2021 WL 4822592 (Ga.) (Appellate Brief)
Supreme Court of Georgia.

Wentworth MAYNARD et al., Petitioner,
v.
SNAPCHAT, INC., Respondent.

No. S21G0555.
October 7, 2021.

Court of Appeals of Georgia, Case No. A20A1218

Brief of Amici Curiae Georgia Chamber of Commerce in Support of Snap Inc.

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1** ***INTRODUCTION

The Georgia Chamber of Commerce files this *amicus curiae* brief in support of Snap Inc. The Court should affirm the opinion of the Court of Appeals.

Defendant Christal McGee criminally sped her vehicle over 100 miles per hour and collided with Wentworth and Karen Maynard's vehicle. The Maynards claim that a speedometer filter in the popular smartphone application Snapchat induced McGee to criminally speed and collide with their vehicle. The Maynards sued Snap Inc., alleging that it negligently designed Snapchat.

Because this case involves the dangerous misuse of another manufacturer's product - a Mercedes-Benz - Georgia's products liability law is not implicated against Snap. See, e.g., Griffin v. Crown Central Petroleum Co., 171 Ga. App. 534, 535 (1984) (citation omitted) (holding that a manufacturer "is under no duty to guard against injury from a patent peril or from a source manifestly dangerous"). Snap is not in the business of manufacturing luxury automobiles. Snap "cannot be expected to determine the relative dangers of various products [it] do[es] not produce or sell and certainly do[es] not have a chance to inspect or evaluate." See Taylor v. Elliott Turbomachinery Co., Inc., 171 Cal. App. 4th 564, 576 (2009). Other states recognize that extending liability in such a way is not practicable or reasonable.

***2** Even if products liability law does apply to the speedometer filter in this case, Snap had no duty to protect the Maynards from McGee's intentional, criminal operation of a vehicle and misuse of the application. Under Georgia law, a plaintiff must prove four elements to recover for negligence: a duty, a breach of that duty, causation, and damages. *Johnson v. American National Red Cross,* 276 Ga. 270, 272 (2003) (citation omitted).

At issue before the Court is the element of duty. "The existence of a legal duty is a question of law for the court," *Rasnick v. Krishna Hospitality, Inc.,* 289 Ga. 565, 567 (2011) (citation omitted). Below, the Court of Appeals held: "Although manufacturers have 'a duty to exercise reasonable care in manufacturing their products so as to make products that are reasonably safe for intended or ***foreseeable uses,'*** this duty does not extend to the ***intentional (not accidental) misuse*** of the product in a tortious way by a third party." Maynard v. Snapchat, Inc., 357 Ga. App. 496, 500 (2020) (quoting *Sheffield v. Conair Corp.,* 348 Ga. App. 6, 8-9 (1) (2018), also citing *Jones v. Nordictrack, Inc.,* 274 Ga. 115, 118 (2001)) (emphasis added). As shown below, this narrow holding is consistent with Georgia caselaw and principles of negligence, products liability, and public policy. Cf. Barrett-Walls, Inc. v. T. V. Venture, Inc., 242 Ga. 816, 819 (1978) (noting Georgia's public policy in promoting business and competition).

3** Unfortunately, the Maynards and the dissent improperly rely on the risk-utility balancing test for establishing ***liability in a design defect claim. As the Court of Appeals properly recognized, application of the liability test is independent from, and must follow, the recognition of a legally cognizable duty. *Maynard,* 357 Ga. App. at 499 ("[T]he applicability of that test does not obviate the requirement to identify a legal duty, which presents a legal question for the court.") (citing *Rasnick,* 289 Ga. at 567). In response, the Maynards claim that the products liability statute, O.C.G.A. § 51-1-11 (b)(1), affirmatively established the element of duty for all products liability plaintiffs in Georgia. But the contention that § 51-1-11 (b)(1) establishes the element of duty against all the globe's manufacturers, towards everyone, is as unsupported by law as it is dubious.

When "fixing the bounds of duty, not only logic and science, but public policy play an important role." *CertainTeed Corp. v. Fletcher,* 300 Ga. 327, 330 (2016) (quoting *CSX Transp., Inc. v. Williams,* 278 Ga. 888 (2005)). Georgia's public policy on negligence liability focuses heavily on guarding from intervening tortious or criminal conduct. Moreover, imposition of a blanket duty on behalf of all manufacturers to control the actions of product users and prevent them from committing tortious or criminal misuse of their products would stifle Georgia's public policy of promoting innovation and business. No smartphone application ***4** developer could stop McGee from deciding to speed and capture the moment with a photograph.

IDENTITY AND STATEMENT OF INTEREST OF AMICI CURIAE

The Georgia Chamber of Commerce is Georgia's largest business advocacy organization. The Chamber is comprised of members and investors ranging from mom-and-pop storefronts to national and international corporations. The Chamber represents a diverse cross-section of industry sectors, and its mission is to "provide coordinated leadership to protect free enterprise, engage members, capitalize on emerging trends, and mitigate risk to Georgia business." Georgia Chamber of Commerce, https://www.gachamber.com/about-the-georgia-chamber/ (last accessed Oct. 3, 2021). For over 100 years, the Chamber's mission has been to keep and create jobs to make Georgia a competitive state for business in the Southeast, and nationwide.

ARGUMENT AND CITATION OF AUTHORITY

I. Georgia law should not hold a manufacturer liable for a person's misuse of another manufacturer's product.

A smartphone application developer should not be held liable for a person's misuse of a car. Assuming the speedometer filter is even a "product," the Maynards do not claim that the intangible software itself somehow caused their physical injuries. See Fluor Corp. v. Jeppesen & Co., 170 Cal App. 3d 468, 475 (1985) ("[T]he policy reasons underlying the... products liability concept should ***5** be considered in determining whether something is a product within the meaning of its use... rather than... to focus on the dictionary definition of the word.") (citations omitted). Rather, the Maynards say that Snap, a smartphone application developer, is liable for a person's misuse of a Mercedes-Benz.

Imposing a duty on a communications software developer to police the misuse of automobiles is not practicable or reasonable. *See Taylor,* 171 Cal. App. 4th at 582 ("Understandably, the law does not require a manufacturer to study and analyze the products of others and to warn users of risks of those products.") (citation omitted). A "duty... must have a logical basis and scope that limit [s] the legal consequences of wrongs to a controllable degree [Cits.], and therefore, [the Court] must draw a commonsense line at which duty ends based on the closeness of the connection between the manufacturer's product, the other product and their uses." *In re New York City Asbestos Litigation, Dummitt v. Chesterton,* 27 N.Y.3d 765, 793 (2016) (citations and internal quotations omitted). Of course, Snap is not in the business of manufacturing automobiles. Application developers such as Snap, therefore, "cannot be expected to determine the relative dangers of various products they do not produce or sell and certainly do not have a chance to inspect or evaluate." T*aylor,* 171 Cal. App. 4th at 576. "This legal distinction acknowledges that over-extending the level of responsibility could potentially lead ***6** to ***commercial as well as legal nightmares in product distribution."*** *Id.* (emphasis added).

Should Georgia choose to extend an application developer's duty to include preventing the misuse of a car, it would be among the first states to do so. As discussed in the briefing, the California Court of Appeals held that Apple, Inc. owed no duty to third parties injured in an automobile accident caused by a distracted driver's use of the FaceTime application while driving. Modisette v. Apple, Inc., 30 Cal. App. 5th 136, 152 (2018). That court recognized the consequential and undesirable impact of extending a software developer's duty to encompass regulating distracted drivers. Id. ("Given the complex public policy considerations involved in such a calculus, and the potentially sweeping implications of finding a duty by Apple here, we conclude that policy considerations dictate finding as a matter of law an exception to the general duty of care."). As in California, Georgia's public policy weighs heavily in favor of declining to extend a duty in this case. See supra § IV.

Relatedly, the New York Court of Appeals recognized that in the "synergistic use of a manufacturer's product and another company's product... the manufacturer's ***lack of control*** over... the other company's product[] militates against recognition of a duty." *New York City Asbestos Litigation,* 27 N.Y.3d at 794 (emphasis added). Accordingly, that State recognized the existence of "a ***7** manufacturer's duty... [when there is] joint use of its product ***and another product that is necessary*** to allow the manufacturer's product to work as intended." *Id.* at 795 (emphasis added).

Applying this well-reasoned logic, Snap cannot be held liable here. Driving a vehicle is not necessary for the proper use of the speed filter. Maynard, 357 Ga. App. at 500 (noting the use of the speed filter applies neutrally, at any speed, and is "equally functional when used while flying in an airplane [] [or] while riding as a passenger stuck in a traffic jam"). Indeed, the speed filter functions as intended even when the user is going zero miles per hour. Moreover, the speed filter's combined use with a vehicle is explicitly warned against. (Answering Br. of Appellee-Def. Snap Inc. at 5 (showing the speed filter instructed users, "Please, DO NOT Snap and drive")). Expanding business liability here would place Georgia out of step with the rest of the nation's tort laws and put the State at a significant competitive disadvantage.

The dissent notes that although the technology involved is novel, the underlying legal principles are ubiquitous. Maynard, 357 Ga. App. at 502 (McFadden, J., dissenting). The Chamber agrees. One seminal Texas case may be helpful in this regard. See Way v. National Shooting Sports Foundation, Inc., 856 S.W.2d 230, 232 (Tex. Ct. App. 1993). There, the Boys' Life magazine published a shooting sports supplement that included an advertisement for firearms. ***8** Id. at 232. A 12-year-old boy read the supplement and was thereafter killed in a rifle accident. Id. The boy's mother sued the magazine alleging, inter alia, that "the information contained in the supplement made the magazine a defective product." Id. The trial court granted the defendants' motion for summary judgment, which had argued that the advertisement was not a "product." Id. at 232-33.

On appeal, the court noted that the plaintiff was "not complaining about the physical properties of the supplement." Id. at 239 (emphasis added). Rather, she had alleged "the ideas and information contained in the magazine encouraged children to engage in activities that were dangerous." Id. (emphasis added). The court conceded that the advertisement possessed "intangible characteristics, not tangible properties." Id. In ultimately finding that "the ideas, thoughts, words, and information conveyed by the magazine... [were] not products," the court reasoned:

> A book containing Shakespeare's sonnets consists of two parts, the material and the print therein, and the ideas and expression thereof. The first may be a product, but the second is not.... These doctrines applicable to the second part are aimed at the delicate issues that arise with respect to intangibles such as ideas and expression. Products liability law is geared to the tangible world.

Id. (quoting Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1034 (9th Cir. 1991)) (emphasis added). Here, Snapchat is a smartphone software that allows its users to communicate with one another. Snap should not be made to prevent certain types ***9** of communications, or activities, of the people sending messages with its platform or face tort liability.

II. Even if this Court finds that products liability law is applicable, Georgia plaintiffs must plead and establish a legally cognizable duty to sustain an action for products liability.

The Maynards allege that when a plaintiff simply "pleads a design-defect" claim under O.C.G.A. § 51-1-11 (b)(1) or Georgia common law, "nothing more is required to establish a legal duty." (Appellants-Pls.' Wentworth & Karen Maynard's Opening Br. at 13 (Aug. 16, 2021)). This is so, they say, because under O.C.G.A. § 51-1-11 (b)(1), "[t]he manufacturer of any personal property... shall be liable in tort... to any natural person who may use, consume, or reasonably be affected by the property." (Id. at 12 (emphasis in original)). Conveniently, the Maynards read this language to establish the element of duty, against all of the world's manufacturers, towards every Georgia plaintiff who files a claim. Accordingly, "the Maynards need not allege any 'special relationship"' required to initiate a duty to control the conduct of third persons, or otherwise make any effort to fulfill their burden of establishing a duty on behalf of Snap. (Id. at 13).

The Maynards are wrong. No Georgia court has ever held that § 51-1-11 (b)(1) establishes a duty against all the world's manufacturers towards all people by their mere pleading of a products liability claim. Indeed, the very text of the statute is restrictive in two fundamental ways. First, the duty extends only towards ***10** three classes of plaintiffs: (1) users; (2) consumers; and (3) persons "who may... reasonably be affected by the property." O.C.G.A. § 51-1-11 (b)(1) (emphasis added). Second, such person must suffer injury "because the property... was not... reasonably suited to the use intended." Id. (emphasis added). The suggestion that the language of § 51-1-11 (b)(1) was meant to create an essentially limitless duty misinterprets the English language, to start. See Deal v. Coleman, 294 Ga. 170, 172 (2013) ("[W]e must afford the statutory text its plain and ordinary meaning, [Cits.] we must view the statutory text in the context in which it appears, [Cits.] and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would.") (citations and internal quotations omitted).

Moreover, the Supreme Court of Georgia has expressly rejected the idea of creating a general legal duty to all the world. See Department of Labor v. McConnell, 305 Ga. 812, 815-16 (2019). There, this Court held "[n]egligence is premised on, among other things, a duty owed by the defendant to the plaintiff... [W]e hereby disapprove [Georgia precedent] to the extent that it created a general legal duty 'to all the world not to subject [others] to an unreasonable risk of harm."' Id. (disapproving Bradley Center v. Wessner, 250 Ga. 199, 201 (1982)) (emphasis added).

***11** Because "[t]he existence of a legal duty is a question of law for the court," whether a plaintiff was someone doing something sufficient to trigger a duty on behalf of a manufacturer under O.C.G.A. § 51-1-11 (b)(1) is outside the province of the jury. Rasnick, 289 Ga. at 567 (citation omitted).

> [T]he threshold issue in a negligence action is whether and to what extent the defendant owes a legal duty to the plaintiff. This issue is a question of law. A legal duty sufficient to support liability in negligence is

> either a duty imposed by a valid statutory enactment of the legislature or a duty imposed by a recognized common law principle declared in the reported decisions of our appellate courts.

Cabrera v. Ellis, 358 Ga. App. 396, 407 (2021) (quoting Sheaffer v. Marriott International, 349 Ga. App. 338, 340 (1) (2019)).

Of course, "[i]n the absence of a legally cognizable duty, there can be no fault or negligence." Id. In the context of a products liability action, therefore, identification of a duty must precede the risk-utility balancing test under Banks v. ICI Americas, Inc., which test for liability is not helpful nor relevant in the identification of a legal duty. 264 Ga. 732, 735 (1994). See also Maynard, 357 Ga. App. at 499 ("[T]he applicability of that test does not obviate the requirement to identify a legal duty, which presents a legal question for the court."). So, the Maynards' and the dissent's focus on the Banks test places the proverbial carriage before the horse, and unfortunately conflates the issues of breach and causation with the issue of duty. The risk-utility test determines breach, not duty. See ***12** id. at 502 ("If we were to default to the risk-utility balancing test in this case without identifying a legal duty, it would eliminate the plaintiffs' burden to assert the elements of a cognizable tort claim.").

III. The Court of Appeals properly determined that Snap has no duty to third parties to control the conduct of its users to prevent intentional, tortious, criminal misuse of the speedometer filter while driving.

The Majority's holding is narrow, and consistent with principles of Georgia products liability and negligence law. "Although manufacturers have 'a duty to exercise reasonable care in manufacturing their products so as to make products that are reasonably safe for intended or foreseeable uses,' this duty does not extend to the intentional (not accidental) misuse of the product in a tortious way by a third party." Maynard, 357 Ga. App. at 500 (quoting Sheffield v. Conair Corp., 348 Ga. App. 6, 8-9 (1) (2018), also citing Jones v. Nordictrack, Inc., 274 Ga. 115, 118 (2001)) (emphasis added).

The Maynards claim that "the General Assembly chose not to limit a manufacturer's liability to only those injuries caused by intended or accidental use." (Opening Br. at 15). But the absence of cited authority to this proposition is telling. The General Assembly limited a manufacturer's duty to those who may reasonably be affected by the product because it was not reasonably suited to the use intended. See O.C.G.A. § 51-1-11 (b)(1). The Court of Appeals has clarified that this duty includes "exercise[ing] reasonable care in manufacturing its products ***13** so as to make products that are reasonably safe for intended or foreseeable uses." Sheffield, 348 Ga. App. at 8-9 (2018) (citing Chrysler Corp. v. Batten, 264 Ga. 723, 724 (1) (1994); Certainteed Corp., 300 Ga. at 329 (1) (2016)) (internal quotations omitted) (emphasis added).

On the other hand, because "virtually any article, of whatever type or design, is capable of producing injury when put to particular uses or misuses, a manufacturer has no duty so to design his product as to render it wholly incapable of producing injury." Woods v. A.R.E. Accessories, LLC, 345 Ga. App. 887, 891 (2018) (quoting Greenway v. Peabody Int'l Corp., 163 Ga. App. 698, 700 (1982)) (emphasis added). Logically, this makes sense. Adept criminals and tortfeasers may think of innumerable ways to misuse "virtually any article, of whatever type or design" to injure third parties. Id. A manufacturer's duty to third parties should not rest on the creativity of the tortfeaser employing its product for an improper use.

Mirroring this logic, the Court of Appeals has already clarified that "a product manufacturer has no duty to design... against harm caused by an ***unforeseeable misuse of its product." Id.*** (citing Restatement (Third) of Torts: Products Liability § 2 (b), cmts. m., p. (Am. Law. Inst. 1998)) (emphasis added). Here, the Majority's holding is simply another clarification of the contours ***14** of the duty: manufacturers have no duty to protect the world against ***intentional (not accidental) misuse of its product in a tortious way.***

The Maynards expend great effort arguing that the "attractiveness of the product... may be considered under the risk-utility test." (Opening Br. at 24 (citation omitted)). But as discussed above, the risk-utility test determines liability, not duty. See supra

§ II. Even if this case were at the liability stage, focusing heavily on the attractiveness of the product for misuse is legally problematic for other reasons. Arguably, a driver doing anything else while driving attracts risk, including drinking water, chatting with a passenger, looking at a smartphone or, perhaps, reading a billboard on the side of the road. If obvious misuse of a product while driving exposed the object's manufacturer to liability, an impermissibly broad burden would be placed across a wide range of industry sectors. As such, the Majority's narrow holding is consistent with Georgia caselaw and public policy. The Maynards strain to manufacture caselaw inconsistent with the Majority's holding, to no avail.

A. Woods v. A.R.E. Accessories, LLC is not applicable because in that case, duty was already established and was not at issue.

First, the Maynards labor to apply the Court of Appeals' reasoning in Woods v. A.R.E. Accessories, LLC to this case. See 345 Ga. App. 887 (2018). In Woods, the court stated:

> ***15** reasonably foreseeable product use or misuse is a factor in considering whether a manufacturer may be liable for a defective product which was a proximate cause of harm resulting from the failure to adopt a reasonable alternative design (or from a failure to warn) to reduce the foreseeable risks of harm posed by the product.

Id. at 891 (2018) (citing Restatement (Third) of Torts: Products Liability § 2, cmt. p. (Am. Law Inst. 1998); *Jones,* 274 Ga. at 117-18; Banks, 264 Ga. at 736-37). What the Maynards fail to note, however, is that in *Woods,* the plaintiff was an indisputable user of the allegedly defective product; the issue was not whether a duty existed, but whether liability had been established on a motion for summary judgment. See id. at 212 ("On these facts, the record shows as a matter of law that the ARE truck cap product was not defective.... Although the trial court granted summary judgment in favor of ARE on other grounds, we affirm...").

In Woods, the plaintiff had himself "raised the [allegedly defective] rear door to access the truck bed, and about 10 to 15 seconds later the door fell from the raised position and hit [the plaintiff's] head." Id. at 887. As a user of the hatchback door, it was obvious that the manufacturer owed a duty to the plaintiff. See O.C.G.A. § 51-1-11 (b)(1) (creating a duty to "any natural person who may use... the property"). In that opinion, every single mention of the word, "duty," was in conjunction with the nature of the duty and what it required, and not whether a duty existed in the first place. See id. at 889 ("A manufacturer has a duty to exercise reasonable care in the manufacture and design of its products...."); id. ***16** ("[A] manufacturer which... knows or reasonably should know of a danger arising from use of the product "has a duty to give warning of such danger."); id. ("That duty requires warnings of nonobvious foreseeable dangers from the normal use of its products."); id. at 890 ("The manufacturer's duty is to exercise reasonable care to design products...."); id. at 891 ("[A] manufacturer has no duty so to design his product as to render it wholly incapable of producing injury."); id. at 891 ("[A] product manufacturer has no duty to design or warn against harm caused by an unforeseeable misuse...") (emphases added). Because duty was already established in Woods, and the issue was liability, it is not helpful and certainly does not control the issue before this Court.

B. Jones v. NordicTrack, Inc. is not applicable because in that case, the issue was whether a product must literally be "in use" (i.e., in operation) to establish liability.

Next, the Maynards toil to cherry-pick language from this Court's decision in Jones v. NordicTrack, Inc., while ignoring the central issue of that case. 274 Ga. 115 (2001). In Jones, the sole certified question was: "Must a product be in use [Cits.] at the time of injury for a defendant to be held liable for defective design under theories of strict liability, negligence, or failure to warn?" Id. at 115 (citing Chrysler Corp., 264 Ga. at 724). The holding was narrow and simple: no. See id. at 118 ("Accordingly, the certified question must be answered in the negative.").

***17** In Jones, this Court reasoned, "[t]he plain language of [O.C.G.A. § 51-1-11 (b)(1)] extends manufacturer liability not only to those who may use the property, but also to those persons who may 'consume' the property or 'reasonably be affected' by it." Id. at 117 (citations omitted). This observation was a mere summation of the statute's language. See generally O.C.G.A. § 51-1-11 (b)(1). So, when this Court preliminarily noted, "in a products liability action for defective design the focus is not on use of the product," it was merely summarizing the unembellished language of § 51-1-11 (b)(1). Id. at 115. Of course, a manufacturer's duty cannot simply stem from the use of a product when the statute applies to those also "reasonably... affected" by it. O.C.G.A. § 51-1-11 (b)(1).

The facts of Jones demonstrate its limited holding. There, the plaintiff had purchased a ski exercise machine and placed it in her recreation room. Jones, 274 Ga. At 116. One day, the plaintiff was "walking through the recreation room when she fell against the ski exerciser" and suffered injuries. Id. She had not been using the exercise machine at the time of injury. Id. So, a more precise recount of the issue is whether a manufacturer could be liable when the product was not in use when the plaintiff was injured by it. See id. at 115 ("Must a product be in use [Cits] at the time of injury for a defendant to be held liable...."") (citations omitted) (emphasis added). The discussion of "use" was in the context of whether the machine was in use (i.e., being operated as a ski exercise machine) at the time ***18** the plaintiff was injured, or not in use (i.e., not being operated as a ski exercise machine) at the time of injury. The opinion stands for the concept that, although the plaintiff was not using the machine when she was injured, she still could be "reasonably... affected" by it. O.C.G.A. § 51-1-11 (b)(1). Id. at 117 ("The fact that the statute also states that a manufacturer is liable when the property is not merchantable and reasonably suited to the use intended does not set forth a requirement of product use....") (citations and internal citations omitted).

Indeed, Chief Justice Norman Fletcher recognized this limited holding in his concurrence:

> I concur with the majority's conclusion that "use", at least insofar as the word "use" means actually operating the allegedly defective product, is not a predicate to liability under Georgia law. I write separately because finding that "use" is not a predicate to liability for a defectively designed product does not mean that a plaintiff in a defective design case, who has presented a reasonable, safer, alternative design, automatically is entitled to a jury trial.

Id. (Fletcher, J., concurring). Jones is not helpful to this Court, because the Maynards alleged that the speedometer filter was in use at the time of the accident. Therefore, Jones does not apply, and the Majority's holding below is certainly not inconsistent with it.

***19 C. Other cited authority is distinguishable and not controlling.**

The Maynards broach two additional Court of Appeals opinions in an attempt to manufacture a holding inconsistent with the Majority's holding. First, they point to Medics Pharmaceutical Corp. v. Newman, for the contention that "[t]he maker of an article... must use reasonable care and skill in designing it... so that it is reasonably safe for the purposes for which it is intended, and for other uses which are foreseeably probable." (Opening Brief at 16 (quoting Medics Pharmaceutical Corp. v. Newman, 190 Ga. App. 197 (1989) (emphasis in original)). But in Medics, the plaintiffs mother had taken a medication during her pregnancy with the plaintiff, which allegedly caused injury. Medics Pharmaceutical Corp., 190 Ga. App. at 197. The issue was not whether a duty existed, or whether the plaintiff was "reasonably... affected" under O.C.G.A. § 51-1-11 (b)(1) by her mother's ingestion of the drug. The issue was whether the trial court erred in denying the defendants' motion for directed verdict after trial. Id. at 198. More specifically, the issue was whether a failure to warn was the proximate cause of the injury, and whether plaintiff's counsel made certain admissions in judicio during closing argument. Id. So, Medics is not helpful here, and the Majority's opinion is not inconsistent with the cherry-picked language.

Next, the Maynards mention *Ford Motor Co. v. Stubblefield* for the contention that the "Court of Appeals rejected Ford's argument that 'the collision. ***20** ., constituted such a misuse of the product that Ford had no legal duty."' (Opening Br. at 16 (quoting *Ford Motor Co. v. Stubblefield,* 171 Ga. App. 331, 335 (1984)). But in that case, the product at issue was the 1975 Mustang II, an automobile, that was involved in an automobile collision. *Id.* at 331. The court noted that "[v]ehicular collision is an event which is foreseeable by the ***[automobile]*** manufacturer." *Ford Motor Co.,* 171 Ga. App. at 336. The court did not hold that misuse can never preclude duty. Of course, it was reasonable that a ***vehicle*** passenger might be reasonably affected under O.C.G.A. § 51-1-11 (b)(1) by a vehicle in a collision so to trigger a duty on the manufacturer. *Id.* ("The sole theory of liability against Ford was its alleged negligence in the design of the automobile in which 15-year-old Terri Stubblefield was a passenger when she was fatally injured."). *Ford* is not applicable here.

IV. Georgia's public policy favors the Majority's holding, which keeps reckless drivers responsible for their tortious conduct, and avoids fashioning a blanket general duty against all manufacturers.

When "fixing the bounds of duty, not only logic and science, but public policy play an important role." CertainTeed Corp., 300 Ga. at 330 (quoting CSX Transp., Inc. v. Williams, 278 Ga. 888 (2005)). The Maynards claim that the Majority's holding contravenes public policy surrounding products liability law. (Opening Br. at 18). Their argument boils down to three points, all of which hold little water.

***21** First, the Maynards say that an "[u]ncritical rejection of design defect claims in all cases where there is intentional-misuse... contravenes sound public policy by encouraging design strategies which perpetuate the manufacture of dangerous products." (Id. at 19 (citations and internal quotations omitted)). To begin, this veiled concern ignores a critical nuance of the Majority's holding. The holding provides that, "th[e] duty does not extend to the intentional (not accidental) misuse of the product in a tortious way by a third party." Maynard, 357 Ga. App. at 500. This limited holding does not touch upon nor reject design defect claims of those people who may use, consume, or be reasonably affected by the product. See O.C.G.A. § 51-1-1(b)(1). Those facts are not before the Court. Moreover, because tortfeasors find new and creative ways to misuse products to harm third parties, manufacturers cannot reasonably be made to anticipate all possible misuses, and should "ha [ve] no duty so to design [their] product as to render it wholly incapable of producing injury." Woods, 345 Ga. App. at 891 (quoting Greenway, 163 Ga. App. at 700) (emphasis added). The result of such a duty would be absurd. It would espouse limitless liability to any third party unfortunate enough to be caught in the crossfire of any product's tortious user, thereby stifling innovation and business in our State.

Second, the Maynards say the Majority's "intentional-misuse" rule removes the decision of apportioning fault from the jury. (Opening Br. at 19). But "[t]he ***22** existence of a legal duty is a question of law for the court." Rasnick, 289 Ga. at 567 (citation omitted). So, the Maynards' concern involves the jury's ability to apportion fault to a (named) defendant which had no legally cognizable duty to begin with. See Alston & Bird, LLP v. Hatcher Management Holdings, LLC, 2021 WL 3501075 (Ga. Aug. 10, 2021) ("[A]pportionment under [Georgia's apportionment statute] does not apply to tort actions brought against a single defendant."). The jury has no role in determining the application of a legal duty. Rasnick, 289 Ga. at 567.

Third, the Maynards note that Georgia's Hands-Free Law was passed after the subject collision, and note the law was meant to protect from distracted driving, which they say is not at issue here. (Opening Br. at 20). To begin, in the 21st Century, technology is ever evolving, and indeed smartphone applications have progressed greatly since 2015. The Majority's reference to the Hands-Free Law describes a recent development in the law in response to progress in science and technology, which should be considered in the judiciary's molding of a duty, now. See CertainTeed Corp., 300 Ga. at 330; Maynard, 357 Ga. App. at 500-01 ("Despite the inherent appeal and distracting nature of smartphone applications, Georgia thus far has not created a duty on the part of manufacturers to control third parties' use of mobile phone applications while driving."). Also, the notion that McGee was not a "distracted" driver is simply inconsistent with the facts of the ***23** case. Id. at 498 ("Due to her distraction and unsafe speed, McGee drove into the back of Maynard's vehicle, injuring everyone involved.").

In fact, Georgia's public policy on negligence liability focuses heavily on guarding from tortious or criminal conduct. It is well established that, "[a]s a general rule, there is no duty to control the conduct of third persons to prevent them from causing physical harm to others." Stanley v. Garrett, 356 Ga. App. 706, 710 (2021) (citing Shortnacy v. N. Atlanta Internal Medicine, P.C., 252 Ga. App. 321, 325 (2) (2001), SecureAlert, Inc. v. Boggs, 345 Ga. App. 812, 816 (2018) (internal quotations omitted)). There are two exceptions to this rule. Id. The first exception is "when a special relationship exists between the actor and another imposing a duty on the actor to control such person's conduct for the benefit of third persons." Id. (citing Houston v. Bedgood, 263 Ga. App. 139, 142 (2) (2003); Gilhuly v. Dockery, 273 Ga. App. 418, 419-20 (2005)) (internal quotations omitted). The second exception is when a "special relationship exists between the actor and another giving such person a right to protection." Id. (citations and internal quotations omitted). Imposing a duty, here, would contravene these basic tenets of negligence jurisprudence. New Star Realty, Inc. v. Jungang Pri USA, LLC, 346 Ga. App. 548, 561 n.7 (2018) ("[A] potentially broad duty is narrowed by the general rule that 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 ***24** harming a third person, absent a special relationship.") (citations and internal quotations omitted). And because the Maynards did not plead a special relationship stemming from Snap towards them, their claim fails.

Fashioning a duty on behalf of all manufacturers to control the actions of product users and prevent them from committing tortious or criminal misuse of their products would choke innovation and business in Georgia. The public policy of this State is to provide a constructive and practical business environment for manufacturers. See, e.g., Barrett-Walls, Inc., 242 Ga. at 819 (noting Georgia's public policy in promoting business and competition). But under the Maynards' test, any potentially foreseeable misuse of a product would subject manufacturers to a jury trial. (Opening Br. at 14-15). Independent of an ultimate finding of liability, the mere expense of litigating every case involving some foreseeable misuse of a product could have a devastating impact on all manufacturers and business interests in Georgia. See Taylor, 171 Cal. App. 4th at 576. ("[O]ver-extending the level of responsibility could potentially lead to commercial as well as legal nightmares in product distribution"). It is foreseeable that criminals will commit crimes. Forcing manufacturers to police the public at large would be an improper tailoring of a private legal duty.

Finally, speeding at 100 miles per hour is inherently dangerous criminal behavior. In the context of O.C.G.A. § 51-1-11 (b)(1), the Court of Appeals has ***25** held that a manufacturer "is under no duty to guard against injury from a patent peril or from a source manifestly dangerous." Griffin, 171 Ga. App. at 535 (citation omitted); Talley v. City Tank Corp., 158 Ga. App. 130, 138 (1981) ("In effect, (the manufacturer) had no duty to protect the (consumer) against... an intervening cause.") (citations and internal quotations omitted). In 2015, all cars had odometers and all smartphones had cameras. If McGee wanted to speed and capture the moment with a photograph, a smartphone application developer could not stop her.

CONCLUSION

The Court should affirm the decision of the Court of Appeals.

October 7, 2021

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