

FILED
SEP 22 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Case No. 83428-8

**SUPREME COURT
OF THE STATE OF WASHINGTON**

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
MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW**

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington Defense Trial Lawyers (“WDTL”) files this memorandum as a friend of the Court to address the issue of whether this Court should grant the State of Washington’s petition for review of the Court of Appeals decision in *Rahman v. State*, 150 Wn. App. 345, 208 P.3d 566 (2009).¹

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,

¹ This Court entered an order granting WDTL’s application to appear as amicus curiae on September 18, 2009.

because, although the instant case involves the liability of a government entity, this issue impacts all private employers throughout Washington state. WDTL believes that additional analysis from this perspective is necessary and will be helpful to this Court in deciding whether to grant the State's petition for review.

II. WHY REVIEW SHOULD BE GRANTED

In the underlying published decision, the Court of Appeals acknowledged and discussed binding precedent issued by this Court dating back to 1917. *Rahman*, 150 Wn. App. at 352-57. After doing so, the Court of Appeals declined to follow this Court's precedent. Instead, the Court of Appeals imposed expansive liability on an employer for an employee's unauthorized acts that did not benefit the employer. *Id.* at 359.

Review is appropriate under RAP 13.4(b)(1) because the underlying decision is in conflict with longstanding decisions of this Court. Review is also appropriate under RAP 13.4(b)(4) because the expansion of liability to unknowing and disapproving employers (both public and private) who reap no benefit from such acts has profound implications for employers in public and private sectors throughout the state. For the reasons discussed below, WDTL respectfully requests that this Court grant the State's petition for review in this case.

III. RELEVANT BACKGROUND FACTS

For the purposes of this memorandum, WDTL relies upon the facts as set forth in the underlying Court of Appeals decision.

In summary, Mohammad Rahman was driving his employer's vehicle from Olympia to Spokane, as required by his employer.

Mohammad invited his wife, Rizwana Rahman, to ride with him on his trip from Olympia to Spokane. Mohammad extended this invitation without his employer's knowledge or approval. Mohammad's 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. As such, his invitation to his wife was an independent and private purpose of his own that did not further Mohammad's employer's business.

The Court of Appeals discussed a number of cases from this Court that confirm that Mohammad's employer is not vicariously liable for acts that do not further the employee's business, including *Gruber v. Cater Transfer Co.*, 96 Wash. 544, 165 P. 491 (1917), and *McQueen v. People's Store Co.*, 97 Wash. 387, 166 P. 626 (1917). See *Rahman*, 150 Wn. App. at 352-55. Even so, the Court of Appeals declined to follow these decisions. *Id.* at 353 ("*Gruber* is inapposite."); *id.* at 354 ("*McQueen* is distinguishable from the present case[.]"). Instead, the Court of Appeals

concluded that Mohammad’s employer “is vicariously liable under the doctrine of respondeat superior as a matter of law.” *Id.* at 359.

IV. LEGAL ANALYSIS

A. The Court of Appeals Decision is in Conflict With Established Legal Principles.²

1. The Scope of Respondeat Superior in Washington.

For nearly one hundred years, Washington courts have adhered to the same guiding legal principles to determine when employers are held liable for negligent acts of their employees.

Under the doctrine of respondeat superior, employers can only be held vicariously liable for torts that are committed by their employees within the scope of employment. *Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 548, 716 P.2d 306 (1986). In *McGrail v. Department of Labor & Indus.*, 190 Wash. 272, 277, 67 P.2d 851 (1937), this Court set forth the following test for determining whether an employee is within the scope of employment:

The test for determining whether an employee is, at a given time, in the course of his employment, is whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment or by the specific direction of his employer, or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer’s interests.

² WDTL presents the following analysis to supplement the discussion of the seminal cases that appears at pages 5 through 11 in the State’s petition for review.

Vicarious liability does not, however, extend to acts committed by an employee who is pursuing his or her own personal interests rather than the employer's, even if the acts were committed during the course of employment. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997) (“Where the employee steps aside from the employer’s purposes in order to pursue a personal objective of the employee, the employer is not vicariously liable.”).

2. Binding Precedent From This Court.

In *Gruber v. Cater Transfer Co.*, 96 Wash. 544, 165 P. 491 (1917), this Court addressed similar circumstances. In *Gruber*, an employee was driving his employer’s truck, but decided to give a ride to an unauthorized passenger on the truck’s rear end gate. *Id.* at 547-49. The employee drove recklessly and in doing so injured the passenger. *Id.* at 546. This Court focused on the status of the passenger as having no authority to ride in the truck at all, “especially in the position which he did ride.” *Id.* at 547. This Court concluded as follows:

We see no escape from the conclusion that [the employer] cannot be held liable for the injuries received by [the passenger], and that it must be so decided as a matter of law.

Id. at 549.

Approximately six weeks after the *Gruber* decision was filed, this Court issued another decision that addressed similar circumstances in

McQueen v. People's Store Co., 97 Wash. 387, 166 P. 626 (1917). In *McQueen*, which cites to *Gruber*, this Court again addressed the issue of whether an employee was acting within the scope of his employment while driving his employer's truck with an unauthorized passenger who suffered injury. *Id.* at 388. The passenger in *McQueen* and another person were invited to ride on the truck's running board by the employee, who while extending the invitation "was acting without reference to the business in which he was employed." *Id.* at 390. The employee "was engaged in furthering his own pleasure, and not in furthering his [employer's] business." *Id.* Therefore, this Court concluded that the employee was not acting within the scope of his employment when he invited the passenger to ride on the truck, but instead that "he was his own master[.]" *Id.* at 390.

B. Conflicting Decision From The Court of Appeals.

There is no material distinction between the operative facts and law in *Gruber* or *McQueen* and the instant case. All three cases involve an employee driving an employer's vehicle for business purposes. Likewise, all three cases involve an unauthorized passenger who gets injured due to the employees' negligent driving. In *Gruber* and *McQueen*, this Court concluded that the employers were not liable because the employees' decisions to invite passengers into the vehicles did not further

their employees' businesses. The Court of Appeals' opposite conclusion on the facts presented in this case constitutes a conflict with prior decisions from this Court. Therefore, review by this Court is warranted.

C. **This Case Involves Issues of Substantial Public Interest That Should be Determined by This Court.**

Vicarious liability has been and should be imposed only if public or social policy has determined that one person should be liable for the act of another. Cases from this Court have confirmed that employers can only be 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 (as opposed to the employee's own personal interests). Important public and social policies support these established parameters so that employers are subject to vicarious liability only when the employer's interests are being pursued in the scope of employment. At the same time, however, the law does not (and should not) make employers liable for an employee's personal undertakings in furtherance of that employee's own personal interests.

The underlying Court of Appeals decision purports to dramatically expand the liability of public and private employers throughout Washington state. The Court of Appeals focused on a portion of the employee's actions that were being done to benefit the employer's

business (driving from Olympia to Spokane) instead of the employee's act that was done for his own private purpose (to appease his wife, who "felt ill" and "was also lonely and wanted to go with her husband"). By redirecting the analysis as it did, the Court of Appeals opened the door to allowing expansive claims against employers based upon employee negligence precipitated by acts done for the employees' own private purposes.

Although public or social policy supports application of vicarious liability when an employee acts within the scope of employment and does so to further the employer's business, no policy supports deeming an employer unknowingly and unwittingly liable for personal acts of an employee that fall outside of the purposes of the employer's business. As such, this case involves issues of substantial public interest that should be determined by this Court. Therefore, the State's petition for review should be granted.

V. CONCLUSION

As discussed above and in the State's petition for review, this Court should grant review because the underlying Court of Appeals decision is in conflict with longstanding decisions of this Court, and because the expansion of liability to unknowing and disapproving employers (both public and private) who reap no benefit from such acts

has profound implications for employers in public and private sectors throughout the state. *See* RAP 13.4(b)(1) & (4). Accordingly, WDTL respectfully requests that this Court grant the State's petition for review.

RESPECTFULLY SUBMITTED this 22nd day of September,
2009.

COZEN O'CONNOR

A handwritten signature in cursive script, appearing to read "Melissa O. White", is written over a horizontal line.

Melissa O. White, WSBA # 27668
Kevin A. Michael, WSBA # 36796

Attorneys for Amicus Curiae Washington
Defense Trial Lawyers

DECLARATION OF SERVICE

Dava Z. Bowzer states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 22nd day of September, 2009, I caused to be filed via electronic filing with the Supreme Court of the State of Washington the foregoing WASHINGTON DEFENSE TRIAL LAWYERS' AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW. I also served copies of said document on the following parties as indicated below:

Parties Served	Manner of Service
<i>Counsel for Respondent Rahman:</i> Karen Kay Harold D. Carr, PS 4535 Lacey Boulevard SE Lacey, WA 98503 Fax: (360) 455-0031	() Via Legal Messenger () Via Overnight Courier (X) Via U.S. Mail (X) Via Facsimile
<i>Counsel for Respondent Rahman:</i> Anne Watson Law Office of Anne Watson, PLLC 3025 Limited Lane NW Olympia, WA 98502 Fax: (360) 357-3809	() Via Legal Messenger () Via Overnight Courier (X) Via U.S. Mail (X) Via Facsimile

Parties Served	Manner of Service
<i>Counsel for Petitioner State of Washington:</i>	
Attorney General Rob McKenna	<input type="checkbox"/> Via Legal Messenger
Assistant AG John Dittman	<input type="checkbox"/> Via Overnight Courier
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Tumwater, WA 98504	<input checked="" type="checkbox"/> Via Email <i>per agreement</i>
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 22nd day of September, 2009.


 Dava Z. Bowzer

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OFFICE RECEPTIONIST, CLERK

To: Bowzer, Dava Z.
Cc: White, Melissa O'Loughlin; Michael, Kevin A.; sestest@kbmlawyers.com; johnd2@atg.wa.gov
Subject: RE: No. 83428-8 - Rahman v. State of Washington - WDTL's Amicus Curiae Memorandum

Rec'd 9/22/09

From: Bowzer, Dava Z. [mailto:dbowzer@cozen.com]
Sent: Tuesday, September 22, 2009 3:40 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: White, Melissa O'Loughlin; Michael, Kevin A.; sestest@kbmlawyers.com; johnd2@atg.wa.gov
Subject: No. 83428-8 - Rahman v. State of Washington - WDTL's Amicus Curiae Memorandum

Please find attached in PDF format Washington Defense Trial Lawyers' Amicus Curiae Memorandum in Support of Petition for Review, which I would request be filed among the papers of Case No. 83428-8; Rahman v. State of Washington. The WDTL Amicus Committee has been granted standing permission to file this memorandum electronically. This document is filed by Melissa O'Loughlin White, WSBA No. 27668, phone: (206) 340-1000, email: mwhite@cozen.com.

I am hereby serving electronically, by copy of this message, counsel for Petitioner State of Washington, who by agreement has accepted this method of service, and will serve by other means those who have not.

Thank you for your attention to this matter.

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