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Not So Special! Georgia Court of Appeals Clarifies Special Circumstance and Special Mission Exceptions to Vicarious Liability

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I. INTRODUCTION

The ever-increasing mobility of today's workforce threatens employers with a risk of vicarious liability for injuries arising from their employees' driving under the doctrine of *respondeat superior*.[1] Although common law protects employers from liability for injuries arising from an employee's commute to or from work,[2] the special circumstance exception and the special mission exception can create vicarious

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1. The doctrine of *respondeat superior* holds "an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Respondeat Superior*, BLACK'S LAW DICTIONARY (11th ed. 2019). In Georgia, "to hold a master [vicariously] liable for a tort committed by his servant, it must appear that *at the time of the injury* the servant was engaged in the master's business and not upon some private and personal matter of his own; that is, the injury must have [been] inflicted in the course [and scope] of the servant's employment." Clo White Co. v. Lattimore, 263 Ga. App. 839, 840, 590 S.E.2d 381, 382 (2003).

2. "As a general rule, a servant [] going to and from his work in an automobile acts only for his own purposes and not for those of his employer, and consequently the employer is not to be held liable for an injury occasioned while the servant is en route to or from his work." Jones v. Aldrich, Co., 188 Ga. App. 581, 583, 373 S.E.2d 649, 650 (1988).

liability for a Georgia employer.[3] These exceptions bring an employee's commute within the scope of employment when an employee acts under a special circumstance or in furtherance of a special mission at the time of an automobile accident; this creates vicarious liability for employers. In *DMAC81, LLC v. Nguyen*,[4] the Georgia Court of Appeals clarified when a special circumstance or special mission creates vicarious liability for employers.

II. FACTUAL BACKGROUND

Gary Cummings (Cummings) was commuting to work one morning when he lost control of his vehicle and crashed into another car, killing two individuals.[5] Cummings was employed by McAlister's Deli (McAlister's) in Macon, Georgia, where he worked on the grill line and assisted with catering deliveries as needed.[6] If Cummings was scheduled to assist with catering, he would arrive at work early to prepare the grill line before making deliveries. Cummings was paid hourly after clocking in each day, required a general manager's permission to come in early, and received a cash payout to cover the cost of gas when he assisted with deliveries.[7] Although Cummings was occasionally called in to assist on his day off, DMAC81, LLC (DMAC), the owner of the Macon McAlister's location, did not have a policy which disciplined employees for refusing to assist on their days off.[8]

On the morning of the accident, Cummings was scheduled to begin his regular shift at 10:00 a.m. However, the general manager called at 8:00 a.m. to ask Cummings to make a catering delivery.[9] Although Macon was under a state of emergency due to inclement weather,[10]

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3. Vicarious liability refers to the "[l]iability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties." *Vicarious Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

4. 358 Ga. App. 170, 170, 853 S.E.2d 400, 402 (2021).

5. Mr. Minh Nguyen was a passenger in the vehicle owned and operated by his brother-in-law Thanh Nguyen at the time of the automobile accident. Both brothers-in-law were killed in the accident. Br. of Appellee at 3–4, *DMAC81, LLC v. Hong Hoa T. Nguyen*, 358 Ga. App. 170, 853 S.E.2d 400 (2021) (No. A20A1991).

6. *DMAC81, LLC*, 358 Ga. App. at 170, 853 S.E.2d at 402; Nguyen v. Cummings, No. 2018-CV-69059, 2020 WL 8968730, at *1 (Apr. 3, 2020).

7. 358 Ga. App. at 170, 853 S.E.2d at 402–03.

8. *Cummings*, 2020 WL 8968730, at *2.

9. *DMAC81, LLC*, 358 Ga. App. at 170, 853 S.E.2d at 403.

10. Governor Nathan Deal issued a state of emergency for 83 counties, including Macon, due to winter weather and snow. Severe Weather Team 2, *WINTER WEATHER: Governor Declares State of Emergency for 83 Georgia Counties*, WSB-TV Atlanta 2 (Jan.

Cummings felt he could not deny this request. Cummings agreed to make the delivery and began his morning commute a little early to prepare the grill line.[11] Cummings sped and drove in the center lane, a few minutes from work, when he lost control of his vehicle and tragically killed two individuals parked in an emergency lane.[12] A blood test revealed marijuana and pain medication in Cummings's system at the time of the accident.[13]

The estate of Mr. Nguyen initiated a wrongful death suit in Bibb County Superior Court against both Cummings and his employer, DMAC.[14] Specifically, the plaintiff alleged DMAC was liable for negligent hiring and retention of Cummings, and vicariously liable for Cummings's negligent conduct under the doctrine of *respondeat superior*.[15] DMAC argued that common law rule immunizes employers from liability when injuries arise during an employee's regular commute to work.[16]

DMAC moved for summary judgment alleging: the special circumstance exception to the common law rule did not create vicarious liability; the special mission exception also did not apply; and DMAC was not negligent in its hiring and retention practices.[17] The trial court agreed that no special circumstance created vicarious liability. However, the trial court found that a dispute of fact existed as to whether the special mission exception applied; thus, it denied DMAC's motions for summary judgment relating to the special mission exception and the alleged negligent hiring and retention practices.[18] On interlocutory appeal,[19] the court of appeals considered DMAC's three

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17, 2018) https://www.wsbtv.com/news/local/snow-possible-across-north-georgia-metro-atlanta-today/684359723/.

11. *DMAC81, LLC*, 358 Ga. App. at 170–71, 853 S.E.2d at 403.

12. *Id.* at 171, 853 S.E.2d at 403; *Cummings*, 2020 WL 8968730, at *1.

13. *DMAC81, LLC*, 358 Ga. App. at 171, 853 S.E.2d at 403.

14. *Cummings*, 2020 WL 8968730, at *1; *DMAC81, LLC*, 358 Ga. App. at 170, 853 S.E.2d at 402.

15. *DMAC81, LLC*, 358 Ga. App. at 170, 853 S.E.2d at 402.

16. Resp. Br. Cross-Appellee at 7–8, *Hong Hoa T. Nguyen v. DMAC81*, 358 Ga. App. 170, 853 S.E.2d 400 (2020) (No. A20A1992).

17. Def. Reply Br. at 2–3, *Nguyen v. Cummings*, 2020 WL 8968730 (Apr. 3, 2020) (No. 2018-CV-69059).

18. *Nguyen*, 2020 WL 8968730, at *2–3.

19. An interlocutory appeal is an appeal that occurs before the trial court's final ruling on the entire case. O.C.G.A. § 5-6-34 (2021). *Interlocutory Appeal*, BLACK'S LAW DICTIONARY (11th ed. 2019). The standard of review on appeal from a trial court's grant or denial of summary judgment is *de novo*. The facts and inferences drawn from them are construed in a light most favorable to the nonmoving party. Centurion Indus., Inc. v. Naville-Saeger, 352 Ga. App. 342, 343, 834 S.E.2d 875, 877 (2019).

motions and affirmed the trial court's decision in part and reversed the decision in part. Ultimately, the court of appeals determined that DMAC was not liable under the doctrine of *respondeat superior* and granted each of DMAC's motions for summary judgment.[20]

III. LEGAL BACKGROUND

Employers can be held liable for torts committed by their employees under the doctrine of *respondeat superior*. This common law doctrine creates vicarious liability when two elements are satisfied: (1) an employee causes injury to another; (2) while acting in furtherance of the employer's business and within the scope of their employment.[21] An employer can be vicariously liable if an injury arises at the time and in the scope of an employee's service to the employer, regardless of whether the employer intended the tortious conduct to result.[22] The Georgia General Assembly codified this doctrine to create liability when torts are committed by the employer's command or in the prosecution[23] and within the scope of the employer's business.[24]

The test for vicarious liability turns on whether an employee is serving its employer at the time of injury.[25] For vicarious liability to result, a tort must occur while an employee is accomplishing the ends of employment.[26] If an employee exercises their independent business and is not subject to their employer's immediate control at the time of injury, employers are generally not vicariously liable.[27] An employer is

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20. *DMAC81, LLC*, 358 Ga. App. at 174–77, 853 S.E.2d at 405–07.

21. Littlefield Constr. Co. v. Bozeman, 314 Ga. App. 601, 603, 725 S.E.2d 333, 335 (2012).

22. Jones v. Aldrich Co., 188 Ga. App. 581, 582, 373 S.E.2d 649, 650 (1988). "A master rarely commands a servant to be negligent, or employs him with the expectation that he will commit a negligent or willful tort; but if the act is done in the prosecution of the master's business . . . the latter will be liable." *Id.*

23. An employee is in prosecution of the employer's business when they are "at the time engaged in serving the master." *Id.*

24. O.C.G.A. § 51-2-2 (2021). "Every person shall be liable for torts committed by his wife, his child, or his servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily." *Id.*

25. Hargett's Tel. Contractors, Inc. v. McKeehan, 228 Ga. App. 168, 169, 491 S.E.2d 391, 393 (1997) ("The test is not that the act of the servant was done during the existence of the employment, but whether the servant was . . . serving the master."). *Id.*

26. Gassaway v. Precon Corp., 280 Ga. App. 351, 353, 634 S.E.2d 153, 155–56 (2006).

27. The employee's conduct must be connected with the scope of employment for an employer to be vicariously liable for the resulting injuries. Chorey, Taylor, and Feil, P.C. v. Clark, 273 Ga. 143, 144–45, 539 S.E.2d 139, 140–41 (2000) (holding employer was not liable when employee committed tort out of reasons disconnected from employment).

not vicariously liable if an employee is engaged in a purely personal mission at the time of injury.[28]

An employer generally will not be liable for an automobile accident that occurs during an employee's commute to or from work.[29] For example, in *Gassaway v. Precon Corporation*, [30] an employee caused an automobile accident while commuting back to a job site after taking a lunch break. The employee was found to be on a "purely personal mission" and not acting within the scope of employment.[31] Specifically, at the time of injury, the employee ran a personal errand, not for the benefit of his employer; did not act in obligation to his employer; did not operate under his employer's direction; and received the primary benefits of his conduct. [32] However, there are exceptions to this general rule. [33] If a commuting employee acts under a special circumstance or in furtherance of a special mission at the time of an automobile accident, vicarious liability can be created by the special circumstance exception or the special mission exception.[34]

A. Special Circumstances Exception

Although an employee acts for their own purpose when commuting to or from work, [35] a special circumstance can arise during the employee's commute which brings the commute within the scope of employment.[36] A special circumstance can arise during an employee's commute when the employee conducts some manner of business, drives their employer's vehicle, or acts out of a duty to their employer while on

28. *Centurion Indus., Inc.*, 352 Ga. App. at 347, 834 S.E.2d at 880. An employee is engaged in a purely personal matter when they pursue an individual affair not arising out of their employment. James B. Hiers & Robert R. Potter, *Georgia Workers' Compensation Law and Practice* § 5:22 (2021). Generally, employees are on a "purely personal mission" when they are on a lunch break or commute to or from work. *Id.*

29. Whether evidence indicates an employee "act[ed] within the scope of his employment . . . at the time of the accident" and creates vicarious liability is a question for the jury. Hunter v. Mod. Cont'l Constr. Co., 287 Ga. App. 689, 691, 652 S.E.2d 583, 584 (2007).

30. 280 Ga. App. 351, 634 S.E.2d 153 (2006).

31. *Id.* at 352–53, 634 S.E.2d at 155–56.

32. *Id.* at 354, 634 S.E.2d at 156–57.

33. *Hargett's Tel. Contractors, Inc.*, 228 Ga. App. at 170, 491 S.E.2d at 393–94.

34. *Id.*

35. *Id.* at 170, 491 S.E.2d at 393.

36. Farzaneh v. Merit Constr. Co., 309 Ga. App. 637, 640–41, 710 S.E.2d 839, 843 (2011).

call.[37] This creates vicarious liability for the employer under the special circumstance exception.

1. Conducting Some Manner of Business

An employee that conducts some manner of company business during their commute acts within the scope of their employment.[38] Relevant caselaw establishes parameters governing what behavior is sufficient to bring a commute within the scope of employment under the special circumstance exception. Several conditions are indicative of whether the employee was conducting "some manner of company business"[39] during a commute.

Courts have examined the extent to which an employee's accessibility to their employer during their commute is sufficient to warrant the special circumstance exception. An employee carrying an employer-issued phone is not sufficient to create a special circumstance; mere accessibility is not enough.[40] However, evidence that an employee is on the phone with their employer at or around the time of an automobile accident can create a special circumstance; this is sufficient to bring an employee's regular commute within the scope of employment and create vicarious liability.[41] For example, an employee in *Clo White Co. v. Lattimore*[42] called their employer three times during their commute. Several conditions supported the court's determination that the employee acted within the scope of employment during the automobile accident: the calls were work-related; the calls occurred outside of regular work hours; and the calls took place while the employee was not "on the clock."[43] Since the employee "conduct[ed] the

37. *Id.* at 639–41, 710 S.E.2d at 843. "The law is clear that in the absence of special circumstances a servant [] going to and from work in an automobile acts only for his own purposes and not for those of his employer." *Clo White Co.*, 263 Ga. App. at 840, 590 S.E.2d at 383.

38. *Id.* at 840, 590 S.E.2d at 383. An employee's performance of an act within the scope of employment while commuting can create a special circumstance warranting the imposition of an employer's vicarious liability.

39. This language originates from the rule establishing the "master-servant" rule that "[t]o hold a master liable for a tort committed by his servant, it must appear that *at the time of the injury* the servant was engaged in the master's business." *Id.* at 840, 590 S.E.2d at 382.

40. *Farzaneh*, 309 Ga. App. at 641, 710 S.E.2d at 843 (employee's mere possession of a direct connection cell phone provided by their employer did not independently create a special circumstance).

41. *Hunter*, 287 Ga. App. at 689–90, 652 S.E.2d at 583–84.

42. 263 Ga. App. 839, 840, 590 S.E.2d 381, 382 (2003).

43. *Id.* at 839, 590 S.E.2d at 381.

[employer's] business at the time of the accident," the employer could be vicariously liable for resulting injuries.[44]

Also, courts have examined whether the work location to which the employee commutes impacts the analysis of whether the special circumstance exception applies. Ultimately, courts have determined that an employee's commute to a work site rather than a central office is not sufficient to warrant an application of the special circumstance exception.[45] An employee in *Farzaneh v. Merit Construction Co., Inc.*[46] was instructed to arrive at a job site at 6:00 a.m. While commuting to the job site, his automobile struck and severely injured a pedestrian.[47] Ultimately, this commute was deemed a "purely personal matter," which fell out of the employee's scope of employment under the general rule.[48] Thus, an employee's commute to or from work does not warrant an application of the special circumstance exception, regardless of whether the employee commutes to a central office or a different assigned work location.[49]

2. Driving an Employer's Vehicle

An employee driving their employer's vehicle at the time of an automobile accident is presumed to act within the scope of their employment, warranting an application of the special circumstance exception.[50] This presumption exists because employers typically provide vehicles to enable employees to conveniently perform duties within the scope of their employment;[51] the provision of an employer vehicle ultimately benefits the employer. However, this presumption alone is not conclusive of an employer's vicarious liability.[52]

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44. *Id.* at 840, 590 S.E.2d at 383. Cotton v. Prodigies Child Care Mgmt., LLC, No. A21A1457, 2022 Ga. App. LEXIS 99, at *7–8 (Ga. App Feb. 25, 2022) (holding sufficient evidence was presented to create a jury question as to whether the special circumstance exception applied when an employee scrolled through her phone to call her employer and caused an automobile accident during her commute back to work after a lunch break).

45. *Farzaneh*, 309 Ga. App. at 642, 710 S.E.2d at 844.

46. 309 Ga. App. 637, 710 S.E.2d 839 (2011).

47. *Id.* at 638, 710 S.E.2d at 842. *Cotton*, 2022 Ga. App. LEXIS 99, at *7–10.

48. *Id.* at 640–42, 710 S.E.2d at 843–45.

49. Although courts do not apply the special circumstance exception when an employee commutes to an assigned work location, courts do recognize a distinction when an employee commutes between work locations once work has already begun for the day. *Id.* at 643, 710 S.E.2d at 845 n.4.

50. *Hargett's Tel. Contractors, Inc.*, 228 Ga. App. at 170, 491 S.E.2d at 393.

51. *Id.*

52. Dougherty Equip. Co. v. Roper, 327 Ga. App. 434, 436, 757 S.E.2d 885, 888 (2014).

Instead, a burden-shifting framework determines whether an employer will be vicariously liable for the automobile accident.[53] An employer can overcome the presumption of liability by providing uncontradicted evidence to establish that the employee did not act within the scope of their employment at the time of an automobile accident.[54] For example, in *Dougherty Equipment Co., Inc. v. Roper*,[55] an employer presented sufficient evidence establishing that the employee had not begun work at the time of an automobile accident; instead, the employee merely drove the employer's automobile to fulfill the duty of arriving at work on time.[56] Then, the burden to produce evidence illustrating the existence of a special circumstance shifted to the plaintiff.[57] However, the plaintiff did not satisfy this burden, and the court found the employer was not liable.[58] As such, the presumption of an employer's liability, that an employee acts within their scope of employment if they get into an automobile accident while driving their employer's car, can be overcome by sufficient evidence.[59]

3. Acting in Response to Being "On Call"

The special circumstance exception can also be applicable when an employee is "on call" and acts in the fulfillment of a duty to their employer at the time of an automobile accident.[60] However, the test for determining whether the special circumstance exception applies turns on whether the employee responded to "an actual call at the time of the accident."[61] An employee must undertake a duty at the employer's direction while being "on call" for the special circumstance exception to apply; the employee's on call status alone is not enough.[62]

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53. *Id.* at 436, 757 S.E.2d at 888. "Under this framework, a presumption arises [that an employee acted in the scope of employment at the time of collision] and the burden is on the employer to show otherwise." *Littlefield Constr. Co.*, 314 Ga. App. at 603, 725 S.E.2d at 335.

54. *Dougherty Equip. Co.*, 327 Ga. App. at 436, 757 S.E.2d at 888.

55. 327 Ga. App. 434, 757 S.E.2d 885 (2014).

56. *Id.* at 437, 757 S.E.2d at 889. Although an employee arguably fulfills a duty by arriving to work on time, a punctual arrival is not under the direction of an employer or in the performance of a service that can be considered in the prosecution of an employer's business. *Id.* at 436–37, 757 S.E.2d at 888–89.

57. *Id.* at 437, 757 S.E.2d at 888–89.

58. *Id.*

59. *Id.* at 436, 757 S.E.2d at 888.

60. *Id.* at 436–38, 757 S.E.2d at 888–89.

61. *Id.* at 437, 757 S.E.2d at 889.

62. *Id.*

Evidence illustrating "an employee's 'on call' status is, at best, circumstantial evidence that [the employee] was acting in the scope of employment."[63] To create vicarious liability, there must also be evidence supporting that the employee was "called to duty and was acting pursuant to that duty at the time of the [automobile] accident."[64] Thus, if evidence establishes that an employee was both "on call" and acting to fulfill a duty to their employer at the time of an automobile accident, the special circumstance exception would create vicarious liability for the employer. [65]

4. Special Mission Exception

Vicarious liability is also created when an automobile accident occurs while an employee acts on a special mission or errand under the employer's direction; this is called the special mission exception.[66] Injuries resulting from a special mission considerably arise out of and in the course of employment, creating vicarious liability for employers.[67] The special mission exception is applicable when four requirements are met.[68] First, an employee must travel to or from either performing a special mission or discharging a duty incidental to the nature of their employment.[69] Second, the employer must direct this mission or errand.[70] Third, the mission or errand must occur before or after regular work hours.[71] Finally, the automobile accident and resulting injuries must arise from the employee's commission of the special mission.[72] Relevant caselaw illustrates how courts apply this exception.

The special mission exception created vicarious liability in *Patterson v. Southeastern Newspapers, Inc.*[73] when an employer directed an employee to assist with newspaper deliveries although the employee was not scheduled for deliveries and did not have a set route. Since the employee commuted upon completion of the route outside of regular work hours (around 6:00 a.m.), at the direction and for the incidental benefit of the employer, and an injury occurred while the employee was

63. *Id.*
64. *Id.*
65. *Id.*
66. *Aldrich Co.*, 188 Ga. App. at 583, 373 S.E.2d at 651.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. 243 Ga. App. 241, 533 S.E.2d 119 (2000).

en route, the resulting injuries considerably arose within the scope of employment.[74] Thus, the special mission exception applied, and the employer was vicariously liable for the resulting injuries.[75]

The special mission exception does not apply when an employee "acts for only his own purposes and not those of his employer."[76] Thus, an employee's commute to their usual place of work does not warrant an application of the special mission exception, even if the employee's commute to work is "in the interest of" the employer.[77] For example, an employee in *Hargett's Telephone Contractors, Inc. v. McKeehan*[78] did not act in the scope of his employment during a commute home after customary hours, even though the employer incidentally benefitted from his work prior to the commute. Since the employee's commute was not special, uncustomary, or within the scope of his employment, the court refused to hold the employer vicariously liable for the employee's commute.[79]

Courts also do not broaden application of the special mission exception to create vicarious liability when injuries arise from an employee's commute to a work site, as opposed to a central office.[80] For example, an employee in *Farzaneh* commuted directly from his home to arrive at an assigned job site by 6:00 a.m.[81] The court established that "commuting to an assigned job site as he did every day of the work week" was not special or uncustomary such as to warrant an application of the special mission exception.[82]

Another consideration is relevant when determining whether the special mission exception applies: whether an employer's policy allows them to discharge an employee for failure to perform the special mission.[83] However, even if an employee acts in furtherance of such a policy, this alone is not independently dispositive.[84] Instead, the policy

74. *Id.* at 241, 241–44, 533 S.E.2d at 119, 120–22.

75. *Id.* at 244, 533 S.E.2d at 122.

76. *Aldrich Co.*, 188 Ga. App. at 583, 373 S.E.2d at 650.

77. *Hargett's Tel. Contractors, Inc.*, 228 Ga. App. at 170, 491 S.E.2d at 394 (refusing to broaden the special mission exception to include an employee's commute after working uncustomary hours). As previously stated, an employee's commute is a "purely personal matter" and is not within the scope of employment. *Farzaneh*, 309 Ga. App. at 640, 710 S.E.2d at 843.

78. 228 Ga. App. 168, 491 S.E.2d 391 (1997).

79. *Id.* at 171, 491 S.E.2d at 394.

80. *Farzaneh*, 309 Ga. App. at 643, 710 S.E.2d at 845.

81. *Id.* at 638, 710 S.E.2d at 842.

82. *Id.* at 643, 710 S.E.2d at 845.

83. *Gassaway*, 280 Ga. App. at 353, 634 S.E.2d at 156.

84. *Centurion Indus., Inc.*, 352 Ga. App. at 346, 834 S.E.2d at 879.

is considered among other factors to determine whether an employee acted within the scope of employment.[85] Courts consider the extent to which an errand is required by an employee's job and the extent to which employment is imperiled by an employee's failure to complete the errand.[86] For example, in *Gassaway*,[87] the court evaluated whether an employee's job would be imperiled by his failure to perform an errand. The court decided that the errand was not required as part of the employee's job; [88] this influenced the court's ultimate decision to not apply the special mission exception.[89]

Courts are wary of expanding the special mission exception. "[A] broad interpretation of the exception would devour the general rule of no liability."[90] As such, an employee cannot unilaterally decide to undertake a special mission; the special mission must directly result from an employer's instruction.[91] Injuries must arise out of a special or uncustomary request by the employer.[92] Thus the special mission exception only creates vicarious liability when injuries arise from the tortious conduct of an employee, before or after regular work hours, when the employee performs a special errand or discharges a duty that is incidental to the nature of their employment, at the direction of their employer.[93]

IV. COURT'S RATIONALE

The court of appeals granted interlocutory review to determine whether Cummings acted under a special circumstance or in furtherance of a special mission at the time of the automobile accident such as to create vicarious liability for DMAC.[94] The court first had to address the threshold issue: whether Cummings acted within the scope of employment.[95] The answer to this issue determined whether the

85. *Id.*

86. *Id.*

87. *Gassaway*, 280 Ga. App. at 354, 634 S.E.2d at 156.

88. *Id.*

89. Other factors include the extent the employee acted under obligation to the employer; whether the errand resulted from the employer's direction; whether the employee was the primary beneficiary of the errand; and whether the employee drove their own automobile; and whether the errands were personal. *Id.* at 354, 634 S.E.2d at 156–57.

90. *Hargett's Tel. Contractors, Inc.*, 228 Ga. App. at 170, 491 S.E.2d at 394.

91. *Centurion Indus, Inc.*, 352 Ga. App. at 347, 834 S.E.2d at 880.

92. *Farzaneh*, 309 Ga. App. at 643, 710 S.E.2d at 845.

93. *Aldrich Co.*, 188 Ga. App. at 583, 373 S.E.2d at 651.

94. *DMAC81, LLC*, 358 Ga. App. at 171–72, 853 S.E.2d at 403.

95. *Id.* at 172, 853 S.E.2d at 403–04.

court would proceed to evaluate the claim that DMAC was negligent in its hiring and retention practices.[96] The court broke its analysis into four parts:[97] it established principles of vicarious liability in Georgia; evaluated if the special circumstance exception applied; assessed whether the special mission exception applied; and considered the negligent hiring and retention practices claim.

Next, the court established the general rules of an employer's vicarious liability under the doctrine of *respondeat superior*; specifically, an employer shall be liable for torts committed by their employees acting in furtherance of their business and within the scope of their employment.[98] The court also recognized the "longstanding general rule that an employee is engaged in a purely personal matter while commuting to or from work."[99] Ultimately, the court evaluated whether the special circumstance exception or the special mission exception applied in this case such as to create vicarious liability for DMAC.

A. Special Circumstances Exception

The court evaluated whether a special circumstance was created when McAlister's called Cummings in to assist with catering deliveries, for the incidental benefit of McAlister's, and Cummings felt unable to decline the request.[100] Several relevant factors were examined, including whether Cummings carried work-related materials; conducted business-related functions; received a stipend for the use of his vehicle; or responded to a duty out of an on-call status at the time of the automobile accident.[101]

The court evaluated the extent to which these relevant factors were present at the time of Cumming's automobile accident, ultimately holding that none of the factors were present in this case.[102] First, Cummings did not carry work-related materials or conduct some

96. *Id.* at 176, 853 S.E.2d at 406. For an employer to be liable for negligent hiring or retention, Georgia law "requires that (1) the employer knew or should have known in the course of ordinary care, that the employee was incompetent, and (2) such incompetence was the direct and proximate cause of damages to the complaining party under color of the employee's employment or during the employee's work hours." W. Melvin Haas, III et al., *Labor and Employment Law*, 58 Mercer L. Rev. 211, 226 (2006).

97. *DMAC81, LLC*, 358 Ga. App. at 170, 853 S.E.2d at 402. The court began by outlining the facts of the case, drawing all inferences in a light most favorable to the nonmoving party under a *de novo* standard of review. *Id.*

98. *Id.* at 172, 853 S.E.2d at 403–04.

99. *Id.* at 172, 853 S.E.2d at 404.

100. *Id.* at 172–73, 853 S.E.2d at 404–05.

101. *Id.* at 173, 853 S.E.2d at 404.

102. *Id.* at 174, 853 S.E.2d at 405.

business-related manners at the time of the accident; no evidence indicates that he used a cellphone at the time of injury.[103] Next, since Cummings was in the course of his morning commute, he had not yet clocked in for the day; accordingly, he was not being paid for his time when the accident occurred.[104] Although Cummings ultimately received money to cover the cost of gas used after making deliveries, he did not receive a stipend for his commute time.[105] Finally, the court established that, although Cummings may have been on call to make a delivery when the accident occurred, his on call status did not independently create a special circumstance warranting DMAC's vicarious liability.[106] Since Cummings was already scheduled for a regular shift on the day of the accident, he did not respond to a call at the time of injury; instead, the injury arose while Cummings drove a regular commute to his regular shift.[107] The court ultimately determined that the factors traditionally creating a special circumstance were not present in this case; thus, the court upheld the trial court's grant of summary judgment as to vicarious liability under the special circumstance exception.[108]

B. Special Mission Exception

Next, the court determined whether the automobile accident occurred while Cummings was engaged in a special mission so as to create vicarious liability for DMAC. Specifically, the court answered the question of whether the request that Cummings arrive to his regular job site early or assist with deliveries despite the inclement weather was sufficient to warrant the application of the special mission exception.[109]

First, the circumstantial evidence surrounding Cummings's automobile accident was compared to precedential case law. The court ultimately determined that the request in *Patterson* was distinguishable from the request that Cummings arrive to work early.[110] In *Patterson*, the employee was called in outside of his normal schedule, at the special request of his employer, when the employee got into an automobile accident on the way home from performing a special

103. *Id.* at 173, 853 S.E.2d at 404.
104. *Id.*
105. *Id.*
106. *Id.* at 173–74, 853 S.E.2d at 404–05.
107. *Id.*
108. *Id.* at 174, 853 S.E.2d at 405.
109. *Id.* at 174–75, 853 S.E.2d at 405–06.
110. *Id.* at 175–76, 853 S.E.2d at 405–06.

mission.[111] Accordingly, the special mission exception created vicarious liability for the employer in *Patterson*.[112] However, the request that Cummings arrive early was distinguishable in that Cummings was already scheduled to work a regular shift on the day of the accident; the request was not special; and the accident occurred during Cummings's regular commute to work.[113] The accident arose while Cummings was "performing his duty to arrive on time"[114] for a regular shift.[115] Since Cummings previously assisted with deliveries on several occasions, the request for Cummings's assistance was neither special nor uncustomary.[116] The request for Cummings to arrive early was treated as a regular commute to work, so the special mission exception did not apply; thus, DMAC was not vicariously liable for the resulting injuries associated with the automobile accident.[117]

Additionally, the court assessed whether the area being under a state of emergency due to inclement weather at the time of Cummings's automobile accident impacted the court's analysis of whether the special mission exception applied.[118] However, the court emphasized that the accident occurred while Cummings commuted to a regular shift.[119] Although inclement weather caused the area to be under a state of emergency, this fact alone was not enough to "transform this routine commute into a special mission."[120]

After considering the facts surrounding Cummings's automobile accident, the court determined that the special mission exception did not apply.[121] Accordingly, the court reversed the trial court's decision and granted DMAC's motion for summary judgment on the issue of the applicability of the special mission exception.[122]

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111. *Id.* at 175, 853 S.E.2d at 405.

112. *Id.*

113. *Id.* at 175, 853 S.E.2d at 405–06.

114. An employee arriving to work on time considerably benefits the employee, not the employer.

115. *DMAC81, LLC*, 358 Ga. App. at 175, 853 S.E.2d at 406.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

C. Conclusion

The court held that injuries resulting from Cummings's commute did not arise out of or in the course of Cummings's employment with DMAC.[123] Since Cummings did not act in the scope of his employment at the time of injuries, the court did not proceed to determine whether DMAC was negligent in its hiring and retention practices; the court granted DMAC's motion for summary judgment on this claim.[124] Ultimately, the special circumstance exception and the special mission exception did not apply to the tragic injuries arising from Cummings's automobile accident, and DMAC was not vicariously liable under the doctrine of *respondeat superior*.[125]

V. IMPLICATIONS

In this decision, the court of appeals refused to expand the scope of the special circumstance exception or special mission exception when determining the vicarious liability of an employer. Instead, the court upheld the well-established principle absolving employers from vicarious liability when injuries arise from an employee's commute to work. A different decision regarding either the special circumstance exception or the special mission exception would have broadened an employer's liability; an employer's risk of vicarious liability would have continually expanded due to the ever-increasing mobility of the modern workforce. Instead of broadening the application of these exceptions, this decision establishes a clearer scope for determining when an employee's commute can subject an employer to vicarious liability.

Historically, an employee's on call status at the time of an automobile accident was indicative of whether the employee acted within the scope of their employment at the time of injury. However, this case establishes parameters which protect employers from an overextension of this notion. Specifically, this case illustrates that, if an automobile accident results while an employee is on call but not acting in service to the employer, the automobile accident falls outside the scope of employment. As such, the employer will not be vicariously liable for the resulting injuries, even if the employee is on call at the time of the automobile accident.

This decision also establishes parameters that protect employers from an overextension of the special mission exception. Opening the

123. *Id.* at 174–76, 853 S.E.2d at 405–06.

124. *Id.* at 176, 853 S.E.2d at 406.

125. Reconsideration was denied on January 27, 2021. *Id.* at 170, 853 S.E.2d at 400. Subsequently, certiorari was denied on July 20, 2021. *Id.*

door to permit weather conditions to become a dispositive factor when determining vicarious liability would pose a detrimental threat to employers and the judicial system. Anytime an automobile accident occurred during an employee's commute, weather conditions could yield an opportunity to hold employers vicariously liable for conduct outside the scope of employment. Accordingly, the court's decision to hold that weather conditions are not an independently dispositive factor protects employers from excessive vicarious liability.

Additionally, although Cummings felt uncomfortable declining the request to assist with catering, the court refused to expand the special mission exception since DMAC did not have a policy to discipline employees for their refusal to come in on their days off. Cummings's discomfort was considered as a relevant factor, but this factor was not independently dispositive. If the court held differently, an employer could be held vicariously liable every time an employee alleged that they felt discomfort when requested to come in. Ultimately, this decision protects employers from an overexpansion of the special mission exception.

The court "decline[d] to interpret the [special circumstance] exception so broadly," because the court recognized that "expand[ing] the special mission exception to these facts would result in the exception swallowing the rule."[126] Accordingly, this decision establishes supplemental guidelines that limit when the special circumstance and special mission exceptions apply.

126. *Id*. at 173, 176, 853 S.E.2d at 405, 406.