IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PISSARRO WRIGHT, Individually, and CHRISTINA HICKS, as Administrator of the Estate of CARLOS HICKS, Deceased, Plaintiffs, v. METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY, INC., a/k/a "MARTA," Defendant.	Civil Action No. 2018CV300282

ORDER ON POST-TRIAL MOTIONS

The above-referenced case was tried before the Honorable Senior Judge Wendy L. Shoob over a nearly two-week period, from Monday, April 30, 2018 through Thursday, May 10, 2018. The jury returned a verdict of $11,250,000.00 in favor of Plaintiffs PISSARO WRIGHT, Individually, and CHRISTINA HICKS, as Administrator of the Estate of Carlos Hicks, Deceased ("Plaintiffs"), after reducing their award by apportioning 5% fault to non-party Novarre Centennial Park, LLC and Portal Holdings, LLC (collectively "Novarre") and 10% fault to Carlos Hicks. Before the Court are Defendant METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY, INC. a/k/a MARTA's Motion for New Trial on Special Grounds, MARTA's Motion for New Trial on General Grounds and MARTA's Motion for Judgment Notwithstanding the Verdict. MARTA and Plaintiffs extensively briefed the issues raised in MARTA's motions, and the Court heard oral argument on the motions on September 18, 2018.

For the purposes of its ruling, the Court is focused on the "superior knowledge" language in the jury charge and the manner in which that issue was addressed by the Court in responding to the jury's three post-charge follow-up questions. In its post-trial motions, among other

grounds, MARTA objects to the Court's handling of the "superior knowledge" issue. A full recitation of the factual backdrop surrounding this question follows:

On May 8, 2018, following the closing arguments of counsel and just prior to the Court and jury breaking for lunch, the Court issued its charge to the jury. Relevant to the "superior knowledge" question, the Court charged the jury as follows:

> While not an insurer of the invitees' safety, the owner/occupier is required to exercise ordinary care to protect the invitee from unreasonable risk of harm of which the owner/occupier has superior knowledge. The owner/occupier owes persons invited to enter the premises a duty of ordinary care to have the premises in a reasonably safe condition and not expose the invitees to unreasonable risk. The owner occupier is not required to warrant the safety of all persons from all things, but to exercise the diligence toward making the premises safe that a good business person is accustomed to use in such matters. The true ground of liability is the owner/occupier's superior knowledge of the perilous condition and the danger therefrom to persons coming upon the property. It is when the perilous condition is known to the owner and not known to the person injured that a recovery is permitted.

(Trial Tr., Vol. 8, 1879:13-25, 1880:1-10). With one exception, the above charge tracks the language of the first paragraph of the Georgia Suggested Pattern Jury Instruction (hereinafter referred to as "Pattern Charge") No. 60.623 Invitees; Actual or Constructive Knowledge. (Georgia Suggested Pattern Jury Instructions, Volume I: Civil Cases, Council of Superior Court Judges of Georgia 2018). The above charge does not include the parenthetical, "(or lead them into a dangerous trap)," which immediately follows the phrase, "not expose the invitees to unreasonable risk" in Pattern Charge No. 60.625. Additionally, Pattern Charge No. 60.625 includes a second paragraph which was not given during the Court's initial charge of the jury.

The Court's initial jury charge on superior knowledge continues as follows:

> I charge you that if a person had equal or superior knowledge of the dangerous hazard or would have had equal or superior knowledge had he exercised ordinary care for his personal safety, he cannot recover.

(Trial Tr., Vol 8, 1883:5-10). The above charge was Defendant's Request to Charge No. 31; Open and Obvious. It was a non-pattern charge based upon Callaway Gardens Resort, Inc., v. Bierman, 290 Ga. App 111 (2008) and Pirkle v. Robson Crossing, 272 Ga. App. 259; 612 S.E.2d 83 (2005).

During deliberations, the jury posed a series of questions to the Court regarding "superior knowledge."

Jury Question No. 1: "What does superior knowledge mean?" The Court responded as follows:

> While not an insurer of the invitee's safety, the owner/occupier is required to exercise ordinary care to protect the invitee from unreasonable risks of harm which the owner/occupier has superior knowledge. The owner/occupier owes persons invited to enter the premises a duty of ordinary care to have the premises in a reasonably safe condition and not expose the invitees to unreasonable risk (or lead them into a dangerous trap). The owner/occupier is not required to warrant the safety of all persons from all things, but to exercise the diligence toward making the premises safe that a good business person is accustomed to use in such matters. The true ground of liability is the owner/occupier's superior knowledge of the perilous condition and the danger therefrom to persons coming upon the property. It is when the perilous condition is known to the owner and not to the person injured that a recovery is permitted.
>
> In order to prevail, the person injured, the plaintiff, must prove by a preponderance of the evidence that the owner/occupier, the defendant, had actual or constructive knowledge of the hazard and that the plaintiff lacked knowledge of the hazard or for some reason, attributable to the defendant, was prevented from discovering it. To establish constructive knowledge, the plaintiff must show that (1) the defendant or the defendant's employee was in the immediate area of the hazard and could have easily seen the hazard or (2) the hazard remained long enough that ordinary diligence by the defendant or the defendant's employees should have discovered it. Constructive knowledge may be inferred by you, the jury, when there is evidence that the owner lacked a reasonable inspection procedure, but if the plaintiff produces no evidence that the hazard could have been discovered during a reasonable inspection, then no inference arises that the defendant's failure to discover the defect was the result of any alleged failure to inspect.

(Trial Tr. Vol 8. Ex., p. 21)

The Court's response above represented a re-charge of the first paragraph of Pattern Charge No. 60.625, but with the inadvertent inclusion of the "dangerous trap" language which is included in the Pattern, plus an expansion of the charge by including the second paragraph of Pattern Charge No. 60.625 on constructive knowledge, which it had initially declined to give.

Jury Question 2: The jury once again returned and submitted this question to be answered by the Court:

> Is "superior knowledge" defined in the section for open and honest [sic], the same definition applied to section 60.625 Invitees; Actual or Constructive Knowledge? Can we have a concise definition to use, meaning is the definition applied the same for plaintiff and defendant? (5/9/18, 5:28 Nicole Lumpkins, Foreperson)

See Exhibit "A" to MARTA's August 30, 2018 Supplemental Brief in Support of Defendant's Motion for New Trial on Special Grounds.

After conferring with counsel and receiving overnight briefs from the parties on the jury's second question, the Court gave the following answer:

> Superior knowledge means that one party (Carlos Hicks or Defendant) knew or should have known of the existence of the hazard and the other party (Carlos Hicks or Defendant) did not. Either party can have superior knowledge. If you find from the evidence that Carlos Hicks knew or in the exercise of ordinary care should have known of the hazard, there can be no recovery. If you find from the evidence that Carlos Hicks knew or should have known of the hazard and the Defendant knew or should have known of the hazard, Carlos Hicks' knowledge is equal to the knowledge of the Defendant, and the Plaintiff cannot recover. If both parties knew or should have known of the hazard, neither party has superior knowledge.

(Trial Tr. Vol. 8 Ex., p. 20).

Jury Question 3: The jury then asked the following questions:

> Can you please clarify how to decide for one party or another?
>
> > A. Plaintiff alleges two charges: Charge 1. Negligence, per-se. Charge 2. Premises Liability.
>
> Do each of these need to be proven according to different criteria.

Therefore.

> Charge 1: Are there mitigating or negating ("cannot recover provisions for this charge?)
> Yes/No
>
> Charge 2: What is needed to prove this charge?

Does (sic) all of the definitions that include "Plaintiff may not recover" apply to Charge 1 or Charge 2 or both?

During closing we heard Plaintiff's counsel mention these two charges after they started their closing by stating Plaintiff's two claims:

1. The wall violated code
2. MARTA failed to keep area safe.

The jury is trying to apply the charge in an outline form / step-by-step form. The misunderstanding is that the charge mentions negligence per se and did not mention the premises (sic) of liability nor did it state the two claims of the plaintiff.

We need an (sic) concise format of first how to find for either plaintiff or defendant. Then does the charge help determine percentages.

Nicole Lumpkins, foreman, 12:30 p.m.

(Trial Tr. Vol. 8 Ex., p. 17-18).

In response, the Court gave the following Charge:

> If you determine that Carlos Hicks knew or should have known of the alleged hazard, you must evaluate whether the knowledge of Carlos Hicks of the hazard was equal or superior to that of Defendant MARTA. If you determine that Carlos Hicks had equal or superior knowledge of the hazard, Plaintiffs cannot recover. If, alternatively, you determine that MARTA had superior knowledge of the hazard, you may find in favor of the Plaintiffs. In making such determinations, you may weigh the relative degrees of fault of Carlos Hicks, Defendant MARTA, and any non-parties that appear on the verdict form. You may allocate fault to any or all of those parties or non-parties as long as the allocations add up to 100%.
>
> Plaintiffs have only one claim: premises liability through negligence (failure to exercise ordinary care and/or negligence per se). You have the law and definitions that apply to Plaintiff's claim.

(Trial Tr. Vol. 8 Ex., p. 19)

Late in the afternoon of Thursday, May 10th the jury returned a verdict of $11,250,000.00 in favor of Plaintiffs, reducing the award by apportioning 5% fault to non-party Novarro and 10% fault to Carlos Hicks. Following the Court's entry of judgment, MARTA filed its three post-trial motions which are presently before the Court.

MARTA'S MOTION FOR NEW TRIAL

The giving of an erroneous charge by the court, or failing to give a pertinent charge, is grounds for a new trial under O.C.G.A. § 5-5-24. A jury charge " 'must not be so phrased so as to have the tendency to confuse and mislead the jury or to becloud the issues in the case.'" Crister v. McFadden, 277 Ga. 653, 655 (2004) (quoting Baxter v. Wakefield, 259 Ga. App. 475, 477 (2003)) (holding trial court's charge instructing the jury to consider negligence elements in particular order constituted harmful error). Additionally, the Supreme Court in Pearson et al. v. Tippman Pneumatics, Inc., 281 Ga. 740 (2007) held that where the trial court re-charged the jury following its question on proximate cause, but such recharge failed to accurately and completely instruct the jury on the legal principles of proximate cause [at issue therein] and because it was clear from the proceedings and the questions from the jury that these legal principles were the crux of appellant's case and thus substantial and harmful as a matter of law, reversal was required. Id.; Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp., 288 Ga. App. 350 (2007). See also Bailey v. Annistown Road Baptist Church, Inc., 301 Ga. App. 677 (2009) (holding that trial court's acceptance of jury's first verdict where the jury's questions and lengthy discussion among counsel and the court reflect that the charges and verdict form created substantial uncertainty about the meaning of the jury's initial decision which was based on an erroneous jury charge required that the judgment be vacated).

Among its objections to the Court's charge re-charging on the superior knowledge issue, MARTA argues that the fourth and final charge on this issue (in response to the jury's third question stated above) improperly instructed the jury to weigh the fault of the parties in determining whether MARTA had superior knowledge. In response, Plaintiff argues that the question of fault is inextricably intertwined with the question of constructive knowledge, which the jury must evaluate when considering the question of superior knowledge.

The Court has carefully considered the case law and the thorough, well-reasoned arguments of both Plaintiffs and MARTA on this issue, and finds that there is no basis in Georgia law supporting the fourth and final charge on this issue (i.e., the third re-charge in response to the jury's third question) which instructed the jury that in making the superior knowledge determination, the jury "may weigh the relative degrees of fault of Carlos Hicks, Defendant MARTA, and any non-parties that appear on the verdict form." The Court agrees with MARTA that an evaluation of the parties' and non-parties' "fault" is not a proper basis upon which to determine superior knowledge. In its initial charge, the Court had already correctly charged the jury on the fault analysis, separate and apart from the charges applicable to the jury's evaluation of whether MARTA was negligent and whether Mr. Hicks exercised ordinary care. (Trial Tr. Vol. 8, 1887:5-11, 16-19). Unfortunately, this Court must find that there was error in the response to the jury's third question on the issue by injecting the question of fault as a proper basis for the jury's evaluation of the superior knowledge question. While Plaintiffs cited numerous cases addressing the parties' relative knowledge of the hazard, the Court finds that the question of weighing of the parties' relative knowledge of the hazard (and whether a weighing of that knowledge is appropriate) is a different inquiry from whether the jury should be instructed to consider the parties' and non-parties' fault as a basis for determining

superior knowledge.

Here, as in Pearson and Bailey, the jury asked multiple follow-up questions on superior knowledge/negligence, evidencing a significant confusion on this issue. Pearson, 281 Ga. 740 (2007); Bailey, 301 Ga. App. 677 (2009)). The jury's confusion, coupled with the fact that the Court's fourth and final charge on the issue represented an erroneous statement of legal principles which are most certainly the "crux" of MARTA's case and thus substantial and harmful as a matter of law (Pearson, 281 Ga. 740 (2007), Lawyers Title Ins. Corp., 288 Ga. App. 350 (2007)), requires the Court to GRANT MARTA's Motion for New Trial on this sole basis.

The Court's ruling is based solely on the superior knowledge issue addressed herein. Therefore, the Court does not reach MARTA's other enumerations of error cited in its Motion for New Trial on Special Grounds and Motion for New Trial on General Grounds.

Judgments notwithstanding the verdict are proper only if there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefore, demands a certain verdict. Ogletree v. Navistar Int'l Transp. Corp, 245 Ga. App. 1, 3 (2000). Considering the substantial evidence presented at trial by both parties and that this Court must view the evidence in the light most favorable to the party securing the jury verdict (Ogletree at 4), this Court cannot rule as a matter of law that the evidence demands a verdict in MARTA's favor. Accordingly, the Court DENIES MARTA's Motion for Judgment Notwithstanding the Verdict.

This case will be specially set for jury trial before the undersigned judge on January 28, 2019. As a condition precedent to the trial going forward on said date, the parties hereby are ordered to engage in good faith efforts to settle this matter. The Court would like to discuss the following two ADR options with counsel by conference call on Tuesday, October 2nd at 9:30 am:

(1) proceed with a summary jury trial before this judge on November 5 and 6; and (2) a mediation before Judge Shoob or other mediator mutually agreed upon prior to November 8, 2018. Counsel shall carefully consider this Order and the two options presented by the Court for resolving this matter short of a new trial in January, and be prepared to discuss entry of a post-trial scheduling order during the October 2nd conference call. Defendant MARTA shall provide a conference bridge for this call and inform all parties and the Court of the details for using same.

SO ORDERED, this the 27th day of September, 2018.

Gail S. Tusan, Judge
Fulton County Superior Court
Atlanta Judicial Circuit

cc: All counsel of record