

median as "the Shaw Road turnaround." These are the only undisputed facts concerning the collision.

{¶3} According to plaintiff, the accident occurred just before dusk. The sky was cloudy and the road was dry. However, plaintiff also testified that he was using his windshield wipers intermittently during periods of light rain and snow and that he had turned on headlights. Plaintiff stated that he was on the left side of, and behind, the salt truck for at least four minutes while on the portion of Rt. 422 that crosses the La Due Reservoir, an area approximately three miles from the accident site. He observed that the truck's taillights were illuminated and that the truck was not spreading salt. Plaintiff testified that, just prior to the collision, the truck was weaving "in and out" of the berm and the right lane. He stated that he had slowed his vehicle to 35 to 40 miles per hour, because he was waiting to see what the truck was going to do next. At that point, the truck suddenly turned left, without signaling, directly in front of plaintiff's vehicle. He recalled having no time to react before the front of his vehicle collided with the left side of the truck. As a result of the impact, plaintiff sustained injuries to his left knee, neck, wrist, lower back, and the middle finger of his right hand.

{¶4} In addition to his own testimony, plaintiff presented the deposition of Frederick Shafer, a witness to the accident. Shaffer was also traveling eastbound on Rt. 422 and had merged into the right lane of travel, with two vehicles directly in front of him and behind the truck. Shafer testified that at approximately 5:00 on the day in question it was "cloudy as can be, but still light enough to see. It wasn't dark enough for headlights." He also testified that the road condition was dry and that it was not

raining or snowing. He stated that the truck was not laying salt prior to the accident. Shafer's account of the accident was: "[***] as we're going across the reservoir on the highway, all of a sudden a black car (plaintiff's vehicle) comes up and passes me on the left. As the truck got to about where Shaw Road was, in that vicinity, he [truck driver] tapped his brakes, let off, and then he hit his brakes really hard and turned from the right-hand lane across the left-hand lane into that turnaround across from Shaw Road." He stated that the driver of the truck did not signal before turning left.

{¶5} Defendant's employee gave a different version of the accident, as did Robert Kovach, another witness to the occurrence. According to Page, it was "cloudy, rainy, and sleety" at the time of the accident. He stated that he was laying salt because the roadway was beginning to ice over, and that the portion of Rt. 422 that crossed the reservoir was particularly susceptible to icing because it was over an area of "open water." He did acknowledge that there were some dry spots on the road. The salting route that Page was covering at the time was the right lane of Rt. 422 eastbound from Rt. 44 to Shaw Road and then back westbound in the right lane of Rt. 422, turning eastbound again at Rt. 44. (Another ODOT employee was responsible for the left lane of that route.) Page testified that he had been employed by ODOT for 17 years, and for the 10 years prior to the accident had been working in the Highway Maintenance division where his responsibilities included salting, plowing and repairing roadways in his assigned district.

{¶6} Page gave the following account of the accident: at approximately 200 yards from the Shaw Road intersection he turned on his left turn signal; his headlights were on, as were the

truck's two strobe lights; at approximately 100 yards from the intersection, he began to decelerate and merge left; the road signs at that location directed the merge because the right lane ended at Shaw Road; at approximately 50 yards from the intersection he was completely in the left lane; he then pulled into the Shaw Road turnaround and stopped to wait for traffic to clear before turning westbound on Rt. 422; while he was stopped, plaintiff's vehicle hit the left, rear portion of the truck.

{¶7} Robert Kovach testified that, at the time of the accident, he had traveled westbound on Rt. 422 and was stopped in the Shaw Road turnaround, waiting to cross the eastbound lanes to enter Shaw Road. He stated that it was snowing lightly but that the road was not covered with snow. Kovach related that he had watched the truck traveling east as he was coming to the intersection and while waiting to turn in; that the truck had all of its lights on and was obviously a salt truck or snow plow; that it had pulled completely into the intersection parallel to his vehicle but headed in the opposite direction when, within a matter of seconds, he observed plaintiff's vehicle strike the truck. He stated that he "believed" the truck driver had signaled before turning; however, on cross-examination, he said he did not remember. He also testified that he got out of his vehicle after the accident, gave his name and telephone number and left without speaking further to either Page or plaintiff.

{¶8} The final witness for defendant was Ronald Vick, an ODOT mechanic who was called to the scene of the accident. Vick testified regarding the damage to the rear portion of the truck's left side. He stated that the salt hopper "was knocked out"; that there was a bent bar between the back left tire and the salt

hopper, and that the ladder was bent and pushed toward the back, center of the truck. He characterized the weather as "wet and slushy." He also stated that when he arrived at the scene he observed that the truck was in the turnaround area and that plaintiff's vehicle was halfway into the turnaround and halfway in the roadway. On cross-examination he related that he arrived at the scene approximately 30 minutes after the accident occurred.

{¶9} In order for plaintiff to prevail on his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. Generally, with regard to the operation of motor vehicles, negligence is the failure to exercise ordinary care or the failure to perform an act required by law. 8 Ohio Jurisprudence 3d (1978) Automobiles and Other Vehicles, Section 448.

{¶10} Because of the widely divergent accounts of the accident in this case, the determination of whether defendant breached a duty owed to plaintiff necessarily turns upon witness credibility. "In determining the issue of witness credibility, the court considers the appearance of each witness upon the stand; his manner of testifying; the reasonableness of the testimony; the opportunity he had to see, hear and know the things about which he testified; his accuracy of memory; frankness or lack of it; intelligence, interest, and bias, if any; together with all facts and circumstances surrounding the testimony." *Adair v. Ohio Dept. of Rehab. & Corr.* (1998), 96 Ohio Misc.2d 8, 11; See 1 Ohio Jury Instructions (1994), Section 5.30.

{¶11} Applying these criteria to the testimony presented herein, the court finds that neither party's testimony was entirely credible. Specifically, the court is not persuaded that the truck turned so suddenly from the right lane that plaintiff had no time to react before slamming into it. On the other hand, the court is not persuaded that Page exercised the requisite degree of care in merging from the right to left lane and turning into the Shaw Road turnaround.

{¶12} Moreover, the court's conclusions as to credibility also depend upon a determination of visibility and road conditions at the time of the accident. On this question, the court is persuaded that there was precipitation at the time and that the road was icing over. The ODOT Radio Log shows that all road crews were put into service at 4:00 p.m. on December 17, 1998. Page's own Road Condition and Operation Report shows that he had laid four tons of salt from 4:00 p.m. to the time of the accident; he laid another six tons from 8:10 p.m. to 11:10 p.m. This evidence corroborates what the court found to be credible testimony by Page and Kovach regarding the presence of precipitation; even plaintiff admitted that he used his windshield wipers intermittently on that day during periods of rain and snow. The court is also persuaded by the totality of the evidence that the skies were cloudy and it was nearly dark. Accordingly, the court finds that ordinary care under the circumstances required a heightened sense of awareness and caution.

{¶13} As to the drivers' specific actions, the court finds as follows. Although neither party's testimony was entirely credible, the court does find that Page entered plaintiff's lane of travel and turned left without exercising the degree of care required

under the circumstances. The photographic evidence of the damage to the truck and to plaintiff's vehicle demonstrates that Page could not have been fully within the turnaround when struck by plaintiff's vehicle. Page admitted during his testimony that there was a blind spot behind the truck and that he did not see plaintiff's vehicle before the collision occurred.

{¶14} All drivers have a duty to look out for and be aware of vehicles located in front, on the side, and in the rear, as the circumstances may warrant. *Bell v. Giamarco* (1988), 50 Ohio App.3d 61. The existence of a duty depends, in part, on the foreseeability of an injury. *Bell v. Giamarco* (1988), 50 Ohio App.3d 61, 62; *Gedeon v. East Ohio Gas Co.* (1934), 128 Ohio St. 335, 338. For the above-stated reasons, the court concludes that Page was negligent in that he breached his duty of ordinary care to protect other drivers from a foreseeable risk of harm. The court further finds that such breach was a proximate cause of plaintiff's injury.

{¶15} Nevertheless, pursuant to R.C. 2315.19, the court must also consider comparative negligence. Under Ohio law, plaintiff is barred from recovery if his contributory negligence is greater (more than fifty percent) than defendant's negligence. As stated previously, all drivers have a duty to look out for and to be aware of other vehicles. *Bell*, supra. Here, the court finds that plaintiff also failed to use the requisite degree of ordinary care under the circumstances. The court found Shafer's testimony on this issue to be more credible than plaintiff's. Specifically, Shafer stated that he was traveling at approximately 50 miles per hour when plaintiff passed him on the left, traveling slightly faster than his vehicle. After which he observed the truck "hit

his brakes really hard" and turn across the left lane. Shafer went on to state that, "[i]t was at that time that the black car, [plaintiff's], he had to probably hit him at whatever speed he was going, it was so quick." Shafer made no mention of observing plaintiff's brake lights, or of observing plaintiff's vehicle slowing down to any extent. Moreover, the photographs of plaintiff's vehicle depict a greater degree of damage than would be reasonably expected had plaintiff been traveling 35 to 40 miles per hour, as plaintiff testified. For these reasons, the court concludes that plaintiff was also negligent.

{¶16} Based upon the totality of the evidence presented, the court finds that plaintiff's negligence was equal to that of defendant's (fifty percent). Accordingly, judgment is recommended for plaintiff with a fifty percent reduction in damages to account for plaintiff's contributory negligence.

LEE HOGAN
Magistrate

Entry cc:

Michael Georgiadis
135 Pine Avenue SE, Suite 211
Warren, Ohio 44481

Attorney for Plaintiff

Eric A. Walker
Assistant Attorney General
65 East State St., 16th Fl.
Columbus, Ohio 43215

Attorney for Defendant

LH/cmd
Filed 3-11-2003
To S.C. reporter 3-18-2003