



across the road." Plaintiff indicated he noticed a "Rough Road" sign before he saw the culvert installation site. Plaintiff estimated he was traveling at 10 to 15 m.p.h. when he approached the installation site. In his complaint, plaintiff stated the right front tire of his automobile was flattened when it struck the roadway depression at the installation site. Furthermore, plaintiff related the right front rim of his car was bent from the impact with the roadway depression.

{¶3} Consequently, plaintiff filed this action seeking to recover \$820.00 for four rims, \$420.00 for four tires, and \$39.95, the cost of a front wheel alignment. Plaintiff contended he sustained these damages as a proximate cause of negligence on the part of defendant in maintaining a hazardous condition on the roadway. Although only one wheel rim was damaged as a result of the July 1, 2002 incident, plaintiff suggested he should be entitled to recover the cost of four wheel rims, since he can not obtain a replacement rim due to the fact the particular rims he had installed on his car are no longer manufactured. Plaintiff did not offer any explanation concerning why he should recover the cost of four replacement tires when only one tire was damaged. Plaintiff submitted the filing fee with the complaint.

{¶4} Defendant denied liability in this matter citing lack of knowledge of the defective roadway condition which caused plaintiff's property damage. Defendant asserted plaintiff has failed to prove any conduct by Department of Transportation personnel resulted in property damage, despite the fact defendant created the roadway condition which caused plaintiff's damage. Defendant contended its personnel installed the culvert on State Route 93 in accordance with standard installation procedures. Defendant denied breaching any duty owed to plaintiff that resulted in any property damage.

{¶5} On October 17, 2002, plaintiff submitted a response to defendant's investigation report. Plaintiff submitted a statement

from Jean E. Stein, who lives adjacent to State Route 93 in close proximity to the area where plaintiff's property damage event occurred. In her statement, Stein related she observed a "bad hole in the road" at the culvert installation site at approximately 4:30 p.m. on July 1, 2002. Plaintiff's incident occurred at approximately 7:00 p.m. on July 1, 2002. Stein reasoned the depression at the culvert installation site presented a hazard to vehicles using the roadway.

#### CONCLUSIONS OF LAW

{¶6} 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. Additionally, defendant has a duty to exercise reasonable care in conducting its roadside construction activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD.

{¶7} Generally, in order to recover on a claim of this type, plaintiff must prove either: 1) defendant had actual or constructive notice of the highway defect and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such condition, as was the case 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 shown defendant's agents created a hazardous condition at the culvert installation site which caused tire and rim damage to plaintiff's vehicle.

{¶8} Furthermore, the court concludes defendant maintained a nuisance condition on the roadway for motor vehicle traffic. Nuisance, defined in this context, is a condition within defendant's control that creates a danger for the ordinary traffic on the regularly traveled portion of the road. See *Harris v. Ohio Dept. of Transp.* (1992), 83 Ohio App. 3d 125 at 129, citing *Manufacturer's National Bank of Detroit v. Erie City Road Comm.* (1992), 63 Ohio St. 3d 318. Evidence has proved defendant did maintain a hazardous condition which did proximately cause plaintiff's property damage. Therefore, defendant is liable to plaintiff for damages based on nuisance.

{¶9} Where the existence of damage is established, the evidence need only tend to show the basis for the computation of damages to a fair degree of probability. *Brewer v. Brothers* (1992), 82 Ohio App. 3d 148. Only reasonable certainty as to the amount of damages is required, which is that degree of certainty of which the nature of the case admits. *Bemmes v. Pub. Emp. Retirement Sys. Of Ohio* (1995), 102 Ohio App. 3d 782. From the evidence before the court, it is determined plaintiff's damages shall be limited to the cost of one wheel rim, one tire, alignment expenses, and filing fee reimbursement. Total compensable damages amount to \$403.37.

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

{¶11} IT IS ORDERED THAT:

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

{¶13} 2) Defendant (Department of Transportation) pay plaintiff (Nickolas A. Fortune) \$403.37 and such interest as is allowed by law;

{¶14} 3) Court costs are assessed against defendant.

DANIEL R. BORCHERT

Deputy Clerk

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