IN THE SUPREME COURT OF GEORGIA

BRIANNA JOHNSON, Petitioner-Plaintiff, v. AVIS RENT A CAR SYSTEM, LLC, *et al.*, Respondents-Defendants.	Supreme Court No. S20G0695 Court of Appeals Nos. A19A0928, A190929
ADRIENNE DANIELLE SMITH, Petitioner-Plaintiff, v. AVIS RENT A CAR SYSTEM, LLC, *et al.*, Respondents-Defendants.	Supreme Court Case No. S20G0696 Court of Appeals Nos. A19A1503, A19A1504

BRIEF OF AMICI CURIAE GEORGIA TRIAL LAWYERS ASSOCIATION AND THE AMERICAN ASSOCIATION OF JUSTICE

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INTRODUCTION

The Georgia Trial Lawyers Association ("GTLA") and the American Association of Justice ("AAJ"), as *amici curiae*, urge this Court to issue an opinion holding that the Georgia Court of Appeals erred in deciding proximate cause as a matter of law in Avis's favor in these companion cases.[1] One of the issues on which the Court granted certiorari is:

> Did the Court of Appeals err in Divisions 2 of the opinions below in determining that the employee's intervening criminal conduct was the proximate cause of the petitioners' injuries, such that the respondents were entitled to judgment as a matter of law on the petitioners' direct negligence claims?

The answer is "yes."

The Court of Appeals erred when it held that "Perry's intervening criminal act was the proximate cause" as a matter of law because "Johnson failed to present evidence that a high speed chase ending in a crash injuring innocent bystanders *usually happens* when a car is stolen." *Avis Rent A Car System, LLC v. Johnson*, 352 Ga. App. 858, 862 (2019) ("*Johnson*") (emphasis added). As discussed below, this is the wrong inquiry under Georgia law. The correct standard is whether it was foreseeable that "some injury would result from [the] act or omission, or that

[1] This brief is being filed in each of the cases captioned above, which are companion cases relying on the same holding regarding proximate cause and foreseeability of an intervening criminal act.

consequences of a generally injurious nature might result." *Williams v. Grier*, 196 Ga. 327, 338 (1943).

GTLA'S STATEMENT OF INTEREST

GTLA is a voluntary membership organization composed of Georgia trial lawyers. The organization is committed to protecting the constitutional promise of justice for all by guaranteeing the right to trial by jury, preserving an independent judiciary, and providing access to the courts for all Georgians. Among the interests central to GTLA's mission statement are erroneous appellate decisions with the potential to impose unnecessary procedural and evidentiary burdens on those injured by others' wrongdoing. This brief is filed under the authority of GTLA President Lyle Warshauer and GTLA Amicus Curiae Committee Chair Caleb Walker.

AAJ'S STATEMENT OF INTEREST

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in Georgia. Throughout its more than 70-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for

wrongful conduct. This brief is filed under the authority of AAJ President Tobi Millrood.

ARGUMENT AND CITATION OF AUTHORITY

The Court of Appeals erred when it concluded as a matter of law that Avis's employee's intervening criminal conduct was the proximate cause of the petitioners' injuries based upon Johnson's failure "to present evidence that a high-speed chase ending in a crash injuring innocent bystanders usually happens when a car is stolen." *Johnson*, 352 Ga. App. at 862 (emphasis added). This is not the relevant inquiry under Georgia law. Instead, the proper inquiry is whether it was foreseeable that "some injury would result from [the] act or omission, or that consequences of a generally injurious nature might result." *Williams*, 196 Ga. at 338; *Love v. Morehouse College, Inc.*, 287 Ga. App. 743 (2007); *Freeman v. Wal-Mart Stores, Inc.*, 281 Ga. App. 132, 136 (2006); *Bailey v. Jim's Minit Mkt., Inc.*, 242 Ga. App. 518, 520 (2000); *Hertz Driv-Ur-Self Stations, Inc. v. Benson*, 83 Ga. App. 866, 875 (1951).

A. Foreseeability, Under Georgia Law, Does Not Require That a Defendant Have Anticipated a Particular Injury or Consequence.

This is a core tenet of negligence law in Georgia as well as across the United States of America. *See, e.g., Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928) ("It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident

was clear to the ordinarily prudent eye") (internal quotations omitted). Contrary to this long and well established authority, the Court of Appeals decision below required the just opposite of the Appellants—It required Appellants to produce evidence that Avis had notice of the particular method in which an accident occurred.

But, as the Court of Appeals, itself, has previously stated: The foreseeability analysis "***is not that specific***: the relevant inquiry is not whether the exact intervening negligent act was foreseeable, but whether, as a general matter, the original negligent actor should have anticipated that this general type of harm might result." *Smith v. Commercial Transp.*, 220 Ga. App. 866, 867 (1996) (emphasis added); *Georgia Dept. of Transp. v. Owens*, 330 Ga. App. 123 (2014)

In other words, foreseeability only requires the anticipation of a general type or category of harm which, in ordinary experience, might be expected to flow from a particular type of negligence. "It is sufficient if, in ordinary prudence, [a defendant] might have foreseen that some injury would result from [its'] act or omission, and that consequences of a ***generally*** injurious nature might result." *Schernekau v. McNabb*, 220 Ga. App. 772, 773 (1996) (emphasis added); *Wallace v. Sears, Roebuck & Co.*, 196 Ga. App. 221, 222 (1990); *Halilovic v. Penske Truck Leasing*, 287 Ga. App. 215, 219 (2007); *CSX Transp., Inc. v. Snead*, 219 Ga. App. 491, 494 (1995). Likewise, "[i]t is not necessary that defendants could have reasonably anticipated the particular type of injury which occurred, as long as they ***should have***

anticipated from the nature and character of the alleged negligent act that ***some injury might result as a natural and reasonable consequence*** of their negligence." *Towles v. Cox*, 181 Ga. App. 194, 197 (1986) (emphasis added and internal quotation marks omitted); *Freeman*, 281 Ga. App. at 136; *see also Ontario Sewing Mach. Co. v. Smith*, 275 Ga. 683, 687 (2002); *Millard v. AAA Elec. Contractors & Eng'rs, Inc.*, 119 Ga. App. 548, 555 (1969).

1. Whether a Defendant Anticipated the General Type or Category of Harm Expected to Flow From Its Negligence is a Fact Question.

Georgia courts have repeatedly applied the rule that only a general anticipation of the category of harm suffered by plaintiff is necessary to deny judgment as a matter of law on the issue of foreseeability. One of the earliest applications occurred in this Court's decision of *Williams v. Grier*, in which the plaintiff sued a baking company whose truck was illegally parked in an intersection and obscured plaintiff's view. 196 Ga. at 328. As a result of the defendant's truck being parked where it was, plaintiff's car was struck by a third car speeding through the intersection. *Id.* at 329. The baking company argued that because of the intervening third party, they were not liable for the plaintiff's injuries. In rejecting this argument, this Court concluded:

> In order for a party to be liable as for negligence, it is not necessary that he should have been able to anticipate the particular consequences which ensued. It is sufficient, if in ordinary prudence he might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might result.

Id. at 337–38.

The Court of Appeals ruling in *Smith v. Commercial Transportation, Inc.,* further confirms the necessity of a defendant's awareness of a general, as opposed to a specific, harm. 220 Ga. App. 866, 867 (1996). In *Commercial Transportation, Inc.,* a tractor-trailer overturned as a result of the driver's negligence. *Id.* at 866. Traffic was backed up for two miles. *Id.* Almost six hours later, a sixteen-year-old driving his family back from Florida failed to notice that vehicles in front of him were slowing down and struck the rear of a different tractor-trailer. *Id.* One of the sixteen-year-old's sisters was killed and another was injured. *Id.* The estate of the deceased sister and the injured sister filed suit against the tractor-trailer driver, his employer, and the employer's insurer.

Similar to Avis' argument in these cases, the defendants in *Commercial Transportation, Inc.* argued the sixteen-year old's "behavior was so unreasonable, it could not be foreseen." *Id.* at 867. The Court of Appeals rejected this argument as "illogical, of course." *Id.* After all, "by definition any intervening negligent act will not be reasonable or normal," otherwise, it would not be negligent. *Id.* And, of course, "not all intervening negligent acts cut off liability." *Id.* Thus, the Court reasoned, there necessarily are a category of acts that, while unreasonable, are nonetheless foreseeable.

Confirming this point, the Court went on to reason that, "as a general matter,

it would be difficult to state that the possibility of subsequent collisions following an initial accident blocking the road is absolutely not foreseeable." *Id.* In other words, the possibility of subsequent collisions following an initial accident that blocks the road is—at least in some instances—foreseeable. For these reasons, the Court specifically held that the issue of proximate cause could not be decided as a matter of law, even though five to six hours and two miles separated the accidents. *Id.* at 868.

2. No More Specificity is Required When the Intervening Act is Criminal.

The requirement of a defendant's awareness of a general, as opposed to a specific, harm has been applied to even the foreseeability of intervening criminal conduct. That is because, under Georgia law, "if the intervening criminal act is a reasonably foreseeable consequence of the defendant's negligent conduct, the legal, causal connection between that conduct and injury is not broken." *Hercules, Inc. v. Lewis*, 168 Ga. App. 688, 689 (1983). As this Court has held:

> it is not necessary that he should have contemplated or even be able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if, by exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

Munroe v. Universal Health Serv., Inc., 277 Ga. 861, 863 (2004) (quoting *Henderson v. Nolting First Mortg. Corp.*, 184 Ga. 724, 737 (1937)).

Federal courts applying Georgia law also understand this principle. In *Cain v. Vontz*, 703 F.2d 1279 (11th Cir. 1983), the 11th Circuit Court of Appeals reversed a district court judge for interpreting Georgia's law of foreseeability in the same way the Court of Appeals did in the decision below:

> This case turns on whether the criminal actions of an unknown assailant were or should have been foreseeable to the defendant Vontz. If the intervening criminal act was foreseeable, the original negligent party could still be liable. ***The judge apparently interpreted Georgia law to mean that a particular kind of crime should be "foreseeable" before a landlord would be liable for any earlier negligence.*** However, liability does not depend upon anticipating the particular injury or that a particular person would be injured. … A dangerous situation was created when the defendant failed to repair the broken locks on a young woman's apartment door.

Id. at 1282–83 (emphasis added).

Most recently this principle was applied in *Rautenberg v. Pope*, where a bystander was run over by a car thief. 351 Ga. App. 503 (2019). In reversing the trial court's grant of summary judgment to the premises owner, the Court of Appeals specifically held "[t]he fact that [the bystander's] injuries were different than those one would normally expect from a truck break-in is not a fact that demands summary judgment." *Id.* at 506.

Rautenberg recognizes, as other courts have recognized, the commonsense notion that consequences of a generally injurious nature are likely to result when a

thief flees in a stolen vehicle.[2] The stolen vehicle, in and of itself, is a potentially dangerous weapon. The thief drives the stolen vehicle on the public roadways in a reckless manner under the threat of capture or pursuit from authorities.

The Georgia ruling in *Rautenberg* comports with authority from around the country. A number of courts from other states have observed that thief-driven vehicles often collide with third parties, causing injury and death. *Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1256 (Utah 1994) ("A thief primarily concerned with avoiding detection and arrest may disregard traffic laws, endangering pedestrians and motorists alike."); *McClenahan v. Cooley*, 806 S.W.2d 767, 776 (Tenn. 1991) (foreseeable increased risk to public when vehicle left unattended in area where public has access). In fact, courts in Florida have recognized this principle in cases for forty years, including in cases ***involving Avis***. *E.g., Vining v. Avis Rent-A-Car Syst., Inc.*, 354 So. 2d 54, 56 (Fla. 1977) ("a reasonable man could foresee the increased danger of injury to the general public using the highways should such a theft occur."); *Hewitt v. Avis-Rent-A-Car System, Inc.*, 912 So. 2d 682, 685 (Fla. 1st DCA 2005) ("Although it was not foreseeable that the particular automobile involved in the accident would be stolen and cause

[2] This Court has previously recognized that property crimes, such as burglaries, can make crimes against persons foreseeable. *E.g, Sturbridge Partners, Ltd. v. Walker*, 267 Ga. 785 (1997) (rape and sodomy was foreseeable due to defendant's knowledge of three prior burglaries which occurred in the two months preceding the incident).

injury, such facts do not break the causative chain. '[A] foreseeable zone of risk means conduct that foreseeably creates a broader zone of risk that poses a general threat of harm to others, rather than the extent to which such conduct may foreseeably cause the specific injury that actually occurred.'").

B. Because the Court of Appeals' Opinions Misapply Georgia Law, this Court Should Reverse.

The proximate cause discussion in the *Johnson* Opinion, which the *Smith* Opinion simply adopts, creates a new, heightened burden to prove foreseeability that is at odds with *Rautenberg* and the concept of foreseeability that has been consistently described by Georgia courts in the other cases cited above. The *Johnson* Opinion required the plaintiffs to present evidence that a high-speed chase ending in a crash injuring innocent bystanders ***usually*** happens when a car is stolen. Again, that is simply not a proper application of foreseeability rule. Instead, the correct standard which the Court should have applied was whether the defendant might have foreseen that some injury would result from Avis's act of hiring a repeat car thief to drive cars, or that consequences of a generally injurious nature might have been expected from that act.

To the extent the issue was a close one, the Court of Appeals should have deferred to the jury's verdict. In general, the standard for taking a case away from a jury is high precisely because the decision to do so infringes on the constitutionally protected right to a jury trial. *See Service Merch., Inc. v. Jackson*, 221 Ga. App. 897,

898 (1996) ("The granting of summary judgment or directed verdict "is a very, very grave matter. By such act, the case is taken away from the jury, and the court substitutes its own judgment for the combined judgment of the [jury]."). The default position of this Court is "the question 'of reasonable foreseeability' of a criminal attack is generally 'for a jury's determination rather than summary adjudication by the courts.'" *See, e.g., Sturbridge*, 267 Ga. at 786 (quoting *Lay v. Munford*, 235 Ga. 340, 341 (1975)).

And, in fact, the jury in these cases issued a verdict that decided the question of foreseeability in favor of the Plaintiffs. Specifically, twenty-four jurors heard the testimony and evidence, and those twenty-four jurors determined that the intervening criminal act was reasonably foreseeable. At a minimum, reasonable minds could disagree on whether Avis should have foreseen that consequences of a generally injurious nature would result to innocent bystanders, like the plaintiffs in *Johnson* and *Smith*, if Avis hired a person with the tendency to steal cars to drive its cars. That makes this an instance where the determination was properly for the juries that heard these cases, not the Court of Appeals.

For all of these reasons, the Court should reverse the Georgia Court of Appeals.

This 1st day of October, 2020.

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CERTIFICATE OF SERVICE

I certify that I have served the counsel listed below via email at their addresses listed with the State Bar of Georgia. Due to the judicial emergency currently declared, this method of service has been used to ensure delivery to counsel, but the undersigned has agreed to provide paper service copies to any counsel upon their request.

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