[Cite as *Alaniz v. Ohio Dept. of Transp.*, 2019-Ohio-5477.]

JOSE ALANIZ Plaintiff v. OHIO DEPARTMENT OF TRANSPORTATION, et al. Defendants	Case No. 2018-00883JD Magistrate Holly True Shaver DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action alleging negligence. The case was tried to a magistrate of the court on the issues of both liability and damages.

{¶2} This case arises out of an automobile collision that occurred in the early morning hours of December 30, 2017. The weather conditions were cold, and it was snowing. Plaintiff, Jose Alaniz, was driving his 2000 BMW sedan on I-75 northbound from the Benchwood Road entrance ramp. Robert Easton was operating a snow plow for defendant, Ohio Department of Transportation (ODOT), and was also traveling northbound on I-75. At some point on I-75, Easton's plow blade came into contact with the driver's side of plaintiff's vehicle. Plaintiff's vehicle "fishtailed" and eventually came to rest under the I-70 overpass. Bretnie Collum, another motorist, had been following Easton's snowplow for some distance in the center lane of I-75 and witnessed the collision. Collum stopped to assist plaintiff after the accident. The Ohio State Highway Patrol (OSHP) came to the scene to investigate and took a written statement from Collum. Plaintiff was able to drive his vehicle home from the accident scene. Plaintiff sought medical treatment the following day and missed one week of work. Plaintiff seeks damages for medical expenses, lost wages, motor vehicle repairs, and pain and suffering.

Law

{¶3} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.,* 99 Ohio St.3d 79, 81, 2003-Ohio-2573,citing *Menifee v. Ohio Welding Prods., Inc.,* 15 Ohio St.3d 75, 77 (1984). The common law of Ohio imposes a duty of reasonable care upon motorists, which includes the responsibility to observe the environment in which one is driving. *Hubner v. Sigall*, 47 Ohio App.3d 15, 17 (10th Dist.1988). Additionally, R.C. 4511.33(A)(1) provides, in part: "A vehicle * * * shall be driven, as nearly as practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety."

Summary of Testimony

{¶4} Plaintiff, who is 44 years old, testified that he was born in Mexico and that he has lived in the United States since he was 14. Plaintiff became a United States citizen seven years ago. Plaintiff has taken some English as a Second Language classes and lives with his family in Vandalia, Ohio. At the time of the accident, plaintiff worked for two employers: Basil's restaurant and Olive Garden restaurant. On December 29, 2017, plaintiff had worked from 9 a.m. to 2 p.m. at Basil's, then from 5 p.m. to midnight at Olive Garden. According to plaintiff, after he finished his shift at Olive Garden, he took the entrance ramp from Benchwood Road onto I-75 northbound, with the intention of exiting at US Route 40 to get to his house. Plaintiff testified that his house is two exits north of Olive Garden. Plaintiff's Exhibit 7D depicts the I-70/I-75 interchange, which is located north of the Benchwood Road entrance ramp and consists of five travel lanes. From the Benchwood Road entrance ramp, to remain on I-75 northbound, a motorist must merge onto the highway, traversing two lanes to the left to access the

center lane of a five-lane area. If a motorist remains in either of the two right lanes of the five-lane area, he would enter I-70, either eastbound or westbound.

{¶5} Plaintiff testified that when he was on the Benchwood Road entrance ramp, he saw the flashing lights on the snowplow in the distance behind him. According to plaintiff, he was driving in the right lane of a three-lane area on the highway. Suddenly, plaintiff felt a big "crash" which felt like it lasted "forever." The snowplow scraped the driver's side of plaintiff's car, starting from the rear of his vehicle moving forward. Plaintiff testified that the plow dragged his vehicle for some distance, then disengaged from his vehicle. Plaintiff stated that he thought he was going to die as he was trying to separate his car from the snowplow. His car eventually broke free from the snowplow, "fishtailed," and then came to rest on the right side of the highway underneath the I-70 overpass. Plaintiff did not write a statement for the OSHP because his written English is "not that good" and he was traumatized.

{¶6} On cross-examination, plaintiff testified that the roads had snow on them and that he was driving approximately 35 to 40 miles per hour because of the poor road conditions. Plaintiff testified that other motorists were also driving slowly. Plaintiff testified that he could see flashing lights far behind him. Plaintiff stated that the front plow on the truck was in a downward position plowing snow when he saw it. Plaintiff was uncertain where the impact occurred, north or south of the I-70/I-75 split. However, plaintiff was adamant that he was in the right lane of a three-lane roadway when the accident occurred. Plaintiff also testified that the snowplow was in the center lane traveling faster than he was, and that the snowplow caught up to his vehicle and struck it from behind as the snowplow was passing his vehicle. Plaintiff stated that he had looked to the left when he merged onto I-75 but also stated that he was focused on looking ahead while he was driving because of the poor road conditions.

{¶7} Bretnie Collum testified that she did not know plaintiff before the accident. Collum had finished her shift at MedVet, in Dayton, which is located several miles south of the Benchwood Road entrance ramp. Collum took the Dryden Road entrance ramp to merge onto I-75 north. Collum explained that the roads were "horrible" and that she was driving cautiously. Collum testified that, initially, she was driving in the far-left lane, but that a truck sped up behind her, so she moved into the center lane behind the snow plow. Collum stated that she followed the snow plow in the center lane and stayed approximately one-and-one-half car lengths behind the snow plow. Collum testified that when she began to follow the snow plow, the front plow was raised, and the snow plow was solely dispersing salt. Collum testified that approximately five minutes after she began to follow the snow plow, the bottom of the front plow blade was lowered and struck plaintiff's driver's side taillight. According to Collum, both the snow plow and plaintiff's vehicle remained engaged for some time as the snow plow dragged plaintiff's vehicle down the highway. At trial, Collum estimated that plaintiff's vehicle and the snow plow were engaged for five minutes. However, in her deposition, Collum had estimated that the vehicles were stuck together for "a few, maybe five feet." (Collum deposition, p. 16.) Collum stated that she was following the snow plow in the center lane, and that plaintiff's vehicle was traveling in the right lane. Collum did not notice plaintiff's vehicle until the snowplow "dropped" its plow on plaintiff's vehicle. Collum testified that the vehicles made contact in an area of the highway where there were only three lanes.

{¶8} Robert Easton testified that he retired from ODOT in July 2011 after having worked there for more than 33 years. Thereafter, Easton worked for ODOT as a seasonal employee during the winter months. Plowing snow was one of Easton's responsibilities during his entire career at ODOT. According to Easton, on December 29, 2017, he had worked his regular shift from 7:30 a.m. to 4 p.m., and then he was called back to begin a second shift at midnight because of the weather

conditions. Easton denied being tired during his midnight shift and stated that he "got some sleep in" between 4 p.m. and midnight.

{¶9} Easton was assigned a specific route to clear snow from I-75 that evening. He began at the ODOT garage, where he performed a "pre-check" of the vehicle, which includes checking wiper blades, tires, and fluids. Easton stated that sometimes in the winter the pre-check takes 10 to 15 minutes. Easton testified that after he left the garage, he drove east on I-70, then south on I-75 in the center lane. Easton testified that he was spreading salt and plowing snow with the front plow angled to the right in the center lane. Although his truck had both a front plow and a "wing plow" on the right side of the vehicle, Easton testified that he was not using the wing plow, because a wing plow is used only when two trucks are available to plow in tandem. Easton was plowing alone that night. Easton described the snow plow truck as having flashing strobe lights on the top, sides, and rear, and noted that there is reflective tape on the back of the salt spreader. Easton stated that because the truck was equipped with a wing plow, the strobe lights were automatically activated when the truck was moving.

{¶10} Easton remained in the center lane traveling south on I-75 until the Stanley Avenue exit. Easton took the Stanley Avenue exit, turned around, and then headed northbound on I-75. Easton stated that he began and remained in the center lane, plowing and salting. Easton does not recall striking another vehicle that night. His supervisor called Easton when he was near the Northwood Boulevard exit on I-75, and informed Easton that he had been involved in an accident. Easton returned to the accident site and gave a statement to both ODOT and the OSHP. Easton did not see plaintiff's vehicle and did not speak to plaintiff when he arrived at the scene. Easton testified that the state trooper inspected his plow for damage. Easton then returned to work and continued plowing I-75. Easton testified that he never left the center lane while he was plowing I-75 and stated that he would have felt his plow hit the raised pavement markers on the lane line on the right side of the center lane if his plow had

drifted into the right lane. Easton acknowledged that it is important to know what is happening around the sides of his vehicle, and that he did not see plaintiff's vehicle at all that night. Easton testified that he did not feel anything hit his plow but admitted that he should have been able to feel that he struck plaintiff's vehicle.

{¶11} Defendants' expert witness, Charles Veppert, testified that he owns a traffic crash reconstruction business, Valley Technical Services (VTS), in Ravenna, Ohio. Veppert worked for OSHP for 29 years and retired in 2006. Veppert has performed approximately 200 accident reconstructions for the OSHP, and approximately 600 for VTS. Veppert is accredited by the Accreditation Commission for Traffic Accident Reconstruction (ACTAR). Veppert reviewed the OSHP crash report, witness statements, the depositions of Collum, plaintiff, and Easton, photographs taken at the scene, Google maps, specifications for both vehicles, and he examined an exemplar truck and plow at an ODOT facility in Columbus, Ohio. Veppert testified that there was no physical evidence from the roadway that pinpointed the accident location. Veppert did not conduct a site visit in this case.

{¶12} However, according to his research using Google maps, Veppert testified that the total distance from where plaintiff entered the highway to the area where his vehicle came to rest after the accident measured 1.4 miles. Veppert testified that the area where plaintiff's vehicle came to final rest was north of the I-70/I-75 split, where there were three lanes of travel.

{¶13} Veppert estimated that the weight of plaintiff's vehicle was less than 4,000 pounds, whereas the weight of the snowplow was between 20,000 and 30,000 pounds. Veppert testified that based solely on the photographs of the damage to plaintiff's vehicle, the contact was consistent with a "fairly serious sideswipe." Based upon Veppert's review of the materials that were provided to him, he opined that during impact, one or both vehicles were moving laterally to one another. Veppert opined that the crash was caused when one or both vehicles left their lanes of traffic. Veppert

concluded that there was no evidence of "vertical" damage that would have been caused by a plow being dropped onto plaintiff's vehicle from a raised position. Rather, Veppert opined that the damage to the vehicle was consistent with a sideswipe from the plow being in a lowered position. Veppert stated that the damage on plaintiff's vehicle corresponds to the height of the plow blade and is consistent with the plow being in a lowered position. Veppert stated that there is no evidence that plaintiff's vehicle was "dragged" by the plow. Veppert testified that the lanes of the highway are 12 feet wide, and the length of the front plow blade was 10 feet, 11.5 inches.

{¶14} On cross-examination, Veppert testified that although he believes a crash occurred between an ODOT truck and plaintiff's vehicle, he cannot determine from the photographs whether the damage occurred from front to back or from back to front. Veppert testified that he would need more information to determine which vehicle had moved from side to side. Veppert noted that the OSHP report reflected that the impact occurred in a three-lane area of the highway.

{¶15} Defendant's theory of the case is that plaintiff had to move two lanes to the left in order stay on I-75 north, and that it is more likely than not that plaintiff caused the collision by drifting into the center lane and contacting the plow blade. Defendant further argues that plaintiff admitted that he did not know where the snow plow was when he was merging, and that he was focused on looking ahead because of the poor road conditions. In contrast, plaintiff's theory of the case is that he had successfully merged into the right lane of a three-lane highway where he intended to remain to access the U.S. Route 40 exit, and that Easton was driving in the center lane north of the I-70/I-75 split when Easton's plow blade encroached into plaintiff's lane and struck his vehicle from the rear and left side while Easton was passing him.

{¶16} Based upon the evidence presented at trial, the magistrate finds that the front plow blade struck the left side of plaintiff's vehicle and scraped it from the rear to

the front as Easton was spreading salt and plowing snow in the center lane of the highway. Easton's truck had its flashing lights activated.

{¶17} The magistrate further finds that plaintiff had to merge across two lanes of the highway to remain on I-75 northbound after entering from Benchwood Road. Plaintiff's testimony was credible that he successfully merged into the lane that he desired: the center lane of the five-lane roadway, which eventually became the right lane in a three-lane area on I-75 northbound, north of the I-70/I-75 split. The magistrate finds that there is no evidence that plaintiff intended to enter the center lane of the three-lane part of the highway to get to his house. Indeed, plaintiff's intended route from Benchwood Road to US Route 40 on I-75 is a short distance, so there was no reason for plaintiff to merge into the center lane where the snowplow was. The magistrate finds that plaintiff's vehicle remained in the right lane of a three-lane area of the highway when it was struck by Easton's front plow blade, which was angled to the right. The magistrate further finds that Easton had approached the I-70/I-75 split from the south, that it was his practice to plow the center lane first while he was plowing alone, that he was plowing alone that night, and that he was plowing the center lane when the accident occurred.

{¶18} Collum testified that she saw the front plow drop and strike plaintiff's left taillight and that it remained attached to plaintiff's vehicle for some time. Although there was conflicting testimony regarding the length of time and distance that the plow and plaintiff's vehicle were engaged, the magistrate finds that Collum was credible when she testified that she was startled to see the plow strike plaintiff's vehicle and stay engaged for some time. However, Veppert's testimony that the damage to the vehicle is consistent with a sideswipe while the plow was in a downward position is more credible and persuasive than Collum's testimony on this point. Since Collum was traveling behind Easton's vehicle, the magistrate is not convinced that she was able to see the front plow, in fact, "drop" onto plaintiff's vehicle. Indeed, both Easton and plaintiff

testified that the front plow blade was down plowing snow when the accident occurred. Whether the plow blade came down in a dropping manner or whether the right, upper tip of the plow blade sideswiped plaintiff's vehicle, there is no question that the plow caused the damage to plaintiff's vehicle. The court finds that it is more likely than not that the snowplow blade was in a downward position encroaching into plaintiff's lane of travel when Easton's vehicle passed plaintiff's vehicle. The court further finds that Easton failed to use ordinary care when he allowed the plow blade to strike plaintiff's vehicle. Both plaintiff and Collum were credible when they testified that plaintiff was traveling in the right lane of the highway in an area of three lanes when the plow blade struck plaintiff's vehicle. Given the fact that Easton does not remember seeing or striking plaintiff's vehicle, the court finds that any testimony that his front plow blade remained completely in the center lane lacks credibility. In addition, Easton's testimony that he would have felt the raised pavement markers on the lane lines if he had crossed them lacks credibility because he did not feel his plow blade strike and scrape plaintiff's vehicle and shatter the rear driver's side window. Furthermore, defendant's expert testified that the area where plaintiff's vehicle came to rest was under the I-70 overpass, which is located north of the I-70/I-75 split and is adjacent to an area of the highway that has three lanes. Although the testimony varied regarding how long the vehicles remained engaged, given the short distance that plaintiff was traveling on I-75, the magistrate finds that the vehicles were more likely than not engaged for a matter of seconds, not minutes. The magistrate further finds that it is understandable that plaintiff testified that it felt like "forever" because he was terrified.

{¶19} In sum, the magistrate finds that plaintiff has proven, by a preponderance of the evidence, that Easton breached the duty of reasonable care when he failed to observe the environment in which he was driving and allowed his front plow blade to encroach into plaintiff's lane of travel and strike plaintiff's vehicle while he was passing plaintiff's vehicle in the three-lane portion of I-75 north of the I-70/I-75 split.

Damages

{¶20} Plaintiff presented a summary of special damages. (Plaintiff's Exhibit 1.) Plaintiff sought medical treatment shortly after the collision, and began treatment with Robert Clark, D.O., at Clark Chiropractic, Inc. (Plaintiff's Exhibits 8A and 8B.) Dr. Clark testified via video that he treated plaintiff from January 19, 2018 through March 14, 2018, for a total of twelve office visits. According to Dr. Clark, plaintiff reported his pain as a "10 out of 10" in the first session, but after treatment, he reached pre-injury status. (Plaintiff's Exhibit 8B, p. 42.) Dr. Clark testified that the tests he conducted on plaintiff showed joint inflammation, and he diagnosed plaintiff with cervical, thoracic, and lumbar strain with mild fasciitis. (*Id*. p. 17.) Dr. Clark opined to a reasonable degree of chiropractic certainty that plaintiff's injuries were a direct result of the collision. Plaintiff testified that he did not have a primary care physician prior to the accident and that he had not sought treatment from Dr. Clark until after the accident.

{¶21} Plaintiff testified that his daughter took him to the hospital after the collision, and that he had an MRI or x-rays taken which revealed no broken bones. Plaintiff testified that he had pain in his neck and back after the collision. Plaintiff stated that his condition improved after he completed the twelve visits with Dr. Clark. Plaintiff described being frightened when the collision occurred and stated that he continues to have bad memories about the accident and thinks about it often. Plaintiff also testified that he has suffered emotional stress regarding the fact that his vehicle has not been repaired and he has not been able to use it since the accident.

{¶22} The parties entered a stipulation regarding plaintiff's medical bills. (Joint Ex. 9.) According to that exhibit, plaintiff paid $75 to Kenbrook Family Practice, but the remainder of plaintiff's medical bills were covered by collateral sources. Plaintiff testified that he paid $80 or $90 out-of-pocket. The court finds that plaintiff is entitled to $75 for his out-of-pocket medical expenses as shown in Joint Ex. 9.

{¶23} Plaintiff testified that he missed approximately one week of work from both of his places of employment. Plaintiff also testified that because he missed a week of work from Olive Garden, he was not eligible for vacation leave. Plaintiff's employers submitted documentation to show the number of hours of work that he missed. (Plaintiff's Exhibit 1.) Plaintiff seeks damages for lost wages and lost vacation time in the total amount of $2,210.00. (*Id*.) However, the court finds that plaintiff incurred lost wages and lost vacation time in the amount of $2,240.00.[1]

{¶24} Plaintiff also testified that he would like to repair the damage to his vehicle. Plaintiff presented a preliminary estimate from Trimbach's Body Shop stating that repair costs would total $6,766.07. (Plaintiff's Exhibit 1J.) However, the court notes that plaintiff's vehicle was 17 years old at the time of the collision, with over 247,000 miles. (*Id*.) The general rule for calculating damages to a motor vehicle as a result of a motor vehicle collision is "the difference between its market value immediately before and immediately after the collision." *Falter v. City of Toledo*, 169 Ohio St. 238, 158 N.E.2d 893 (1959) paragraph one of the syllabus. Plaintiff did not present evidence of the market value of his vehicle prior to and after the collision. "[A]n alternative method [of calculating damages] -- the cost of repair -- is an acceptable measure of damages if the cost of repair does not exceed the amount of damages that would be arrived at using the primary measure of damages. In other words, the cost of repair must not exceed the diminution in market value. Nor may the cost of repair exceed the fair market value of the property before the accident." *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App. 3d 523, 528 (10th Dist.2007). Inasmuch as plaintiff has failed to provide the court with the fair market value of his vehicle before the collision, the magistrate is unable to determine whether the estimated repair costs exceed the value of his vehicle. When the repair costs exceed the value of the vehicle, an award of repair costs is

[1]Plaintiff's calculations on Exhibit 1 state that plaintiff's wage loss for Basil's on Market totals $390. However, 30 hours at $14 per hour totals $420. Thus, the $30 difference in damage calculations.

prohibited. (*Id*., at 529; see also, *Reasoner v. State Farm Mut. Auto. Ins. Co.*, 10th Dist. Franklin No. 01AP-490, 2002-Ohio-878, stating that, under the cost of repairs method, plaintiff must also present proof of the value of the vehicle immediately before the event that caused the damage being repaired.) Accordingly, although the magistrate is aware that plaintiff incurred damage to his vehicle, the magistrate finds that plaintiff has failed to present sufficient evidence from which the court can calculate any award for that damage.

{¶25} Plaintiff testified that he sought medical treatment after the accident by going to the hospital for imaging studies and that he underwent chiropractic treatment from January to March 2018. According to both plaintiff and Dr. Clark, plaintiff was in severe pain from the accident but by the end of the treatment, approximately three months later, plaintiff was back to pre-injury status. The court finds that plaintiff experienced pain and suffering as a result of the collision, and that he experienced extreme fright from being struck by the snowplow. Indeed, plaintiff testified that he thought he was going to die when the snowplow struck his vehicle. Based upon the evidence presented, the magistrate finds that plaintiff is entitled to an award of damages for pain and suffering in the amount of $9,000. Accordingly, the magistrate recommends that plaintiff be granted an award in the amount of $11,340.00, which includes the $25 filing fee.

{¶26} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely*

and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

HOLLY TRUE SHAVER
Magistrate

Filed October 10, 2019
Sent to S.C. Reporter 2/11/20