IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

ADRIENNE DANIELLE SMITH,	)	
	)	
Plaintiffs,	)	
	)	Civil Action Number:
	)	
vs.	)	14C-00798-4
	)	
AVIS RENT A CAR SYSTEM, LLC,	)	
PV HOLDING CORP, CSYG, INC.,	)	
YONAS G. GEBREMICHAEL, PETER	)	
DUCA and BYRON DEVON PERRY,	)	
	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR NEW TRIAL

After a ten (10) day trial, the jury reached its unanimous verdict on February 3, 2017 in the amount of $47,000,000. The jury found for the Plaintiff, Adrienne Danielle Smith, and against all Defendants and apportioned the fault amongst the Defendants. Defendants Avis Rent a Car, LLC, Avis Budget Group, Inc. and Peter Duca ("Avis") subsequently filed a Motion for Judgment Notwithstanding the Verdict (JNOV) and Alternatively for New Trial which was heard by this Court. After consideration of the motions and briefs, responses thereto, reply briefs, oral arguments, all matters of record and the applicable and controlling law, this Court finds as follows:

Defendants have asserted that pursuant to O.C.G.A. §9-11-50(b) the Court should set aside the verdict and judgment thereon and enter a judgment notwithstanding the verdict on the grounds that there was no conflict in evidence as to any material issue and that the evidence introduced, with all reasonable inferences demanded therefrom, demanded a verdict in favor of Defendants. In the alternative, Defendants seek a new trial as the verdict of a jury is "contrary to evidence and the principles of justice and equity." O.C.G.A. §5-5-20.

This was a negligence case and the jury was instructed that the Defendants ("Avis") had a duty to act with reasonable care. Ordinary negligence means the absence of or failure to use that degree of care

which is used by ordinarily careful persons under the same or similar circumstances. Negligence requires proof that the defendant owed a legal duty, that it breached that duty and that the breach was a proximate cause of the injury sustained by the plaintiff. Georgia imposes a general duty to all the world not to subject them to unreasonable risk of harm.

"Mere ownership of an automobile involved in a collision may not be made the basis for holding an owner liable for negligent operation of the automobile without showing that the defendant owner was guilty of some other negligent act which proximately contributed the plaintiff's injury." White Long v. Hall County Board of Commissioners, 219 Ga. App. 853 (1996). However, this does not mean that there could never be any liability. White Long 291 Ga. App. at 855. The jury heard evidence of Avis's knowledge of the risk and the potential or likelihood of vehicle theft. Vehicle theft was a reasonably foreseeable occurrence. Avis had a duty to act with reasonable care in light of its knowledge of the car thefts and their inherent risks.

> What is "ordinary care" varies with the circumstances and the magnitude of the danger to be guarded against. Since it is impossible to prescribe definite rules in advance for every combination of circumstances which may arise, the details of the standard must be filled in each particular case. But, to be negligent, the conduct must be unreasonable in light of the recognizable risk of harm.

Lau's Corp. v. Haskins, 261 Ga. 491 (1991). In cases such as the one at bar where material facts are disputed, the jury determines the particular standard of care to be applied and whether the jury breached that standard.

The jury heard very extensive testimony about Avis's use of a two-key system for the majority of its fleet in North America. Under that system, Avis issued two keys for each vehicle that it rented and attached both keys to the same ring. Evidence presented showed this was the cause of a number of prior thefts and the jury also heard evidence about the consequences of Avis's decision to maintain the two-key system for most vehicles. In addition, there was testimony presented by Plaintiff about security at the Courtland Street Avis location, including questions about missing security of gate keys and about a prior vehicle theft at the Courtland Street location which happened under Perry's watch, Avis's conduct after

that incident and action Avis would have taken had a background check been run on Perry.

In terms of negligent hiring and negligent retention the elements are the same. An "employer has a duty to exercise ordinary care not to hire or retain an employee the employer knew or should have known posed a risk of harm to others." Munroe v. Univ. Health Servs., Inc., 277 Ga. 861 (2004). That duty arises "where it is reasonably foreseeable from the employee's 'tendencies' or propensities that the employee could cause the type of harm sustained by the plaintiff." Munroe, 277 Ga. at 863. O.C.G.A.§51-2-5(5) provides that an employer is vicariously liable "for the negligence of a contractor. . . if the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relation of master and servant . . ." This issue is generally a question of fact for the jury to determine. The jury found that CSYG was an Avis employee, not an independent contractor, and the evidence supported that conclusion, as well as finding that Avis negligently retained CSYG.

The question of causation is fact specific to each case. There was circumstantial evidence of causation and given Byron Perry's inconsistent sworn statements, the jury could accept either version, but did not have to speculate. It was undisputed that the Ford Edge was taken unlawfully. In addition, there was evidence presented, including testimony of Avis's witnesses, to support at least an inference that the Ford Edge was removed from the lot using a gate key. The evidence presented creates a question of fact for the jury to resolve. As to the question of whether Smith's injuries were preventable, evidence supported the jury's conclusion that they were. There was testimony about how the use of ordinary care could have prevented the theft and crash involving the Ford Edge.

The jury also had to determine if Avis could have reasonably foreseen Byron Perry's criminal conduct. Intervening criminal conduct does not insulate a defendant from liability "if the defendant had reasonable grounds for apprehending such wrongful act would be committed." Goldstein, Garber & Salama, LLC v. J.B., 300 Ga. 840 (2017). The jury was presented with evidence that Avis was aware of the risk of vehicle theft, both as it involved the two-key system and other car theft. In addition, there was

evidence presented about Avis's initiative to improve performance in various areas, including key security, and testimony that Avis was acting in response to prior car thefts. From this evidence, the jury could infer that Avis foresaw theft and its risks.

Georgia law requires that "the prior incident be sufficient to attract . . . attention to the dangerous condition which resulted in the litigated incident." Starbridge Ptrs. Ltd. v. Walker, 267 Ga. 785 (1997) (quoting Matt v. Days Inn of Am., 212 Ga. App. 792 (1994)). Documents admitted during trial showed that Avis distributed regional security reports weekly to security managers across the region and that security managers across the country communicated with each other about trends in thefts. Avis also had specific knowledge about Byron Perry that would alert it to the risk of theft posed by him.

Avis' knowledge of car theft is sufficient for Avis to have anticipated the risk of harm that is a reasonably foreseeable consequence of car theft. The record shows that Avis was aware of a stolen car being involved in a hit-and-run incident and that another was involved in shooting. In addition, there was testimony from Avis's witnesses that someone who steals a car is likely to make efforts to evade capture by the police.

As previously discussed, the jury correctly found that CSYG was an employee, not an independent contractor, of Avis. As a result Avis was derivatively liable for the tortious acts of its employee. In addition, there was evidence presented that would support the conclusion that CSYG was negligent and that it negligently hired Byron Perry. And, the jury heard evidence that supported a conclusion that Byron Perry's employment with CSYG gave him the opportunity to have the Ford Edge key, a way to get the car off of the lot and to have knowledge of the Avis operations so he could steal the vehicle without being noticed.

CSYG existed for the purposes of operating Avis locations, including the one on Courtland Street. The jury concluded that CSYG breached its duty of reasonable care in hiring Byron Perry, given his extensive criminal history, and in failing to perform a hands-on inventory to ensure that all vehicles were accounted for at closing. Avis provided CSYG with the rental facility at the Courtland Street

location. CSYG hired employees and performed routine business activities because of its relationship with Avis. The jury concluded that CSYG was acting within the scope of its employment when it engaged in tortious conduct. As there was sufficient evidence to support a conclusion that CSYG was negligent when acting within the course and scope of its employment, the judgment is proper and Avis is vicariously liable for the fault apportioned to CSYG and Yonas Gebremichael. When liability is vicarious, the principal and agent "are regarded as a single tortfeasor." PN Express, Inc. v. Zengel, 304 Ga. App. 672 (2010).

The Avis Defendants argue that the verdict was speculative and not supported by the evidence and as a result that a new trial should be conducted. There was sufficient evidence presented regarding how the Ford Edge was stolen. There were wire cutters and twist ties like the one attached to the remaining key in Byron Perry's locker which supports the idea that Perry cut the cable on the keys, kept one and attached the other to the Avis tag with the twist tie. To leave the premises, Perry could have either driver off during hours while the gate was open or used a stolen gate key to remove the car after hours. There was also testimony about how a one-key system would have alerted the employee who was working that evening because the key would have been missing. In addition, the gate locks at Courtland Street were not changed, even after being alerted by the regional security manager that gate keys were missing.

Evidence about vehicle thefts at other Avis locations was properly admitted. Thefts were occurring regionally and nationally. Evidence regarding other locations was introduced to show the control Avis exercised over locations and that the security manager was performing inspections over security procedures at other locations like he was doing at the Courtland Street location.

Avis is also challenging the court permitting the use of video depositions. This Court entered a scheduling order prior to trial which ordered the parties to address all objections to depositions. This objection was never raised prior to trial. Avis did make some specific objections to portions of Pete Duca and John Wotton's 30(b)(6) depositions but did not object to the use of those depositions in lieu of live

testimony on the grounds that the deponents were actually present throughout the trial. The parties even created a video that included both parties' designations, in the order in which they appeared at the deposition, at Avis's insistence and Avis did not argue then that the testimony by deposition was procedurally improper. The Consolidated PreTrial Order even included Plaintiff's statement that she might use the 30(b)(6) testimony of Duca and Wotton at trial and Avis did not object. In addition, it is within the trial court's discretion to permit the use of depositions of parties or designees for any purpose during trial, whether the witness is available or not. O.C.G.A §9-11-32(a)(2) provides:

> The deposition of a party or of anyone who, at the time of the taking the deposition, was an officer, director or managing agent or a person designated under paragraph (6) of subsection (b) of Code Section 9-11-30. . . to testify on behalf of a public or private corporation, a partnership or association, or governmental agency which is a party may be used by an adverse party for any purpose.

Avis has asserted that the Court incorrectly instructed the jury on the relevance of intervening criminal acts. In order to establish that the Court did not instruct the jury properly, there is essentially a four part test. Avis must (1) show that the instruction was substantially incorrect both independently and in the context of the complete charge, (2) have timely and properly objected to the charge, (3) must not expand or change the grounds for the objection and (4) must establish how the error harmed them. The charge given is the one that was proposed by Avis. Assuming that was an erroneous charge, Avis would still have to set forth very specifically how they were harmed by the charge.

A jury's award will not be disturbed if it is within the range of damages established by the evidence. Avis has argued that the damages were excessive in relation to other verdicts. That standard is difficult to establish.

> Amounts awarded in other cases are of slight use in determining excessiveness because to make any comparison of the verdict in this case with any other verdict that would be of any substantial evidentiary value, we would have to find a case practically similar in all essential details, with substantially the same number and kind of injuries sustained by the plaintiff in this case, and no similar case has been brought to our attention.

Nat'l. Trailer Convoy, Inc. v. Sutton, 136 Ga. App. 760 (1975). The award in this case is similar to other

verdicts in similar cases around the country. The jury in this case heard about Plaintiff Smith's injuries, past and future medical expenses and life care expenses, as well as Smith's physical and emotional pain and suffering. A jury's judgment and its enlightened conscience guides it to determine how much to award a plaintiff for pain and suffering.

Avis has asserted that Plaintiff's counsel's conduct impermissibly inflated the jury's verdict. Plaintiff's counsel did show a slideshow with images of stock photos as demonstrative exhibits. Georgia law permits the use of visual aids to assist the jury. This Court observed during the trial that there was no claim that the photos shown were of the plaintiff, the defendant or this particular accident. Avis did not make a contemporaneous objection to the use of the slideshow. In addition, the demonstrative evidence did not go tot he jury room with the jury. The jury was instructed that any arguments made by counsel were not evidence.

Furthermore, "counsel is permitted wide latitude in closing argument and any limitation of argument is a matter for the trial court's discretion." Lillard v. Owens, 281 Ga. 619 (2007). Counsel can comment on witnesses' credibility and possible sources of bias. The Court did admonish counsel regarding some of his comments in the jury's presence. "Any objection to a closing argument made after the argument has concluded is untimely." Young v. Griffin, 329 Ga. App. 413 (2014). Avis did not object when Plaintiff's counsel referred to Avis as a "puppet master," nor when counsel suggested that Byron Perry's defense was not credible (Mr. Perry's attorney objected but Avis's attorney did not). Avis did not contemporaneously object but now argues that the comments were so inflammatory as to taint the jury's verdict. However, the court is not required to take corrective measures sua sponte.

Defendants have filed motions seeking a JNOV. In granting such a motion, the Court "substitutes its own judgment for the combined judgment of twelve jurors good and true, and ends the case without another trial. Such act declares that there is no conflict in the evidence and that all deductions and inferences from the evidence introduced demand a particular verdict." Johnson v. Curenton, 127 Ga. App. 687 (1972). This Court finds that there was conflict in the evidence and thus a JNOV would not be

proper in this case.

In considering a motion for new trial, the evidence must be reviewed in the light most favorable to the party who prevailed before the jury. Crosby v. Kendall, 247 Ga. App. 843 (2001). The court enjoys broad discretion and "any evidence" supporting the verdict authorizes the trial court to deny the motion. Espirit Log & Timber Homes, Inc. v. Wilcox, 302 Ga. App. 550 (2010). "Before any motion for new trial. . . may be granted, the moving party must show that the error alleged as the basis for the motion was materially harmful." Ford Motor Co. v. Conley, 294 Ga. 530 (2014). The Court finds that there was evidence supporting the verdict and if there were any errors they were not materially harmful.

Therefore, the Defendants' Motion for Judgment Notwithstanding the Verdict or, Alternatively, a New Trial is hereby DENIED.

SO ORDERED this 16 day of July, 2018.

Joseph C. Iannazzone, Judge
State Court of Gwinnett County

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