

Case No. 83428-8

SUPREME COURT  
OF THE STATE OF WASHINGTON

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RIZWANA RAHMAN,

Plaintiff/Respondent,

v.

STATE OF WASHINGTON,

Defendant/Petitioner,

v.

MOHAMMAD SHAHIDUR RAHMAN, individually and  
MOHAMMAD SHAHIDUR RAHMAN and RIZWANA RAHMAN,  
as a marital community,

Third Party Defendants.

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WASHINGTON DEFENSE TRIAL LAWYERS'  
AMICUS CURIAE BRIEF

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## I. INTRODUCTION

Washington Defense Trial Lawyers (“WDTL”) files this brief as a friend of the Court to assist in determining the important issues raised in this case as they relate to employers throughout Washington state.

Neither party disputes that an employer in Washington can be held vicariously liable for acts of an employee if 1) the employee was acting within the scope of his or her employment, and 2) the employee was pursuing the employer’s interests. This case focuses on the appropriate application of the general rule, consistent with Washington law and public policy. Here, the Court must examine how vicarious liability applies when an employee is acting within the scope of employment in a general sense, but concurrently violating an employer’s explicit rule. The distinction is critical to properly enforcing Washington’s longstanding *respondeat superior* doctrine, and confirming the reasonable expectations of all Washington employers.

Although Mr. Rahman’s general course of action (travelling from Olympia to Spokane for an inspection) arguably satisfies the *respondeat superior* test, his specific act (inviting his wife to ride with him) does not. As explained below, the focus of this Court’s inquiry should center on the specific act that resulted in the alleged liability. Here, that critical act was Mr. Rahman’s decision to invite his wife to ride with him, despite his

employer's explicit prohibition against passengers in its vehicles. Because this specific act was not undertaken in pursuit of his employer's interests, Washington law and public policy do not support the application of vicarious liability in this case. Accordingly, WDTL respectfully requests that this Court reverse the Court of Appeals and reinstate the trial court's summary judgment dismissal. Doing so is necessary to preserve the important distinction between Washington's *respondeat superior* law and the California enterprise liability statutory scheme that has been expressly rejected by Washington courts.

## II. IDENTITY AND INTEREST OF AMICUS

WDTL, established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its members is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

The underlying Court of Appeals decision addresses the following issue of concern to WDTL members and their clients: whether an employee may render his/her employer vicariously liable by inviting an

unauthorized passenger to ride in the employer's vehicle. WDTL believes that additional analysis would be helpful to this Court, in particular, because, although the instant case involves the liability of a government entity, this issue potentially impacts all private employers throughout Washington state.<sup>1</sup>

### III. STATEMENT OF THE CASE

For the purposes of this brief, WDTL relies upon the statement of facts set forth in the underlying Court of Appeals decision, *Rahman v. State*, 150 Wn. App. 345, 347-50, 208 P.3d 566 (2009).

In summary, Mr. Rahman (an employee) was driving his employer's vehicle from Olympia to Spokane, as required by his employer. He invited his wife to ride with him on his trip from Olympia to Spokane. Mr. Rahman extended this invitation without his employer's knowledge or approval, and in direct violation of the employer's clear rules. His only motive for doing so was to appease his wife, who "felt ill" and "was also lonely and wanted to go with her husband[.]" *Rahman*, 150 Wn. App. at 348.

The trial court granted summary judgment dismissal of all claims against the employer, and the Court of Appeals reversed. This Court

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<sup>1</sup> This Court entered an order granting WDTL's application to appear as amicus curiae on March 22, 2010, directing WDTL to file its brief no later than April 15, 2010. WDTL also filed an amicus memorandum in support of the State's Petition for Review.

granted review to consider “[w]hether the State may be vicariously liable for injuries sustained by an unauthorized passenger of a state-owned vehicle driven by a state employee while on state business.”<sup>2</sup>

#### IV. ARGUMENT

##### A. The Parties Both Ask This Court to Apply Established Washington Law.

As discussed in both parties’ briefs, it is well-established that employers can be held vicariously liable for acts of an employee only if 1) the employee was acting within the scope of his or her employment, and 2) the employee was acting in pursuit of the employer’s interests. *See* State’s Supp. Br. at 4-13 (citing cases); Rahman’s Supp. Br. at 2-4 (citing cases).

According to the State, affirming the underlying decision would require this Court to abandon *respondeat superior* law that has been in effect in Washington since 1917. *See* State’s Supp. Br. at 4-13. By contrast, according to the respondent, “[a]ccepting the State’s position to the contrary would require this Court to overturn longstanding precedent.” Rahman’s Supp. Br. at 4. Given that neither party is urging this Court to abandon precedent, this case presents a dispute over the proper application

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<sup>2</sup> This is the Commissioner’s Office’s summary of the principal issue this case presents. [[http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme\\_issue\\_s.display&fileID=2010May](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issue_s.display&fileID=2010May)], *last visited* April 13, 2010.

of well-established law. Resolution of the facts of this case turns on how broadly (or narrowly) these examinations are made.

**B. The Employee's Specific Act is the Proper Focus of the Washington Test.**

Mr. Rahman was concurrently undertaking multiple activities at the time of the automobile accident. One of his acts was authorized by his employer and undertaken to benefit his employer. His other act was expressly prohibited by his employer and was not done in pursuit of his employer's interests. Respondent urges this Court to focus only on the employee's general act of travelling from Olympia to Spokane for an inspection, as required by his employer. By contrast, the State focuses on the employee's more specific act of inviting his wife to ride with him, which was in direct violation of the State's rules. Under respondent's interpretation, an employer would have unlimited liability for any damage or injury that happens to occur while the employee is "on the clock." The State, on the other hand, argues that an employer is not vicariously liable where, as here, an employee directly violates an explicit company rule<sup>3</sup> in a way that does not further the employer's interests.

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<sup>3</sup> It bears noting that Mr. Rahman's violation of the State's rule was by no means an "accident." The rule cannot be violated through mere negligence. His decision to allow his wife to accompany him was necessarily intentional.

The resolution of this case turns on which of the two concurrent acts is addressed to determine whether there is vicarious liability under the test set forth above. The first option is the employee's broader, more general actions that day (driving from Olympia to Spokane for an inspection). The second option is the employee's specific act (inviting his wife to ride with him) that was instrumental in the resulting liability. When there is a conflict between a general act and a specific act under principles of statutory construction, this Court has made clear that the specific prevails over the general. "It is the law in this jurisdiction, as elsewhere, that where concurrent general and special acts are *in pari materia* and cannot be harmonized, the latter will prevail, unless it appears that the legislature intended to make the general act controlling." *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008) (quoting *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976)). Applying this logic by analogy is helpful in resolving the issues in this case.

An employee's mere act of driving his employer's automobile across the state could undoubtedly result in injury to third parties (*e.g.*, persons in other cars and pedestrians) and therefore could result in vicarious liability for the employer under the established Washington test.

To some degree, those injuries are “unavoidable” in that no driver can anticipate who or what might be in his or her path at the moment a negligent act takes the driver off the roadway. Here, there is an important distinction. Mr. Rahman’s wife would not have suffered injuries caused by the automobile accident if Mr. Rahman had not undertaken the unauthorized specific act of inviting her to ride with him. Thus, the liability for her injuries absolutely would not have existed, but for a specific act of the employee. The specific act was indisputably outside the scope of his employment, unbeknownst to his employer, and not done for the benefit of the employer. Put another way, had the employee adhered to the employer’s rules, it would have been impossible for respondent to have sustained the injuries alleged.

This distinction illustrates why the focus of Washington’s *respondeat superior* test must be on the specific act. If an employee’s general act (*i.e.*, driving) were the focus, then all specific acts would be subsumed within the general act. Vicarious liability would be created in virtually every situation regardless of what the employee’s specific act may be. In other words, by merely “being on the clock,” all manner of expressly unauthorized activity would become the responsibility of the employer. That is inconsistent with longstanding Washington law.

Washington public policy supports this result. It is prudent for employers throughout Washington state (including private employers, as well as governmental entities) to implement proactive measures in an effort to reduce injuries and damages caused by their employees. Such rules also serve to minimize the employer's vicarious liability for acts that are unauthorized and do not benefit the employer, consistent with existing Washington law. Rules such as these should be both encouraged and enforced. In this case, the employer's rule prohibited passengers from riding in the employer's vehicles. If Mr. Rahman had followed that rule, his wife would not have been injured. If this Court determines the employer is vicarious liability regardless of the employee's specific unauthorized act, then the employer's rules will be rendered meaningless. The imposition of strict liability on employers for any number of ill-informed decisions made by an employee while he or she happens to be "on the clock" would actually encourage recklessness. Instead, this Court should encourage and enforce employers' attempts to limit actions of their employees. Consistent with longstanding Washington precedent, vicarious liability should be reserved for situations when an employee's specific act is within the scope of his or her employment, and done in pursuit of the employer's interests. Because Mr. Rahman's act of inviting his wife to ride with him was not within the scope of his employment and not done in

pursuit of the employer's interests, vicarious liability should not be imposed on his employer.

**C. Washington Law is, and Should Remain, Different From California Law.**

The doctrine of *respondeat superior* is well established under Washington law. By contrast, California law differs significantly. California's statutory scheme, which dates back to 1872, imposes "enterprise liability." See Cal. Civ. Code § 2338 (providing that the enterprise is responsible for its agent's acts, including wrongful acts and willful omissions regardless of whether the act benefits the enterprise). It is significant that respondent is not advocating for the abandonment of Washington law. As discussed in the State's Supplemental brief, the practical effect of the Court of Appeals' decision is the imposition of California's enterprise liability theory. See State's Supp. Br. at 13-17 (citing cases). Washington courts have repeatedly declined to adopt California's expansive theory of vicarious liability, as have courts from other jurisdictions. See *id.*

The critical distinction between enterprise liability and *respondeat superior* underscores why this Court's inquiry must look to the specific act that resulted in the alleged liability, not the general act of "being on the clock." If the Court accepts respondent's argument that merely by virtue

of the fact that the employee was travelling to Spokane on business (and therefore the subsequent injury was done in furtherance of the employer's interests), then the distinction between *respondeat superior* and enterprise liability will be effectively eradicated in Washington. The employee is held vicariously liable for all acts of an employee while working for the employer, regardless of authorization and regardless of whether the act was done for the benefit of the employer. This is inconsistent with Washington's longstanding *respondeat superior* law, not supported by Washington public policy, and should be rejected by this Court.

#### V. CONCLUSION

The Court of Appeals' conclusion that an employer in this case "is vicariously liable under the doctrine of *respondeat superior* as a matter of law" it is contrary to well-established principles established by this Court. Because this expansion of liability has profound implications for employers throughout the state, WDTL respectfully requests that this Court reverse the Court of Appeals. In doing so, this Court should reaffirm that employers cannot be held liable for unauthorized specific

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acts taken by their employees that do not benefit their employers.

RESPECTFULLY SUBMITTED this 15th day of April, 2010.

COZEN O'CONNOR



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