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## ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2013

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2120295

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Shirley Hines

v.

Trinity Contractors, Inc.

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2120296

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Scotty Kelley

v.

Trinity Contractors, Inc.

Appeals from Jefferson Circuit Court  
(CV-10-741 and CV-10-901231)

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PITTMAN, Judge.

In appeal no. 2120295, Shirley Hines appeals from an order of the Jefferson Circuit Court ("the trial court") granting a motion for a summary judgment filed by Trinity Contractors, Inc. ("Trinity"), against her in case no. CV-10-741. In appeal no. 2120296, Scotty Kelley appeals from that same order to the extent the trial court granted a motion for a summary judgment filed by Trinity against him in case no. CV-10-901231, which had been consolidated with case no. CV-10-741. We reverse and remand.

#### Factual Background and Procedural History

Both of these appeals stem from complaints arising out of an automobile accident that occurred on June 1, 2009. The following facts are undisputed. On June 1, 2009, at approximately 7:00 a.m., Hines was traveling on Interstate 59, where two lanes in each direction are separated by a median. Hines was traveling northbound in the left lane next to the median when Hines lost control of her vehicle, causing it to go down into the median and back up into oncoming traffic in a southbound lane. Upon entering the southbound lane, Hines's vehicle struck a black pickup truck that was being driven by

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Kelley, which was catapulted and then hit by an 18-wheel tractor-trailer truck that was being driven by Marshall Kelly Cummings and was owned by Southern Haulers, LLC.

Hines filed a complaint, which was assigned case no. CV-10-741, on March 9, 2010, alleging that a vehicle, previously referred to as a "phantom vehicle," that belonged to Trinity had caused her vehicle to travel off the road and into the median. Hines asserted claims of negligence and wantonness against Trinity and a number of fictitiously named defendants, and she asserted a claim for uninsured- and underinsured-motorist coverage against Farmers Insurance Exchange, with whom Hines had a policy of automobile insurance at the time of the accident. Farmers and Trinity filed separate answers to Hines's complaint.

On April 13, 2010, Southern Haulers filed a complaint asserting claims of negligence and wantonness against Hines, Trinity, and a number of fictitiously named defendants and claims of "negligent and/or wanton entrustment" and "negligence and/or wantonness respondeat superior and/or common law agency and/or vicarious liability" against certain fictitiously named defendants; that complaint was assigned

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case no. CV-10-901231. Hines and Trinity filed separate answers to Southern Haulers' complaint. Trinity subsequently filed a motion requesting that the trial court consolidate case no. CV-10-741 and case no. CV-10-901231 for the purposes of discovery and trial; the trial court granted that motion. Southern Haulers later amended its complaint to add Kelley as a defendant. Kelley filed a cross-claim against Trinity and a number of fictitiously named defendants, asserting claims of negligence and wantonness. Trinity filed an answer to Kelley's cross-claim.

On May 16, 2011, Hines filed in case no. CV-10-901231 a motion for a summary judgment as to all claims asserted against her by Southern Haulers in that action. On June 17, 2011, the trial court entered an order in case no. CV-10-901231 granting Hines's summary-judgment motion as to the claims of negligence and wantonness asserted against her by Southern Haulers. Additionally, having granted Hines's summary-judgment motion, the trial court dismissed all claims that had been asserted against Hines in Southern Haulers' complaint.

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Southern Haulers and Kelley filed a joint stipulation for dismissal, agreeing to dismiss Southern Haulers' claims against Kelley; the trial court, pursuant to that stipulation, dismissed Southern Haulers' claims against Kelley. On January 26, 2012, Kelley and Hines filed a joint motion to realign the parties; the trial court granted that motion, realigning Kelley and Hines as plaintiffs with Southern Haulers.

On August 15, 2012, Trinity filed a motion for a summary judgment as to all claims asserted against it. The trial court entered a judgment on November 6, 2012, granting Trinity's motion for a summary judgment on all claims asserted against it. The trial court stated, in pertinent part, that

"the totality of the evidence overwhelmingly indicates that the phantom vehicle was not a Trinity Contractors vehicle. The subsequent 'memory' of Shirley Hines would, at most, constitute only a scintilla of evidence but cannot reasonably be deemed to constitute substantial evidence for which this case should proceed to trial."

The trial court directed the entry of a final judgment, pursuant to Rule 54(b), Ala. R. Civ. P. Both Hines and Kelley filed timely notices of appeal to the supreme court; that court transferred the appeals to this court, pursuant to Ala.

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Code 1975, § 12-2-7(6), and this court consolidated the appeals, ex mero motu.

### Discussion

On appeal, both Hines and Kelley argue that the trial court erred in granting the summary-judgment motion of Trinity because, they say, there remained a genuine issue of material fact as to whether the truck that ran Hines off the road belonged to Trinity.

"We review a summary judgment de novo. American Liberty Ins. Co. v. AmSouth Bank, 825 So. 2d 786 (Ala. 2002).

"We apply the same standard of review the trial court used in determining whether the evidence presented to the trial court created a genuine issue of material fact. Once a party moving for a summary judgment establishes that no genuine issue of material fact exists, the burden shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact. "Substantial evidence" is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." In reviewing a summary judgment, we view the evidence in the light most favorable to the nonmovant and entertain such reasonable inferences as the jury would have been free to draw.'

"Nationwide Prop. & Cas. Ins. Co. [ v. DPF Architects, P.C.], 792 So. 2d [369] at 372 [(Ala.

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2000)] (citations omitted), quoted in American Liberty Ins. Co., 825 So. 2d at 790."

Potter v. First Real Estate Co., 844 So. 2d 540, 545 (Ala. 2002).

Trinity attached a number of exhibits to its summary-judgment motion. One of the exhibits was an affidavit signed by Hines on July 21, 2009, in which Hines stated that she had been forced off the inside lane of Interstate 59 into the median, where she lost control of her vehicle. Hines stated in the affidavit: "The vehicle that forced me off the highway was a rather large truck, similar to the ones you see Alabama Power use, which was white with blue writing on the side. That was all I was able to see prior to being forced off [the road] by it." Trinity also attached the affidavit and excerpts of the deposition of Chari Dickson Fikes, who had been driving in a vehicle behind Hines's vehicle at the time of the accident. Fikes stated in her affidavit that the truck that forced Hines out of her lane and into the median was larger than a pickup truck and was white with blue letters on the side. In her deposition, Fikes testified that she was driving in a vehicle following behind Hines's vehicle, that a white truck in the right lane "got over on [Hines]," and that

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Hines's vehicle had swerved into the median and onto the other side of the interstate. She stated that the majority of the truck was white but that she had noticed blue letters on the door of the truck. She stated that she saw only the left side of the truck and that she did not remember what was written on the truck. She stated that the driver of the truck was a white male with a short haircut. Fikes testified that the truck that had swerved near Hines did not stay at the scene of the accident.

Trinity also attached portions of the transcript of Hines's deposition testimony to its summary-judgment motion. In her deposition, Hines testified that, after the accident, a white male, who, she said, was about five foot to five-foot, two inches tall, had salt and pepper hair, and was wearing a navy-blue work uniform with a nametag, was speaking with someone in the crowd and that she had believed he was the driver of the white truck because of the things he was saying. Hines testified in her deposition that she could see the writing on the truck when it swerved near her and that it had read "Trinity Contractors." She stated that the truck was white and that the lettering "was in like a round circle. The



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blue was there and the word Trinity Contractors." She stated that the writing was on the driver's side door and that the truck was "kind of like a utility truck." She stated that there were toolboxes on the side of the truck with a hatch. Hines also testified that she had been talking about the accident with her daughter when she first mentioned that the truck was a Trinity truck and that she had contacted her attorney at that time. She stated that her children had continued to ask her things so that she "could try to rehash and remember what [had] happened." She stated that it was one or two weeks after the accident that she had recalled that it was a Trinity truck that had forced her from the roadway.

Trinity also attached excerpts of the transcript of Eugene C. Jones's deposition to its summary-judgment motion. Jones, the president of Trinity, testified in his deposition that Trinity's trucks are white and that the lettering on the trucks is royal blue and light blue, with the "C" in "Contractors" overlaid on the "T" of Trinity. He testified that nine Trinity trucks would fall within Hines's description of the truck that ran her off the road and that all nine were white with blue lettering on the door. Jones testified that,

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on the morning of the accident, the majority of Trinity's workers were signed in at a service meeting at Trinity's office. With regard to job-site trucks, Jones stated that they have sign-in sheets that workers sign indicating the time they report to the sites. He testified that the keys to the trucks that are not assigned to a worker are kept in a lock box and that the unassigned trucks are kept in the yard at Trinity's office. Jones stated that, on the day of the accident, two of the trucks that matched Hines's description were located at Trinity's job site at the north pavilion at the University of Alabama at Birmingham ("UAB"); he stated that one was being driven by Keith Jones and the other by Michael Bearden. He stated that there were no sign-in sheets for the UAB job site. He stated that the workers who drive utility trucks that are assigned to job sites are allowed to take the trucks home and to drive the trucks directly to the job site from their homes. He testified that those workers are not supposed to use the trucks for personal use. Jones stated that the workers have the option of wearing a Trinity t-shirt, but, he said, the t-shirts do not have name tags on them.

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Trinity also attached the affidavit of Aimee Jones, the Service Group Office Manger for Trinity. In her affidavit, Aimee stated that she was responsible for dispatching Trinity employees who are assigned company-owned vehicles from 6:00 a.m. to 7:30 a.m., Monday through Friday. According to Aimee, on the date of the accident, Trinity owned 31 company vehicles and only 9 of those vehicles "are remotely similar to the description of the subject 'phantom vehicle'" described by Hines. She stated that the words "Trinity Contractors" appear in blue lettering on the side of those nine vehicles. Aimee stated that, on the morning of the accident, of the nine vehicles, six were parked at the site of Trinity's office, two were at Trinity's job site at UAB, and one was located at a job site at Gardendale High School. According to Aimee, none of the nine vehicles had been in the vicinity of Interstate 59 near Fairfield at any point around the time of the accident at 7:15 a.m. Finally, Aimee stated in her affidavit that, on the date of the accident, Trinity did not have any employee whose appearance would have been even remotely similar to the driver of the vehicle as described by Hines in her deposition.

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Trinity also submitted excerpts of the transcript of Marshall Kelly Cummings's deposition testimony. Cummings, who was traveling in the southbound lane at the time of the accident, testified that he had seen Hines's vehicle swerve but that he had not seen a phantom vehicle cause her to swerve. He stated that he "saw the whole thing happen" and that "there wasn't a phantom vehicle there."

Hines and Kelley filed responses to Trinity's summary-judgment motion;<sup>1</sup> Southern Haulers filed a motion joining in Hines's and Kelley's responses. Along with her response, Hines filed an affidavit in which she stated that, at the time she signed her previous affidavit in July 2009, she could not recall the name of the company written on the side of the white truck that had caused her vehicle to travel into the median, although she had seen it on the day of the accident. Hines stated that she could see the image and writing in her head but that she could not initially recall what the writing had said. Hines stated in her affidavit that, after

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<sup>1</sup>The parties and the trial court refer to a response filed by Kelley; however, Kelley's response to Trinity's summary-judgment motion does not appear in the record in either appeal no. 2120295 or appeal no. 2120296.

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discussing the accident with her family and replaying it in her head, she had recalled the name on the side of the truck as "Trinity Contractors."

In granting Trinity's summary-judgment motion, the trial court observed that the only evidence linking Trinity to the accident was Hines's deposition testimony and her subsequent affidavit attempting to explain her failure to recall the writing on the side of the white truck at the time she submitted her affidavit in July 2009.

Both Hines and Kelley argue on appeal that Hines's deposition testimony describing the truck as a Trinity truck is not contradictory to her previous affidavit testimony. Trinity, on the other hand, asserts, citing McGough v. G & A, Inc., 999 So. 2d 898, 904 (Ala. Civ. App. 2007), and Tittle v. Alabama Power Co., 570 So. 2d 601, 604 (Ala. 1990), that Hines cannot create an issue of fact with her subsequent deposition testimony, in which she identified the truck that ran her vehicle off the road as a Trinity truck, because, it argues, that testimony directly contradicts her earlier affidavit testimony in which she stated that all she had seen was that the truck was large, white, and had blue writing. In McGough,

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this court stated that "[t]he court may not consider deposition or affidavit testimony that directly contradicts earlier deposition or affidavit testimony without adequate explanation." 999 So. 2d at 904 (emphasis added). Likewise, in Tittle, the Alabama Supreme Court determined that when seemingly inconsistent testimony has been clarified or read in context to reveal its consistency, the later testimony is, in fact, admissible. 570 So. 2d at 604-05. In the present case, the statement in Hines's first affidavit that "[t]he vehicle that forced [her] off the highway was a rather large truck, similar to the ones you see Alabama Power use, which was white with blue writing on the side" was consistent with the testimony in her later deposition and her second affidavit. The statement in Hines's first affidavit that blue writing on the side of a white truck of the type Alabama Power uses "was all [she] was able to see prior to being forced off [the road] by [the white truck]" implies, although it does not expressly state, that she could not read what the blue writing on the side of the white truck said. That implication is inconsistent with her testimony in her later deposition and second affidavit. However, in both Hines's later deposition

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testimony and her second affidavit, she explained that, although she did not recall what the blue writing said when she signed her first affidavit, after thinking further about what she had seen when the accident occurred, she was able to picture in her mind what words were written in blue on the side of the white truck and that what was written in blue was "Trinity Contractors." Thus, Hines clarified the apparent discrepancy between the statement in her first affidavit that blue writing on the side of a white truck of the type Alabama Power uses "was all [she] was able to see prior to being forced off [the road] by [the white truck]" and the testimony in her later deposition and her second affidavit indicating that what was written in blue writing on the side of the white truck was "Trinity Contractors." Because Hines clarified that apparent discrepancy, we conclude that the testimony in Hines's deposition and her second affidavit indicating what was written on the side of the truck that caused her vehicle to swerve into the median was "Trinity Contractors" was proper evidence for the trial court to consider in ruling on Trinity's summary-judgment motion. See McGough, supra.

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Trinity cites Hamilton v. Plantation Transport, Inc., 583 So. 2d 266 (Ala. 1991), in support of its assertion that the trial court properly granted its summary-judgment motion. In Hamilton, a driver that had been run off the road testified that the truck that had caused the collision had a license plate with a white background and green print and also presented evidence indicating that the company whose truck allegedly caused the accident was the only business located on the road on which the accident occurred. 583 So. 2d at 266. The company, in turn, presented evidence indicating that its trucks had white and blue license plates and that it was not the only business with access to the road on which the accident had occurred. Id. The Alabama Supreme Court affirmed the summary judgment in the company's favor based on the lack of substantial evidence of a genuine issue of material fact. Id.

We conclude that the present case is distinguishable from Hamilton. In this case, although Trinity produced evidence indicating that its trucks that matched the description of the truck that ran Hines into the median were not on or near Interstate 59 on the date and time of the accident, Hines



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presented testimony in her deposition and her second affidavit indicating that "Trinity Contractors" was written in blue on the side of the truck that caused her vehicle to swerve into the median, which constituted substantial evidence tending to prove that it was a truck owned by Trinity that had caused Hines to swerve into the median. Viewing the evidence in a light most favorable to Hines and Kelley, as we are required to do, we conclude that a genuine issue of material fact exists as to whether a truck owned by Trinity was responsible for the accident. We, therefore, reverse the summary judgments entered in favor of Trinity in case no. CV-10-741 and in case no. CV-10-901231, and we remand the cases to the trial court for further proceedings consistent with this opinion.

2120295 -- REVERSED AND REMANDED.

2120296 -- REVERSED AND REMANDED.

Thomas and Moore, JJ., concur.

Thompson, P.J., and Donaldson, J., dissent, without writings.