2021 WL 3634908 (Ga.) (Appellate Brief)
Supreme Court of Georgia.

Wentworth MAYNARD and Karen Maynard, Appellants-Plaintiffs,
v.
SNAPCHAT, INC., Appellee-Defendant.

No. S21G0555.
August 16, 2021.

Ct. App. No. A20A1218

Appellants-Plaintiffs Wentworth and Karen Maynard's Opening Brief

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1** ***Summary

This appeal arises from a products-liability action for negligent design. The Maynards filed this action against Snapchat, Inc., a social media company, and Christal McGee, one of its teenage users. V2-329-46 (Pls.' 2d Am. Compl.).

The Maynards allege that Snapchat's Speed Filter encourages its users to "driv [e] cars at speeds of 100 MPH or more because they want to use Snapchat's Speed Filter to capture a mobile photo or video showing them hitting 100 MPH and then share the Snap." V2-335. Despite knowledge that its Speed Filter was having this dangerous effect, Snapchat refused to take the no-cost step of removing its Speed Filter, rendering it inoperable at dangerous speeds, or otherwise addressing the danger. As a result, Snapchat's users continued to engage in dangerous speeding.

On September 10, 2015, Christal McGee was driving at over 100 MPH for the specific purpose of using the Speed Filter to take a Snap of her going 100 MPH and then sharing the 100-MPH-Snap on Snapchat. As one of Christal's passengers testified, "Christal... said ***she was just trying to get the car to 100 m.p.h. to post it on Snapchat.*** She said 'I'm about to post it.'" *Maynard v. Snapchat, Inc.,* 346 Ga.App. 131, 132 (2018) *(Maynard I)* [1] (emphasis added); *see* V2-337 (same).

***2** Because Christal was driving at dangerously high speeds, there was no time to react when, as she raced down Tara Boulevard in Clayton County, Georgia, she suddenly approached a car driven by Wentworth Maynard. V2-338. Christal's car crashed into Wentworth's car at a speed of about 107 MPH, and because of the violent crash, Wentworth suffers permanent and irreversible brain damage, and his life, as well his wife Karen's life, will never be the same. *Id.*

Despite plainly stating a negligent-design claim against Snapchat, a divided Court of Appeals held that, on the pleadings alone and without discovery, Snapchat did not owe a "duty to use reasonable care in designing the Speed Filter product." Maj. Op. at 2. After the Maynards petitioned this Court for a writ of certiorari, which Snapchat opposed, this Court granted the write to decide the following question: "Did the Court of Appeals err in affirming the dismissal of [the] Maynard[s'] second amended complaint?" July 7, 2021 Order at 1.

The answer to this question is a resounding yes. The Majority created new and unprecedented law in Georgia by its holding that:

Although manufacturers have 'a duty to exercise reasonable care in manufacturing its 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."

Maj. Op. at 7 (quoting *Chrysler Corp. v. Batten,* 264 Ga. 723, 724 (1994)).

There is no prior Georgia case holding, or even suggesting, that there is an ***3** intentional-misuse exception to a manufacturer's duty. Even the Majority's own articulation of its holding makes clear that it has created unprecedented Georgia law.

The first clause of the Majority's holding quotes existing Georgia law: "manufacturers have 'a duty to exercise reasonable care in manufacturing its products so as to make products that are reasonably safe for intended ***or foreseeable*** uses.'" Maj. Op. at 7 (emphasis added). In other words, so long as the intentional misuse was foreseeable, the manufacturer owes a duty and could be liable.

The second clause of the Majority's holding then creates a new exception, not found in *Chrysler,* the case quoted in the first clause, or any other prior Georgia case: "this duty does not extend to the ***intentional*** (not accidental) misuse of the product." Maj. Op. at 7 (emphasis added). Under the Majority's new exception, even if the intentional misuse is foreseeable, a manufacturer owes no legal duty at all.

Put simply, the Majority created a new intentional-misuse exception to the prior rule of foreseeability. *Id.* More important, the Majority created a blatant conflict with this Court's and the Court of Appeals' prior precedent.

4** As this Court held in *Jones v. NordicTrack, Inc.,* "in a products liability action for defective design ***the focus is not on use of the product." 274 Ga. 115, 115 (2001) (emphasis added). "The very facts of *Banks* [2] illustrate the difficulty in defining 'use' in the context of injury proximately caused by an alleged defective product..." *Id.* at 117. In *Banks,* "the product was certainly not in use, in any manner, as a rodenticide, and any attempt to characterize the boy's ingestion of poison as a type of 'use,' i.e., misuse, unintended use, or abnormal use of the product is ***wholly unnecessary.***" *Id.* at 118 (emphasis added).

Similarly, as the Court of Appeals held in *Woods v. A.R.E. Accessories, LLC,* "a product that causes harm as a result of unforeseeable misuse is not defective." 345 Ga.App. 887, 891 (2018). "On the other hand, ***reasonably foreseeable product use or misuse*** is a factor in considering whether a manufacturer may be liable... [for] the failure to adopt a reasonable alternative design (or [for] a failure to warn) to reduce the foreseeable risks of harm posed by the product." *Id.* (emphasis added).

Because the Majority created a new exception that blatantly conflicts with this Court's and the Court of Appeals' prior precedent, the Court of Appeals plainly erred in affirming the dismissal of the Maynards' complaint. This Court should reverse the Court of Appeals and instructed that it remand this case to the trial court, so that, *over five years* after this action was filed, merits discovery can finally begin.

Statement Of The Case

In the darkness of late evening on September 10, 2015, at around 10:15 PM Wentworth Maynard left his home at the Villas at Hampton, an apartment complex in Lovejoy, Georgia, and drove out in his Mitsubishi Outlander. V2-338. Wentworth turned right and merged onto Tara Boulevard heading south. What Wentworth did ***5** not know was that Christal McGee, an eighteen-year-old, was driving recklessly down on the same road and about to crash into Wentworth's car. V2-337-38.

Wentworth could not know what was about to happen because Christal was driving at over 100 MPH where the speed limit is 55 MPH. V2-337. Christal had just left work at the Bay Breeze Seafood Restaurant, about one mile north. Christal was driving her father's Mercedes-Benz C230, and she was giving her co-workers, Henry Williams, Heather McCarty, and Kaylan Henderson, a ride home. *Id.*

Soon after leaving the Bay Breeze, Christal began rapidly accelerating her speed. She quickly pushed the speed to 80 MPH, then to 90 MPH, and finally to over 100 MPH. *Id.* And because Christal was driving so fast, there was no time for Christal to react when she approached Wentworth's car. Christal's car crashed into the back of Wentworth's car at a speed of about 107 MPH. V2-338.

The crash was so violent that it flung both cars in opposite directions on the four-lane divided highway. Wentworth's Mitsubishi was launched off the road and landed in an embankment dividing the highway, while Christal's Mercedes spun around and ended up in an embankment on the highway's right side:

***6** *Id.* (photos appear in the operative Complaint).

Christal hit her head on the windshield, causing bleeding and requiring a trip to Piedmont Fayette Hospital, where Christal's passengers were also treated for cuts and bruises. *See* V2-340. Wentworth, however, fared much worse.

***7** Wentworth was rushed to Atlanta Medical Center, a Level 1 trauma center, and he began a five-week stay in the intensive care unit, where he was treated for severe and permanent brain damage. *See* V2-338. For those five weeks, he breathed with a breathing tube and ate with a feeding tube. Wentworth then spent another six weeks in a step-down and acute rehab facility. And after those six weeks, Wentworth made it home, where he continued ongoing recovery and rehabilitation. Only after many hard-fought months, Wentworth was finally able to get out of bed on his own.

These severe and nearly fatal consequences raise an obvious question: Why was Christal driving so dangerously fast? The answer is that Christal "wanted to share a Snap showing how fast she was driving, and she was driving at excessive speeds because of Snapchat's Speed Filter." V2-337; *see also id.* ("Snapchat's Speed Filter facilitated McGee's excessive speeding. Among other things, McGee was motivated to drive at an excessive speed to obtain [social media] recognition....").

As the Court of Appeals explained in *Maynard I,* "Heather McCarty was a passenger in the back seat of McGee's vehicle." 346 Ga.App. at 132. "McCarty's affidavit recounts the events preceding the [crash] as follows:"

I looked up and noticed that we seemed to be accelerating. ***I looked in the front, and saw Christal McGee holding her phone. The screen had a speed on it, which was about 80 m.p.h. and climbing.*** I asked Christal if her phone was keeping up with the speed of the car. Christal said it was. I told her I was pregnant and asked her to slow down. ***Christal responded and said she was just trying to get the car to 100 m.p.h. to post it on Snapchat. She said "I'm about to post it."*** I began pleading with Christal to slow down. I saw the speed on the ***8** phone hit 113 m.p.h. before she let off the gas. Just after I saw the speed of 113 m.p.h., a car pulled out of an apartment complex, and I screamed.

SynopsisPara

Id. (emphasis added); *see also* V2-337 (quoted in *Maynard I*).

Unfortunately, and as Snapchat knows all too well, Christal's behavior was to be expected. Christal was using Snapchat in exactly the way that Snapchat knew its largely teenage and young adult users were using the Speed Filter.

"Snapchat knew or should have known that wrecks had occurred due to the fact that Snapchat's Speed Filter and other products were encouraging users to drive at excessive and dangerous speeds." V2-339; see V2-336 ("For example, in July 2015, the website www.knowledgeglue.com reported on a woman in Brazil who documented driving 110 MPH on Snapchat and then moments later wrecked her car suffering serious injuries."); id. ("[A] petition was hosted on www.change.org calling on Snapchat to remove the Speed Filter on its application.").

9** Yet, "[d]espite actual or constructive knowledge of the danger, Snapchat chose not to remove its speed filter as of September 10, 2015." V2-337. And because Snapchat has chosen not to remove its Speed Filter, even as of today, "there continue to be additional injuries - including deaths - that have occurred because of Snapchat's Speed Filter." V2-340. In other words, based on real-life experience, Snapchat knows that its Speed Filter encourages and incentivizes young drivers to drive at dangerous speeds. See 6ABC News, "Did Snapchat play role in deaths of 3 young women?" [3] ("[W]hat ***prompted the driver to apparently break the speed limits?.... The girls, we're told, were ***'Snapping' their speed.***") (emphasis added).

In fact, Snapchat's products have such a profound psychological effect on its teenage and young-adult users that, immediately after being in a high-speed collision, Christal went straight to Snapchat. Christal's "first impulse was to Snap and share a photo of herself, which she captioned 'Lucky to be alive.'" V2-339-40.

Id. (photo appears in the operative Complaint).

Based on the combined negligence of Snapchat and McGee and the near-fatal ***10** injuries Wentworth has suffered and will continue to suffer, on April 20, 2016, the Maynards filed this tort action. V2-341-43; *see* A18A0749, V1-11-22.

In response, Snapchat moved to dismiss for failure to state a claim and objected to merits discovery. After the trial court granted Snapchat's motion based on the CDA, the Court of Appeals granted interlocutory appeal and reversed the trial court. *Maynard I,* 346 Ga.App. at 134. On remand, Snapchat again moved to dismiss. After the trial court granted Snapchat's motion based on duty and causation, V1-6-22, the Court of Appeals granted interlocutory appeal and, in a two-one decision, affirmed solely on duty. Maj. Op. at 11. This action is now before this Court following its grant of a writ of certiorari. July 7, 2021 Order.

Standard Of Review

A motion to dismiss must be denied unless it is "certain" that "the plaintiff would not be entitled to any relief under any set of facts." *Atlanta Dev. Auth. v. Clark Atlanta Univ., Inc.,* 298 Ga. 575, 578 (2016); *see South v. Bank of Am.,* 250 Ga.App. 747, 749 (2001) (applying same standard to motion for judgment on the pleadings).

Unlike federal law, "Georgia has not chosen to adopt the heightened pleading requirements... in *Iqbal* and *Twombly*." *Stillwell v. Allstate Ins. Co.,* 663 F.3d 1329, 1334 (11th Cir. 2011). As such, "conclusions may generally be *pleaded* under the Civil Practice Act," "there are no prohibitions in the rules against pleading conclusions," and "[i]t is immaterial whether an allegation is one of fact or ***11** conclusion." *Ledford v. Meyer,* 249 Ga. 407, 408-09 (1982).

As a result, this Court must "construe the pleadings in a light most favorable to the plaintiff, with any doubts resolved in the plaintiff's favor." *Atlanta Dev.,* 298 Ga. at 578. "[E]ven if the facts in a case are entirely uncontradicted and uncontroverted, where there is room for difference of opinion between reasonable [people] as to whether or not negligence should be inferred, the right to draw the inference is peculiarly within the exclusive province of the jury." *Ogletree v. Navistar Int'l Transp. Corp.,* 271 Ga. 644, 647 (1999) (quotation marks omitted).

Argument

1. The Majority Erred In Holding That The Products-Liability Statute And Common Law Do Not Establish A Legal Duty.

In its Opinion, the Majority first agrees that the Maynards and the Dissent "correctly" identify "the risk-utility balancing test... in *Banks v. Ici Adams* [4] ... as the test for negligence in a design defect case such as this one." Maj. Op. at 5.

The Majority then holds that "the applicability of that test does not obviate the requirement to identify a legal duty." *Id.* at 5-6; *see id.* at 11 ("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.").

However, no Georgia court has ever held that the products-liability statute and ***12** common law do not establish a legal duty and that a plaintiff must establish some separate source of duty in a products-liability case.

Under Georgia law, "[t]he duty can arise either from a valid legislative enactment, that is, by statute, or be imposed by a common law principle recognized in the caselaw." *Rasnick v. Krishna Hosp., Inc.,* 289 Ga. 565, 566-67 (2011).

"[I]n a design defect case such as this one," Maj. Op. at 5, that showing of duty is easily made. Code Section 51-1-11 (b)(1) provides that:

> The 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 and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.

O.C.G.A. § 51-1-11 (b)(1) (emphasis added). Similarly, it is well-established common law that, "[i]n products liability cases predicated on negligence, ***the duty imposed*** is the traditional one of reasonable care." *Ream Tool Co. v. Newton,* 209 Ga.App. 226, 228 (1993) [5] (emphasis added).

Whether the claim is under Code Section 51-1-11 or the common law does not matter. "[T]here is no significant distinction" between the two. *Jones,* 274 Ga. at 117 n.5. "'[O]nly semantics distinguishes the cause of action for negligence and a cause of action pursuant to O.C.G.A. § 51-1-11,'" and negligence claims "'are but ***13** re-statements of the claims relative to defective design.'" *Banks,* 264 Ga. at 735 n.3.

Thus, once a plaintiff pleads a design-defect, as the Majority agreed that the Maynards have "correctly" done, Maj. Op. at 5, nothing more is required to establish a legal duty. There may be questions as to whether the manufacturer breached that duty or whether the breach is a proximate cause. But those *separate* questions should not be conflated with duty. "[K]eeping the legal question of duty distinct from the factual questions of foreseeability, breach, and causation is essential to ensure that the court does not inappropriately decide factual issues that should be submitted to the jury." *Norfolk S. Ry. Co. v. Zeagler,* 293 Ga. 582, 586-87 (2013).

That is why, in case after case, the products-liability statute or the common law independently establish the legal duty. *See, e.g., Chrysler,* 264 Ga. at 724 ("[A] manufacturer has a duty to exercise reasonable care...."); *Banks,* 264 Ga. at 733 ("O.C.G.A. § 51-1-11 imposes strict liability...."); *Jones,* 274 Ga. at 117 ("[L]iability is controlled by both Georgia statutory and case law."). [6]

That legal duty is also why the Maynards need not allege any "special relationship." Maj. Op. at 6. A special relationship is required only when the plaintiff cannot "show that [the defendant] had a legal obligation, i.e., a duty, to [act]."

***14** *Rasnick,* 289 Ga. at 567-68. Because the products-liability statute and common law impose a duty on Snapchat to use reasonable care in designing its products, the Maynards do not need any special relationship. *See, e.g., Weirum v. RKO Gen., Inc.,* 539 P.2d 36, 41 (Cal. 1975) ("Liability is not predicated upon defendant's failure to intervene... but rather upon its creation of an unreasonable risk of harm....").

2. The Majority Erred In Holding That A Manufacturer Owes No Duty To Guard Against *Foreseeable* Intentional Misuse.

Confusingly, despite claiming that the Maynards and the Dissent proceed "without identifying a legal duty," Maj. Op. at 11, the Majority seems to concede that Snapchat did actually owe a duty. *See id.* at 7 ("[M]anufacturers have 'a duty to exercise reasonable care... so as to make products that are reasonably safe for intended or foreseeable uses'...") (quoting *Chrysler,* 264 Ga. at 724).

The Majority then pivots and claims that, although Snapchat owed a legal duty, "this duty does not extend to the intentional (not accidental) misuse of the product in a tortious way by a third party." *Id.* To support this holding, the Majority cites only one case, Jones, and it does so by a "Compare" cite and without quoting any reasoning or holding from Jones. *Id.* at 7 n.11.

As the Dissent correctly recognizes, "the majority creates new law," and "[t]here is no support for it in the case cited." Dissent Op. at 4. In fact, the Majority's new intentional-misuse rule violates the plain language of the products-liability statute and both this Court's and the Court of Appeals' binding precedent.

15** In Code Section 51-1-11, the General Assembly provided that a manufacturer is liable to "any natural person who may use, consume, or ***reasonably be affected by the property." O.C.G.A. § 51-1-11 (b)(1) (emphasis added). In so doing, the General Assembly chose not to limit a manufacturer's liability to only those injuries caused by intended or accidental use. And because the General Assembly chose not to include an intentional-misuse limitation, the Majority lacked the authority to "add a line to the law" and "force an outcome that the legislature did not expressly authorize." *Turner v. Ga. River Network,* 297 Ga. 306, 308 (2015).

That is precisely what this Court held in *Jones,* the only case cited by the Majority to support its "new rule." Dissent Op. at 4. Relying on "[t]he plain language of the statute," 274 Ga. at 117, this Court held that, "in a products liability action for defective design," ***"the focus is not on the use of the product,"*** *id.* at 115 (emphasis added). Instead, "the proper analysis in a design defect case is to balance the risks inherent in a product design against the utility of the product so designed." *Id.*

Jones also explains why the Majority's new intentional-misuse rule violates this Court's other binding precedent. As this Court explained in *Jones,* "[t]he very facts of *Banks* illustrate the difficulty in defining 'use' in the context of injury proximately caused by an alleged defective product, and therefore, the fallacy of the need for a finding of 'use' as a predicate to liability." *Id.* at 117. "In that case, a nine-year-old boy died after ingesting a rodenticide... in an unmarked container at a boy's ***16** club serviced by a pest control company." *Id.* at 117-18.

Despite the fact that "the product was certainly not in use, in any manner, as a rodenticide," "[t]his Court determined that the plaintiffs were entitled to a new trial on their claim that the rodenticide was defectively designed." *Id.* at 118. That holding was not predicated on a finding that the boy had "accidentally" ingested the rodenticide. As this Court made clear in Jones, "any attempt to characterize the boy's ingestion of poison as a type of 'use,' i.e., misuse, unintended use, or abnormal use of the product is ***wholly unnecessary.***" *Id.* (emphasis added).

The Majority's new intentional-misuse rule similarly violates the Court of Appeals' binding precedent. In *Medics Pharmaceutical Corp. v. Newman,* a mother was diagnosed with "genital cancer" caused by a drug called "Diastyl," taken "[d]uring her pregnancy" "to prevent miscarriage." 190 Ga.App. 197, 197 (1989). Although Medics "did not recommend or market its product for that purpose," and thus the mother and the prescribing physician were intentionally misusing the drug, "a jury issue was presented as to the foreseeability of the drug's use." *Id.* at 198.

As the Court of Appeals held, "[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." Id.* (quoting *Ford Motor Co. v. Stubblefield,* 171 Ga.App. 331, 335 (1984)). As a result, a jury had to decide whether Medics "knew or should have known that physicians were regularly ***17** prescribing [Diastyl] to prevent miscarriages." *Id.*

As another example, in *Ford,* a fifteen-year-old died after "another car traveling at... 56 to 65 m.p.h." struck the Ford Mustang in which she was "riding... from behind." 171 Ga.App. at 332. Although speeding and striking another car from behind constitutes a third-party tort, the Court of Appeals rejected Ford's argument that "the collision... constituted such a misuse of the product that Ford had no legal duty." *Id.* at 335. That is because a "[v]ehicular collision," even when caused by a third party's tort, "is foreseeable." *Id.* at 336.

In sum, the products-liability statute and binding Georgia precedent all recognize that "[t]he 'heart' of a design defect case is the reasonableness of selecting from among alternative product designs and adopting the safest feasible one." *Jones,* 274 Ga. at 118. "Consequently, the appropriate analysis does not depend on the use of the product, ***as that may be narrowly or broadly defined,*** but rather includes... whether the defendant failed to adopt a reasonable alternative design which would have reduced the foreseeable risks of harm presented...." *Id.* (emphasis added). [7]

3. The Majority Erred In Holding That Georgia Public Policy Requires That *All* Fault Must Be Assigned To A Reckless Driver.

Lacking any support in the products-liability statute or binding Georgia ***18** precedent, the Majority resorts to "public policy" to justify its new intentional-misuse rule. Maj. Op. at 8. Relying on the "new 'hands-free law' that focuses on *drivers' conduct* and prohibits them from even '[p]hysically holding] or supporting]' a smartphone while driving," the Majority concludes that all fault must be assigned to a reckless driver and that a manufacturer cannot owe a legal duty. *Id.*

For several reasons, the Majority's reliance on the Hands-Free Law fails.

First, the Majority disregards the Georgia public policy established by the products-liability statute and long-standing common law. *See Mut. Life Ins. Co. of N.Y. v. Durden,* 9 Ga.App. 797, 800 (1911) ("The only authentic and admissible evidence of public policy of a State is its constitution, laws, and judicial decisions."). That statute and common law establish a *public policy*

that "a manufacturer has a duty to exercise reasonable care," *Chrysler,* 264 Ga. at 724, and "shall be liable in tort" for injuries proximately caused by its products, O.C.G.A. § 51-1-11 (b)(1).

The Hands-Free Law does not diminish, let alone repeal, that public policy. It merely imposes an *additional* duty on drivers. See, e.g., O.C.G.A. § 40-6-241 (b) ("A driver... shall not engage in any actions which shall distract such driver...."). The Hands-Free law says nothing about immunizing a manufacturer when its negligence *combines* with the driver's negligence. *See* Dissent Op. at 5 ("The majority cites no case from our Supreme Court or this [C]ourt that relieves manufacturers of that duty simply because a plaintiffs injuries resulted from a third ***19** party's intentional misuse of the product.").

The Majority not only disregards the public policy established by products-liability law, but its new rule actively undermines it. By focusing *solely* on the driver, the Majority "diverts the appropriate focus" and finds "that [the Speed Filter] is not defective even though the product may easily have been designed to be much safer at little added expense and no impairment of utility." *Ogletree,* 269 Ga. at 445. [8] "Uncritical rejection of design defect claims in all cases" where there is intentional-misuse "thus ***contravenes sound public policy*** by encouraging design strategies which perpetuate the manufacture of dangerous products." *Id.* (emphasis added).

Second, the Majority similarly disregards and circumvents Georgia public policy established by the apportionment statute. See O.C.G.A. § 51-12-33 (c) ("[T]he ***trier of fact*** shall consider the fault of all persons or entities who contributed to the alleged injury or damages....") (emphasis added). By enacting the apportionment statute, the General Assembly made it public policy that juries shall decide how to allocate fault when joint tortfeasors, such as a manufacturer and a reckless driver, combine to cause physical harm. Yet, the Majority's new intentional-misuse rule takes that decision away from the jury. It decides, as a matter of law, that all fault ***20** must be assigned to the reckless driver and none can be assigned to the manufacturer.

Third, even if the Hands-Free Law could somehow justify the Majority's new intentional-misuse rule, the Majority ignores the fact that the Hands-Free Law only became effective on July 1, 2018 - nearly three years *after* the collision in which Wentworth suffered permanent brain damage. *Compare* O.C.G.A. § 40-6-241 (effective "July 1,2018") *with* V2-337-38 (2d Am. Compl.) ("September 10,2015").

The General Assembly did not make the Hands-Free Law retroactive. *See, e.g., Deal v. Coleman,* 294 Ga. 170, 174 (2013) ("'[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine older than our Republic.'"). As a consequence, the Majority could not use this 2018 statute to establish what Georgia's public policy was in 2015. The alleged "focus[] on *drivers conduct,*" Maj. Op. at 8, came after the Maynards' injuries.

Fourth, the public policy behind the Hands-Free Law does not apply to the Maynards' claims. As the Majority recognizes, the Hands-Free Law was passed after the General Assembly formed "a committee to study... ***distracted driving.***" *Id.* (emphasis added). But the Maynards' claims do not depend on distracted driving. They stem from dangerous *speeding.* The fact that McGee was "holding]" her phone while driving, and thus in violation of the Law, is not the reason the Maynards were injured. O.C.G.A. § 40-6-241 (c)(1). They were injured because, motivated by Snapchat's Speed Filter, McGee was driving at over 100 MPH.

***21 4. The Majority Relies On Distinguishable And Unpersuasive Foreign Cases.**

In addition to the Hands-Free Law, the Majority relies on two foreign cases.

The first case is *Modisette v. Apple, Inc.,* 241 Cal. Rptr. 3d 209 (Cal. Ct. App 2018). *See* Maj. Op. at 9 n.16. In *Modisette,* the plaintiffs claimed that *cell* phones themselves were dangerous and Apple was liable for *any* distracted-driving incident:

> The facts and documents cited by the Modisettes about "distracted driving" confirm ***how broadly they construe the scope of the duty*** owed to them by Apple. Essentially, the Modisettes argue that ***cellphone***

> ***manufacturers owe a duty to all individuals injured by drivers who were distracted by using the phones while driving*** if the cell-phone manufacturer had available the technology to disable use of the phone while the user is driving.

241 Cal. Rptr. 3d at 223 (emphasis added). [9]

Based on that broad claim, the California Court of Appeals held that it could not impose a duty on Apple because the *burden* would be too great:

[W]e determine that ***the burden*** a contrary conclusion would place upon cell-phone manufacturers and the consequences to the community ***strongly militate toward finding that Apple had no duty*** to the Modisettes even if their injuries were foreseeable... The legal landscape with respect to the use of cell phones is distinctly different. "***There are 396 million cell phone service accounts in the United States*** - for a Nation of 326 million people." The United States Supreme Court has described cell phones as "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." ***It is not*** ***22** ***only foreseeable that millions of people will have their cell phones in their cars - it is almost a certainty.***

Id. at 220-22 (citations omitted) (emphasis added). [10]

In stark contrast, the Maynards expressly allege that there is a "limited or non-existent burden on Snapchat to eliminate the risks posed by the Speed Filter." V2-339. And the Majority never identifies what burden, let alone what unreasonable burden, exists. Of course, even assuming such burden existed, the risk-utility analysis is a fact question for "a jury" to decide. *Banks,* 264 Ga. at 734.

In truth, there is no meaningful burden. As safety advocates have explained:

The question here is what good can come from this filter? Did the friends of these drivers look at those snaps thinking, "Wow, that's so awesome, look how fast they were going"? ***"It incentivizes somebody to do something they know is not safe, but they do it anyway for the sake of the picture or video,"*** said Katie Bassett, who has written about distracted driving and the Snapchat speed filter for the Safer America consumer safety blog. Blaming the app puts less accountability on the individual, of course, but at some point common sense needs to step in. That's where Snapchat went wrong: Assuming users would be smart enough to not use the app when behind the wheel. ***There are so many fun Snapchat filters that don't instigate reckless behavior. If no good can come from this, then what's the point?***

Knox News, "The dangers of Snapchat's speed filter," [11] (emphasis added).

The second case is ***23** *Ely v. General Motors Corp.,* 927 S.W.2d 774 (Tex. App. 1996). In *Ely,* the plaintiff sued GM, after a local mechanic was test-driving (for service reasons) a Cadillac El Dorado, lost control, and caused a collision. The Texas Court of Appeals was mostly focused on whether there was "an agency relationship" or "joint enterprise" between GM and the local franchisee employing the mechanic, and whether GM "negligently" selected the franchisee. *Id.* at 776, 779, 780.

At the end of its opinion, however, the Texas Court of Appeals addressed a claim that "[GM] was negligent in manufacturing, marketing, and advertising a vehicle designed to exceed safe speed limits." *Id.* at 782. In rejecting this claim, the Court found that, "[i]n her pleadings, [the plaintiff] limits her allegation for liability to a violation of ***a fiduciary duty*** to the public by [GM] by running the above advertisement." *Id.* (emphasis added). "She does not, however, plead or cite any facts or law giving rise

to a fiduciary duty on the part of [GM].” *Id.* Nor were there any allegations that the mechanic saw this advertisement or was influenced by it. *Id.*

Here, the Maynards do not assert any fiduciary-duty claim, let alone *limit* their allegations to such a claim. Instead, the Maynards assert a negligent design-defect claim. As such, *Ely* has no relevance to this case. Moreover, unlike the plaintiff in *Ely,* the Maynards allege that “Snapchat knew or should have known that its users were in fact being encouraged by the Speed Filter to drive at dangerous speeds.” V2-335. Indeed, McGee told one of her passengers that “‘she was just trying to get the car to 100 m.p.h. to post it on Snapchat.”’ V2-337; *see id.* (“‘I want to hit 100.”’).

24** Those allegations place the Maynards' claims well within recognized common law. As the Restatement explains, “[a]n act is negligent if the actor intends it to affect, or ***realizes or should realize that it is likely to affect, the conduct of another ...in such a manner as to create an unreasonable risk of harm to the other.” Restatement 2d of Torts § 303 (emphasis added); *see also id.,* cmt. d; *Shafer v. Keeley Ice Cream Co.,* 234 P. 300, 303 (Utah 1925); *Weirum,* 539 P.2d at 41.

Indeed, in California federal court, there is another pending action against Snapchat that asserts the same negligent design claim against Snapchat. In that case, the court rejected Snapchat's reliance on *Modisette* and *Ely* and “conclude [d] that Plaintiffs ***have sufficiently alleged a duty.***” *Lemmon v. Snap, Inc.,* No. 19-CV-4504, 2019 WL 7882079, at *7 (C.D. Cal. Oct. 30, 2019) (emphasis added).

5. The Majority Also Improperly Decides Fact Disputes Against The Maynards And Otherwise Disregards Their Factual Allegations.

The Majority Opinion not only involves several purely legal errors, but the Majority also improperly decides fact disputes and disregards factual allegations. For example, the Majority found that the Maynards “only point to the attractiveness of the [Speed Filter] product itself, not to any specific reward system or status ranking predicated on misusing it while driving.” Maj. Op. at 7.

But, even if that were all that the Maynards allege, it would be sufficient to state a design-defect claim. In *Banks,* this Court expressly listed “***attractiveness of the product***” as a factor that may be considered under the risk-utility analysis. ***25** 264 Ga. at 736 n.6 (emphasis added). In fact, it was the *primary* factor in *Banks.* “Plaintiffs' nine-year-old son, Marlo, discovered some rat poison pellets... and thought they were candy.” *ICI Ams., Inc. v. Banks,* 211 Ga.App. 523, 528 (1993) (Pope, C.J., dissenting). There was no evidence that ICI provided any specific rewards, status, or advertising for children who ate rat poison. Much like here, “[t]here was evidence that the danger the rat poison would be ***misused*** by being consumed by children was foreseeable to ICI.” *Id.* at 523 (emphasis added).

That, however, is not all that the Maynards allege. They also allege that “Snapchat rewards, in ***unknown, variable, and changing ways,*** users who consume Snapchat in excessive and dangerous ways.” V2-334 (emphasis added). And so, even if Snapchat does not actually reward users for 100-MPH-Snaps, *users do not know that.* “All the achievements and trophies in Snapchat are unknown to users. You don't even know about the achievement until you unlock it. Snapchat have tried their best to maintain the secrecy.” MakeBlogPost, “Snapchat Trophies.” [12]

***26** “Snapchat knows or should know that its design has created extreme and addictive behaviors by its largely teenage and young-adult users.” V2-334. “Indeed, Snapchat purposefully designed its products” in this way “to encourage such behaviors.” *Id.* “The easiest way to understand this [design] is by imaging a slot machine.” Vice, “Your Addiction to Social Media Is No Accident.” [13] “You pull the lever to win a prize, which is an intermittent action linked to a variable reward. Variable meaning you might win, or you might not.” *Id.*

In other words, Snapchat knew or should have known that its Speed Filter was encouraging many users to drive at 100 MPH or more precisely to find out whether they would get a “High-Speed” reward or “100-MPH” trophy. Snapchat does not tell its

users whether those rewards exist because that is the "fun," or the addictive nature, of Snapchat's product. You never know what reward you might get.

As another example, the Majority also found that "the Speed Filter function is use-neutral; it is equally functional when used while flying in an airplane, while riding as a passenger stuck in a traffic jam, or when misused." Maj. Op. at 7-8.

Again, even if it were that simple, the Maynards would still properly state a design-defect claim. Nearly every product at issue in a design-defect case has some utility and some safe uses. Those were the facts in Banks, where rat poison can be used without posing a danger to humans; in Medics, where Diastyl was then properly marketed and prescribed for non-pregnancy hormone treatment; and in Ford, where automobiles can be used without getting into rear-end collisions. Conversely, nearly every product has some danger and some unsafe uses. That is the whole purpose of ***27** the risk-utility analysis. The jury makes a fact decision after weighing risk and utility.

Of course, it is not that simple. While the Speed Filter may be used in "innocent ways," Snapchat knows that an alarming number of its users engage in "dangerous Snapchat speeding." 6ABC News, supra. "'One time I saw like 120 miles per hour[.]'" *Id.* "'People go 100 down the Schuylkill....'" *Id.* "'You want to see how fast you can get, so when you get open lanes, you just kick it [.]'" *Id.* One mother who lost her daughter to a Speed Filter crash put it best. "I think that's horrible that there is something out there to tell them 'Hey go faster[.]'" *Id.*

As one more example, the Majority claims that "there is no allegation that Snapchat failed to warn McGee." Maj. Op. at 10 n.16.

But that *directly* contradicts what a prior Court of Appeals panel held in this action. The Court of Appeals has previously held, in binding precedent and now law of the case, that "the Maynards seek to hold Snapchat liable for its own conduct, principally for the creation of the Speed Filter ***and its failure to warn*** users that the Speed Filter could encourage speeding and unsafe driving practices." *Maynard I,* 346 Ga.App. at 136 (emphasis added); *see also* V2-339.

Finally, although the Majority did not reject the Maynards' foreseeability allegations as improperly pled (instead, the Majority adopted a *per se* rule that the allegations did not matter), Snapchat may argue that this Court should do that. In opposing the Maynards' petition for certiorari, Snapchat argued that the Maynards' ***28** "allegations do not establish foreseeability," and they "only rely on articles about three *subsequent* accidents allegedly involving the Filter." Resp. to Pet. at 21,22 n.6.

But "there are no prohibitions in the rules against pleading conclusions," and "[i]t is immaterial whether an allegation is one of fact or conclusion." *Ledford v. Meyer,* 249 Ga. 407, 408-09 (1982). The Maynards easily satisfy this notice-pleading standard, properly alleging that "Snapchat knew or should have known that its users were in fact being encouraged by the Speed Filter to drive at dangerous speeds, and that it was reasonably foreseeable that its users would continue to be motivated to drive at dangerous speeds by Snapchat's Speed Filter." V2-335.

In fact, even under *more* restrictive federal pleading standards, the Maynards' foreseeability allegations are properly pled and must be assumed as true. In *Lemmon,* the other pending lawsuit against Snapchat involving the Speed Filter, the Ninth Circuit correctly accepted the plaintiffs' foreseeability allegations as true and rejected Snapchat's arguments to the contrary:
The Parents thus allege a cause of action for negligent design - a common products liability tort. This type of claim rests on the premise that manufacturers have a "duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public." Lewis Bass, Prods. Liab.: Design & Mfg. Defects § 2.5 (2d ed., Sept. 2020 Update). ***Thus, a negligent design action asks whether a reasonable person would conclude that "the reasonably foreseeable harm" of a product, manufactured in accordance with its design, "outweigh[s] the utility of the product."*** *Merrill v. Navegar, Inc.,* 26 Cal.4th 465, 110 Cal.Rptr.2d 370, 28 P.3d 116, 125 (2001) (citation omitted); *see also Morden v. Cont'l AG,* 235 Wis.2d 325, 611 N.W.2d 659, 674 (2000) (explaining that the relevant "duty of ***29** care requires manufacturers to foresee all reasonable uses and misuses and the consequent foreseeable dangers" of their products "and to act accordingly" (citation omitted)).

It is thus apparent that the Parents' amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker. ***Their negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat's reward system and the Speed Filter).*** Thus, the duty that Snap allegedly violated "springs from" its distinct capacity as a product designer. *Barnes,* 570 F.3d at 1107. This is further evidenced by the fact that ***Snap could have satisfied its "alleged obligation" - to take reasonable measures to design a product more useful than it was foreseeably dangerous - without altering the content that Snapchat's users generate.*** *Internet Brands,* 824 F.3d at 851.

Lemmon v. Snap, Inc., 995 F.3d 1085, 1092 (9th Cir. 2021) (emphasis added). [14]

Moreover, the examples pled in the Maynards' complaint involve *prior* incidents, such as a "July 2015" wreck and "prior to September 10, 2015, a petition... calling on Snapchat to remove the Speed Filter on its application." V2-336. "These are just two examples," "there are additional examples," and "[t]he Maynards are not required to, nor do they assume the obligation to, plead *evidence."* V2-336-37. And while the Maynards' Petition did also discuss the *eleven* deaths from three separate subsequent incidents, the Maynards did so to demonstrate why this case presented a question of great public importance - not for foreseeability. Pet. at 28.

30 *Conclusion

For those reasons, this Court should reverse the Court of Appeals and direct the Court of Appeals to remand this action to the trial court for merits discovery.

The Maynards submit this brief on August 16, 2021. A copy of the order granting an extension of time in which to file this brief is attached as Exhibit 1.

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Appendix not available.

Footnotes

1 *Maynard I* involves a prior Court of Appeals decision. Snapchat chose not to further appeal that decision, and so it "shall be binding in all subsequent proceedings," including this one. O.C.G.A. § 9-11-60 (h). *MaynardII* is the decision at issue in this appeal, and the Maynards will cite to the Court of Appeals opinions from that decision as the Majority (or Maj. Op.) or the Dissent (or Dissent Op.).

2 *Banks v. ICI Ams., Inc.,* 264 Ga. 732 (1994).

3 https://6abc.com/1196846/; *see also* V2-340 (citing same).

4 *Banks v. ICI Ams., Inc.,* 264 Ga. 732, 734 (1994).

5 *Overruled on other grounds by Ogletree v. Navistar Int'l Transp. Corp.,* 269 Ga. 443, 445 (1997) (abolishing the "the open and obvious" danger rule).

6 "'[O]nly semantics distinguishes the cause of action for negligence and a cause of action pursuant to O.C.G.A. § 51-1-11,'" and negligence claims "'are but re-statements of the claims relative to defective design.'" *Banks,* 264 Ga. at 735 n.3; *see also Jones,* 274 Ga. at 118 n.5 ("[T]here is no significant distinction....").

7 The Maynards cited and expressly discussed *Banks, Medics,* and *Ford* in their opening and reply briefs to the Court of Appeals. Ct. App. Opening Br. at 20-21; Ct. App. Reply at 10-11. The Majority simply chose not to address these cases.

8 Although *Ogletree* addresses and abolishes "the 'open and obvious danger' rule as to design defect cases," this Court's reasoning and public-policy conclusion apply equally to the Majority's intentional-misuse rule. 269 Ga. at 445. The two rules share the same defect - they focus solely on the user, while ignoring the fact that the danger can be remedied, and thus lives saved, without any meaningful cost.

9 *See also Coalition Against Distracted Driving v. Apple, Inc.,* No. B278992, 2018 WL 2016665, at *1 (Cal. Ct. App. May 1, 2018) (requesting "a 'permanent injunction requiring Defendants to fund an effective and ongoing national public education campaign ... [for] not less than $1 billion annually").

10 The California Court of Appeals also found that the plaintiffs could not demonstrate proximate causation. But the Majority did not reach that issue here.

11 https://www.knoxnews.com/story/opinion/columnists/angela-gosnell/2016/11/06/trending-dangers-snapchats-speed-filter/93160392/

12 http://www.makeblogpost.com/2019/08/01/snapchat-trophies-and-achievements/; *see also* Ct. App. No. A18A0749, V2-570 (discussing same).

13 https://www.vice.com/en/article/vv5jkb/the-secret-ways-social-media-is-built-for-addiction; *see also* V2-334 (citing same and other similar articles).

14 Although the legal issue the Ninth Circuit decided was whether the Communications Decency Act applied, the court necessarily held that the plaintiffs' foreseeability allegations were well-pled *facts.* Otherwise, there would have been no viable claim based on Snapchat's content.