**IN THE SUPREME COURT OF GEORGIA**

| | |
|---|---|
| **BRIANNA JOHNSON,**<br>**Petitioner-Plaintiff,**<br>**v.**<br>**AVIS RENT A CAR SYSTEM, LLC, et. al.,**<br>**Respondents-Defendants.** | **Supreme Court No. S20G0695**<br>**Court of Appeals Nos. A19A0928 A19A0929** |
| **ADRIENNE DANILLE SMITH,**<br>**Petitioner-Plaintiff,**<br>**v.**<br>**AVIS RENT A CAR SYSTEM, LLC, et. al.,**<br>**Respondents-Defendants.** | **Supreme Court No. S20G0696**<br>**Court of Appeals Nos. A19A1503 A19A1504** |

# AMICUS BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS AVIS RENT A CAR SYSTEM, LLC AND AVIS BUDGET GROUP, INC.

Jeffrey S. Ward, President
Elissa Haynes, Chair
Philip Thompson, Co-ViceChair
Anne Kaufold-Wiggins, Co-Vice Chair
Amicus Curiae Brief Committee
Georgia Defense Lawyers Association
P.O. Box 60967
Savannah, Georgia 31420
(912) 349-3169 (telephone)

Philip W. Savrin
Georgia Bar No. 627836
Alexia R. Roney
Georgia Bar No. 581777
Freeman Mathis & Gary, LLP
100 Galleria Parkway, Suite 1600
Atlanta, GA 30339-5948
(770) 818-0000(telephone)

*On behalf of the Georgia Defense Lawyers Association*

COMES NOW, the Georgia Defense Lawyers Association, though counsel, and files this Amicus Brief in Support of Respondent-Defendants Avis Rent a Car System, LLC, and Avis Budget Group, Inc. (collectively "Avis").

## INTRODUCTION

Byron Perry, who was a car washer for an independently owned company operating under the Avis brand, stole a rental vehicle after the lot had closed. Five hours later and several miles away, Perry fled from the police in the stolen vehicle, ultimately crashing it into a brick wall where Brianna Johnson and Adrienne Smith were sitting. Yet, juries found Avis to be entirely at fault for a $7 million verdict in favor of Johnson and 50% at fault for a $47 million verdict in favor of Smith. The Court of Appeals reversed on several grounds, however, including two issues that this Court has agreed to review: (1) whether Perry's criminal actions broke the chain of causation of any breach of a duty owed by Avis; and (2) whether Perry was acting under the color of his employment when the Petitioners were injured.

As explained below, this Court should affirm the judgment of the Court of Appeals because the jury's finding of causation by Avis usurped the legal determination of whether Avis had a duty in tort in the first place. Duty is a question of law, and this Court has made clear that there is no common law duty to keep "all the world" safe from harm. *Dep't of Labor v. McConnell*, 305 Ga. 812, 815 (2019). As the facts presented in this case clearly demonstrate, the question of a duty is

necessarily a legal matter so as to guard against an employer becoming the insurer of an employee's criminal actions that are wholly adverse to the employer's interests, let alone committed miles and hours away from the place and time of his employment.

The concern is more than purely legal as the amount of damages awarded in these cases follows a recent trend of so-called "nuclear verdicts" that impose hidden but extreme costs on Georgians in the form of increased consumer prices, higher insurance premiums, and a disincentive for businesses. In May of this year, THE DAILY REPORT ran several articles addressing the trend of "social inflation" and "nuclear verdicts," including in Georgia. Greg Land, Insurance Defense Lawyers Talk 'Nuclear', THE DAILY REP. (May 18, 2020); Greg Land,Tort Reform Capping Nuclear Insurance Verdicts Stymied by Covid-19, THE DAILY REP. (May 11, 2020); Greg Land, 'Reptile' Co-Author Don Keenan Says Big Verdicts Reflect Justice, THE DAILY REP. (May 14, 2020). When juries hold Avis responsible for Petitioners' injuries even though it was Perry who stole the car, ran from police, and struck bystanders, the specter of an inflamed jury becomes more probable than possible. The Court should not abdicate its responsibility to set the legal parameters of duty and proximate cause before the case reaches the jury.

## STATEMENT OF INTEREST

The Georgia Defense Lawyers Association ("GDLA") is an association of more than 950 Georgia lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice. The GDLA and its members are interested in this Court clarifying the parameters of an employer's tort liability for the criminal conduct of its employees away from the business premises and outside the scope of their employment.

## ARGUMENT AND CITATION OF AUTHORITIES

### A. Petitioners' injuries were too remote from Perry's employment to impose a legal duty on Avis to protect them from harm.

The first issue presented for review is whether Perry's criminal acts were the proximate cause of Petitioners' injuries such that Avis was entitled to judgment as a matter of law. The question of causation is not relevant, however, if no duty was owed in the first place. *See City of Douglasville v. Queen*, 270 Ga. 770, 771 (1999); *Goodhart v. Atlanta Gas Light Co.*, 349 Ga. App. 65, 69 (2019). *See also Dep't of Labor v. McConnell*, 305 Ga. 812, 815 (2019) (rejecting the concept of a common law duty to all the world).

Importantly, whether a duty exists is a legal question for the *court* to resolve and *not* a jury. *Rome v. Jordan*, 263 Ga. 26, 27 (1993). As this Court has explained, "[t]he legal duty is the obligation to conform to a standard of conduct under the law for the protection of others against unreasonable risks of harm." *Rasnick v. Krishna Hosp., Inc.*, 289 Ga. 565, 566 (2011). Further,

> the innocence of the plaintiff is immaterial to the existence of the legal duty on the part of the defendant in that the plaintiff will not be entitled to recover unless the defendant did something that it should not have done, i.e., an action, or failed to do something that it should have done, i.e., an omission, pursuant to the duty owed the plaintiff under the law.

*Id*. "The duty can arise either from a valid legislative enactment, that is, by statute, or be imposed by a common law principle recognized in the caselaw." *Id*. at 566-67; *Diamond v. DOT*, 326 Ga. App. 189, 195 (2014).

Stated in plain terms, Avis had no legal obligation to protect Petitioners from harm committed by a rogue employee who stole a vehicle from the rental car lot and then collided into a brick wall hours later and several miles away. As recognized by *Sotomayor v. TAMA I, LLC*, 274 Ga. App. 323, 327 (2005),

> "one is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen or what is only remotely and slightly probable."

*Id*. (*quoting Feldman v. Whipkey's Drug Shop*, 121 Ga. App. 580, 581 (1970)). Further,

> An event is not regarded as being foreseeable if it is one in the nature of an extraordinary coincidence, or a conjunction of circumstances, or which would not occur save under exceptional circumstances; if it is unusual and unlikely to happen, or if it is a rare event in experience, or if other and contingent experiences preponderate largely in causing the injurious effect.

*Id*. (*quoting Standard Oil Co. v. Harris*, 120 Ga. App. 768, 774 (1969)).

Consistent with these principles, the courts in Georgia have held uniformly that "negligence which results in the theft of a vehicle later involved in a collision is not sufficient negligence to authorize a claim against the owner." *J. C. Lewis Motor Co. v. Giles*, 194 Ga. App. 472, 473 (1990). In *J.C. Lewis*, the dealership's negligence in leaving the keys in the vehicle did not support a claim for an injury caused by the car thief. As stated over a century ago, injury resulting "from the immediate negligence of a conscious, efficient, and responsible actor, with whose conduct the [defendant] is in no wise bound by any privity, the leaving of the machine unguarded is not the proximate cause of the injury." *Lewis v. Amorous*, 3 Ga. App. 50, 56 (1907). *See also Long v. Hall Cty. Bd. of Comm'rs*, 219 Ga. App. 853, 855 (1996) (finding no liability for negligently creating conditions that allowed a convict to steal a vehicle and cause injuries to the public); *Price v. Big Creek of Ga.*, 191 Ga. App. 534, 535 (1989) (finding no liability by the employer for injuries caused by a car thief where the employee negligently left the keys in the truck); *Dunham v. Wade*, 172 Ga. App. 391, 393 (1984) (finding no liability for injuries caused by a car thief where the operator negligently left the keys in the vehicle).

The legal question presented in the cases at bar, therefore, is whether Perry's decision to run from the police and crash into a wall where Petitioners sat was legally too remote from anything Avis did or did not do to hold Avis to a duty to safeguard Petitioners from harm. To create such duty, this Court would have to ask the following questions:

1. Were Petitioners' injuries likely to happen as a result of Perry's theft of the vehicle from Avis, or were their injuries "unusual and unlikely to happen?"

2. Were Petitioners' injuries "in the nature of an extraordinary coincidence, or a conjunction of circumstances or which would not occur save in exceptional circumstances?"

3. Was Perry's use of the vehicle a "rare event in experience or if other and contingent experiences preponderate largely in causing the injurious effect?"

The answers to these questions must emphatically be that while Avis may have been able to control access to the vehicle, it had no ability to influence Perry's decisions to run from the police in a reckless manner that caused injury. Avis had every incentive to prevent Perry from stealing Avis's own property, but to hold Avis liable for failing to prevent Petitioners' injuries under these circumstances would fly in the face of common sense and the law. The Court of Appeals' decision on this issue should be affirmed.

**B. <u>Perry was not acting under the color of employment as a matter of law</u>**

The second issue for review is whether Avis was entitled to judgment as a matter of law on the negligent hiring and retention claim brought against Perry's

employer (CSYG, Inc.) in the *Smith* case. In that matter, Avis was deemed to be vicariously liable for CSYG's conduct; thus, Avis's liability turns on whether Perry was acting "under color of employment" by CSYG when he crashed the stolen vehicle into the wall where Petitioners sat.

In her complaint, Petitioner Smith alleged that CSYG and its owner, Yonas Gebremichael, were negligent in hiring and retaining Perry. In Georgia, an employer can be liable for negligent hiring and retention if the employer "knew or in the exercise of ordinary care should have known that [the employee] was unsuitable for that position because he posed a reasonably foreseeable risk of personal harm" to others. *Munroe v. Universal Health Servs., Inc.* 277 Ga. 861, 863 (2004). Where,as here, the employee was clearly not furthering the employer's business interests, the employee can nevertheless be liable if the employee was acting "under color of employment." *See Harvey Freeman & Sons v. Stanley*, 259 Ga. 233, 234 (1989); *TGM Ashley Lakes v. Jennings*, 264 Ga. App. 456, 459 (2003).

Smith cannot make a credible claim that Perry was acting even under "color of employment" when he *stole* the vehicle from the Avis lot and used it to run from the police many hours and miles away from the place and time of his employment. The facts presented in this case are in stark contrast to those in *Graham v. City of Duluth*, 328 Ga. App. 496 (2014), touted by Smith as analogous to her claim. In *Graham*, a police officer used his badge and pepper spray – that were issued to him

by his government-employer to perform his duties as an employee – to assault the plaintiff. As recited in the parallel criminal case against the officer, he had "approached [plaintiff's] window, stated that he was a police officer [and] displayed a police badge" only to then assault her with his pepper spray when she obeyed by stepping out of the car. *Dailey v. State*, 313 Ga. App. 809, 810 (2012).

Whereas the officer in *Graham* used his position as a police officer to assault the plaintiff, there is nothing remotely akin to this in Perry's decision to run from the police and crash a vehicle into the wall where Smith sat. The sole connection to Avis was that Perry had stolen the vehicle from Avis's lot many hours before and miles away. Whether Perry wore an Avis hat or uniform, as Smith contends, is irrelevant because he did not use his employment to run from the police and crash into the wall. Nor did Avis provide Perry with the vehicle that he stole after hours from the lot. Indeed, Perry could have used any vehicle in the same manner and with precisely the same results. As Judge McFadden aptly stated in the decision below, "none of his conduct demonstrates that Perry was acting under a pretense of employment when he injured Smith. 353 Ga. App. at 30.

Similar to the duty argument in the preceding section of this brief, Avis had no ability to safeguard Smith from Perry's conduct - conductthat was not only outside the scope of Perry's employment *but antithetical thereto*.

In sum, a negligent hiring and retention claim cannot extend to Petitioner's

injury given the complete absence of any nexus between the injury and Perry's duties as an employee. A contrary ruling would create a duty by employers to protect members of the general public, no matter how remote or fortuitous the injury may be, which runs counter to the firmly-established law of this State that no such duty is owed "to all the world." *See McConnell, supra.* This Court should therefore affirm on this ground as well.

## CONCLUSION

For the reasons stated, GDLA urges this Court to reject Petitioners' efforts to expand the tort duties and liabilities in unfounded and unprecedented ways. Instead, the imposition of tort liabilities must be constrained to harm that a party can reasonably be expected to prevent.

**GEORGIA DEFENSE LAWYERS ASSOCIATION**

Jeffrey Ward, President
Elissa B. Haynes, Chair
Anne Kaufold-Wiggins, Co-Vice Chair
Philip Thompson, Co-Vice Chair
Amicus Curiae Brief Committee
P.O. Box 60967
Savannah, Georgia 31420
(912) 349-3169

*/s Philip W. Savrin*
Philip W. Savrin
Georgia Bar No. 627836
Alexia R. Roney
Georgia Bar No. 581777
Freeman Mathis & Gary, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339-5948
(770) 818-1422 (telephone)
(770) 937-9960 (facsimile)

*On behalf of the Georgia Defense Lawyers Association*

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **AMICUS BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS AVIS RENT A CAR SYSTEM, LLC AND AVIS BUDGET GROUP, INC.** upon all parties electronically via the Court's SCED system under Georgia Supreme Court Rule 14 and by depositing a copy of same in the United States Mail, postage pre-paid, addressed as follows:

Brantley C. Rowlen
Jason P. Wright
Lewis Brisbois Bisgaard & Smith, LLP
1180 Peachtree Street N.E., Suite 2900
Atlanta, GA 30309

William T. Casey, Jr.
Swift Curie McGhee & Hiers LLP
1355 Peachtree Street NE, Suite 300
Atlanta, GA 30309

Laurie Webb Daniel
Matthew D. Friedlander
Holland & Knight LLP
1180 West Peachtree Street N.E.
Suite 1800
Atlanta, GA 30309

G. Lee Welborn
Downey & Cleveland, LLP
288 Washington Avenue
Marietta, GA 30060

John D. Hadden
The Hadden Law Firm, LLC
44 Broad Street, Suite 600
Atlanta, GA 30303

Nathan A. Gaffney
Fried Rogers Goldberg LLC
3550 Lenox Road, N.E., Suite 1500
Atlanta, GA 30326

Darren W. Penn
Penn Law LLC
4200 Northside Parkway NW
Building One, Suite 100
Atlanta, GA 30327

Brian D. Rogers
Rogers & Fite LLC
4355 Cobb Parkway, Suite J564
Atlanta, GA 30339

This the 12th day of November, 2020

*/s Philip W. Savrin*

Philip W. Savrin
Georgia Bar No. 627836
Alexia R. Roney
Georgia Bar No. 581777
Freeman Mathis & Gary, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339-5948
(770) 818-1422 (telephone)
(770) 937-9960 (facsimile)

*On behalf of the Georgia Defense Lawyers Association*

**GEORGIA DEFENSE LAWYERS ASSOCIATION**

Jeffrey Ward, President
Elissa B. Haynes, Chair
Anne Kaufold-Wiggins, Co-Vice Chair
Philip Thompson, Co-Vice Chair
Amicus Curiae Brief Committee
P.O. Box 60967
Savannah, Georgia 31420
(912) 349-3169