

**IN THE COURT OF APPEALS  
STATE OF GEORGIA**

IN/EX SYSTEMS, INC.,

Appellant,

v.

TAHSIN MASUD, AS FATHER  
AND NEXT OF FRIEND OF SANA  
MASUD, A MINOR, AND TAHSIN  
MASUD, AS PERSONAL  
REPRESENTATIVE AND AS  
ADMINISTRATOR OF THE  
ESTATE OF AILA T. MASUD,  
DECEASED,

Appellee.

Appeal No.: A19A0805

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**AMICUS CURIAE BRIEF OF  
THE GEORGIA DEFENSE LAWYERS ASSOCIATION**

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**I. INTRODUCTION AND STATEMENT OF INTEREST**

The Georgia Defense Lawyers Association (“GDLA”) is an association of approximately 900 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. Though its members are diverse, they share a common interest in ensuring well-reasoned and longstanding Georgia precedent is applied consistently and predictably for the benefit of the clients its members serve.

The GDLA respectfully submits this Amicus Curiae Brief to demonstrate the trial court’s error in denying summary judgment to an employer under the doctrine of respondeat superior and infinitely expanding an employer’s vicarious liability for an employee’s negligent maintenance of his personal vehicle where the alleged wrong of the employee did not depend upon his employment or any characteristic thereof, and more importantly, where the employer did not cause the wrong and could not have reduced the probability of the wrong occurring. The citizens of Georgia, and especially Georgia employers whose employees operate personal vehicles for work, have an interest in upholding and advancing the policy considerations behind

respondeat superior and avoiding trial court Orders with irreconcilable positions surrounding an employer's vicarious liability.

Accordingly, this Court should reverse the trial court's denial of Defendant In/Ex's motion for summary judgment.

## **II. ARGUMENT AND CITATION OF AUTHORITY**

At issue in this case is the downstream confusion created by the trial court holding that an employer has no duty to inspect an employee's personal vehicle yet noting that the act of an employee in operating an unsafe vehicle may implicate an employer's liability under a theory of respondeat superior. This Court should reverse the Opinion below as it unjustifiably and infinitely expands the scope of an employer's duty and potential liability for an employee's maintenance and operation of his or her personal vehicle while serving no benefit to the safety of the motoring public.

### **A. An Employer Cannot be Vicariously Liable for an Employee's Actions Performed Outside the Scope of Employment.**

Appellee suggests that In/Ex has "simply misconstrued" the "actionable negligence" and "negligent act" at issue in this case. Br. of Appellee at 20. However, it is largely immaterial whether this Court finds the negligent act at issue in this case to be Green's negligent maintenance of his personal vehicle, which was performed three months before the collision, or Green's purportedly knowing operation of his unsafe vehicle. The imposition of vicarious liability is improper under either "act".

Vicarious liability cannot attach to In/Ex unless it is shown that Green was acting in the course and scope of his employment at the time of the negligent act.<sup>1</sup> *Dougherty Equipment Co., Inc. v. Roper*, 327 Ga. App. 434, 436 (2014).

We first address Appellant’s position that the negligent act at issue was Green’s knowing operation of an unsafe vehicle. “To hold a master liable for a tort committed by his servant . . . [t]he test is not that the act of the servant was done during the existence of the employment, but whether the servant was at that time serving the master.” *Tyner v. Comfort Rest Sleep Products, Inc.*, 236 Ga. App. 423, 424 (1999) (emphasis in original). Further, “[i]t is well-established that in the absence of special circumstances **an employee acts only for her own purpose and not for those of her employer in going to and from work in an automobile.**” *Id.* (emphasis added).

Appellee notes that Green was on his way from one In/Ex job site to another at the time of this collision. Br. of Appellee at 8. Going from one job site to the next should not be treated any differently than driving to and from an employer’s physical

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<sup>1</sup> Appellee incorrectly asserts that In/Ex **concedes**, for purposes of this appeal, that Green was acting in the course of scope of his employment at the time of the collision. Br. of Appellee at 19. In/Ex made no such concession. Rather, In/Ex explicitly notes that it “**does not concede that Green was “on the job” or in the course and scope of employment at the time of this accident**” yet reasons that the question is not necessary for purposes of their appeal and even if the Court assumed *arguendo* that Green was acting in the course and scope of his employment, it would still be improper to impose vicarious liability on In/Ex. Br. of Appellant at 4. (emphasis added).

office for respondeat superior purposes. More importantly, the key factor is whether the specific act benefited the employer's business.<sup>2</sup> *CGL Facility Management, LLC v. Wiley*, 328 Ga. App. 727, 731 (2014); *see also Dougherty Equipment Co., Inc. v. Roper*, 327 Ga. App. 434, 437 (2014) (finding vicarious liability to be improper where employee was driving a van to fulfill his personal duty of arriving at work on time, and no evidence showed that he was undertaking a duty at his employer's direction at the time of the accident). It would defy logic to conclude an employee's act of knowingly operating an unsafe vehicle benefits his employer.

While it is true that Green was charged with Operation of Unsafe Vehicle, in violation of O.C.G.A. § 40-8-7, this does not amount to Green's **knowledge**, actual or constructive, that he was operating an unsafe vehicle **at the time of** Plaintiff's injury. *See Nelson v. State*, 224 Ga. App. 623, 624 (1997) (holding O.C.G.A. § 40-8-7 is a strict criminal liability statute where a showing of mens rea or guilty knowledge on the part of the violator is unnecessary). Further, as this Court has held, a violation of O.C.G.A. § 40-8-7 constitutes a breach of duty solely on the **operator** of the unsafe vehicle. *Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 310 (2008) (finding that O.C.G.A. § 40-8-7 confers no duty of inspection upon the

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<sup>2</sup> Georgia courts also consider the "special mission" exception which applies to a special or uncustomary request of an employer to an employee. *Betsill v. Scale Systems, Inc.*, 269 Ga. App. 393, 395-96 (2004). There is nothing in the record to suggest that Green was on a "special mission" at the time of this collision.

employer but rather upon the driver of the vehicle at issue).

A few days after installing the wheel on his truck, which occurred three months prior to this collision, Green admits that he noticed some of the wheel nuts had loosened but notes that upon making this observation, he tightened all of the wheel nuts. *See* R. at 2521, Vol. 17. More importantly, after re-tightening the wheel nuts, Green **denies** that he should have expected them to loosen again. *Id.* Appellee's position that "Green had plenty of warning that something was wrong and unsafe with the truck" amounts to nothing more than mere speculation and conjecture which is insufficient to defeat summary judgment. *State v. Rozier*, 288 Ga. 767, 768 (2011).

The trial court record is devoid of evidence that Green **knew or should have known** of an issue with his vehicle **at the time of the collision**, which eliminates an actionable negligence claim for which In/Ex could be held vicariously liable. While Appellee relies upon the decisions of this Court which have found "[t]he **owner or driver** of a motor vehicle must exercise reasonable care in the inspection of his machine to discovery any defects . . . and is chargeable with knowledge of any defects which such inspection would disclose", Appellee fails to establish how this duty of inspection is shifted to the owner or driver's employer. *Fouts v. Builders Transp., Inc.*, 222 Ga. App. 568 (1996) (emphasis added). Moreover, the trial court explicitly held "**an employer does not have a duty to ensure the safety of [a]**

**vehicle”** and thus found that In/Ex had no duty to inspect Green’s vehicle prior to this collision. R. at 2500-01, Vol. 18. (emphasis added).

The other “act” at issue, Green’s negligent maintenance of his personal vehicle three months before the collision, is likewise insufficient and far too removed for imposing vicarious liability on In/Ex. Holding an employer vicariously liable for the acts of an employee who negligently maintains his or her personal vehicle, on grounds that the poorly-performed maintenance somehow benefited the employer or because the employer reimbursed the employee for repairs and maintenance<sup>3</sup>, obliterates the requisite proximate cause component of a viable negligence action.

**B. Public Policy is Thwarted by Imposing Liability on an Employer for an Employee’s Negligent Maintenance and/or Operation of a Purportedly Unsafe Motor Vehicle.**

An employer is not the insurer of an employee or third party’s safety. Rather, an employer’s liability under the doctrine of respondeat superior is imposed for three policy reasons: “(1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim’s losses

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<sup>3</sup> The fact that an employer reimburses or otherwise provides compensation to an employee for travel or mileage is not determinative of a finding of vicarious liability. *Gassaway v. Precon Corp.*, 280 Ga. App. 351 (2006) (holding summary judgment for employer was proper where employee was operating a personal vehicle at the time of the collision, though not in the course and scope of employment, received a per diem for lodging, and where employer’s policy was to reimburse employees for mileage when operating their personal vehicles.)

will be equitably borne by those who benefit from the enterprise that gave rise to the injury.” *Hicks v. Heard*, 286 Ga. 864, 875 (2010).

Imposing liability on Defendant In/Ex under a respondeat superior theory does nothing to prevent the recurrence of its employee, or any employee of In/Ex, from negligently maintaining a personal vehicle or knowingly operating an unsafe vehicle. Judge Posner demonstrates this non-deterrence concept in a case involving an alarm company’s failure to notify the fire department of a fire in Plaintiff’s home upon the alarm company’s receipt of an alarm signal. *Edwards v. Honeywell, Inc.*, 50 F.3d 484, 485-86 (7<sup>th</sup> Cir. 1995). In *Honeywell*, Judge Posner noted that “[t]he provider of an alarm service not only has no knowledge of the risk of fire in its subscribers’ premises, and no practical ability to reduce that risk . . . it also lacks knowledge of the risk of a fire to firemen summoned to extinguish it.” *Id.* at 490-91. This is because the “risk depends not only upon the characteristics of the particular premises but also on the particular techniques used by each fire department, the training and qualifications of the firemen, and the quality of the department’s leadership.” *Id.* at 491. Similarly, Defendant In/Ex had no knowledge of the risk that Green would negligently maintain his personal vehicle, no ability to prevent Green from negligently maintaining his personal vehicle or from operating a negligently maintained vehicle, and no knowledge of the maintenance requirements for Green’s personal vehicle.

To ensure vicarious liability is imposed for its intended purpose of deterring tortious conduct, it follows that there should be at least **some** element of “enterprise causation”. “Enterprise causation”, which “captures the relationship between the existence of an employer’s business and the occurrence of a wrong by an employee”, provides that an employer causes the wrong of an employee “if the dissolution of the enterprise and subsequent unemployment of the employee would reduce the probability of the wrong to zero.” Alan Q. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 571-72 (1988). Vicarious liability is ineffective where the employer does not cause the wrong and where the employer cannot reduce the probability of the wrong:

. . . because many motor vehicle torts probably are attributable to carelessness or momentary lapse of attention rather than to calculated risk-taking, the ability of an employer to affect substantially the probability of motor vehicle torts through threats of discharge or other such incentives within the employment relationship is quite limited. **It thus seems improbable, or at least highly conjectural, that the benefits of a reduced accident rate under vicarious liability would be substantial enough to justify the imposition of added costs on the business enterprise.**

*Id.* at 575, 585 (emphasis added).

Moreover, respondeat superior is not a “gotcha” moment invoked to reach into the deeper pockets of the employer. The second and third policy factors behind imposing respondeat superior, as set forth by *Hicks*, are inextricably bound together

and vicarious liability is invoked to provide greater assurance of compensation to innocent victims in circumstances where it is **equitable** to shift losses to the employer because the employer benefits from the injury-producing activity, and such losses are, as a practical matter, sure to occur from the conduct of the employer's business. *Arcadia Ins. Co. v. U.S.*, 674 Fed.Appx. 938, 942-43 (11<sup>th</sup> Cir. 2017); *see also Lawson v. Entech Enterprises, Inc.*, 294 Ga. App. 305, 307 (2008) (holding that O.C.G.A. § 40-8-7 imposed no duty on contractor to inspect allegedly defective truck owned and operated by a subcontractor and therefore could not be held liable for death of motorist.)

It would be quite the stretch to state that In/Ex benefited from Green's negligent maintenance of his vehicle or from Green's purported knowing operation of an unsafe vehicle. Likewise, it is difficult to imagine how In/Ex could or should have anticipated that one of its employees would disregard the maintenance instructions for his or her personal vehicle and knowingly operate an unsafe vehicle. This is not a situation where, for example, a restaurant may be held liable for its server's actions of spilling scalding hot soup on a customer. In that context, the restaurant is charged with the duty to hire experienced servers or is responsible for training the server how to avoid spills when serving customers, as the act of serving soup is well within the foreseeable tasks of a server. Here, an employer cannot reasonably be required to train every employee who operates a personal vehicle on

how to safely maintain their personal vehicle, nor should an employer be tasked with ensuring its new hire is an accomplished mechanic. This is because “[t]he work situation in which the employer has the least control over motor vehicle operation is one in which a worker drives a personal vehicle for work purposes.” Stephanie G. Pratt, *Work-Related Roadway Crashes: Challenges and Opportunities for Prevention*, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, Sept. 2003, at 2, DHHS (NIOSH) Publication No. 2003-119.

Upholding the trial court’s irreconcilable holding that an employer has no duty to inspect an employee’s vehicle yet may be liable for an employee operating an unsafe vehicle, would inevitably lead to a slippery slope of changing the business risks involved when an employer hires an employee who, as part of his job, may operate a personal vehicle. For example, an insurer is “selective of those risks which [revolve] around the character, integrity, and personal characteristic of those whom they will insure.” *James v. Pennsylvania Gen. Ins. Co.*, 167 Ga. App. 427, 428 (1983).

Similarly, an employer should employ the same degree of selectiveness when choosing who to hire, to reduce the risk of a potential negligent hiring claim. The selectiveness, in this scenario, may be a trucking company’s decision to refrain from hiring a prospective truck driver who has a history of driving infractions on his Motor Vehicle Report – seeing as how driving infractions would undoubtedly increase the

trucking company's risk of liability exposure. However, to change the risk an employer is taking by imputing acts outside of the employee's scope of employment and acts which an employer has no ability to anticipate or prevent, contradicts the public policy considerations behind imposing vicarious liability.

At the time of the collision, Green was employed as a technician for In/Ex, a construction subcontractor engaged in the business of installing movable walls and other specialty products in commercial buildings. R. at 10-12, Vol. 32. It is undisputed that In/Ex had no duty to inspect Green's personal vehicle R. at 2500-01, Vol. 18. Returning to the public policy consideration of determining whether it would be equitable to hold In/Ex liable under a theory of respondeat superior, it cannot reasonably be said that In/Ex would have been in a better position than Green to determine whether Green's personal vehicle was safe to drive at the time of the collision. It therefore follows that liability should not result unless the employer "had reason to believe that an undue risk of harm would exist because of the [nature] of the employment." RESTATEMENT 2D OF AGENCY § 213, cmt. d.

### **CONCLUSION**

The detrimental effect of the trial court's finding that there is no duty for an employer to inspect an employee's private vehicle while leaving open the possibility of an employer being vicariously liable for an employee's negligent maintenance of a personal vehicle and/or knowing operation of an unsafe personal vehicle, should not

be underestimated. Travel by private vehicle is the predominant form of transportation for individuals traveling to work nationwide. Brian McKenzie, *Who Drives to Work? Commuting by Automobile in the United States: 2013*, U.S. CENSUS BUREAU, Aug. 2015, at 1, <https://www.census.gov/content/dam/Census/library/publications/2015/acs/acs-32.pdf>. In 2013, approximately 86 percent of workers in the United States commuted to work by automobile. *Id.*

The trial court's Order and Supplemental Order denying In/Ex's motion for summary judgment seemingly sweeps all notions of public policy aside and leaves Georgia employers at a crossroads when it comes to hiring employees who will be operating personal vehicles. Employers will be faced with the impossible burden of ensuring each of its employees safely and properly perform maintenance on their vehicles while somehow controlling each and every decision the employee makes when it comes to operating the vehicle. Such a burden thwarts public policy concerns and adversely impacts employers and the workforce as a whole. As such, the GDLA, as *amicus curiae*, respectfully requests that this Court reverse the trial court's denial of Defendant In/Ex's motion for summary judgment.

Respectfully submitted this 8<sup>th</sup> day of April, 2019.

This submission does not exceed the word count limit imposed by Rule 24.

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**CERTIFICATE OF SERVICE**

This is to certify that I have this day served a copy of the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** upon all parties in this matter using the Court's eFast system and by depositing a true and correct copy of same in the U.S. Mail, in a properly addressed envelope with adequate postage to counsel of record as follows:

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