IN THE SUPREME COURT
STATE OF GEORGIA

ANTHONY LOVE,

Appellant,

Case No. S24G0371

v.

JOHN MCKNIGHT,

Appellee.

BRIEF OF AMICUS CURIAE GEORGIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLEE

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Introduction and Summary

Under the "American Rule," parties to a lawsuit bear the cost of their own attorneys' fees and expenses of litigation unless otherwise provided by statute or contract. Perhaps the oldest exception to Georgia's application of the rule has been a part of the State's statutory law since 1860 and is codified today at O.C.G.A. § 13-6-11. Among other things, the statute permits awarding litigation costs to a prevailing plaintiff where the jury finds that the defendant has acted in "bad faith."

At issue in this case is whether evidence of traffic law violations, or, more broadly, whether violation of laws and other legal duties intended to protect the public, can constitute bad faith. The issue is not, as argued by another amicus, merely whether the receipt of a traffic *citation* constitutes bad faith, but, rather, whether the actions underlying the violation can, in appropriate cases, support a finding of bad faith by the jury.

Given the limited scope of the Court's certiorari question, as well as the procedural posture of the issue—whether a jury should be

allowed to consider whether traffic law violations constitute bad faith—the answer to the Court's question is yes. Traffic laws, and other laws specifically intended to protect members of the public from unsafe behaviors can, if violated, be considered by a jury as indicative of bad faith supporting an award under O.C.G.A. § 13-6-11. Therefore, the Georgia Trial Lawyers Association urges this Court to affirm the Court of Appeals.

Identity and Interest of the Amicus

The Georgia Trial Lawyers Association is a voluntary membership organization composed of approximately 2000 Georgia trial lawyers. Founded in 1956, GTLA is dedicated to strengthening and upholding Georgia's civil justice system and protecting the related rights of Georgia's citizens and consumers. As part of its mission, GTLA often appears in state and federal appellate courts as amicus curiae to assist those courts in interpreting constitutional, statutory, and common law rules and to represent the interests of its members. GTLA's members frequently represent citizens with cases involving violations of rules and regulations enacted to protect the public, as is the case here, and

where proper application of the rules of procedure and damages is critical. Therefore, GTLA submits this brief in support of the appellee and urges the Court to affirm the Court of Appeals.

Except for the common interest of our members and their clients in protecting the right to trial by jury and ensuring the proper application of Georgia law to preserve their legal rights, GTLA has no direct or indirect interest in the outcome of this case.

Argument and Citation of Authority

1. O.C.G.A. § 13-6-11 has been an important tool for protecting the rights of those injured by the wrongful acts of others for more than 160 years

O.C.G.A. § 13-6-11 provides that

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

This language is substantially the same as that contained in Clark,

Cobb, and Irwin's 1860 Georgia Code,[1] and, as noted by the Court in *O'Neal v. Spivey*, 167 Ga. 176 (1928), was originally codified from earlier common law decisions. And, although the statute is contained in the Contracts title of the Georgia Code, a long and unbroken chain of precedent has held it applicable to tort claims as well, as have federal courts applying Georgia law. *See, e.g., Taylor v. Devereux Found., Inc.*, 316 Ga. 44, 89 (2023) (upholding award of fees under O.C.G.A. § 13-6-11 in tort case involving sexual assault of behavioral health facility resident); *U-Haul Co. of W. Georgia v. Ford*, 171 Ga. App. 744, 746 (1984) ("Expenses of litigation are recoverable under OCGA § 13–6–11 in both tort and contract actions"); *Parks v. Parks*, 89 Ga. App. 725, 732 (1954) ("These provisions of Code, § 20–1404 are applicable to torts");

[1] "The expenses of litigation are not generally allowed as a part of the damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them." Code of 1860 (Clark, Cobb, & Irwin), § 2883, available at p. 539 (p. 95 of PDF) at https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?filename=4&article=1018&context=ga_code&type=additional (accessed July 29, 2024).

Selma, Rome & Dalton R. Co. v. Fleming, 48 Ga. 514, 515 (1873) ("Under section 2891, Irwin's Revised Code, damages for a *tort* may be increased by the expenses of litigation, if the defendant have shown himself specially litigious in the matter") (emphasis in original); *see also Brooks v. Brooks*, 366 Ga. App. 650, 658 (2023) (noting generally that code section applies outside of contract cases); *LaRoche Indus., Inc. v. AIG Risk Mgmt., Inc.*, 959 F.2d 189, 193 (11th Cir. 1992) (recognizing that, under Georgia law, O.C.G.A. § 13-6-11 applies to tort as well as contract claims).[2]

The Georgia Defense Lawyers Association argues in its amicus brief that certain 2021 amendments to O.C.G.A. §§ 1-1-1 and 1-1-8 mean that O.C.G.A. § 13-6-11 no longer applies to tort claims.

[2] In *Taylor*, Justice Ellington observed that "[a]t some point, the General Assembly inserted 'in making the contract' after 'bad faith,' which would indicate an intent that OCGA § 13-6-11 should *not* be applied in tort cases." 316 Ga. at 117 n.95 (Ellington, J., dissenting in part and concurring in part) (emphasis in original). But this language was removed in 1984, and as a result, Justice Ellington concluded, "even if this Court in the past incorrectly allowed the predecessors to OCGA § 13-6-11 to authorize expenses of litigation in tort cases, the General Assembly has since embraced that interpretation." *Id.* (emphasis added).

Specifically, it argues that "the Legislature has emphasized the statutory text and the '[a]rrangement and numbering system, including, but not limited to, title, chapter, article, part, subpart, Code section, subsection, paragraph, subparagraph, division, and subdivision numbers and designations' should all be considered when interpreting a statute." GDLA Br., p. 13.

But the legislature did not say that, much less emphasize it, because statutory interpretation was not in any way the purpose or effect of the legislation. In fact, these amendments were a direct response to the United States Supreme Court's recent decision in *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255 (2020), which denied the State copyright protections for annotations to the Official Code of Georgia, Annotated because those annotations were deemed to be a legislative act. As explained on the Senate floor by Senate Bill 238[3] sponsor Brian Strickland, the purpose of the bill was to clarify, in response to the decision in *Public.Resource.Org, Inc.*, that "the only

[3] S.B. 238 (2021-2022), which contained the subject amendments, was ultimately passed and signed as Act 306.

thing we produce as a state is the law itself, and the only thing that is the law is the actual code itself."[4] The amendments were about nothing more than a copyright dispute over annotations.[5] Any notion that this amendment had anything to do with statutory interpretation or that it implicitly purged away a century and a half of appellate case law on this issue is entirely without merit.

2. Reckless disregard for the safety and/or rights of others amounts to bad faith

The Court of Appeals has repeatedly found that violations of laws intended for the public's benefit can support a finding of bad faith under O.C.G.A. § 13-6-11, and the Supreme Court should affirm this principle. "Indicative of whether a party acts in good or bad faith in a given transaction is his abiding by or failing to comply with a public law made

[4] Video of Senator Strickland's statement on S.B. 238 can be found on the legislature's Vimeo archive for Day 28, March 8, 2021: https://vimeo.com/showcase/9620717?page=2&page=3. This specific discussion begins at approximately 2:12:45 on the video timecode.

[5] O.C.G.A. § 1-1-1(c), the text of which was not mentioned in GDLA's brief, makes clear this effect by specifying that case annotations, along with other non-statutory material in the O.C.G.A., "shall not be construed to have the imprimatur of the General Assembly by virtue of such inclusion in the Official Code of Georgia Annotated."

for the benefit of the opposite party, or enacted for the protection of the latter's legal rights." *Nash v. Reed*, 349 Ga. App. 381, 383 (2019); *see also Windermere, Ltd. v. Bettes,* 211 Ga. App. 177, 179 (1993) ("Evidence that appellants failed to comply with mandatory safety regulations promulgated for the benefit of appellees is some evidence that appellants acted in bad faith in the transaction, within the meaning of OCGA § 13-6-11."); *Hinton v. Georgia Power Co*., 126 Ga. App. 416, 419 (1972) (same) *Pickett v. Georgia, F. & A.R. Co*., 98 Ga. App. 709, 712 (1958) (same).

While intent to cause harm almost certainly supports a finding of bad faith, Appellant's contention that such intent is *required* is incorrect. For more than a century, this Court has found bad faith where a party's actions demonstrate a reckless disregard for the rights and safety of others. *Blocker v. Clark*, 126 Ga. 484, 54 S.E. 1022, 1024 (1906) ("[A] reckless disregard of the rights of others [] amount[s] to bad faith."). As this Court recently noted, "the Restatement (First) of Torts provides a definition of 'Reckless Disregard of Safety' that is largely consistent with how the term 'reckless' had been used in Georgia civil

cases…" *Ford Motor Co. v. Cosper*, 317 Ga. 356, 368 (2023). Specifically, the Restatement defines "Reckless Disregard for Safety" as follows:

> The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.

Restatement (First) of Torts § 500. As this Court further noted in *Cosper,*

> the Restatement clarifies that "reckless" conduct is distinct from, and less culpable than, conduct deemed intentional. Specifically, the Restatement explains that "[r]eckless misconduct differs from intentional wrongdoing" because a reckless actor "does not intend to cause the harm which results" and may "even...hope[ ] or...expect[ ] that his conduct will prove harmless." *Id*. § 500, cmt. (f). According to the Restatement, conduct can be "reckless" so long as the actor "realizes or, from facts which he knows, should realize that there is a strong probability that harm may result," and the Restatement further clarifies that "a strong probability is a different thing from the substantial certainty without which [an actor] cannot be said to intend the harm in which his act results."

Cosper, 317 Ga. at 370.

Notably, the Restatement's definition of "Reckless Disregard of Safety" closely aligns with Georgia's traffic law on reckless driving,

which applies to "[a]ny person who drives any vehicle in reckless disregard for the safety of other persons or property…" *See* O.C.G.A. § 40-6-390(a).[6] And "whether a defendant's manner of driving under the circumstances demonstrated a reckless disregard for the safety of others is a question that is reserved for the jury." *Mule v. State*, 355 Ga. App. 239, 240 (2020) (quoting *Turner v. State*, 342 Ga. App. 882, 884 (2017)).[7]

While the Appellant's amicus argues that "[a] guilty plea to a traffic violation…does not conclusively establish negligence," GDLA Brief, p. 8, it does create "a rebuttable presumption of negligence in a civil case arising from the same incident." *Gaddis v. Skelton*, 226 Ga. App. 325, 326 (1997). And while Georgia law allows a defendant to

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[6] *See also* O.C.G.A. § 16-2-1 ("Criminal negligence is an act or failure to act which demonstrates a willful, wanton, or reckless disregard for the safety of others who might reasonably be expected to be injured thereby.").

[7] *See also Fouts v. State,* 322 Ga. App. 261, 267 (2013) ("The offense of reckless driving may be committed in a variety of ways, and whether a defendant's manner of driving under the circumstances demonstrated a reckless disregard for the safety of others is a question that is reserved for the jury"); *Shy v. State*, 309 Ga. App. 274, 278 (2011) (same); *Bautista v. State*, 305 Ga. App. 210, 212 (2010) (same).

"present evidence that he was not negligent despite the plea," it remains "conclusive if unrebutted." *Id.* As the Georgia Court of Appeals noted in this case, "Love pleaded guilty to the offense of following too closely and does not dispute that he did so." *McKnight v. Love*, Slip Op. at 24, 369 Ga. App. 812, 823–24 (2023). With this in mind, we now turn to the specific application of O.C.G.A. § 13-6-11 in this case.

3. A jury question remains as to whether Love's actions constituted bad faith

O.C.G.A. § 40-6-49(a) states that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." Since unrebutted, Love's guilty plea of violating O.C.G.A. § 40-6-49(a) is conclusive of his negligence. *Gaddis*, 226 Ga. App. at 326. But, more importantly, "whether the act of 'following too closely' demonstrated a reckless disregard for the safety of others under the circumstances in which such act was committed" is a jury question. *Lesh v. State*, 259 Ga. App. 325, 326–27 (2003). Accordingly, whether Love's act of following too closely in violation of O.C.G.A. § 40-6-49(a) demonstrated a reckless disregard for the safety

of others, which is indicative of bad faith, is a question properly reserved for the jury.[8]

Love's guilty plea is not the only evidence of Love's disregard for the safety of other motorists. McKnight testified that Love was driving "pretty fast" and "seemed distracted," further noting that he (McKnight) had stopped long enough himself to look behind him and see that Love was not going to stop. V2. 1305-07. This was a forceful collision, not a mere "tap" or minor fender bender. Therefore, there is also evidence that Love was distracted while driving, in violation of O.C.G.A. § 40-6-241(b). While subsection (c) of that same code section applies specifically to use of a hands-free device, subsection (b) separately provides that a driver "shall not engage in any actions which shall

[8] *See, e.g., Beneke v. Parker*, 293 Ga. App. 186, 189 (2008) *rev'd in part on other grounds*, 285 Ga. 733 ("A jury could reasonably find that Beneke's actions here in following too closely and in slamming hard into Parker's vehicle demonstrated a reckless if not wilful disregard for the safety of others"); *Gathuru v. State*, 291 Ga. App. 178, 178 (2008) ("A jury found [the defendant] guilty of two counts of reckless driving (driving too fast for conditions and following too closely)"); *Cronan v. State,* 236 Ga. App. 374, 377 (1999) (defendant convicted of reckless driving under an indictment charging him with following too closely, among other things).

distract such driver from the safe operation of such vehicle." There is sufficient evidence from which the jury could find that Love was on the phone at the time of the collision and, whether he was using a hands-free device or not, that he was distracted while driving, especially given the manner in which the collision occurred and McKnight's description of Love's speed and apparent lack of attentiveness. The jury could also construe Love's false statement about using his phone while driving as an attempt to cover up his inattentiveness and could reasonably infer that he was distracted. These findings would authorize the jury to conclude that Love acted in bad faith.

It bears repeating that the issue is not whether Love merely received a citation, or pled guilty to it. Even if Love had not received a citation, the facts support a finding that he had violated the Uniform Rules of the Road prohibiting following too closely (O.C.G.A. § 40-6-49), driving while distracted (O.C.G.A. § 40-6-241), and driving recklessly (in violation of O.C.G.A. § 40-6-390). It can hardly be disputed that the purpose of these rules is to ensure safe passage for those traveling on the roadways, and under the facts of this case, violation of those

standards could permit a jury to find that Love's behavior constituted bad faith under O.C.G.A. § 13-6-11. *See, e.g., Crook v. State*, 156 Ga. App. 756, 757 (1980) (purpose of Uniform Rules of the Road "is to promulgate the safe and expeditious movement of vehicular traffic on the highways.").

Conclusion

Not all traffic violations will result in a finding of bad faith under O.C.G.A. § 13-6-11. Most probably will not. But when highway safety violations cause harm to those reasonably anticipated to be injured thereby, a jury should be permitted to consider those facts and determine whether the defendant's actions met the required level of recklessness to support such a finding. This is the basic role of the jury, and that role should not be usurped. O.C.G.A. § 13-6-11 serves an important role in the justice system by shifting the costs of litigation to those acting in bad faith.

The Court of Appeals should be affirmed.

Respectfully submitted this 29th day of July, 2024.

This submission does not exceed the word count limit imposed by Rule 20.

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SUPREME COURT OF GEORGIA
Case No. S24G0371

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ANTHONY LOVE v. JOHN MCKNIGHT.

Upon consideration of the Motion to File Brief of Amicus Curiae, it is ordered that the motion is granted and that the movant file the brief attached to the motion.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk