

when he noticed a snowplow 100 to 200 feet ahead of him in the right lane. According to plaintiff, it was not snowing but the roads were wet and there was snow on the ground. Plaintiff stated that he attempted to pass the snowplow when it suddenly pulled into his lane without signaling. Plaintiff explained that he immediately applied his brakes but that he was unable to stop before the front passenger side of his car collided with the left-rear wheel area of the snowplow. Plaintiff insisted that McDonald made an improper left-hand turn from the right lane into his path.

{¶4} Plaintiff's passenger, Eva Peterson, testified that prior to the accident she had not been paying much attention to the traffic but that she recalled seeing the flashing lights of the snowplow ahead of them. She claimed that the snowplow turned in front of them and that all she saw "was the wheels" prior to impact.

{¶5} Defendant's employee offered a different version of the accident. According to McDonald, he had been traveling 40 to 45 mph and was laying salt on the eastbound roadway. McDonald stated that the eastbound portion of his route ended soon after he passed exit 306. McDonald testified that, after signaling his intent, he moved from the right lane into the left lane in order to enter the paved turnaround and head westbound on I-90 to apply salt to those lanes. McDonald acknowledged that he saw plaintiff's vehicle approximately 2,000 feet behind him, and that there were no cars between them. According to McDonald, the left berm gradually widened toward the median to provide a paved approach to the turnaround area. He testified that the bed of the truck was 95 percent full of salt, as he had recently refilled the load. McDonald stated that inasmuch as the vehicle was so full, he had to slow down to about 15 mph to make the turn safely and not tip the truck due to the top-heavy load. McDonald stated that as he entered the turnaround, he felt the truck move and that he looked to his left and saw plaintiff's car. McDonald recalled that the truck stopped running and that as he exited the vehicle, he noticed both vehicles were located completely off the roadway and in the turnaround area. McDonald recalled seeing a straight set of tire tracks in the snow that went from the berm to the gravel shoulder and into the grassy median; at the end of, and in line with, the tracks was plaintiff's car.

{¶6} Defendant posits that plaintiff drifted left when he attempted to pass the snowplow, and that plaintiff continued to drive off the traveled portion of the roadway, unaware that he had crossed over both the berm and the paved entranceway to the turnaround. Defendant presented expert testimony from Henry Lippian, a traffic reconstructionist, who opined that at the first point of impact both vehicles were in the turnaround area. He noted that neither vehicle was on or near the berm at final rest. He further explained that plaintiff's car struck the snowplow between the front and rear wheels and was partially drawn under the truck. He concluded that the impact was not consistent with the truck making a perpendicular turn from the right lane but was instead a shallow angle collision, more like a sideswipe. Lippian reasoned that as the car slid underneath the truck, the tires of the truck rubbed on the car doors and then the car rotated counterclockwise and finally disengaged. Lippian further opined that if the snowplow had four-way flashers engaged, persons driving behind the vehicle would not perceive the blinking turn signal.

{¶7} 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.

{¶8} Because of the differing accounts of the accident and the absence of corroborating statements from other drivers who may have observed the collision, 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.

{¶9} Applying these criteria to the testimony presented herein, the court finds that plaintiff's description of the events was not credible. Specifically, the court is not convinced that the truck turned from the right lane at a 90 degree angle, nor does the court believe that plaintiff had no time to perceive or react to the maneuver being executed by McDonald before colliding with the side of the snowplow. Upon review of all the evidence and testimony presented, the court is persuaded that plaintiff was mistaken in his perception of the available lanes of travel and, in all probability, plaintiff drove off the traveled portion of the roadway. The court further finds that the demonstrative evidence depicted by Joint Exhibit W combined with McDonald's testimony regarding the tire tracks in the median substantiates defendant's explanation of how the accident occurred. For the foregoing reasons, the court finds that plaintiff's negligent driving was the sole proximate cause of the accident. The court concludes that plaintiff has failed to prove, by a preponderance of the evidence, that defendant engaged in any negligent act which proximately caused personal injury or property damage to plaintiffs. Accordingly, judgment shall be rendered in favor of defendant.

{¶10} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. WARREN BETTIS
Judge

Entry cc:

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