

*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,                | ) |                             |
| v.                        | ) |                             |
|                           | ) | CIVIL ACTION NO. 18-A-388-7 |
| HASSAN MUSTAPHA EL-HADDAD | ) |                             |
| and MUSTAPHA HADDAD,      | ) |                             |
|                           | ) |                             |
| Defendants.               | ) |                             |

**ORDER ON DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Defendant Hassan Mustapha El-Haddad was driving a 2000 Toyota 4Runner owned by his father, defendant Mustapha Haddad, on August 12, 2017. Defendant Hassan El-Haddad claims that when he went to press the brakes, they “went out,” causing him to collide with the rear of plaintiff Wade Douglas Boykin’s vehicle, pushing the Boykin vehicle into the car in front of it. Boykin sues defendant Hassan El-Haddad for negligence and negligence per se, defendant Mustapha Haddad for negligently failing to maintain the brakes on the 4Runner, and both defendants for O.C.G.A. §13-6-11 attorney’s fees for bad faith.<sup>1</sup> Defendants have pending a motion for partial summary judgment. Defendant Mustapha Haddad seeks summary judgment for the claim plaintiff asserts against him for negligently failing to maintain the brakes on his 4Runner. Additionally, both defendants seek summary judgment for the plaintiff’s O.C.G.A.

<sup>1</sup> A prior count for punitive damages asserted only against defendant Hassan El-Haddad in plaintiff’s original complaint and in plaintiff’s first amended complaint was not incorporated by reference or re-plead in plaintiff’s second amended complaint. Naming “punitive damages” as one of seven categories of damages which plaintiff seeks to recover without asserting an actual claim for punitive damages against a named party, which plaintiff does in his second amended complaint, does not constitute a claim for punitive damages. Punitive damages are therefore no longer an issue in the case and the Court need not consider any party’s arguments on the point.

§13-6-11 bad faith attorney's fees claim. Plaintiff argues defendants are not entitled to summary judgment on either issue.

“Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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. Thus, to prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue of material fact, so that the party is entitled to judgment as a matter of law.” (Citation and punctuation omitted.) Archer Forestry, LLC v. Dolatowski, 331 Ga. App. 676, 677 (771 SE2d 378) (2015).

The facts show that as he saw that plaintiff Boykin's vehicle was stopped, defendant Hassan El-Haddad began applying his brakes. The 4Runner slowed down “somewhat,” but not like it normally did when the brakes were applied. Defendant Hassan El-Haddad “tried to stop” by “pressing the brakes,” then pressing them harder after he realized the brakes were not functioning, but he hit plaintiff's car in the rear. El-Haddad deposed that he told the responding officer that “the brakes went out.” Following the collision, defendant El-Haddad pumped the brakes to see if they would work. El-Haddad deposed that the brakes did work after the collision, and with the responding officer's knowledge, El-Haddad drove the 4Runner less than a mile to his apartment, parked it, and never drove it again. According to El-Haddad, he never experienced brake problems in the vehicle before or after this wreck.

Defendant Mustapha Haddad, who plaintiff charges negligently maintained the brakes on the 4Runner, retrieved the vehicle from son Hassan El-Haddad's apartment and drove it directly from the apartment where El-Haddad had parked it to a repair shop owned by an individual named Malik. Mustapha Haddad checked the brakes before driving the vehicle by “pumping

them,” and the brakes worked for the single trip Mustapha Haddad made in the vehicle from the apartment to the repair shop. Neither Mustapha Haddad nor anyone in his family ever drove the 4Runner again, as it was sold after repair. Cosmetic repairs were made to repair damage done in the collision, but no brake repairs were done, defendant Haddad deposed, because “there was nothing wrong with the brakes to repair them.”

“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). 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.” (Citation omitted). Cantrell v. U-Haul Company of Georgia, Inc., 224 Ga. App. 671 (482 SE2d 413) (1997). The evidence regarding maintenance of the brakes on the 4Runner indicates that defendant Mustapha Haddad bought the 4Runner more than ten years prior to suit being filed from a dealer, and no maintenance records were provided upon purchase. While the vehicle was in his possession, defendant Haddad states that he performed normal, routine maintenance including brake maintenance, and he deposed that in addition to checking the brake fluid and oil level each time he had the oil changed in the vehicle, Sam’s Auto in Cobb County performed a brake repair on the car at some point in time. An affidavit from Kyung I. Kwon of Sam’s Auto Body Collision, Inc. in Cobb County states that Sam’s Auto has no records that predate 2016, but since 2016, Sam’s performed no work on the subject vehicle. Mustapha Haddad states that the brakes never failed while he owned and drove the car.

Once defendant Mustapha Haddad gave the 4Runner to his son Hassan El-Haddad to drive, Hassan El-Haddad bought the fuel for the car, had the oil changed, paid the ad valorem taxes, paid for the emission testing, and generally maintained the vehicle either himself or with his mother’s assistance, according to his father. This is consistent with defendant Hassan El-

Haddad's discovery response that "both the Defendant and his parents maintained the vehicle." There is no documentary evidence in the record of any routine brake service or brake repairs performed on the 4Runner by either father or son at any time.

Defendant Mustapha Haddad argues that he is entitled to summary judgment on plaintiff's claim for negligently maintaining the brakes because there is no evidence that Haddad breached his duty to maintain the brakes. Arguing that he had neither actual nor constructive knowledge that the brakes were defective, Mustapha Haddad cites Ken Thomas of Georgia, Inc. v. Halim, 266 Ga. App. 570, 575 (597 SE2d 615) (2004) for the proposition that "negligence by [a defendant] proximately causing the accident cannot be reasonably inferred solely from circumstantial evidence showing that [the defendant] repaired and maintained a car that suffered a sudden mechanical malfunction."

Plaintiff argues that defendant Mustapha Haddad's argument overlooks his statutory duty, as owner of the vehicle, to inspect and maintain the brakes. O.C.G.A. §40-8-50(b) provides, "Every motor vehicle . . . when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, including two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure on any one part of the operating mechanism shall not leave the motor vehicle without brakes on at least two wheels." Further, "the owner or driver of a motor vehicle must exercise reasonable care in the inspection of his machine to discover any defects that may prevent its proper operation, and is chargeable with knowledge of any defects which such inspection would disclose." (Citation omitted.) Fouts v. Builder's Transport, Inc., 222 Ga. App. 568, 578 (474 SE2d 476) (1996). Where, as here, a defendant admits that brake

failure caused the collision, it becomes the defendant's burden to prove that he "was free from negligence in maintaining them." Johnson v. McAfee, 151 Ga. App. 774, 775 (261 SE2d 708) (1979).

Plaintiff argues that there is insufficient evidence in this record to prove as a matter of law that defendant Mustapha Haddad was free from negligence in maintaining the brakes on the 4Runner. Plaintiff correctly asserts that there are no dates, service providers, or documentation indicating any brake maintenance on this vehicle at any time, whether the vehicle was in Mustapha Haddad's possession or his son's. The one instance of brake repair Mustapha Haddad cites, at Sam's Auto in Cobb County, Mustapha Haddad does not date, but Sam's Auto refutes as having taken place in either 2016 or 2017 before this collision occurred in August of 2017. Defendant Mustapha Haddad does not state upon what date responsibility for maintaining the brakes and possession of the vehicle shifted from himself to his son, and his son, Hassan El-Haddad, does not provide that date or any specifics regarding any brake maintenance he performed on the vehicle, either.

Plaintiff analogizes this case to Kirby v. Spate, 214 Ga. App. 433 (448 SE2d 7) (1994). In Kirby, the plaintiff, an applicant for a bus-driver job with a school bus company, was injured when the brakes failed on the bus she was driving during her bus-driving evaluation, injuring her. The trial court granted the defendant bus-owner's motion for summary judgment, which the Court of Appeals of Georgia reversed. Although the evidence showed that the defendant bus owner had paid for one complete mechanical overhaul and check of the used bus, one brake job, two braking inspections, monthly general service which usually included a brake inspection and that the defendant bus owner would drive the bus and check the oil and water weekly, the Court of Appeals held that "under certain circumstances, it may not be sufficient to escape liability for

damages arising from a brake failure that an owner repeatedly had the brake system inspected for the purpose of detecting and repairing any existing brake defects. The brake defect which existed at the time of the accident (and was its proximate cause) must have occurred ‘wholly’ without the fault of the owner.” (Citation and punctuation omitted.) Kirby at 437. Citing the bus’s purpose of carrying schoolchildren on behalf of the State of Georgia, the Court held, “a genuine issue of material fact yet may remain whether the owner has exercised ordinary diligence if he fails to establish an effective maintenance program to replace periodically all deteriorative brake parts which, if allowed to deteriorate or otherwise become defective through ordinary wear and tear, could with reasonable foreseeability result in injury to bus passengers. Whether it complies with the requirements of ordinary diligence merely to inspect a bus (being used as a school bus) for existing brake defects and to replace deteriorative brake parts only after they have become defective, rather than establishing an ongoing maintenance program to replace periodically deteriorative brake parts before they fail and foreseeably cause a brake system failure, presents questions of fact for the jury.” Id.

The Court of Appeals in U-Haul, supra, a case defendant Mustapha Haddad relies upon in support of his motion for summary judgment, characterizes the distinction as follows: “In [Kirby], we reversed the trial court’s grant of summary judgment because a fact issue remained regarding whether the defendant school bus owner exercised ordinary diligence when no effective regular maintenance program had been established. In this case, it is undisputed that such a program existed at U-Haul, that the program was followed, and that U-Haul had no reason to believe when it rented the truck to [plaintiff] that the brakes were defective.” U-Haul at 672.

In the present case, a fact issue remains as to defendant Mustapha Haddad’s negligence in maintaining the brakes on the 4Runner. As in Kirby, there is evidence in this record that no

effective regular maintenance program for the 4Runner's brakes existed for this vehicle with significant age on it, or that defendant Mustapha Haddad routinely followed a maintenance schedule if he had one. Defendant Haddad has failed to carry his burden on summary judgment of showing that he is free from negligence in the maintenance of the brakes which his son admits failed, causing the collision, so summary judgment is DENIED on this issue.

Defendants El-Haddad and Haddad contend they are entitled to summary judgment on plaintiff's claim for O.C.G.A. §13-6-11 attorney's fees, which plaintiff specifically seeks for "bad faith." O.C.G.A. §13-6-11 provides that "the expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them." "Bad faith warranting an award of attorney fees must have arisen out of the transaction on which the cause of action is predicated. It may be found in how defendant acted in his dealing with the plaintiff. The question of bad faith in the underlying transaction is for the trier of fact to determine." Haarhoff v. Jefferson at Perimeter, L.P., 315 Ga. App. 271, 273 (727 SE2d 140) (2012). Defendants assert that the underlying transaction, "becoming involved in a rear-end accident with the plaintiff," does not constitute bad faith as a matter of law.

Plaintiff correctly asserts that defendants' assessment of bad faith fails to address the following principle: "Indicative of whether a party acts in good or bad faith in a given transaction is his abiding by or failing to comply with a public law made for the benefit of the opposite party, or enacted for the protection of the latter's legal rights." (Citation omitted.) Nash v. Reed, 349 Ga. App. 381, 383 (825 SE2d 853) (2019). Nash is instructive. Plaintiff Nash, a jogger, was struck by Reed, a driver, and Nash sued Reed for negligence, negligence per

se and O.C.G.A. §13-6-11 attorney's fees. The trial court granted summary judgment to Reed on Nash's O.C.G.A. §13-6-11 claim for bad faith attorney's fees. In reversing, the Georgia Court of Appeals found that there was evidence that among other things, Reed "crossed a double-yellow line in an attempt to get around Nash even though traffic laws generally prohibit him from doing so." Nash at 384. This evidence of failure to comply with a public law, the Court of Appeals found, is sufficient evidence of bad faith to send the O.C.G.A. §13-6-11 issue to the jury.

There is evidence in this record that both defendant Hassan El-Haddad and defendant Mustapha Haddad broke laws made for the benefit of plaintiff: El-Haddad for following too closely, for which he was cited and paid the ticket, and Haddad in failing to maintain the brakes on the 4Runner in working order as required by O.C.G.A. §40-8-50(b). Under Nash, this is some evidence of bad faith, and "on summary judgment, even slight evidence of bad faith can be enough to create an issue for the jury." (Citation and punctuation omitted.) Nash at 383. The defendants' motion for summary judgment as to attorney's fees is DENIED.

SO ORDERED, this 12<sup>th</sup> day of August, 2019.



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Carl W. Bowers  
Judge, State Court of Cobb County



**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served true and exact copies of the foregoing

***ORDER***

(through the PeachCourt Portal), to the following:

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This 8<sup>th</sup> day of August, 2019.

/s/ Wendy Basnett  
Wendy Basnett  
Judicial Administrative Specialist  
Office of Judge Carl W. Bowers  
State Court of Cobb County  
Cobb Judicial Circuit