Auto Liability Case Law Update

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AUTO LIABILITY:
***Metropolitan Atlanta Rapid Transit Authority v. Morris, et. al.*, 334 Ga. App. 565 (November 16, 2015).**

In *MARTA v. Morris*, the Georgia Court of Appeals weighed in on several pertinent issues for auto liability, including: (1) vicarious liability when evidence implicates a vehicle bearing a company's logo, (2) apportionment of fault to a plaintiff, (3) evidence of non-intoxicating levels of alcohol, and (4) attorney's fees. The facts in *Morris* showed that the plaintiff collided on Peachtree Street with a bus marked "MARTA" and "Five Points." Specifically, the plaintiff, as well as several third parties, reported to an officer that the bus veered into the plaintiff's lane, causing her to hit the curb. *Id.* at 565-66.

Vicarious Liability Standard for Logo-Bearing Vehicles

MARTA challenged the trial court's denial of its directed verdict motion, contending that the plaintiff had presented insufficient evidence to establish MARTA's vicarious liability. As the Court of Appeals noted, "[w]hen a servant causes an injury to another, the test to determine if the master is liable is whether or not the servant was at the time of the injury acting within the course and scope of his employment and on the business of the master." *Id.* at 567; *quoting Hicks v. Heard,* 286 Ga. 864, 865 (2010). This issue is particularly pertinent to companies with generally recognizable corporate branding on their vehicles (e.g., FedEx, UPS, or DHL).

Both the plaintiff and third party witnesses testified that the bus responsible for the incident was marked "MARTA" on its side, but as the Court of Appeals correctly stated, "[a] vehicle's insignia, alone is insufficient to show ownership of that vehicle or that it was being operated in the course and scope of employment." *Id.* at 567. The MARTA insignia was not the only evidence linking the bus with MARTA, however. The Court of Appeals also noted that undisputed evidence showed that the bus driver was wearing MARTA's accepted bus driver uniform, that only MARTA bus drivers are permitted to operate buses, and, most importantly, that the bus let passengers on and off at a MARTA bus stop immediately after the incident. *Id.* at 567-68. These facts, taken together, were sufficient to support the jury's verdict that the driver was a MARTA employee acting in the scope of employment. *Id.* at 568.

Evidentiary Threshold to Apportion Fault to Plaintiff

MARTA also appealed the trial court's refusal to charge the jury, pursuant to O.C.G.A § 51-12-33, that it could apportion liability to the plaintiff. MARTA requested that the trial court instruct the jury to determine the percentage of the plaintiff's fault, if any. The trial court denied MARTA's request, however, because it found that there was no evidence contradicting the plaintiff's and eyewitnesses' testimony that the bus had simply veered into the plaintiff's lane. The Court of Appeals began by noting that "[a] charge on a given subject is justified if there is even slight evidence from which a jury could infer a conclusion regarding that subject." *Id.* at 568; *quoting Hendley v. Evans*, 319 Ga. App. 310, 311 (2012).

Nevertheless, without any evidence contradicting the plaintiff and eyewitnesses' description or indicating that the plaintiff was at fault in some way, the Court of Appeals held that the trial court did not err in declining to permit the jury to apportion fault to the plaintiff. *Id.* at 569-70; *see also Beadles v. Bowen*, 106 Ga. App. 34, 36 (1962) (holding it is error to charge a plaintiff's contributory or comparative negligence when there is no evidence of such negligence).

Presence of Alcohol

The plaintiff admitted to having one margarita at dinner prior to the incident. MARTA contended that the plaintiff's ingestion of alcohol prior to the incident constituted evidence of negligence. However, the responding police officer noted in his report that he saw no evidence that the plaintiff was intoxicated and did not administer a field sobriety test. The Court of Appeals held that without that type of evidence, there was nothing in the record showing that the plaintiff was intoxicated or impaired, as the presence of alcohol in a person's body, by itself, does not support an inference that the person was an impaired driver. *Id.* at 570; *citing State v. Frost*, 297 Ga. 296, 305 (2015).

Attorneys' Fees

MARTA challenged the jury's award of attorney's fees, arguing that there was a bona fide controversy as to whether MARTA was vicariously liable for the driver's actions. That argument failed, however, because the existence of a bona fide controversy negates the possibility of a statutory award of attorneys' fees only where bad faith is not an issue. *Id.* at 570-71. In light of the evidence that the bus driver (acting in the scope of employment) hit the plaintiff and fled the scene, the jury could properly conclude that MARTA acted in bad faith and was liable for statutory attorneys' fees. *Id.* at 571.

CONTRADICTORY TESTIMONY: *Whole Foods Market Group, Inc. v. Shepard*, 333 Ga. App. 137 (July 14, 2015).

In *Whole Foods*, a seven judge panel of the Court of Appeals interpreted the *Prophecy* rule. This opinion does not alter the *Prophecy* standard or transform the law, but, in a 4-3 split decision, the majority and detailed dissent's analysis of the evidence are useful in defining "contradictory testimony."

To recap, the *Prophecy* rule states when a party has given contradictory testimony, and when that party relies exclusively on that testimony in opposition to summary judgment, a court must construe the contradictory testimony against him. *Whole Foods*, 333 Ga. App. at 138. This case focuses on the critical issue of whether testimony is contradictory, or "if one part of the testimony asserts or expresses the opposite of another part of the testimony." *Id.*, *citing Bradley v. Winn-Dixie Stores*, 314 Ga.App. 556, 557-558 (2012).

Here, a truck driven by a Whole Foods employee struck another vehicle. Plaintiff filed for summary judgment on its claim that the Whole Foods driver was negligent per se for failing to maintain a lane. *Whole Foods*, 333 Ga. App. at 137. At deposition, the Whole Foods driver adopted an unsworn incident report stating he had just initiated a lane change, felt the impact of the collision, and then came "back in" the lane. *Id.* at 137-38. In an affidavit filed in opposition to summary judgment, the Whole Foods driver testified that he was beginning to change lanes, but he had not left his own lane at the time of the collision. *Id.*

The affidavit also attempted to reconcile the statements by stating the driver was never asked point blank at deposition if his vehicle ever truly left his lane. *Id.* The plaintiff testified that he remained in his lane at all pertinent times. *Id.* at 137.

The Court of Appeals majority affirmed the trial court's decision to disregard the testimony as contradictory, because it believed someone cannot come "back in" to a lane it had never left. *Id.* at 140.

The dissent noted the proper test to determine whether statements are inconsistent for the *Prophecy* rule is "to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said." *Id.* at 143; *citing Price v. Thapa*, 323 Ga.App. 638, 640 (2013).

Based on that standard, the dissent looked to multiple sections of deposition testimony that shed doubt on whether the Whole Foods driver ever left his lane. *Id.* at 141-42. In other words, the dissent felt there was sufficient uncertainty present in his deposition testimony about his presence in (or out of) the lane that his subsequent, clarifying affidavit did not amount to a "contradictory" statement sufficient to trigger the *Prophecy* rule. *Id.* 142-43. ❖