[Cite as *Sauer v. Crews,* 2011-Ohio-3310.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Sharon A. Sauer, Co-Executor of the Estate of Julia Augenstein et al.,	:	
Plaintiffs-Appellees,	:	No. 10AP-834
v.		(C.P.C. No. 07CVC07-9394)
Stinson J. Crews et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on June 30, 2011

Lamkin, Van Eman, Trimble, Beals & Doughterty, LLC, *Timothy L. Van Eman* and *Keri N. Yaeger*, for appellees.

Freund, Freeze & Arnold, *Kenneth E. Harris* and *Sandra R. McIntosh*, for appellants.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendants-appellants, Stinson J. Crews and Stinson Crews Paving, Inc., appeal from a judgment of the Franklin County Court of Common Pleas in favor of plaintiffs-appellees, Sharon A. Sauer and Karen S. Streets. In that judgment, the trial court found that defendants' negligence caused the death of plaintiffs' mother, Julia Augenstein. For the following reasons, we affirm the trial court's decision.

{¶2} The morning of November 24, 2006, Crews, owner of Stinson Crews Paving, Inc., arrived at the Grove City Christian Child Care Center to patch and repair the deteriorated paving of the day care center's driveway and parking lot. Crews brought with him an asphalt paver and a skid loader, which he hauled to the job site on a flatbed trailer. Sometime in the afternoon, Crews parked the empty trailer on the street in front of the day care center.

{¶3} Columbus Street, the street on which the day care center is located, consists of three lanes, with the middle lane designated a turn-only lane. Columbus Street runs east-west and has a 35-mile-per-hour speed limit. The portion of Columbus Street that includes the day care center is a no-parking zone.

{¶4} Despite the "no parking" signs posted nearby, Crews parked the trailer in the westbound lane of Columbus Street, immediately to the east of the day care center's entrance. The trailer blocked the majority of the westbound lane, forcing motorists to detour into the turn-only lane to avoid it. The trailer, which was dark in color and only two to three feet in height, had no illuminated lights or reflective tape on it.

{¶5} Crews directed his employee, George Siler, to place cones behind the trailer to alert westbound drivers to its presence. Siler positioned two to five orange, 12-inch tall, non-reflective cones in a diagonal line beginning at the rear, outside corner of the trailer and ending at the curb. At most, the cones extended 30 feet from the rear of the trailer.

{¶6} Around 5:20 p.m., Crews and his employees were repaving the portion of the day care center's driveway located closest to the street. Raymond Jackson, owner and driver of a 14-wheel dump truck, had just delivered a load of fresh asphalt to the job

site. Jackson backed his truck into the driveway to dump asphalt into the paver that Stinson was operating. A sizable portion of Jackson's cab extended into the westbound lane of Columbus Street. Crews told Siler to go into the street to direct Jackson into position to dump the asphalt and flag traffic around the dump truck.

{¶7} At this point, any westbound driver on Columbus Street encountered at least four different obstacles blocking the lane of travel. First, the driver had to negotiate around the trailer and accompanying cones located immediately to the east of the day care center's entrance. Then, the driver had to avoid the truck cab and Siler, who had positioned himself in the center, turn-only lane at a point west of the truck cab and east of the trailer.

{¶8} Augenstein encountered these obstructions as she drove her Buick Park Avenue from the Elks Club to her home. Rather than flagging Augenstein out and around the trailer, Siler flagged Augenstein toward the trailer. As Augenstein began turning her car left to drive between the truck and Siler, she hit the rear of the trailer. Apparently, Augenstein did not see the trailer.

{¶9} As a result of her collision with the trailer, Augenstein sustained fractured vertebrae, a break in her spinal cord near the base of her brain, a compound fracture of her right hand, a fracture of her left mandible, and fractured ribs. Emergency medical personnel transported Augenstein to Grant Hospital, where she was pronounced dead.

{¶10} On July 17, 2007, Sauer and Streets, co-executors of Augenstein's estate, filed a complaint against Crews in the trial court.[1] In the complaint, plaintiffs asserted both

[1] The parties later entered into a written stipulation, signed by the trial court, agreeing to add Stinson Crews Paving, Inc. as a defendant.

survivorship and wrongful death claims. In their answer, defendants denied liability for Augenstein's death, and they asserted contributory fault as an affirmative defense.

{¶11} Crews then filed a third-party complaint against Century Surety Company ("Century"). Crews alleged that the commercial general liability policy that he had secured from Century provided him with coverage for Augenstein's accident. Century, however, declined coverage. Crews thus asserted a claim for breach of contract against Century, and he sought a declaratory judgment that he was entitled to coverage for the accident under the Century policy. In return, Century filed a counterclaim requesting the trial court to issue a declaratory judgment that the commercial general liability policy did not require Century to provide Crews with either a defense or indemnity.

{¶12} For purposes of trial, the trial court bifurcated plaintiffs' claims from Crew's third-party claims and Century's counterclaim. Over the course of a four-day bench trial, plaintiffs and defendants presented evidence. On July 22, 2010, the trial court issued its decision, which included findings of fact and conclusions of law. The trial court concluded that defendants were negligent in: (1) failing to use ordinary care for the safety of motorists, including Augenstein; (2) violating R.C. 4513.10(A), which requires a vehicle parked on a roadway open to traffic to be equipped with a red light visible from a distance of 500 feet to the rear of the vehicle; (3) violating R.C. 4511.74(A), which prohibits any person from placing an obstruction upon a highway without proper authority; (4) violating R.C. 4511.68(A)(14) and (16), which prohibit any person from parking a vehicle at any place where signs prohibit parking or on the roadway portion of a thruway; (5) violating R.C. 4511.22(A), which prohibits stopping so as to impede or block the normal and reasonable movement of traffic; and (6) violating the Codified Ordinances of Grove City,

Section 907.17, which prohibits any person from obstructing any rights-of-way without first obtaining a construction permit. The trial court also concluded that "[d]efendants' negligence was 100% the proximate cause of injuries and damages sustained by the [p]laintiffs, including the wrongful death of Julia Augenstein" and that "Julia Augenstein was not negligent and no conduct on the part of Julia Augenstein proximately caused the subject collision." (Conclusions of law, ¶2 and 3.)

{¶13} On August 3, 2010, the trial court entered judgment against defendants in the amount of $251,552.04, plus interest. The judgment entry stated that there was "no just reason for delay," thus allowing the instant appeal even though the third-party claims and counterclaim remain unresolved. Civ.R. 54(B). On appeal, defendants assign the following error:

> The trial court erred in attributing 100% of the liability for the accident to Appellants, and zero to Plaintiffs' decedent.

{¶14} The contributory fault of the plaintiff (or, in this case, the decedent) may be asserted as an affirmative defense to a tort claim. R.C. 2315.32(B); *Striff v. Luke Med. Practitioners, Inc.*, 3d Dist. No. 1-10-15, 2010-Ohio-6261, ¶66. If a decedent's own negligence contributed to her death and that negligence was "not greater than" the combined tortious conduct of all other persons involved, then the contributory fault of the decedent does not bar the recovery of damages from the other persons involved. R.C. 2315.33. However, the trial court must diminish any compensatory damages recoverable by an amount that is proportionally equal to the percentage of the decedent's negligence. Id.; R.C. 2315.35. See also *Eastley v. Volkman*, 4th Dist. No. 09CA3308, 2010-Ohio-4771, ¶30.

{¶15} Defendants argue that the trial court erred in not apportioning some percentage of liability to Augenstein because: (1) she failed to maintain an assured clear distance ahead in violation of R.C. 4511.21(A); (2) she operated her motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a); and (3) she got behind the wheel despite having a significant blind spot in her vision due to macular degeneration. Each of these arguments requires this court to apply the manifest-weight-of-the-evidence standard. Under that standard, where there exists competent, credible evidence supporting the findings and conclusions of the trial court, an appellate court must affirm the trial court's judgment. *Myers v. Garson*, 66 Ohio St.3d 610, 614, 1993-Ohio-9. The manifest-weight-of-the-evidence standard requires an appellate court to presume that the findings of a trier of fact are correct. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24; *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. This presumption arises because the trier of fact, who can observe the witnesses' demeanor, gestures, and voice inflections, is best able to weigh and judge the credibility of the proffered testimony. Id. Consequently, an appellate court cannot reverse a decision simply because it holds a different opinion regarding the credibility of the witnesses and evidence before the trial court. *Wilson* at ¶24; *Seasons Coal Co.* at 81.

{¶16} To establish a claim for negligence, a party must prove: (1) the existence of a legal duty, (2) a breach of that duty, and (3) injury that is the proximate cause of the breach. *Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshall*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶22. Where a legislative enactment imposes a specific duty for the safety of others, failure to perform that duty is negligence per se. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184. In cases of negligence per se, a party

can conclusively establish the first two elements of negligence, duty and breach of duty, by merely proving the commission or omission of a specific act prohibited or required by statute. *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, ¶15. Here, defendants argue that Augenstein was negligent per se when she violated R.C. 4511.21(A) by failing to maintain an assured clear distance ahead of her vehicle so that she could avoid colliding with the trailer.

{¶17} R.C. 4511.21(A) states that "no person shall drive any motor vehicle * * * in and upon any street or highway at a greater speed than will permit the person to bring it to a stop within the assured clear distance ahead." A driver violates the assured-clear-distance-ahead statute if she collides with an object that: (1) was ahead of her in her path of travel, (2) was stationary or moving in the same direction as she, (3) did not suddenly appear in her path, and (4) was reasonably discernable. *Pond v. Leslein*, 72 Ohio St.3d 50, 52, 1995-Ohio-193; *Ziegler v. Wendel Poultry Servs., Inc.* (1993), 67 Ohio St.3d 10, 12, overruled on other grounds, *Fidelholtz v. Peller*, 81 Ohio St.3d 197, 1998-Ohio-462. Cases involving the assured-clear-distance-ahead statute require evaluation of the conduct of the driver in light of the facts surrounding the collision. *Purcell v. Norris*, 10th Dist. No. 04AP-1281, 2006-Ohio-1473, ¶16. Violation of the assured-clear-distance-ahead statute constitutes negligence per se. *Pond* at 53; *Ziegler* at 12.

{¶18} In the case at bar, plaintiffs tacitly concede that the trailer was ahead of Augenstein in her path of travel, the trailer was stationary, and the trailer did not suddenly appear in Augenstein's path. Thus, the only matter in dispute is whether the trailer was reasonably discernable. In arguing that the trailer was reasonably discernable, defendants rely on *Smiddy v. Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, where the

Supreme Court of Ohio held that, "[a]n automobile, van, or truck stopped on a highway in a driver's path during daylight hours is, in the absence of extraordinary weather conditions, a reasonably discernable object as a matter of law." Id. at paragraph two of the syllabus. We do not find *Smiddy* controlling for two reasons. First, the rule announced in *Smiddy* applies to automobiles, vans, and trucks—not flatbed trailers. The trailer at issue here was only two- to three-feet tall. Thus, it lacked the height and conspicuousness of an automobile, van, or truck. Given the differences in shape and size between a trailer and a motor vehicle, we decline to expand *Smiddy* to cover the instant situation.

{¶19} Second, the record contains evidence that the accident occurred in twilight, not daylight. Mark Rice, plaintiffs' expert witness on accident reconstruction, testified that the sun set in Grove City on the date of the accident at 5:11 p.m. Augenstein collided with the trailer at 5:29 p.m.—almost 20 minutes after sunset. Ellie Francis, one of defendants' expert witnesses, testified that the 30-minute time period after the sun sets is called civil twilight, during which light diminishes rapidly before completely ceding to darkness. The accident, therefore, happened well within the civil twilight period and only 12 minutes before nighttime.

{¶20} Moreover, Douglas E. Stonerock, a Grove City police officer, testified that as he drove to the accident scene, it was dusk and street lights were on. As Officer Stonerock arrived at the accident scene only four minutes after Augenstein struck the trailer, his testimony constitutes evidence of the lighting conditions around the time of the collision. Because the evidence recounted above qualifies as competent, credible

evidence that the accident happened during twilight, *Smiddy* did not require the trial court to find that the trailer was reasonably discernable as a matter of law.

{¶21} In arguing to the contrary, defendants rely on the testimony of witnesses who stated that it was still daylight when Augenstein collided with the trailer. Under the manifest-weight-of-the-evidence standard, when the evidence is susceptible to more than one interpretation, appellate courts must give it the interpretation consistent with the trial court's judgment. *Cent. Motors Corp. v. Pepper Pike*, 73 Ohio St.3d 581, 584, 1995-Ohio-289. Appellate courts do not reweigh the evidence. *Browning v. Ohio State Highway Patrol*, 151 Ohio App.3d 798, 2003-Ohio-1108, ¶14. Here, the evidence that the accident occurred during twilight is consistent with the trial court's judgment. Thus, we rely on that evidence in reviewing the judgment.

{¶22} Defendants next argue that the record lacked competent, credible evidence that the trial court could rely on to find that the trailer was not reasonably discernable. We disagree.

{¶23} "The word 'discernable' ordinarily implies something more than 'visible.' " *McFadden v. Elmer C. Breuer Transp. Co.* (1952), 156 Ohio St. 430, 442. "Discernable" connotes cognitive awareness and describes an object that is mentally perceptible or distinguishable, while "visible" means merely capable of being seen. Id.; *Tritt v. Judd's Moving & Storage, Inc.* (1990), 62 Ohio App.3d 206, 217-18. Moreover, the object struck must be reasonably discernable for a time sufficient to allow the driver to avoid it with the exercise of reasonable care. *Venegoni v. Johnson*, 10th Dist. No. 01AP-1284, 2002-Ohio-1988.

{¶24} Here, the record contains evidence of multiple factors that prevented the trailer from being reasonably discernable. First, Crews failed to provide westbound motorists with adequate warning that the trailer was blocking their lane of travel. Had Crews obtained a construction permit from Grove City to obstruct Columbus Street, he would have had to submit a traffic control plan consistent with the Ohio Manual of Uniform Traffic Control Devices ("OMUTCD"). According to Rice, plaintiffs' expert witness on accident reconstruction, the OMUTCD sets forth the standard in Ohio for the configuration of warning and channeling devices necessary when commercial equipment blocks the roadway. To comply with the OMUTCD, Crews would have had to use traffic cones to channel westbound traffic into the turn-only lane beginning 245 feet from the rear of the trailer. Additionally, Crews would have had to post various warning signs prior to the traffic cones, informing drivers of "road work ahead," "right lane closed ahead," and "lane ends, merge left." Crews failed to post any warning signs, and the diagonal line of traffic cones that Siler placed behind the trailer extended, at most, only 30 feet.

{¶25} Furthermore, Ben Townsend, a motorist who traveled west on Columbus Street around 3:15 p.m. on the day of the accident, testified that he almost hit the trailer himself. Townsend stated that the cones were not far enough away from the trailer to give westbound motorists a decent warning that the trailer was blocking the lane. Defendants attack the credibility of Townsend's testimony because he did not report his near miss until after the accident. However, when determining whether competent, credible evidence supports a trial court's judgment, we do not judge a witness's credibility. *Dalesandro v. Ohio Dept. of Transp.*, 10th Dist. No. 10AP-241, 2010-Ohio-6177, ¶14.

{¶26} Second, the trailer's discernability was decreased by the positioning of the dump truck and Siler's flagging, both of which distracted attention away from the trailer. The seven- to eight-foot high dump truck protruding into the westbound lane dwarfed and overshadowed the two- to three-foot high trailer next to it. Rather than standing before the trailer to guide westbound motorists around both it and the truck, Siler positioned himself between the trailer and truck. Due to Siler's position, he did not provide westbound motorists with advance warning of the trailer, and, in fact, shifted focus to the obstacle that he preceded—the dump truck. Moreover, Siler, who was standing in the center, turn-only lane, flagged Augenstein toward the trailer, rather than out and around the trailer. Thus, instead of assisting Augenstein in avoiding the trailer, Siler directed Augenstein right into the trailer.

{¶27} Third, the lack of sufficient illumination reduced the trailer's discernability. Although darkness was fast approaching, the trailer did not have any lights on it to warn approaching motorists of its presence. The only advanced warning that the trailer blocked the road—the traffic cones—were only 12 inches in height and non-reflective.

{¶28} Defendants argue that the record contains evidence that the trailer was reasonably discernable. Relying on Crews' and Siler's testimony that numerous motorists negotiated around the trailer without incident, defendants contend that the trailer was reasonably discernable because every motorist, other than Augenstein, saw and avoided the trailer. We concur with defendants that this evidence could have supported a finding in their favor on the issue of the trailer's discernability. However, the existence of evidence on both sides of an issue does not justify reversal of the trial court's judgment. *Ohio Consumers' Counsel v. Pub. Utilities Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134,

¶50; *Amsbary v. Brumfield*, 177 Ohio App.3d 121, 2008-Ohio-3183, ¶14. The trial court found more persuasive the evidence proving that the trailer was not reasonably discernable, and we cannot reweigh the evidence to come to a different conclusion.

{¶29} In sum, we conclude that competent, credible evidence supports a finding that the trailer was not reasonably discernable. Thus, the trial court did not err in refusing to find Augenstein negligent per se for failure to maintain an assured clear distance ahead.

{¶30} We next turn to defendants' second argument: the trial court erred in not attributing some fault to Augenstein because she violated R.C. 4511.19(A)(1)(a) when she drove under the influence of alcohol. R.C. 4511.19(A)(1)(a) prohibits any person from "operat[ing] any vehicle * * * within this state, if, at the time of the operation, * * * [t]he person is under the influence of alcohol." A person is "under the influence of alcohol" if he is in a state of intoxication or exhibits a lessening "of the clearness of intellect and control of himself which he would otherwise possess." *State v. Hardy* (1971), 28 Ohio St.2d 89, 90. Operation of a motor vehicle while under the influence of alcohol is negligence per se. *Erie Ins. Co. v. Columbus* (May 8, 1980), 10th Dist. No. 79AP-815; *Kemock v. Mark II* (1978), 62 Ohio App.2d 103, 119-20.

{¶31} Augenstein struck the trailer while driving home from the Elks Club, where once a week she typically had a cocktail consisting of blended whisky and 7-Up. Augenstein had a blood alcohol level of .03 at the time of her death.[2] Dr. Joseph Ohr, one of defendants' expert witnesses, testified that a blood alcohol level of .03 is intoxicating in an 86-year-old female like Augenstein. Ohr opined that the consumption of

[2] The legal limit in Ohio is .08. R.C. 4511.19(A)(1)(b).

alcohol impaired Augenstein's driving ability and contributed to the accident. The trial court, however, rejected this testimony, finding Ohr not credible on the issues of intoxication and impairment.

{¶32} In its role as trier of fact, "[a] trial court is not required to automatically accept expert opinions offered from the witness stand." *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, ¶71. See also *McKay Machine Co. v. Rodman* (1967), 11 Ohio St.2d 77, 82 (holding that a trier of fact "can accept all, a part or none of the testimony offered by a witness whether it is expert opinion or eyewitness fact"). However, "expert opinion 'may not be *arbitrarily* ignored, and some reason must be objectively present for ignoring expert opinion testimony.' " *White* at ¶71 (emphasis sic) (quoting *United States v. Hall* (C.A.5, 1978), 583 F.2d 1288, 1294). See also *H.R. v. L.R.*, 181 Ohio App.3d 837, 2009-Ohio-1665, ¶15 (holding that even when expert testimony is not directly controverted, a trier of fact may reject that testimony as long as the record contains objectively discernable reasons for doing so); *Stancourt v. Worthington City School Dist.*, 10th Dist. No. 07AP-835, 2008-Ohio-4548, ¶30 (same). A fact finder can reject expert opinion for a multitude of reasons, including unreliability, incredulity, or clarity. *McCabe v. Sitar*, 7th Dist. No. 06 BE 39, 2008-Ohio-3242, ¶24; *Harbison v. Conover*, 3d Dist. No. 6-06-03, 2006-Ohio-6196, ¶20. Cross-examination may reveal inconsistencies and errors in an expert's testimony, an expert may contradict his own testimony, or nonexpert witnesses may rebut expert testimony and challenge an expert's credibility. *Sims v. Dibler*, 172 Ohio App.3d 486, 2007-Ohio-3035, ¶44.

{¶33} In the case at bar, the record contains multiple reasons for the trial court's decision to disbelieve Ohr. First, immediately after testifying that alcohol impaired

Augenstein and it was more likely than not that that impairment contributed to the accident, Ohr admitted to the following on cross-examination:

> Q: If I go home tonight and have a glass of wine, am I impaired?
>
> A: Yes.
>
> Q: So when you say alcohol * * * caused impairment in Julie Augenstein, you don't know the degree of impairment, do you?
>
> A: No, I don't.
>
> Q: And therefore, you don't know the degree to which alcohol caused or contributed to cause this accident?
>
> A: That is true.

(Tr. 519.)

{¶34} Ohr's answers to the above questions suggest that he believes that even de minimus consumption of alcohol results in impairment. However, Ohio law prohibits drunken driving, not driving after a drink. *State v. Taylor* (1981), 3 Ohio App.3d 197, 198. In other words, although alcohol may have some influence on a person, that person is not "under the influence" until she displays intoxication or an adversely altered ability to act and react. *Hardy* at 91. In opining that one alcoholic drink causes impairment, Ohr reveals that his definition of impairment falls short of the level of inebriation necessary for a person to be under the influence. Moreover, Ohr conceded that he did not know to what degree alcohol contributed to the accident, undercutting his earlier testimony regarding causation.

{¶35} Second, Christopher Emmelhainz, an officer with the Grove City Police Department and lead investigator of Augenstein's accident, refuted Ohr's testimony.

Emmelhainz acknowledged that Augenstein had alcohol in her system at the time of the crash, but he stated that it was not at "a level that someone would be impaired." (Tr. 233.) Additionally, Emmelhainz did not uncover any evidence that demonstrated impaired driving before the accident; rather, the evidence showed that Augenstein was driving at the 35-mile-an-hour speed limit, she obeyed traffic signals, and she was not weaving. At the conclusion of his investigation, Emmelhainz concluded that the sole cause of the accident "was the trailer illegally blocking the lane of travel without being properly marked so that vehicular traffic [was] aware [that it was] there." (Tr. 190.) Emmelhainz did not attribute any fault to Augenstein.

{¶36} Third, Streets' testimony also rebutted Ohr's opinion that Augenstein was impaired. As a bartender at the Elks Club for 13 years, Streets often saw her mother during Augenstein's weekly Friday visits to the Elk Club. Streets stated that she never saw her mother impaired after imbibing her customary drink.

{¶37} We conclude that the weaknesses in Ohr's own testimony, as well as Emmelhainz's and Streets' contradictory testimony, constitute objectively discernable reasons to disregard Ohr's testimony on the issues of intoxication and impairment. Therefore, the trial court did not err in rejecting that portion of Ohr's opinion.

{¶38} Francis, another of defendants' expert witnesses, opined that a blood alcohol level of .03 would have negatively impacted Augenstein's visual capability, her ability to attend and respond, and her ability to monitor her movements. Francis concluded that these deficiencies, in combination with Augenstein's vision problems, could explain why Augenstein crashed into the trailer. The trial court did not explicitly find this testimony incredible. However, given that the trial court concluded that Augenstein

was not negligent, the trial court necessarily had to disbelieve Francis. Just as Emmelhainz's and Streets' testimony justifies the rejection of Ohr's opinion, we find that Emmelhainz's and Streets' testimony also constitutes a basis for the trial court to disbelieve Francis' opinion.

{¶39} In weighing the evidence, the trial court disbelieved both Ohr and Francis and concluded that Augenstein did not violate R.C. 4511.19(A)(1)(a). Emmelhainz's and Streets' testimony is competent, credible evidence supporting the trial court's conclusion. Therefore, we find that the trial court did not err in refusing to find Augenstein negligent per se for driving under the influence.

{¶40} We next turn to defendants' final argument: the trial court erred in not attributing to Augenstein some fault for the accident because she was driving with a significant blind spot in her left eye due to macular degeneration. Defendants fail to specify what duty Augenstein breached by driving with a blind spot in one eye. Generally, the existence of a duty depends on the foreseeability of injury. *Wallace* at ¶23; *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 1998-Ohio-602. "[I]f a reasonably prudent person would have anticipated that an injury was likely to result from a particular act, the court could find that the duty element of negligence is satisfied." *Wallace* at ¶23. We find that a reasonably prudent person could foresee that injury to other motorists and pedestrians would likely occur if a motorist drove without sufficient visual acuity. Consequently, Augenstein had a duty to refrain from driving if she did not have sufficient visual acuity. The operative question, therefore, is whether Augenstein breached that duty.

{¶41} The parties do not dispute that Augenstein had a valid Ohio driver's license at the time of her death. Plaintiffs introduced Augenstein's license into evidence, and it indicates that Augenstein applied for and received a renewed license on August 29, 2006—approximately three months prior to the accident. Pursuant to R.C. 4507.12(A), with one inapplicable exception, "each person applying for the renewal of a driver's license shall submit to a screening of the person's vision before the license may be renewed." If the results of the vision screening "indicate that the vision of the person examined meets the standards required for licensing, the deputy registrar may renew the person's driver's license." R.C. 4507.12(B). When Augenstein visited her ophthalmologist, Dr. Charles J. Hickey, on September 12, 2006, she told Hickey that she had "passed [her] drivers test recently." (Defendants' exhibit FF, Hickey's medical records for Augenstein.) Augenstein's driver's license and Hickey's medical record constitute competent, credible evidence proving that Augenstein did not breach her duty to possess sufficient visual acuity to drive before getting behind the wheel.

{¶42} Defendants rely on the testimony of Francis, their expert witness, to argue that Augenstein's vision was so diminished that she was negligent, if not reckless, in driving. Francis, however, conceded on cross-examination that Augenstein had sufficient vision to meet the technical requirements necessary to drive.

{¶43} Defendants also attack the medical record documenting Augenstein's passage of the vision screening to renew her driver's license. Defendants argue that the medical record is not proof that Augenstein had sufficient visual acuity to drive because the record merely states that Augenstein passed a "drivers test," and does not specify that that test measured Augenstein's visual acuity. We reject this argument. In Ohio, the

only test a resident must pass to renew her license is a vision screening. R.C. 4507.09(B). Moreover, since Hickey is a specialist in eye problems, it logically follows that Augenstein would report to him events relevant to her vision, such as passage of a vision screening to renew her driver's license. In any event, the medical record is not the only evidence that Augenstein passed the vision screening. The very fact that the Bureau of Motor Vehicles ("BMV") issued Augenstein a renewed license is evidence that she passed the vision screening. R.C. 4507.12(C) (prohibiting the BMV from issuing a driver's license to an individual who does not meet the vision standards required for licensing).

{¶44} Finally, defendants hypothesize that the vision screening did not adequately test Augenstein's vision, and they question whether the screening was appropriately administered and the results correctly interpreted. Defendants also point to Francis' testimony that a person can cheat on the vision test by using peripheral vision to see what she cannot see with her central vision, or memorizing the letters used to test the right eye and repeating those during a test of the left eye. Because this challenge to the results of Augenstein's vision screening depends on mere speculation, we find it unavailing. We also note that Augenstein had no need to cheat or depend on BMV error to pass the vision screening—as Francis admitted, Augenstein met the vision requirements to drive.

{¶45} In sum, we conclude that the record contains competent, credible evidence that Augenstein had sufficient visual acuity to drive. We thus conclude that the trial court did not err in refusing to find Augenstein negligent for driving with compromised vision.

{¶46} As each of the bases for attributing contributory fault to Augenstein fail, we overrule defendants' sole assignment of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and FRENCH, JJ., concur.