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Angie T. Davis
Angie T. Davis, Clerk of State Court
Cobb County, Georgia

IN THE STATE COURT OF COBB COUNTY

STATE OF GEORGIA

WADE DOUGLAS BOYKIN,)
)
Plaintiff,)
) CIVIL ACTION
v.)
) FILE NO. 18-A-388
HASSAN MUSTAPHA EL-HADDAD,)
AND MUSTAPHA HADDAD)
)
Defendant.)
_____)

**DEFENDANTS' BRIEF IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT**

COME NOW, Defendants HASSAN EL-HADDAD ("Hassan") and MUSTAPHA HADDAD ("Mustapha"), and file this their Brief in Support of Motion for Partial Summary Judgment, pursuant to O.C.G.A. § 9-11-56, showing the Court as follows:

INTRODUCTION

The present action stems from a rear-end motor vehicle accident that occurred on August 2, 2017. (*See*, Plaintiff's Second Amended Complaint). Since that accident, Defendant Hassan has maintained that the brakes on his vehicle failed at the time of the collision. Defendant Mustapha owned that vehicle at the time of the collision. In addition to claims of negligence directed at Defendant Hassan, the driver of the vehicle in the collision, Plaintiff also claims that Defendant Mustapha, as owner of the vehicle, negligently failed to maintain the brakes of the vehicle involved in the subject accident. Additionally, Plaintiff alleges that the Defendants have acted in violation of O.C.G.A. § 13-6-11 and seeks recover of attorney's fees. Finally, Plaintiff seeks an award of punitive damages against the Defendants.

Based upon the undisputed material facts in the record and the argument set forth below,

this Court must find that Defendants are entitled to summary judgment against the foregoing claims of Plaintiff on the grounds that Plaintiff has failed to establish one or more essential elements under his theory of recovery, and that there is no evidence in the record that would support Plaintiff's recovery on the foregoing claims.

STATEMENT OF FACTS

This action arises out of an automobile accident between the Plaintiff and Defendant Hassan which occurred on August 2, 2017. (See, Plaintiff's Second Amended Complaint ("SAC")). The vehicle driven by Defendant Hassan (the "subject vehicle") collided with the rear-end of Plaintiff's vehicle. (See, generally, Plaintiff's SAC at ¶10). Defendant Hassan told the police that as he was driving his "brakes went out" and he rear ended Plaintiff. (Plaintiff's SAC at ¶17). Defendant Hassan maintains that his subject vehicle's brakes failed. (Plaintiff's SAC at ¶18). Defendant Mustapha was the owner of the subject vehicle driven by Defendant Hassan and involved in the subject accident. (See, Plaintiff's SAC at ¶22). In the five years prior to the accident, the subject vehicle had normal and routine brake maintenance. ("Exhibit A" at Response to Interrogatory No. 7, attached to Defendant's Statements of Theories of Recovery And Undisputed Material Facts). Defendant Mustapha gave Defendant Hassan permission to drive the subject vehicle. (Plaintiff's SAC at ¶23). To Defendant Mustapha's knowledge, there was never an issue with the subject vehicle's brakes prior to the accident that is the subject of this lawsuit. (See, transcript of testimony from the Deposition of Mustapha Haddad, attached as "Exhibit B" to Defendant's Statements of Theories of Recovery And Undisputed Material Facts).

ARGUMENT AND CITATION

Under Georgia Law, Summary Judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

O.C.G.A. § 9-11-56 (c). A defendant moving for Summary Judgment may point out that there is an absence of evidence to support an element of the plaintiff's case. Lau's Corp. v. Haskins, 261 Ga. 491, 495 (1991). The Plaintiff cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue on that element. Id. Here, even when the Plaintiff is given the benefit of all reasonable doubts and all favorable inferences that may be drawn from the evidence, Plaintiff has failed to establish all the elements of the causes of actions brought in Count II, Count IV, and his claim for punitive damages.

I. DEFENDANT MUSTAPHA IS ENTITLED TO SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM FOR NEGLIGENT MAINTENANCE BECAUSE THERE IS A COMPLETE ABSENCE OF THE ESSENTIAL ELEMENTS OF DUTY AND BREACH IN PLAINTIFFS' CAUSE OF ACTION.

Plaintiff seeks recovery from Defendant Mustapha for negligence based upon allegations that Defendant Mustapha negligently failed to maintain the brakes of the vehicle involved in this accident – the malfunction of said brakes proximately causing the subject accident. (See, Second Amended Complaint at ¶¶36-41; Count II). In order to state a cause of action for negligence, a plaintiff must establish the following essential elements: duty, breach of duty, a legally attributable causal connection between the incident and the resulting injury, and some loss or damage. *See generally* Finney v. Machiz, 218 Ga. App. 771 (1995). A defendant who shows, that under any theory, one essential element is missing is entitled to summary judgment, despite any remaining issues of fact regarding the other elements. Id. In this case, even when the evidence is viewed in favor of Plaintiff, Plaintiff cannot prove that Defendant Mustapha breached a duty owed to Plaintiff because Defendant Mustapha had no knowledge of the defective brakes. Additionally, that a mechanical malfunction of the vehicle owned by Defendant Mustapha was the proximate cause of the accident does not reasonably create an inference that Defendant Mustapha was negligent. The Plaintiff has failed to show that Defendant Mustapha's negligence is more probable than a sudden

mechanical failure.

A statutory duty exists for the owner of a vehicle to maintain the brakes in good working order. O.C.G.A., § 40-8-50(a); *See also*, Cantrell v. U-Haul Co. of Georgia, Inc., 224 Ga. App. 671, 671 (1997). The Court of Appeals has expressed that, “An owner who permits another to operate the vehicle when the owner knows or should know that the brakes are defective is liable for injuries proximately caused by defective brakes.” Cantrell, 224 Ga. App. at 671 citing Lewis v. Harry White Ford, Inc., 129 Ga. App. 318, 319 (1973). In the case at hand, there is not one piece of evidence in the record that indicates that Defendant Mustapha knew that the brakes on the vehicle driven by his son, Defendant Hassan, were defective prior to the accident.

Here, Plaintiff is merely asking a jury to infer that, because the Defendant Mustapha owned the vehicle involved in this car accident and previously maintained or repaired the vehicle, Defendant Mustapha must have been negligent in some way when the brakes of that vehicle failed. To the contrary, “[n]egligence by [a defendant] proximately causing an accident cannot be reasonably inferred solely from circumstantial evidence showing that the defendant maintained or repaired a car that suffered a sudden mechanical malfunction.” Ken Thomas of Georgia, Inc. v. Halim, 266 Ga. App. 570, 575 (2004). Absent evidence from the Plaintiff regarding Defendant Mustapha’s actual or constructive knowledge of a brake defect when he permitted Defendant Hassan to drive the vehicle, the theory that Defendant Mustapha’s breached a duty owed to Plaintiff, and that his actions or omissions in connection with the vehicle’s brakes were a proximate cause of this accident, fail as a matter of law.

Moreover, Plaintiff has failed to present evidence that Defendant Mustapha’s negligence in maintaining or repairing the brakes in good working order is more probable than a sudden mechanical malfunction. In Ken Thomas, the plaintiff claimed that because a car suffered a sudden

mechanical failure, defendant negligently failed to maintain the vehicle or negligently failed to warn of the car's unsafe condition. 266 Ga. App. 570. The plaintiff relied on the mere fact that defendant owned the vehicle and may have done some prior maintenance on the vehicle to create an inference that the defendant must have been negligent in some way. In that case, the Court ruled that summary judgment for the defendant was proper, reasoning that the "evidence does not render less probable the conclusion that the car suffered a sudden mechanical malfunction that was not the proximate result of any negligence by defendant." Ken Thomas, 266 Ga. App. at 574.

As the Court in Ken Thomas ruled, the fact that Defendant Mustapha owned, maintained, and/or repaired the vehicle with defective brakes involved in the subject accident is not enough for the claim of negligence against Defendant Mustapha to survive summary judgment. Plaintiff has not come forth with any facts indicating that Defendant Mustapha had any knowledge of brake defects at any time prior to the accident, but particularly when he permitted his son to drive the vehicle. Accordingly, Plaintiff has not presented evidence sufficient to prove that any sudden mechanical failure not caused by the Defendant Mustapha is less probable, and, therefore, summary judgment is proper as to the claim against Defendant Mustapha.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM ATTORNEY'S FEES UNDER O.C.G.A. § 13-6-11 BECAUSE PLAINTIFF HAS FAILED TO PRESENT EVIDENCE OF BAD FAITH IN THE UNDERLYING ACTION GIVING RISE TO THIS LAWSUIT.

Plaintiff seeks to recover attorney's fees in this lawsuit pursuant to O.C.G.A. § 13-6-11. (Second Amended Complaint at ¶¶50-55; Count IV). A claim for attorney's fees under O.C.G.A. § 13-6-11 may be sustained only if the defendant has acted in "bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." Plaintiff has presented no evidence to support such a claim. Bad faith under § 13-6-11 "must relate to the acts in the transaction itself prior to the litigation, not to the motive with which a party proceeds in the

litigation.” David G. Brown, P.E., Inc. v. Kent, 274 Ga. 849, 850 (2002). In this case, no evidence supports the contention that Defendants acted with bad faith in the underlying actions giving rise to this lawsuit (i.e. becoming involved in a rear-end car accident with the Plaintiff). Rear-ending another vehicle, even if this is the result of negligence, is not the sort of “sinister” conduct that supports an allegation of bad faith. *See* Graves v. Diambrose, 243 Ga. App. 802, 803 (2000).

“When bad faith is not an issue...there is not any evidence to support an award [of attorney’s fees]...if a bona fide controversy clearly exists between the parties.” Backus Cadillac-Pontiac, Inc. v. Brown, 185 Ga. App. 746, 747 (1988) (internal quotations and citations omitted). Thus, absent improper conduct in the course of the litigation, an award of attorney’s fees is improper “if the evidence shows that a genuine dispute exists-whether of law or fact, on liability or amount of damages, or on any comparable issue.” *Id.* (internal quotations and citation omitted). The Plaintiff has not produced any evidence of improper conduct during the course of this litigation, nor has there been any improper conduct on the part of Defendants in connection with the underlying actions, i.e., the rear-end automobile accident.

III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT AS TO PLAINTIFF’S PUNITIVE DAMAGES CLAIM BECAUSE PLAINTIFF HAS FAILED TO PRESENT EVIDENCE OF DEFENDANTS’ CULPABLE CONDUCT AS CONTEMPLATED BY O.C.G.A. § 51-2-5.1.

Although Plaintiff’s Second Amended Complaint omits the Count seeking punitive damages that was previously asserted in his First Amended Complaint (See, Plaintiff’s First Amended Complaint at ¶¶44-49), Plaintiff continues to list “punitive damages” as a type of damage he seeks to recover in this lawsuit. (See, Plaintiff’s Second Amended Complaint at ¶30). “Punitive damages ‘are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.’ [Cit.] In Georgia, when the tortious conduct amounts to ‘willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the

presumption of a conscious indifference to consequences(,)’ punitive damages are allowed pursuant to OCGA § 51-12-5 to deter the wrongdoer from repeating his wrongful acts. [Cits.] Punitive damages cannot be imposed without a finding of some form of culpable conduct. Negligence, even gross negligence, is inadequate to support a punitive damage award. [Cit.]” Colonial Pipeline Co. v. Brown, 258 Ga. 115, 118(3b) (1988).

To be entitled to punitive damages, the Plaintiff cannot merely show negligence of the Defendant, but Plaintiff must show “clear and convincing evidence that the defendant’s actions showed willful misconduct, malice, fraud, oppression, or that entire want of care which would raise the presumption of conscious indifference of the consequences.” O.C.G.A. § 51-2-5.1(b). “Ordinarily the imposition of punitive damages is an issue for the jury. However, the controlling criteria is whether there is any evidence to support such an award. (Cit.)” Associated Health Sys., Inc. v. Jones, 185 Ga. App. 798, 802 (1988). Here, Plaintiff’s bare claim of entitlement to punitive damages is insufficient to preclude summary judgment in Defendants’ favor on that issue. Plaintiff cannot point to any evidence in the record to support an allegation that the Defendants acted with the culpability required for the imposition of punitive damages. Therefore, Plaintiff’s claim for punitive damages fails as a matter of law, and partial summary judgment in favor of Defendants at to the claim for punitive damages is appropriate.

CONCLUSION

Plaintiff cannot prove that Defendant Mustapha knew about the defective brakes when he permitted his son to drive the vehicle Defendant Mustapha owned. That defective brakes were the proximate cause of the subject accident of this litigation does not create an inference that Defendant Mustapha was negligent. Plaintiff has failed to show that Defendant Mustapha’s negligence was more probable than a sudden mechanical malfunction. Thus, Defendant

Mustapha is entitled to summary judgment on Plaintiff's claim against him for allegedly negligently failing to maintain the vehicle's brakes.

Plaintiff has also failed to come forward with evidence that could possibly support his claim for attorney's fees under O.C.G.A. §13-6-11 or for punitive damages. The undisputed facts of this rear-end accident, even when viewed most favorably to Plaintiff, cannot support Plaintiff's recovery under those claims. Therefore, Defendants are entitled to summary judgment on those issues.

WHEREFORE, the Defendants respectfully urge this Court to enter an Order GRANTING Partial Summary Judgment in their favor as to Plaintiff's Count II, Count IV, and claim for punitive damages, as stated in Plaintiff's Second Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the following counsel of record with a true and correct copy of the foregoing pleading via electronic service and/or by depositing said copy in the United States Mail, with sufficient postage affixed thereon, and properly addressed to the following:

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This 5th day of March, 2019.

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