

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

ANDREW RUSSELL,	:	
PLAINTIFF,	:	CIVIL ACTION FILE NO.
v.	:	12A44555-5
BROWN & BROWN WRECKER SERVICE,;	:	
“DRIVER MARSHALL,” JOHN DOES	:	
1-3, and DOE CORPORATIONS 1-3,	:	
DEFENDANTS.	:	

ORDER DENYING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

On August 14, 2013, the parties, represented by counsel, appeared for oral argument as scheduled on the Defendants’ Motion for Summary Judgment on this action for damages for negligence. The Court has considered the pleadings, briefs, affidavits, DVD, deposition and arguments of the parties.

This is a case for damages to the front end of Plaintiff’s car allegedly inflicted by the towing company called by the Doraville Police Department to remove it from the emergency lane on I-285E.

The Plaintiff’s car became disabled and was left in the emergency lane on I-285E at midnight Saturday night, February 18, 2012. The driver, who is not the car’s owner, called his mom and friend to come get him. The front end was not damaged at that time. The next day, Sunday, at around noon, the driver and a friend went back to the car to replace the battery. They summoned a HERO van to help. The car still would not start. There was no damage to the front end at that time. They left the car there.

At 11:30 that night, Corporal John Lowe ("Lowe") of the Doraville Police Department saw the car disabled where the driver had left it. The parties disagree as to whether the front end of the car was damaged at the time Lowe inspected it, before calling the Defendant towing company ("Brown"). Lowe states the front end was crumpled and the car was leaking oil onto the highway as it sat on the side of the highway. He states he considered the car a hazard, so he contacted Brown, with whom the Doraville Police Department has a contract for towing. He was there when the car was lifted onto Brown's flatbed, and saw no additional damage inflicted on the car during this process.

The next morning, the driver's mom called a private towing company. It was unable to find the car. The driver then learned the car had been towed to Brown's lot. He paid \$125 to retrieve the car, and then found all the damage to the front end. The Plaintiff claims negligence and a theory of *res ipsa loquitur*.

At the hearing, the Plaintiff represented to the Court that the videotape taken by the police car at the scene would substantiate his claim that the car was not damaged at the time Brown took possession. The videotape was unavailable at the time of the hearing because the Police Department was unable to provide Plaintiff with a version formatted for viewing. However, at the Court's request, a DVD taken from the videotape was provided to the Court for viewing after the hearing. The images are shot from the police car, which is behind the subject vehicle during the entire duration of the DVD. As the issues concern damage to the front end of the car, the DVD is inconclusive. However, the Court notes that, while the tow ticket, filled out by both Lowe and Brown's driver, states damage to the car at pick-up included "heavy front end damage/rear/sides all over," rear-end damage is not apparent on the DVD. Of greater concern, after the tow truck arrives and parks in front of the damaged vehicle, as Lowe walks between the bright lights of the tow truck

and the front end of the subject vehicle, his silhouette appears clearly through the front windshield of the car. It appears his silhouette is visible all the way through to the bottom of the front windshield. However, in pictures presented from Brown's impound lot, the hood of the car appears to be buckled up higher than the bottom of the front windshield.

To prevail at summary judgment, the movant must show that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmovant, warrant judgment as a matter of law. O.C.G.A. § 9-11-56 (c). A defendant may prevail at summary judgment by showing that the evidence in the record is insufficient to create a jury issue on at least one essential element of plaintiff's case. Lau's Corp. v. Haskins, 261 Ga. 491(1991). If the moving party shows the absence of evidence as to one essential element of the plaintiff's case, the plaintiff cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue. O.C.G.A. § 9-11-56 (e).

The Defendants claim there are no issues of material fact and they are entitled to judgment as a matter of law, as there is no evidence they breached a duty to the Plaintiff. Lowe's police report and deposition testimony state consistently that the damage to the front end of the vehicle existed at the time Brown was called. Indeed, there is no eyewitness testimony regarding the car's condition between the time the HERO truck left and the time Lowe arrived at the scene, many hours later. However, viewed in a light most favorable to the Plaintiff as non-movant, the DVD of the incident provides images that appear to be consistent with the Plaintiff's claim that Brown is responsible for damage to the vehicle, either in the towing process or while the car was impounded on its lot. Brown will need to explain to the jury how Lowe's silhouette appears through the bottom of the front windshield while he is standing between the disabled

vehicle and the tow truck on the side of the highway, if the hood was buckled higher than the bottom of the windshield at the time Brown arrived at the scene.

Therefore, the Defendants' Motion for Summary Judgment is DENIED.

SO ORDERED, this 7th day of October, 2013.

Eleanor L. Ross

Eleanor L. Ross, Judge
DeKalb County State Court

Copy to:

- ✓ Akins Doherty, Esq.
- ✓ Jason Schwartz, Esq.

FILED IN THIS OFFICE
THIS 7th DAY OF Oct 20 13
K Tankersley
Clerk, State Court, DeKalb County