of the Revised Code concerns building standards.¹ R.C. 3781.29 addresses situations where a utility such as plaintiff is required to mark the locations of underground cables after receiving statutorily required notice through a protection service that an excavator planned digging operations at the buried cable sites. Grass mowing operations as performed by defendant generally do not involve excavating. Despite the absence of a statutory duty to establish markings, defendant has argued plaintiff was negligent in failing to properly mark the location of the phone box and attached cable. Defendant has suggested the sole cause of plaintiff's damage was plaintiff's own negligence. Defendant insisted its bush-hog operator exercised due care while mowing grass along the roadside. Defendant maintained its employee did not act negligently in destroying a telephone box and telephone cable with grass mowing equipment.

{¶3} Plaintiff filed a response professing the property damage suffered was the proximate cause of defendant's negligence in the

¹ See specifically R.C. 3781.25-R.C. 3781.29.

time and manner mowing activity was performed. Plaintiff asserted that if the above ground pedestal was hidden from view by high vegetation it was the result of negligence on the part of defendant in maintaining the ground cover on the right-of-way of State Route 276.

{¶4} Additionally, plaintiff contended it was not charged with any statutory duty to mark its utility facilities because: 1) defendant did not ask for markings pursuant to R.C. 3781.28(A) and 2) R.C. 3781.27-R.C. 3781.32 do not apply to "public improvements" as defined by R.C. 153.64 (see R.C. 3781.27). R.C. 153.64(A)(1) states:

{¶5} "'Public improvement' means any construction, reconstruction, improvement, enlargement, alteration, or repair of a building, highway, drainage system, water system, road, street, alley, sewer, ditch, sewage disposal plant, water works, and all other structures or works of any nature by a public authority."

{¶6} R.C. 153.64(A)(2) states:

{¶7} "'Public authority' includes the state, or a county, township, municipal corporation, school district, or other political subdivision, or any public agency, authority, board, commission, instrumentality, or special district of or in the state or a county, township, municipal corporation, school district, or other political subdivision."

{¶8} From the facts presented the court concludes defendant's mowing operations were considered a public improvement as defined by statute. Also, defendant agency is a public authority and consequently the exclusionary language of R.C. 3781.27 applies.

{¶9} Furthermore, plaintiff related the destroyed pedestal was actually an above ground facility and not "underground utility facilities" referenced in R.C. 3781.25 through R.C. 3781.29. Plaintiff reiterated its property was damaged due to defendant's inability to regard a clearly identifiable object and/or alternatively defendant's failure to control ground cover in a

sufficient manner.

{¶10} Defendant must exercise due diligence in the maintenance and repair of highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. Additionally, defendant has a duty to exercise reasonable care in conducting its roadside maintenance activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD. Defendant is only liable when plaintiff proves, by a preponderance of the evidence, that defendant's negligence is the proximate cause of plaintiff's damages. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285. This court, as the trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51. In the instant claim, the court concludes sufficient evidence has been presented to show defendant breached the duty of care owed to plaintiff and this breach proximately caused plaintiff's damage. Therefore, defendant is liable to plaintiff in the amount of \$630.31, plus the \$25.00 filing fee. *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19.

{¶11} Having considered all the evidence in the claim file and adopting the memorandum decision concurrently herewith;

{¶12} IT IS ORDERED THAT:

{¶13} 1) Plaintiff's claim is GRANTED and judgment is rendered in favor of the plaintiff;

{¶14} 2) Defendant (Department of Transportation) pay plaintiff (Cincinnati Bell Telephone Co.) \$655.31 and such interest as is allowed by law;

{¶15} 3) Court costs shall be assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk