IN THE COURT OF APPEALS
STATE OF GEORGIA

Avis Rent A Car System, LLC, *et al.* *Defendants/Appellants*, v. Adrienne Danielle Smith, *Plaintiff/Appellee*.	Case No. A19A1503

AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND GEORGIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANTS/APPELLANTS

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Georgia Chamber of Commerce represents more than 41,000 diverse businesses across Georgia employing over two million individuals. Established in 1915, the Georgia Chamber's primary mission is to keep, grow, and create jobs in Georgia. The Georgia Chamber pursues this mission in part by advocating the views of business and industry in the shaping of public policy. Through such advocacy, the Chamber hopes to ensure that Georgia's business environment remains economically competitive with the rest of the world.

This appeal is important to our members because imposition of liability against the Avis Defendants would take Georgia tort law in a new and extreme direction. The judgment below stretches the concepts of duty and proximate cause

beyond reason. Businesses must be able to operate in a legal environment that is fair, stable, and predictable. The judgment in this case violates those bedrock principles.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This appeal involves two fundamental tort law concepts that prevent indefinite and indeterminate liability and legal uncertainty: duty and proximate cause. These principles operate as an anchor for justice, keeping tort liability sound, fair, and predictable. Principles of duty and proximate cause also act as an engine for economic growth: when a potential defendant can anticipate its legal responsibility, it can rationally allocate its resources among preventing possible harm, compensating actual harm, and conducting its ordinary business. Insurers can best predict and price risks in tort environments that are stable and predictable.

Plaintiff wishes to take Georgia tort law in an unsound new direction that is untethered to traditional principles of duty and proximate cause. Plaintiff wants this Court to apply unfair "deep pocket liability" and hold the Avis Defendants liable for a harm caused by the illegal act of a third party driver to a highly remote plaintiff with no connection to the Avis Defendants.

Georgia tort law has never imposed (and should never impose) a duty of care to protect plaintiffs from criminal acts by third parties absent a special relationship

between the defendant and third party actor that does not exist here. Further, Georgia case law on proximate cause indicates that, as a matter of law, owners of stolen cars are not liable for damages caused by thieves. Otherwise, all manner of businesses, as well as private individuals, could be held liable for a wide variety of criminal actions by third parties. Because imposition of liability on the Avis Defendants would be fundamentally inconsistent with basic tort principles, it would open up countless others to unpredictable and unfair liability.

The Court should reverse the judgment with directions to enter judgment as a matter of law for the Avis Defendants.

ARGUMENT

I. Avis Defendants Owed No Duty to Protect Plaintiff From A Third Party Absent a Special Relationship Not Present Here

Duty is a fundamental element of a negligence claim. *See City of Rome v. Jordan,* 263 Ga. 26, 27 (1993) (duty of care is a "threshold issue"). It defines the legal obligations one owes another and prevents unlimited and unpredictable liability. The existence of a legal duty is a legal question, *see Rasnick v. Krishna Hospitality, Inc.*, 289 Ga. 565, 566 (2011), and is "not resolved exclusively on the basis of foreseeability." *Certainteed Corp. v. Fletcher*, 300 Ga. 327, 330 (2016). '"[I]n fixing the bounds of duty, not only logic and science, but public policy play

an important role.'" *CSX Transp., Inc. v. Williams*, 278 Ga. 888, 890 (2005) (citation omitted).

The Georgia Supreme Court recently made clear that there is *no* general common law duty "to all the world not to subject [others] to an unreasonable risk of harm." *Georgia Dept. of Labor v. McConnell*, Nos. S18G1316 & S18G1317, 2019 WL 2167323, at *3 (Ga. May 20, 2019) (disapproving *Bradley Ctr., Inc. v. Wessner*, 250 Ga. 199, 201 (1982)); *see also id.* at *3 n.4 (discussing other cases relying on *Bradley Center* that are overruled).

Even before this recent reaffirmation by the Georgia Supreme Court *rejecting* a duty of care "to all the world," courts had clarified that the potentially broad duty language in *Bradley Center* had its limits. As a general rule, "'a person does not have a duty to control the conduct of another person, who is a potential tortfeasor, so as to prevent that person from harming a third person,' absent a special relationship." *New Star Realty, Inc. v. Jungang PRI USA, LLC*, 346 Ga. App. 548, 560 n.7 (2018) (citation omitted). In other words, "one owes no duty to protect another from injuries inflicted by a third party." *May v. State*, 295 Ga. 388, 398 (2014).

The two narrow exceptions allowing liability to be imposed on a defendant based on a "special relationship" do not apply here.

One exception allows liability to be imposed when "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct." *Shortnacy v. North Atlanta Internal Med., P.C.*, 252 Ga. App. 321, 325 (2001) (quoting Restatement (Second) of Torts § 315(a) (1965)). The defendant's ability to control the third party actor is key.

For example, a psychiatrist who lacks legal authority to place restraints on his patient's liberty lacks sufficient control over that patient to have a duty to protect others from that patient's conduct. *See Houston v. Bedgood*, 263 Ga. App. 139, 142 (2004)) ("absent legal authority in the physician to place restraints on the liberty of his patient, the duty to control does not arise."); *Trammel v. Bradberry,* 256 Ga. App. 412, 418 (2002) (father of schizophrenic son lacked "the right or exercise of physical control over the behavior of a mentally ill person necessary to create the special relationship").[1] In contrast, a nursing home "owes the duty of supervision over any known resident whose propensity to cause harm to others is

[1] *See also Smith v. United States*, 873 F.3d 1348, 1352 (11th Cir. 2017) (applying Georgia law) ("The only Georgia cases that have recognized a 'special relationship' sufficient to support a negligence claim involved situations where the defendant had control over the third party who injured the plaintiff…."); *Grijalva v. United States*, 289 F. Supp. 2d 1372, 1379 (M.D. Ga. 2003) (social worker not liable for shooting by patient where social worker lacked legal authority to control the patient).

known or should have been known to the management." *Associated Health Sys., Inc. v. Jones*, 185 Ga. App. 798, 801 (1988).

The other exception allows liability to be imposed when "a special relation exists between the actor and the other which gives to the other a right to protection." *Shortnacy*, 252 Ga. App. at 325 (quoting Restatement (Second) of Torts § 315(b)). An example would be a landlord's duty to protect tenants from foreseeable criminal acts committed by third parties on the landlord's premises.

In this case, the Avis Defendants and Plaintiff are strangers to one another. Further, no recognized special relationship exists between the Avis Defendants and the subject car thief that could hold the Avis Defendants responsible for the thief's misconduct. The thief was not acting within the scope of his employment or even at work when his bad acts occurred. *See Lear Siegler, Inc. v. Stegall*, 184 Ga. App. 27, 28-29 (1987); *Dougherty Equip. Co., Inc. v. Roper*, 327 Ga. App. 434, 438 (2014). The Avis Defendants are entitled to relief as a matter of law.

II. Avis Defendants Were Not a Proximate Cause of Plaintiff's Harm

The Avis Defendants are also entitled to relief because they were not the proximate cause of the Plaintiff's harm. The car thief's criminal conduct and reckless driving caused the Plaintiff's injuries, not the Avis Defendants.

The Georgia Supreme Court has long held that "[t]he requirement of proximate cause constitutes a limit on legal liability; it is a policy decision that, for a variety of reasons, e.g. intervening act, the defendant's conduct and the plaintiff's injury are too remote for the law to countenance recovery." *Atlanta Obstetrics & Gynecology Group, P.A. v. Coleman*, 260 Ga. 569, 569 (1990).

Georgia courts have a restrained judicial philosophy with respect to holding defendants liable for intervening criminal acts by third parties, including car thieves. *See, e.g.*, *Dunham v. Wade*, 172 Ga. App. 391, 393 (1984) (no liability where owner left keys in unguarded vehicle, it was stolen, and the thief wrecked the car, killing an occupant).

The cases make clear that "[f]oreseeable consequences are those which are *probable*, according to ordinary and usual experience…. One is not bound to anticipate or foresee and provide against that which is unusual or that which is only remotely and *slightly probable*." *Dowdell v. Wilhelm*, 305 Ga. App. 102, 105 (2010 (emphasis in original); *see also Goldstein, Garber & Salama, LLC v. J.B.*, 300 Ga. 840, 842 (2017) (no liability for act by third party that is "merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience.") (quoting *Johnson v. American Nat'l Red Cross*, 276 Ga. 270, 273 (2003)).

The Avis Defendants' conduct falls within these well-prescribed limits. Plaintiff's harm is not a "probable or natural" consequence (*Goldstein, Garber & Salama*, 300 Ga. 840 at 843) of the car thief's hiring[2] or the Avis Defendants' security measures. An intervening cause is too remote to be foreseeable if it "furnished only the condition or occasion of the injury," *Church's Fried Chicken v. Lewis*, 150 Ga. App. 154, 157 (1979), and "that is what occurred in this case." *Cope v. Enterprise Rent-A-Car*, 250 Ga. App. 648, 652 (2001); *see also Alamo Rent-A-Car, Inc. v. Hamilton*, 216 Ga. App. 659, 660. (1995) (car rental agency's alleged negligence in failing to inquire into renters' driving records or intended use of vehicle was superseded by intoxicated motorist's unauthorized criminal acts).

Further, the Plaintiff's harm occurred "much later in the day" after the car thief left work and "miles away" from the rental facility—factors which led the Court of Appeals to reject liability for a third party's criminal act in *Dowdell*, 305 Ga. App. at 106 (sheriff's deputies were not liable for a post-escape fatal shooting by a prisoner several hours after the escape and six miles from the courthouse where the escape occurred).

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[2] Indeed, requiring employers to hire workers without criminal records in order to avoid tort liability in the event of a future offense might run afoul of other state policies, such as encouraging the re-integration of felons into society.

III. Application of Traditional Duty and Proximate Cause Doctrines In This Case Serves Important Policy Interests

Potential defendants—especially businesses like rental-car agencies—respond rationally to risk. They will invest in cost effective precautions, take out insurance when they can, and avoid activities that create liability concerns. These rational activities require liability that is roughly predictable, so that the business knows which actions to take.

Once a potential defendant's liability depends more on the vagaries of jury sentiment rather than established law, predictability is lost. Liability can become too uncertain to insure (or self-insure) cost-effectively. Consumers may be forced to pay higher than normal prices for goods and services to cover the potential cost of litigation and liability—a "tort tax." Socially beneficial activities that may expose the business to new risk may be abandoned. For example, if businesses are subject to liability for criminal acts by third parties, they may decide not to serve high crime areas, hurting the vast majority of the population that is law-abiding.

In particular, car rental agencies such as the Avis Defendants provide an important service for consumers. Like other businesses, car rental firms do not have unlimited funds. Georgia would benefit far more from car rental revenues being spent on newer vehicles and frequent maintenance to promote safety, avoidance of price increases that can discourage tourism, and wages and benefits

for workers than perfecting security measures to ensure that no car can ever be stolen by a determined thief.

In fact, the importance of protecting car rental agencies from unreasonable liability led the United States Congress to enact a federal law called the Graves Amendment, 49 U.S.C. § 30106. The Graves Amendment is a statutory statement of proximate cause. It provides that car rental agencies cannot be held vicariously liable for the negligence of their customers.[3] As the Eleventh Circuit explained in upholding the constitutionality of the Graves Amendment:

> It is plain that the rental car market has a substantial effect on interstate commerce. It is also apparent that Congress rationally could have perceived strict vicarious liability for the acts of lessees as a burden on that market. The reason it could have

[3] The Graves Amendment provides in relevant part:

> (a) In General.—An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—
>
> (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
>
> (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

49 U.S.C. § 30106(a).

> done so is that the costs of strict vicarious liability against rental car companies are borne by someone, most likely the customers, owners, and creditors of rental car companies. If any costs are passed on to customers, rental cars — a product which substantially affects commerce and which is frequently an instrumentality of commerce — become more expensive, and interstate commerce is thereby inhibited.

Graves v. Vanguard Rental USA, Inc., 540 F.3d 1242, 1253 (11th Cir. 2008) (internal footnote omitted). The Eleventh Circuit further explained that the law's proponents "perceived vicarious liability as a burden on consumers." *Id.* at 1253 n.6. These policy considerations also support rejection of a duty in this case.

Finally, it is worth noting that creating the type of duty "to all the world" that was rejected by the Georgia Supreme Court in *McConnell*, 2019 WL 2167323, at *3, would not be limited to the Avis Defendants and other car rental agencies in similar cases. Erosion of traditional duty and proximate cause rules to permit liability for harm to remote plaintiffs based on a third party's criminal act would "expand traditional tort concepts beyond manageable bounds," *Williams*, 278 Ga. at 890, and impact any number of industries and potential defendants.

Every business in Georgia employs persons who spend considerable time off duty engaging in activities that the employer does not control. If the employer became liable in tort for every criminal act in which the employment merely supplied an instrumentality or condition that factored into a subsequent remote

injury, tort liability would be boundless. A retailer would be exposed if an employee stole from the business and used the stolen item to commit another crime.

For example, a pharmacy might be liable if an employee stole prescription drugs, sold them to a stranger on the street, and that stranger accidentally overdosed. A gas station might be liable if an arsonist stole gasoline and then lit fire to a home or school. A sporting goods store might be liable if a worker stole a baseball bat or knife and later harmed someone. A hardware store might be liable if an employee stole fertilizer and made a bomb.

In addition, a manufacturer would be at risk if any worker took a tool home and used it to commit domestic violence. Automobile dealers and businesses with fleets of vehicles or delivery trucks could be liable for harms to remote plaintiffs caused by reckless criminal drivers, similar to this case.

The possibilities for abuse of the Plaintiff's theory would be endless and would impact every sector of Georgia's economy. Georgia's appellate courts sensibly have rejected tort duties that make a business responsible for the independent criminal actions of a third party over which the defendant has no special relationship. Rather than recognizing a new tort duty whose implications

cannot be cabined, this Court should apply Georgia's long-settled law to find in favor of the Avis Defendants.

CONCLUSION

For these reasons, the Court should reverse the judgment with directions to enter judgment as a matter of law for the Avis Defendants.

Respectfully submitted this 7th day of June, 2019. This submission does not exceed the word count limit imposed by Rule 24.

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