IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

WADE DOUGLAS BOYKIN, Plaintiff, v. HASSAN MUSTAPHA EL-HADDAD and MUSTAPHA HADDAD. Defendants.	CIVIL ACTION FILE NO. 18-A-388

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Plaintiff Wade Douglas Boykin ("Plaintiff"), by and through the undersigned counsel, and hereby files his Response in Opposition to Defendant's Motion for Partial Summary Judgment, showing this Court as follows:

I. INTRODUCTION

This case arises from a rear-end collision. Defendant Hassan El-Haddad ("Hassan") caused the subject collision by rear-ending Plaintiff in a 2000 Toyota 4Runner (the "4Runner"). Hassan's father, Mustapha Haddad ("Mustapha"), owned the 4Runner.

Hassan contends that the wreck occurred because his brakes failed. Hassan's sworn statements provide that his father, Mustapha (the 4Runner's owner), was responsible for maintaining the vehicle. Meanwhile, Mustapha has testified that his son, Hassan (the 4Runner's permitted user), was responsible for maintaining the vehicle. Whatever the truth, this much is certain: neither Mustapha or Hassan did anything to maintain the 4Runner's brakes in the time period leading up to the subject collision.

This evidence (or, more accurately, lack of evidence) is fatal to Mustapha's motion for partial summary judgment on Plaintiff's negligent maintenance claim. Georgia statutes and case law impose upon a vehicle owner a duty to maintain the vehicle's brakes in good working order. This duty applies even when the vehicle is loaned to another. While a defendant may avoid liability by establishing a history of routine maintenance and inspections, no such evidence exists here. During discovery, Mustapha identified several shops that purportedly serviced the 4Runner, but none of those shops produced any evidence of brake maintenance or work on the 4Runner. Moreover, Mustapha later testified that the shops he identified all serviced the 4Runner before he began letting Hassan borrow it.

Once Hassan began driving the 4Runner, Mustapha testified, he considered it Hassan's responsibility to maintain the vehicle (including its brakes). However, there is no evidence that Hassan did anything to maintain the 4Runner. He cannot identify a single auto shop to which he took the car for maintenance. He cannot produce a single record proving he did anything at all to maintain the 4Runner. He had no idea where the 4Runner underwent post-wreck repairs.

In sum, the evidence shows that, during the period when Mustapha lent the 4Runner to Hassan, no one was maintaining the vehicle or its brakes—each apparently believing it was the other's responsibility. But, as the 4Runner's owner, a duty to maintain the vehicle (and its brakes) remained with Mustapha. The undisputed facts show that he neglected that duty. Thus, if Hassan's testimony—that the 4Runner's brakes failed—is to be believed (which it must be at this phase), then the record evidence demands that a jury determine whether Mustapha's negligence caused that failure.

As to Plaintiff's claim for attorneys' fees under O.C.G.A. § 13-6-11, Defendants' motion for summary judgment on that claim must be denied. Georgia law requires the issue of "bad faith" to go to the jury where evidence shows that (1) the defendant broke a law enacted to protect the plaintiff and (2) the violation of such law proximately caused the plaintiff's injuries.[1] Here, Plaintiff alleges, and the evidence shows, that each Defendant violated laws enacted for the protection of motorists. Plaintiff's claim for attorney's fees under the "bad faith" prong of O.C.G.A. § 13-6-11 therefore must go before a jury.

Similarly, Plaintiff's claim for punitive damages must stand for two reasons. First, evidence exists that Mustapha knowingly allowed his son to drive a vehicle with defective brakes, which constitutes clear and convincing evidence of a conscious indifference to the consequences. Second, Mustapha's pattern and policy of allowing dangerous driving, *i.e.*, allowing his son to regularly drive his vehicle without keeping the brakes in good working order, exhibited a total disregard for the safety of others. Accordingly, Defendants' Partial Motion for Summary Judgment must be denied in its entirety.

I. STATEMENT OF UNDISPUTED FACTS

A. The Subject Wreck and Brake Failure.

This case arises from a high-speed rear-end collision. (Deposition of Hassan El-Haddad ("Hassan Dep.") attached to Plaintiff's Response to Defendant's Statement of Material Facts ("SOMF") as Exhibit "1," pp. 11:12-17, 20:6-15; Deposition of Wade Boykin ("Boykin Dep."), attached to SOMF as Exhibit "2," pp. 33:11-13.) On August 2, 2017, Plaintiff, who

[1] Defendant admits that the brake failure proximately caused the subject wreck. (Def.'s Brief, p. 3) ("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.") (emphasis added).

was driving a sedan, came to a complete stop in traffic. (Boykin Dep., p. 31:14-23.) Hassan, who was driving the 4Runner, noticed Plaintiff's vehicle stopped in traffic and tried to apply his brakes. (Hassan Dep., p. 13:12-15, 17:11-16, 18:13-22.)

Hassan claims his brakes failed.[2] (*Id*., p. 18:3-12.) He asserts that he pumped his brakes multiple times, but the 4Runner continued toward Plaintiff's vehicle. (*Id*., p. 18:6-19:15.) Just before the 4Runner slammed into the rear of Plaintiff's much smaller sedan, Hassan was traveling at approximately 30 to 35 mph. (*Id.*, p. 20:6-15; Boykin Dep., p. 33:11-13.) Plaintiff estimates the 4Runner's speed at impact to be between 20 and 30 mph. (Boykin Dep., p. 33:11-13.) The impact was so great that it caused Plaintiff's vehicle to crash into the car in front of him. (*Id*., pp. 33:22-34:2.)

Police and paramedics responded to the crash. At the accident scene, Hassan blamed the collision on brake failure and told the responding officer that his brakes "went out." (Hassan Dep., pp. 23:7-23.) The investigating police officer nevertheless cited Hassan for following too closely. (Hassan's Interrogatory Responses ("Hassan ROGs"), attached to SOMF as Exhibit "3," Resp. No. 16.)

After the collision, Hassan claims that he told his father about the brake failure.[3] (Hassan Dep., p. 30:1-3.) At some point following the collision, Hassan's father claims that he took the vehicle to an auto shop, but non-party requests to the shop identified reveal a total

[2] For purposes of summary judgment, the court must assume that the brake failure is true. *Cantrell v. U-Haul Co. of Georgia, Inc.*, 244 Ga. App. 671, 672 (1997).

[3] Hassan's sworn testimony was that he told his father about the brake failure following the collision. However, his father testified that Hassan never told him about the brake failure. (Mustapha Dep., pp. 10:25-11-8, 32:24-33:2, 33:12-17, 46:16-25.)

absence of post-wreck service records. (Hassan Dep., p. 29:14-16; Deposition of Mustapha Haddad ("Mustapha Dep."), attached to SOMF as Exhibit "4," p. 12:2-14; Documents Produced by Zam Zam Motor, Inc. d/b/a Extreme Auto Repair by Zaheer A. Malik, attached to SOMF as Exhibit "5.")[4] Defendants subsequently sold the 4Runner before Plaintiff could inspect the vehicle.[5]

B. Ownership and Maintenance.

Mustapha purchased the 4Runner from a dealer at least a decade prior to the subject wreck. (Mustapha's Interrogatory Responses ("Mustapha ROGs"), attached to SOMF as Exhibit "7," Resp. No. 6.) Mustapha "was not provided any maintenance records when he purchased the vehicle." (Mustapha ROGs, Resp. No. 6.) At all times relevant to this lawsuit, the 4Runner was owned by Mustapha. (Hassan ROGs, Resp. No. 5; Mustapha ROGs, Resp. No. 2.) Hassan's parents let him drive the 4Runner as needed. (Hassan ROGs, Resp. No. 5.)

In his Interrogatory Responses, Hassan stated that he shared responsibility of maintaining the vehicle with his parents. (Hassan ROGs, Resp. No. 5.) However, he was unable to identify a single auto shop at which the 4Runner was serviced. (Hassan ROGs, Resp. No. 6.) Similarly, Hassan was unable to produce any documents proving that the vehicle was serviced. (Hassan's Responses to Plaintiff's Requests for Production ("Hassan RPDs"), attached to SOMF as Exhibit "8," Resp. No. 11.) Moreover, Hassan had no idea what repairs

[4] Service records obtained from Allstate show post-wreck repairs, but, notably, no repairs were performed on the 4Runner's brakes. (Documents Produced by Non-Party Allstate, attached to SOMF as Exhibit "6."

[5] Despite a spoliation letter to Allstate and multiple requests to preserve the 4Runner, Allstate and Defendants allowed the vehicle to be sold before Plaintiff was able to have an expert inspect the vehicle and its brake components. Plaintiff's Motion for Sanctions for Spoliation more fully addresses this issue.

were done to the vehicle after the wreck. (Hassan Dep., p. 29:14-25.) Rather, he responded, "**I don't know. My dad did that**." (*Id.*, p. 29:14-16) (emphasis added). Thus, Hassan's sworn discovery responses and testimony show that Hassan did nothing to maintain the vehicle or its brakes.

In discovery, Mustapha named several shops to which he purportedly took the 4Runner.[6] (Mustapha ROGs, Resp. NO. 8.) Non-party discovery from these entities revealed a complete absence of records that the vehicle was *ever* serviced. (Composite Responses to Plaintiff's Non-Party Document Requests, attached to SOMF as Exhibit "9," Affidavit of Kyung I. Kwon, attached to SOMF as Exhibit "10.") Notably, when asked during his deposition whose responsibility it was maintain the 4Runner, Mustapha responded: "**not mine.**" (Mustapha Dep., p. 26:4-12 (emphasis added); *see also* pp. 29:1-16, 36:13-19.) Instead, Mustapha pointed the finger at his son:

> Q: Who is responsible for maintenance of the 4Runner, routine maintenance, oil and filter change?
>
> A: I don't know who. I take it to Marietta. Most of the time Hassan, he does that, my son. He took it to change the oil.

(Mustapha Dep., p. 25:20-24.)[7] Critically, after Mustapha gave the vehicle to his son, he *never* checked the brakes:

> Q: After you gave the 4Runner that we are here talking about today to your son, did you ever check the brakes?

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[6] During his deposition, Mustapha testified that all the auto shops identified in his written discovery involved service rendered before the vehicle was loaned to Hassan. (Mustapha Dep., p. 41:4-42:4.) He further testified once that "[w]hen the car is in the possession of Hassan, Hassan was the one who did the maintenance." (Mustapha Dep., p. 41:9-22.)

[7] Mustapha later testified that he never took the car to have its oil and filter changed. (Mustapha Dep., p. 37:5-10.)

A: No.

(Mustapha Dep., p. 45:7-10.)

In sum, Hassan produced no evidence that he did anything to maintain the vehicle or inspect the brakes. Instead, he relied on his parents for that. Mustapha—who initially claimed in his Interrogatory Responses to have maintained the vehicle for the five years prior to the wreck—later testified that it was Hassan's responsibility to maintain the vehicle. Mustapha did *nothing*. Indeed, Defendants' motion for partial summary judgment is unsupported by *any* evidence of regular inspections, maintenance or repairs of the 4Runner—much less the vehicle's brakes. Stated differently, while Defendants seek summary judgment on Plaintiff's negligent maintenance claim, they remain unable to come forward with *any* evidence demonstrating that either of them actually did anything to maintain the vehicle or its brakes.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Summary Judgment Standard.

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. O.C.G.A. § 9-11-56. At the summary judgment phase, the Court must view all facts and reasonable inferences from those facts in a light most favorable to the non-moving party. *Cantrell v. U-Haul Co. of Georgia, Inc.*, 244 Ga. App. 671, 672 (1997). In cases involving an undisputed brake failure, as is the case here, a jury must decide whether the brakes failed as a result of the defendant's failure to exercise due care. *Johnson v. McAfee*, 151 Ga. App. 774, 775 (1979); *see also Cruse v. Taylor*, 89 Ga. App. 611 (1954). This is particularly true in cases where the undisputed evidence shows the failure to establish an ongoing brake maintenance program. *Kirby v. Spate*, 214 Ga. App. 433, 437

(1994) (reversing summary judgment because a fact question existed as to whether a vehicle owner exercised ordinary diligence by failing to establish an effective maintenance program).

B. Summary Judgment is Not Proper because Each Element of Plaintiff's Claim for Negligent Maintenance is Satisfied.

Defendant's Motion for Summary Judgment argues that, with respect to his negligent maintenance claim against Mustapha, Plaintiff failed to satisfy the elements of "duty" and "breach." Defendant acknowledges, however, the statutory duty imposed upon an owner to maintain his vehicle's brakes. Thus, Defendant appears to concede Mustapha's duty, while challenging only the breach of his duty. Nevertheless, the record evidence also shows a breach of Mustapha's duty. At the very least, a jury could reasonably conclude that Mustapha breached his duty rendering summary judgment improper. For this reason, summary judgment must be denied.

1. Mustapha, as the owner of the 4Runner, had a duty to maintain the vehicle's brakes.

Georgia law unequivocally imposes a duty on vehicle owners to maintain their brakes. O.C.G.A. § 40-8-43; *see also Kirby v. Spate*, 214 Ga. App. 433, 437 (1994). Defendant concedes this duty. (Def.'s Brief, p. 4.) Code Section 40-8-54 provides that "[a]ll brakes shall be maintained in good working order and shall be so adjusted as to operate as equally as practicable with respect to the wheels on opposite sides of the vehicle." O.C.G.A. § 40-8-54. Additionally, O.C.G.A. § 40-8-50 provides, in pertinent part:

> Every motor vehicle, other than a motorcycle or motor driven cycle, 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*.

O.C.G.A. § 40-8-50(b) (emphasis added). Critical to the present case, the duty remains with the owner of the vehicle, even where the vehicle is loaned to another. *Cantrell v. U-Haul Co. of Georgia*, 224 Ga. App. 671 (1997).

Here, Mustapha indisputably owned the 4Runner. Mustapha, while keeping title to the 4Runner, loaned the vehicle to his son, Hassan. Thus, under well-established Georgia law, the duty to maintain the 4Runner's brakes remained at all times with Mustapha. Viewing the evidence in a light most favorable to Plaintiff, the first element of Plaintiff's claim for negligent failure to maintain brakes against Mustapha—the duty to keep the brakes in good working order—is satisfied.

2. A jury must decide whether Mustapha breached his duty by failing to adequately maintain or inspect the 4Runner.

"An owner who permits another to operate [his] 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. Stated differently, where an owner lends his vehicle to another, he may be charged with constructive knowledge of a brake defect where he *should have known* of the defect.[8] *See id.*

Once brake failure is established, as Hassan's testimony does for purposes of this motion, the burden shifts to the defendant to prove he acted with ordinary care by inspecting, maintaining, and repairing the brakes. *Johnson v. McAfee*, 151 Ga. App. 774, 775 (1979)

[8] Defendant's Motion for Summary Judgment ignores the "constructive knowledge" portion of the standard. For example, on page four of Defendant's Brief, he argues that "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." (Def.'s Brief, p. 4.) Plaintiff concedes that there is no evidence that Mustapha actually knew the brakes were defective. Rather, Plaintiff argues, and the evidence shows, that Mustapha should have known of the defective brakes, but did not because he completely failed to maintain and inspect the brakes.

(holding that where brake failure is shown, "[i]t then devolves upon the defendant to produce evidence in [sic] his own behalf to satisfy the jury that the operation of the automobile was . . . not the result of any failure to exercise ordinary care on his part."); *see also Cruse v. Taylor*, 89 Ga. App. 611, 616 (1954) (holding that defendant has the burden "to convince the jury that the violation of the statute, if unintentional, was consistent with due care on his part in having the brakes inspected and repaired and that the defect existed at the time of the accident wholly without his fault.").

In some circumstances, where a defendant can show a history of routine maintenance and inspection, the defendant can successfully meet his burden and challenge liability. *E.g.*, *Ken Thomas of Georgia, Inc. v. Halim*, 255 Ga. App. 570 (2004); *see also Cantrell*, 224 Ga. App. at 671. "However, 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." *Kirby*, 214 Ga. App. at 437.

Conversely, where a vehicle owner "fails to establish an effective maintenance program," especially concerning a critical component, such as brakes, the Georgia Court of Appeals has held that "a genuine issue of material fact yet may remain whether the owner has exercised ordinary diligence." *Id.; see also Johnson*, 151 Ga. App. at 775; *Cruse*, 89 Ga. App. at 616. This case falls into the latter category because the record evidence shows a total absence of any routine maintenance or inspection. Indeed, each Defendant points to the other as the party responsible for maintenance and neither can produce any evidence that the brakes were routinely inspected or maintained. Thus, a genuine issue of material fact exists as to whether Mustapha exercised ordinary care in maintaining the brakes.

Defendant's reliance on *Cantrell v. U-Haul Company of Georgia, Inc.* is misplaced. I224 Ga. App. 671 (1997). In *Cantrell*, two plaintiffs sued U-Haul for injuries sustained when their rental truck's brakes failed. *Id.* at 671. U-Haul moved for summary judgment arguing that the plaintiffs failed to establish the essential element that U-Haul "knew or *should have known* the brakes were defective when the truck was rented to them." *Id.* at 672. Based on the routine maintenance and inspections—which are simply not present in this case—the Court found that U-Haul had no way of knowing about an issue with the brakes. *Id.* Specifically, the Court of Appeals, in affirming summary judgment, relied upon evidence that "the truck was regularly maintained and serviced," as well as other evidence of a regular inspection protocol. *Id.*

Here, unlike *Cantrell*, there is no evidence showing the vehicle's brakes were regularly inspected, so Defendant cannot rely on such evidence to claim that he had no way of knowing about their purportedly defective condition. Instead, each Defendant punts responsibility to the other—Hassan claims that his father was responsible for maintaining the vehicle, but Mustapha claims that his son was responsible for maintaining the vehicle—resulting in what appears to be total failure to regularly inspect and maintain the vehicle. Thus, unlike *Cantrell*, where the subject vehicle was regularly inspected and maintained and the defendant produced supporting records, in this case the undisputed evidence shows little or no maintenance—and certainly no record of such. For example, evidence produced by the non-party auto shops that Defendant identified show no service, inspection, or repairs. As the owner of the vehicle and person responsible for maintenance under Georgia law (and according to Hassan), Mustapha's total failure to maintain the brakes presents a jury question as to Defendant's constructive knowledge of the brake defect.

Defendant's reliance on *Ken Thomas of Georgia, Inc. v. Halim*, 255 Ga. App. 570 (2004) is similarly misplaced. In *Halim*, the plaintiff, who was a passenger, sued a car dealer after sustaining injuries in a wreck involving a loaner vehicle. *Id.* at 570. The plaintiff's amended complaint alleged a failure of the vehicle's steering system and that the dealer negligently failed to maintain or repair the vehicle. *Id.* The Court of Appeals reversed the trial court's denial of summary judgment for the dealer. *Id.* at 576. Similar to *Cantrell*, but unlike Defendant in this case, the dealer maintained extensive records of maintenance and repairs on the subject vehicle. *Id.* at 572. In *Halim*, the Court also relied on expert testimony presented by an automobile mechanic that certain damage to the car could not have caused a steering malfunction.[9] The Court concluded that negligence could not be "reasonably inferred solely from circumstantial evidence that [the dealer] repaired and maintained a car that suffered a sudden mechanical malfunction." *Id.*

The scenario in *Halim* is different from and, therefore, inapposite to, the present case. The argument in this case is not that Mustapha should be liable simply because he "owned the vehicle and may have some done prior maintenance on the vehicle," as argued by Defendant, but rather, that a jury could find a breach of his duty based on his total failure to adequately maintain or inspect the vehicle's brakes. Stated differently, had Mustapha performed routine maintenance or inspections, he could have and *should have known* of the alleged issue with the brakes. Thus, the only similarity between this case and *Halim* is they both concern

[9] Plaintiff cannot present expert testimony in this case because Defendants allowed for the sale of critical evidence—the vehicle and its brake components. These arguments are fully addressed in Plaintiff's Motion for Sanctions, but Plaintiff's inability to present expert testimony on this subject in this instance is the perfect example of the prejudice resulting from Defendants' spoliation.

allegations of mechanical vehicle failure. Based on Defendant's failure to routinely maintain and repair the vehicle, a jury could (and should) conclude that he breached his duty of care.

The case *Kirby v. Spate* is directly on point and requires the issue of Defendant's constructive knowledge to go before the jury. 214 Ga. App. 433 (1994). In *Kirby*, a bus driver sued the owner of a bus when the vehicle's brakes failed, and he was injured in the resulting collision. *Id.* at 434. Similar to this case, "[n]o problem had been noticed with the brakes earlier that day."[10] *Id.* Moreover, just as Defendant claims in this case, "[a]t the time of purchase no bus repair history or maintenance log was obtained from the sellers," and after purchasing the vehicle no formal maintenance log was kept. *Id.* In reversing the trial court's grant of summary judgment to the bus owner, the Court found a genuine issue of fact on the owner's liability where "he fail[ed] 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 . . . ." *Id.* at 448.

Here, neither Defendant has established *any* maintenance program for the vehicle, but especially not a "routine" program. Neither Defendant can testify with any specificity as to what maintenance or repairs were performed and when they were done. Instead, each Defendant assigns responsibility for maintaining the vehicle's brakes on the other, which appears to have resulted in limited maintenance, if any. Moreover, the "routine inspection" allegedly performed by Mustapha—which he testified took place *before* he began loaning the vehicle to Hassan and not during the period when Hassan was routinely using it—consisted

[10] Defendant testified that he had no issue with the brakes prior to the collision. Unlike *Kirby*, no mechanical inspection was performed—he simply pumped the brakes.

only of a visual inspection and application of the brakes, which, under *Kirby*, is insufficient. A jury could easily conclude Defendant could have and should have known about the vehicle's brake defects had he established an effective maintenance program for the brakes.

Accordingly, the Court should deny Defendant's Partial Motion for Summary Judgment on Plaintiff's negligent failure to maintain claim against Defendant Mustapha.

C. Plaintiff's Claim for "Bad Faith" Attorney's Fees Must Go Before the Jury.

Each Defendant's violation of a statute enacted for the protection of Plaintiff constitutes evidence of "bad faith" under Georgia law, requiring the issue to go before the jury. *E.g.*, *Nash v. Reed*, 2019 WL 1123530, at *2 (Ga. Ct. App. Mar. 12, 2019) (reversing trial court's award summary of judgment under statute's "bad faith" prong). Accordingly, Defendant's Motion for Summary Judgment must be denied.

Georgia's attorney's fee statute provides:

> 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.

O.C.G.A. § 13-6-11 (emphasis added).

Thus, Code Section 13-6-11 contemplates a three-prong test for the recovery of attorney's fees where *any evidence*, no matter how slight, tends to show: (1) the defendant has acted in "bad faith," (2) the defendant has been "stubbornly litigious," or (3) where the defendant has caused the plaintiff unnecessary trouble or expense.[11] *Id.*; *see also City of*

[11] Georgia case law does not distinguish between the treatment and meaning of the second and third prongs. *See Jeff Goolsby Homes Corp. v. Smith*, 168 Ga. App 218 (1983). The law does, however, clearly differentiate claims for fees under the "bad faith" prong and the "stubborn litigiousness" prong.

Lilburn v. Astra Group, Inc., 286 Ga. App. 568, 571 (2007) (holding that "[e]ven slight evidence of bad faith can be enough to create an issue for the jury.").

"Whether a plaintiff has met any of the preconditions for an award of attorney fees and litigation expenses set forth in [O.C.G.A. § 13-6-11 is] solely a question for the jury." *Covington Square Assocs., LLC v. Ingles Markets, Inc.*, 287 Ga. 445, 446 (2010) (citation omitted). The issue of "bad faith" attorney's fees must go before the jury.

"The bad faith referred to [in O.C.G.A. § 13-6-11,] in actions sounding in tort, means bad faith in the transaction out of which the cause of action arose." *Windermere*, 211 Ga. App. at 179. Where evidence of bad faith is presented, even if slight, the existence of a bona fide controversy is not dispositive of the claim for O.C.G.A. § 13-6-11 attorney's fees. *See Merlino v. City of Atlanta*, 283 Ga. 186, 190 (2008); *Latham v. Faulk*, 265 Ga. 107, 108 (1995); *see also Oglethorpe Power Corp. v. Estate of Forrister*, 332 Ga. App. 693, 705 (2015) (quoting *Lamb v. State Farm Mut. Auto Ins. Companies*, 240 Ga. App. 363, 365 (1999)) (holding "the existence of a bona fide controversy negates the possibility of a statutory award only '[w]here bad faith is not at issue.'"); *Windermere*, 211 Ga. App. at 179. Thus, Georgia appellate courts have been attentive to ensuring that if there is *any* evidence of bad faith, the jury should decide the issue instead of the trial court even if a bona fide controversy exists.

"'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.'" *Nash*, 2019 WL 1123530, at *2 (Ga. Ct. App. Mar. 12, 2019) (quoting *Windermere*, 211 Ga. App. at 179). In other words, evidence that a defendant broke a law enacted for the benefit of a plaintiff is evidence that the defendant acted in bad faith in the transaction within the meaning of O.C.G.A. § 13-6-11, therefore

requiring the issue of "bad faith" to go to the jury. *Id.*; *see also, Bramlett v. Bajric*, 2012 WL 4951213 (N.D. Ga. 2012); *Meyer v. Trux Transp., Inc.*, 2006 WL 3246685 (N.D. Ga. 2006) (denying defendant's partial motion for summary judgment on attorney's fees because evidence of the driver's violation of O.C.G.A. § 40-6-391(a)(6) was sufficient to send the issue to the jury).

For example, in *Nash*, the pedestrian plaintiff suffered injuries when the defendant crossed a double-yellow line, failed to honk or otherwise alert the plaintiff to his presence, and struck him with his SUV. 2019 WL 1123530, at *2 (Ga. Ct. App. Mar. 12, 2019). The defendant driver, exactly like Defendants in this case, moved for summary judgment on the plaintiff's claim for attorney's fees under O.C.G.A. § 13-6-11. *Id.* The defendant argued that there was no evidence of bad faith or stubborn litigiousness. *Id.* The Court of Appeals, relying on *Windermere*, reversed the trial court finding that the defendant's violation of traffic law was sufficient to send the issue to the jury. *Id.*

Here, each Defendant violated laws which were enacted for the benefit of motorists. Mustapha, in disregard of his statutory duties, failed to establish a routine maintenance or inspection program for his vehicle's brakes, which not only endangered Plaintiff, but also his son. Indeed, Mustapha admitted that driving a vehicle without functioning brakes is dangerous. (Mustapha Dep., p. 49:11-13.) Despite this knowledge, Mustapha neglected his duty to keep the 4Runner's brakes in good working order in violation of O.C.G.A. § 40-8-54.

Hassan violated O.C.G.A. § 40-6-49 by following too closely behind Plaintiff's vehicle. Furthermore, while the duty to keep brakes in working order lies with the owner, Hassan admittedly did nothing to make sure the brakes were working before driving. (Hassan Dep., p. 46:14-20.)

Under the binding authority of *Nash* and *Windermere* and the persuasive authority of *Bramlett* and *Meyer*, Defendants' violations of traffic laws enacted to protect Plaintiff is sufficient to defeat summary judgment on the issue of "bad faith" attorney's fees under O.C.G.A. § 13-6-11 and send the issue to the jury. Accordingly, Defendant's Partial Motion for Summary Judgment as to Plaintiff's claim for attorney's fees must be denied.

D. Plaintiff's Entitlement to Punitive Damages Must be Decided by the Jury.

Punitive damages are proper because Plaintiff has presented evidence from which a jury could determine that Mustapha acted with the "entire want of care which would raise the presumption of conscious indifference to consequences" under either one of two theories. O.C.G.A. § 51-12-5.1.[12] The jury could conclude that Plaintiff is entitled to punitive damages based on (1) Mustapha's single instance of allowing his son to drive his car, despite having constructive knowledge of a serious mechanical problem, *see J.B. Hunt Transport, Inc. v. Bentley*, 207 Ga. App. 250 (1992), or (2) by Mustapha's pattern and policy of allowing dangerous driving. *Lindsey v. Clinch Cty. Glass, Inc.*, 312 Ga. App. 534 (2011).

1. <u>Plaintiff is entitled to punitive damages based on Mustapha's constructive knowledge of a serious mechanical problem with the 4Runner.</u>

Where the jury could infer that the owner of a vehicle knowingly allowed for another to drive a vehicle with a brake malfunction, the issue of punitive damages must be tried before the jury. *Bentley*, 207 Ga. App. at 255.

In *Bentley*, a truck driver stopped at a terminal and completed a report "requesting service which indicated problems with the [truck's] brakes and a 'wobble' in the front end of

[12] Although the evidence showing Hassan's total failure to maintain the 4Runner is concerning, the duty to maintain the vehicle remained with Mustapha as the vehicle's owner. Accordingly, Plaintiff only seeks to recover punitive damages against Mustapha.

the tractor." *Id.* at 251. The truck was put in for service early in the morning and put back on the road several hours later. *Id.* The logs indicating what work, if any, was performed on the vehicle were destroyed by the trucking company. *Id.* The Court found that, given the destruction of the logs, the jury could infer that the company knowingly allowed for a vehicle with mechanical defects to be put back on the road. *Id.* at 257. Accordingly, the Court of Appeals affirmed the jury's award of punitive damages.

The situation in *Bentley* is similar to the present case. Mustapha, as the owner of the 4Runner, loaned the vehicle to his son. However, the record establishes that Mustapha did nothing to inspect or maintain the vehicle's brakes. Similarly, Hassan was unable to identify any auto shops that serviced the 4Runner or produce any records establishing that service was, in fact, performed. The total failure of each Defendant to maintain the vehicle's brakes resulted in the subject wreck. Mustapha should have known about the brake defect but did not based on the lack of maintenance and inspection, *i.e.*, he had constructive knowledge of the brake defect. Thus, similar to *Bentley*, a jury could infer that he knowingly allowed for his son to drive a vehicle with a brake defect.[13] Under *Bentley*, these facts are clear and convincing evidence of a conscious indifference to the consequences of his actions. *See id.* at 257.

Accordingly, Defendant's Partial Motion for Summary Judgment should be denied and Plaintiff's claim for punitive damages against Mustapha should go before the jury.

[13] In *Bentley*, the jury was able to infer knowledge based on the trucking company's failure to preserve the maintenance logs. 207 Ga. App. at 257. This case is different in that there simply is no evidence of maintenance. Thus, it is similar in that the jury could infer constructive knowledge based on Mustapha's total failure to maintain the 4Runner's brakes.

2. Plaintiff is entitled to punitive damages based on Mustapha's pattern and policy of allowing dangerous driving.

"In cases involving automobile collisions, punitive damages are authorized when the accident results from a pattern or policy of dangerous driving, . . . but not when a driver simply violates a rule of the road." *Lindsey v. Clinch Cty. Glass, Inc.*, 312 Ga. App. 534, 535 (2011).

In *Lindsey*, the Court of Appeals cautioned that the above-quoted rule "should not be read for the proposition that punitive damages are never available in a case where a driver causes an accident" because of an isolated violation of a traffic law. *Id.* Rather, the party seeking punitive damages must show a habit of violating the law which proximately caused the wreck, *i.e.*, "establish a policy or pattern of dangerous driving." *Id.* Thus, *Lindsey* provides authority to allow punitive damages where a driver makes a pattern or policy of breaking traffic laws. *Id.*

Here, the record shows just that—a pattern and policy of allowing dangerous driving by repeatedly violating O.C.G.A. § 40-8-54. Mustapha completely failed to maintain the 4Runner or its brakes—a component critical enough for the General Assembly to impose a statutory duty to maintain brakes in good working order. He knew driving without functioning brakes was dangerous, but, nevertheless, allowed for his son to drive his vehicle—for numerous years—without adequately inspecting or maintaining the brakes. Stated differently, Mustapha facilitated a pattern and practice of dangerous driving by allowing his son to drive a seventeen-year-old vehicle without routinely checking the brakes. It was only a matter of time before Hassan injured another motorist or himself.

A jury could easily conclude that this total and utter breach of duty demonstrates the "entire want of care which would raise the presumption of conscious indifference to

consequences." Accordingly, Defendants' Partial Motion for Summary Judgment as to Plaintiff's claim for punitive damages must be denied.

III. CONCLUSION

For the reasons set forth above, Plaintiff seeks an Order from this Court DENYING Defendants' Partial Motion for Summary Judgment in its entirety.

Respectfully submitted this 25th day of March 2019.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served all counsel to this action with a copy of the foregoing ***PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT*** by electronic service and by depositing a copy of the same in the United States Mail, in an appropriately addressed envelope with adequate postage thereon as follows:

Kevin W. Burkhart
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This 25th day of March 2019.

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