**Docket Number CV 2016-044**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**

**ALEXIS MOSS,**

**Appellant**

**v.**

**HITCH INC.,**

**and PIPER PETERSON.**

**Appellees.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF ALABAMA**

**BRIEF FOR APPELLANT**

**ORAL ARGUMENT REQUESTED**

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*Moss v. Hitch Inc.*

Docket No. CV 2016-044

**CERTIFICATE OF INTERESTED PARTIES**

 Alexis Moss hereby certifies that the following persons, attorneys, and entities have an interest in the outcome of the case:

1. Victoria Burnett, Burnett & Associates, Attorney for Appellant;
2. Hitch Inc., Appellee;
3. Alexis Moss, Appellant;
4. Piper Peterson, Appellee;
5. Andrea Shaw, United States District Judge;
6. Lynn Hogewood Schuk, LH&S, LLP, Attorney for Appellee.



Victoria Burnett

Attorney for Appellant

**STATEMENT REGARDING ORAL ARGUMENT**

 Alexis Moss requests oral argument to persuade this court that the District Court improperly granted summary judgment in favor of the defendants, especially in regard to her claim of wantonness.

 Oral argument will significantly aid the court in reviewing this claim because the case has many complicated facts and involves an emerging area of law in Alabama. Specifically, the District Court misapprehended the nature of this claim when it held that a driving service company could not be liable for their driver’s wanton conduct while en-route to pick up a paying passenger.

**TABLE OF CONTENTS**

Page

CERTIFICATE OF INTERESTED PARTIES C-1

STATEMENT REGARDING ORGAL ARGUMENT i

TABLE OF CONTENTS ii

TABLE OF CITATIONS v

STATEMENT OF JURISDICTION viii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

 1. PROCEDURAL HISTORY 3

 2. STATEMENTS OF THE FACTS 5

 3. STANDARD OF REVIEW 7

SUMMARY OF THE ARGUMENT 9

ARGUMENT 11

1. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF PETERSON AND HITCH WHEN THE ALABAMA GUEST STATUTE IS INAPPLICABLE BECAUSE MOSS WAS A PASSENGER AND PETERSON’S BEHAVIOR WAS WANTON, CAUSING SEVERE INJURIES TO MOSS.
2. MOSS WAS A HITCH PASSENGER, AND THEREFORE, NOT BARRED UNDER THE ALABAMA GUEST STATUTE FROM RECOVERING FOR PETERSON’S WANTONNESS AND NEGLIGENCE.
3. EVEN IF MOSS WAS CONSIDERED A “GUEST”, AND NOT A PASSENGER, MOSS IS NOT BARRED FROM RECOVERING FROM PETERSON’S WANTONNESS BECAUSE THE ALABAMA GUEST STATUTE DOES NOT EXTEND TO WANTON CLAIMS AND PETERSON WAS WANTON.
4. Peterson had the duty to use reasonable care and control while driving and breached her duty.
5. Peterson had knowledge of danger and that injury would likely occur.
6. Despite her knowledge of danger, Peterson acted with reckless indifference.
7. Peterson’s conduct proximately caused Moss’ injuries.

CONCLUSION 14

CERTIFICATE OF SERVICE 16

**TABLE OF CITATIONS**

**FEDERAL CASES**

Alphabetical order.

*Case name*

Citation…………………………………………………………………..11

*Case name*

Citation…………………………………………………………………..11

*\*Case name*

Citation…………………………………………………………………..11

*\* (heavily relied on) Case name*

Citation…………………………………………………………………..11

**STATE CASES**

*Case name*

Citation…………………………………………………………………..11

*Case name*

Citation…………………………………………………………………..11

*Case name*

Citation…………………………………………………………………..11

*Case name*

Citation…………………………………………………………………..11

**FEDERAL STATUTES**

28 U.S.C. § 1290 (2004) ………………………………………………………..11

28 U.S.C. § 1332 (2004).

28 U.S.C. § 1291 (2004).

Fed. R. Civ. Pro. 54(b). ???

**STATE STATUTES**

*\** Ala. Code Ann. § 34- 7- 20 (2004) ……………………………………………..11

**STATEMENT OF JURISDICTION**

Jurisdiction is proper in the United States District Court for the Northern District of Alabama, pursuant to 28 U.S.C. § 1332 (2004). Plaintiff, Alexis Moss, is a resident of the State of Florida. (R. 3). Defendants, Hitch Inc. and Piper Peterson, are residents of separate states. *Id.* Hitch Inc. is an Alabama Corporation with the principle place of business in Birmingham, Alabama, and Peterson is a resident of the State of Tennessee. *Id.* The matter in controversy exceeds, exclusive of interest and costs, $75,000.00, as specified by 28 U.S.C. § 1332 (2004). (R. 2). Furthermore, jurisdiction over the defendant, Peterson, is proper because the defendant has purposely availed herself to the law of Alabama through residence and/or direct solicitation of Alabama citizens and guests by working for an Alabama Corporation, in Birmingham, Alabama. *Id.*

Plaintiff filed a timely notice of appeal on March 4, 2016, from the entry of summary judgment on behalf of the defendants, which was entered on March 1, 2016. (R. 61). The United States Court of Appeals for the Eleventh Circuit has appellate jurisdiction to hear all civil cases from final decisions of the United States District Court for the North District of Alabama, pursuant to 28 U.S.C. § 1291 (2004).

**STATEMENT OF THE ISSUES**

1. WHETHER THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF PETERSON AND HITCH WHEN THE ALABAMA GUEST STATUTE IS INAPPLICABLE BECAUSE MOSS WAS A PASSENGER, PARTICIPATING IN A HITCH RIDE, AND PETERSON WANTONLY OPERATED HER VEHICLE.

**STATEMENT OF THE CASE**

1. **Procedural History**

On, January 25, 2016, Alexis Moss (“Moss”) filed a complaint against Hitch Inc. (“Hitch”), and Piper Peterson (“Peterson”), in the United States District Court for the Northern District of Alabama. (R. 2). Moss properly filed this civil action in the District Court pursuant to 28 U.S.C. § 1332 (2004). *Id.* The complaint alleged wantonness and negligence claims against Hitch and their employee, Peterson. (R. 4-5). Additionally, the complaint asserted negligent supervision and vicarious liability to Hitch for Peterson’s acts. (R. 6). The complaint demanded compensatory damages in the amount of $337,500.00 with interest and costs and, upon the jury’s finding as may be required in the interest of justice, any punitive damages in such an amount as the jury may assess. (R. 32). The defendants filed an answer on February 8, 2016. (R. 15). The answer included defenses of failure to state a claim upon which relief can be granted, failure to prove any cause of action, assumption of the risk, and contributory negligence. (R. 13-14). The answer also denied Hitch’s liability for Peterson’s conduct, claiming the Alabama Guest Statute precluded Moss’s negligence and wantonness claims because Moss was considered a guest and Peterson did not act in wantonly. *Id.* On February 12, 2016, the defendants filed a motion for summary judgment on Counts I, II, and III of the complaint, which alleged negligence, wantonness, and negligent supervision respectively. (R. 53-55). On February 12, 2016, Moss filed a brief in opposition to the defendants’ motion for summary judgment. ( R. 56-58).

On March 1, 2016, the District Court granted the defendants’ motion for summary judgment on Counts I, II, and III pursuant to Fed. R. Civ. Pro. 54(b). (R. 59-60). The court did not rule on Moss’ negligent supervision claim, which remains pending. *Id.* On March 4, 2016, Moss filed a notice of appeal. (R. 61).

1. **Statement of Facts**

This case arises from an automobile accident that occurred while Peterson was serving as a driver for Hitch, and Moss was riding as a passenger. (R. 18-19). Moss and Peterson grew up together and often visited one another after Moss moved to Florida. (R. 18). On June 13, 2015, Moss was visiting Peterson in Birmingham, Alabama, where Peterson worked for Hitch as a driver. *Id.* Peterson agreed to take Moss to the airport later that evening, and Moss offered to pay her fifteen dollars for the ride. *Id.* On that night, Peterson received text messages from Hitch while they were waiting to drive Moss to the airport. *Id.*

Hitch is a local technology company that allows drivers to use their personal cars to transport passengers for hire. (R. 35). When hired, drivers sign documents confirming their duties and responsibilities, the company’s rights, and driver’s performance procedures. (R. 41-50). These documents include the “Referral Service Agreement”, and the “Rules of Conduct”. (R. 41-49). The Rules of Conduct include the driver’s duties, such as to display Hitch’s glitter “thumb’s up” placard on the car when driving for Hitch, to obey all local traffic laws, and not to engage in distracted driving, such as texting. (R. 48).

When drivers begin work, they are matched with passengers through Hitch’s application (app) on smart phones. (R. 42). Passengers download the app and disclose their current location and desired destination, and then Hitch refers the passengers to the drivers who either accept or reject them. *Id*. If accepted, the driver places the Hitch glitter thumb on their car and proceeds to pick up the passenger and deliver them to their destination. (R. 38, 42). Hitch later pays drivers a percentage of the passenger’s fee after they are delivered. (R. 42).

Peterson was hired as a Hitch driver after giving them her Alabama drivers license, and signing the Rules of Conduct and Referral Service Agreement, and worked for several months in areas of Birmingham that she was familiar with. (R. 35, 41-49, 63). The text messages Peterson received were referrals for two separate Hitch passengers. (R. 36). Peterson accepted the two passengers through the app and allowed Moss to “tag along” with her in the passenger seat. *Id.* Peterson displayed the glitter thumb on her car and departed to pick up the first Hitch passenger. (R. 38). While en-route to pick up the first passenger, Peterson and Moss listened to music and took pictures of themselves (“selfies”). (R. 36). She picked up one man from Homewood and delivered him to his desired destination. *Id.* After the first passenger was delivered, Moss placed the camera on the dashboard and resumed video-recording the two of them singing and dancing, while Peterson drove to pick up the second Hitch passenger. (R. 18). En-route, Peterson was engaged in singing, dancing and “lean[ing] in” for selfies, when she collided with a vehicle in an oncoming lane. (R. 19). At the time of the collision, the video was still recording. *Id.* Moss was ejected from the car and suffered numerous severe injuries including several broken bones, a broken leg, massive brain swelling, cracked vertebra, and psychological issues. (R. 4, 23). She spent nearly eight weeks in the hospital and is still experiencing ongoing rehabilitation for her leg and hand, and psychological counseling for lack of concentration, focus, and memory retention. (R. 19).

Moss was an active athlete since she was 10 years old and attended Florida State University on a full-ride softball scholarship. (R. 20). That scholarship enabled her to pursue a chemical engineering degree and obtain two previous internships with Dow Chemical (“Dow”). (R. 22-23). Furthermore, Moss received a lucrative job offer with Dow upon her completion of her degree. (R. 25). As a result of her injuries, Moss was forced to withdraw from school and was unable to complete her degree, losing her job offer with Dow. (R. 4). Moss is still experiencing ongoing distress regarding her inability to finish college, her financial concerns, and her lack of brain function. (R. 5). Moss incurred, and will continue to incur, expenses related to doctor, hospital, drug, and rehabilitation treatment for her injuries. (R. 5, 28-32). She has suffered from physical pain, emotional stress, and mental anguish, and will continue to for a significant time in the future. (R. 5).

Moreover,in this case, there are numerous disputes of material fact present that should be submitted to a jury. There are disputed facts regarding whether Moss was a passenger or a guest. While Hitch and Peterson allege that Moss was not a passenger because Moss did not pay for Peterson’s services, and the nature of the ride was social, Moss offers contradicting facts. (R. 13, 37). Moss asserts she paid Peterson fifteen dollars to drive Moss to the airport, making her a passenger. (R. 18). Additionally, Moss claims the ride mutually benefited Peterson and Moss because Moss was participating in a Hitch ride and Peterson was working as a Hitch driver since she was en-route to pick up a Hitch passenger, with the glitter thumb on her car. (R. 18, 20, 36). Additionally, there are disputed facts concerning whether Peterson was wanton. Though Hitch and Peterson allege an oncoming car veered into her lane, Moss asserts Peterson sideswiped an oncoming car in an opposite lane while distracted by a phone. (R. 18, 21, 36).

Applying these disputed facts to the Alabama Guest Statute, Moss is not precluded from suing for negligence and wantonness and thus the defendants are liable for Peterson’s wantonness, which caused Moss’s injuries. In addition, Peterson claims Moss was controlling the phone, thus she could not have been engaged in distracted driving and therefore was not wanton. (R. 18). However, Moss claims Peterson was paying attention to the phone and engaged in distracted driving by “lean[ing]” in for selfies and videos. (R. 18, 36). Furthermore, regardless of whether Moss was considered a passenger or guest, defendants are still liable for Moss’s injuries because the Alabama Guest Statute does not preclude claims for wanton behavior and there is sufficient evidence in which a reasonable juror could find Peterson was wanton. Accordingly, the District Court improperly granted summary judgment in the defendants’ favor.

**C. Standard of Review**

 The judge can hold summary judgment proper if there are no disputes of material fact regarding an essential element Moss’ case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In *Celotex*, the United States Supreme Court defined the requirements for summary judgment under Fed. R. Civ. P. 56(c). *Celotex*, 477 U.S. at 322. The court held that “the plain language of Rule 56(c) mandates the entry of summary judgment… against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation there can be no ‘genuine issues of material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id*. at 322-23.

 The United States Eleventh Circuit Court of Appeals clearly and succinctly states that when reviewing a summary judgment it “must apply the same legal standards that the district court was required to apply in its summary judgment decision; therefore, the district court’s legal conclusions are subject to *de novo* review.” *Herman v. NationsBank Trust Co.*, 126 F.3d 1354, 1360 (11th Cir. 1997).

 In *Chapman*, the Eleventh Circuit Court sitting en banc reiterated the *de novo* standard of review of a district court’s grant of summary judgment. *Chapman v. Al Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000). The court held that “[t]he mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case.” *Chapman*, 229 F.3d at 1023. In reviewing summary judgment, the Court must review the evidence “in the light most favorable to the nonmovant.”, the party bearing the burden to produce disputes of fact. *Phillips v. United States Servs Auto. Ass’n*, 988 So. 2d 464, 467 (Ala. 2008).

In conclusion, summary judgment is improper if disputes of material fact exist that could have affected the outcome of the case because a reasonable jury could have inferred the “existence of the fact sought to be proved.” *Id.* Thus, If the judge improperly ruled on summary judgment, because disputes of material fact existed, the case must be reversed and remanded for trial *de novo*. *Id*.

**SUMMARY OF THE ARGUMENT**

 On June 13, 2015, Moss was involved in a car accident while riding with Peterson. This accident resulted in a magnitude of severe injuries to Moss and gave rise to her negligence and wantonness claims against Peterson, and her employer, Hitch. The District Court granted summary judgment in favor of the defendants on claims of negligence and wantonness, asserting the Alabama Guest Statute precluded these claims. The District Court erred by granting summary judgment because Moss was a “passenger”, Peterson’s conduct was wanton, and there are disputes of material fact present.

 The Alabama Guest Statute does not preclude Moss from recovering for negligence and wantonness conduct because Moss was a “passenger”. The Alabama Guest Statute limits guest’s claims against drivers by precluding “guests” from suing a driver for negligence, and limits them only to wantonness claims. Ala. Code § 32-1-2 (2012). However, if a rider is considered a “passenger”, the Guest Statute does not apply, and they can sue for negligence and wantonness. *Id.* In this case, Moss was considered a passenger because she paid Peterson for her services to the airport and the ride mutually benefitted Peterson as a Hitch driver, and Moss as a participant. Peterson was en-route to pick up a Hitch passenger and Moss was “tag[ging] along” to see a Hitch driver in action. Moss was not a guest in Peterson’s car at the time of the accident; thus, the Alabama Guest Statute does not apply in this case, and Moss is not precluded from recovering in negligence and wantonness claims

Moss could still recover in wantonness claims, even if she was a guest, because Peterson was acting wantonly. The Alabama Guest Statutes precludes guests from recovering from negligence claims, but does not preclude them from wantonness claims. *Id.* Peterson acted in a wanton manner because she had the duty to drive with reasonable care and control, consciously breached her duty, was aware of the danger, and, despite her knowledge, acted with reckless indifference, causing a collision that directed injured Moss. The collision itself is evidence that she did not comply with her duty to drive using reasonable care so as to not collide with any vehicle, and to obey all traffic laws, including not to engage in distracted driving, such as using phones. In addition, Peterson signed a Hitch contract, including rules of conduct, disclosing her duty to obey all traffic laws and not to engage in distracted driving. Despite this duty, Peterson was listening to music and dancing while being video-recorded, and driving. The Alabama Guest Statute does not preclude Moss’s wantonness claim and thus, Peterson and Hitch are liable to Moss for wantonness.

**ARGUMENT**

1. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF PETERSON AND HITCH WHEN THE ALABAMA GUEST STATUTE IS INAPPLICABLE BECAUSE MOSS WAS A PASSENGER AND PETERSON’S BEHAVIOR WAS WANTON, CAUSING SEVERE INJURIES TO MOSS.

Alabama Courts have recognized the Alabama Guest Statute to limit guest’s claims against driver’s to only wantonness. Ala. Code § 32-1-2 (2012). However, The Alabama Guest Statute does not apply to passengers, who are not precluded from recovering for a driver’s negligence or wantonness. *Id*.“The owner, operator, or person responsible ... of a motor vehicle shall *not* be liable for … injuries to… a *guest* … transported without payment*…* in [a]… motor vehicle… *unless* such injuries… are caused by the *willful or wanton misconduct* of such operator*,* owner, or person responsible of the [car]”. *Id*.(emphasis added). If a rider is considered a “guest” the Alabama Guest Statute precludes them from negligence claims, but does not preclude wantonness, if the driver’s conduct was wanton. *Id.*  However, if a rider is considered a “passenger”, then the Alabama Guest Statute does not apply and are not precluded from negligence or wantonness claims. *Id.*  In this case, the Alabama Guest Statute does not preclude Moss from recovering in wantonness claims because (1) Moss was a passenger, and (2) Peterson’s conduct was wanton. Furthermore, genuine disputes of material fact exist as to whether Moss was a passenger or a guest and whether Peterson’s conduct was wanton. (R. 3, 13, 36). The depositions, provided by both parties, contain substantial evidence from which a jury could return a verdict in favor of the nonmoving party, Moss. Accordingly, summary judgment was improper.

1. **Moss was a “passenger” and thus, the Alabama Guest Statute does not preclude Moss from recovering on Peterson’s wantonness and negligence.**

The Alabama Guest Statute precludes “guests” from recovering from negligence claims, and limits them to recovering only from wantonness claims; however, the Alabama Guest Statute does not apply to “passengers”, who are permitted to sue for both negligence and wantonness. Ala. Code § 32-1-2 (2012). The determination between a “guest” and “passenger” is based on whether the ride benefits the driver or the rider. *White v. Pratt*, 712 So. 2d 210, 212 (Ala. Civ. App. 1998). A rider is considered a “passenger” if the transportation promotes the “mutual interest” of both parties and a common benefit, creating a “joint business relationship” *or* if the purpose of the trip is “for the attainment of some objective to the driver” and the rider simply accompanies them for some benefit. *White*, 712 So. 2d at 212; *Sullivan v. Davis*, 83 So. 2d 434, 436-37 (Ala. 1955). This means if the ride is of mutual interest to both the rider and the driver, or if the purpose of the trip is for the driver to attain a benefit and the rider accompanies them for a separate benefit, then the rider is considered a “passenger”. *Id.*

On the other hand, a rider is considered a “guest” if the ride was conditioned on payment and if the ride was purely social. *Thedford v. Payne*, 812 So. 2d 905, 909 (Ala. 2001) (holding a driver giving a friend a ride home from football practice was a “guest” because the rider gave money for gas expenses as a “mere courtesy”); *Klaber v. Elliott*, 533 So. 2d 533 So. 2d 576, 578 (Ala. 1988) (holding a purely social ride was not “business-related” when a rider occasionally paid for gas expenses, thus the rider was considered a “guest”).

For example, in *Sullivan*, a driver gave his potential employee a ride home when an accident occurred. *Sullivan v. Davis*, 83 So. 2dat 437. Unlike *Thedford*, Moss and Peterson’s ride was not purely social and the ride mutually benefitted both parties because the ride was business related, thus the rider was considered a “passenger” as a matter of law. *Id.; See also* *White v. Pratt*, 712 So. 2d at 211-12. (holding a company owner’s son giving an employee a ride from work was sufficient evidence of a business relationship, implying the rider was a passenger, thus the determination was for the jury).

Additionally, in *Wagnon*, the Alabama Supreme Court held if there is a mutual benefit to the driver and the rider, and the trip attains some objective to the driver, the rider is considered a passenger. *Wagnon v. Patterson*,70 So. 2d 244, 249 (Ala. 1954). Patterson and Wagnon worked together and Wagnon often gave Patterson a ride home for fifty cents a week. *Id.* at 247. Patterson’s weekly payments and Wagnon’s service of driving created a mutual benefit for both parties and was sufficient evidence that Patterson was a “passenger”. *Id.* at 251. Thus, the facts were given to a jury for determination. *Id.*

Furthermore, in *Russell*, A ride given by an employee to a customer, to deliver gasoline to the customer’s locked storage tank, was considered of business nature and with the sole purpose of expediting the delivery service. *Russell v. Thomas*, 178 So. 2d 556, 559 (Ala. 1965). An accident occurred after the delivery while the employee was en-route to return the customer home. *Russell*, 178 So. 2d at 557. The Alabama Supreme Court held the returning trip was not disassociated from the original ride because there was continuity of driver’s purpose to deliver gasoline for the company; thus, the circumstances favored a “passenger” because the driver accrued the benefits of working for the company, and the customer was only riding to accelerate the process. *Id.* at 560.

In the present case a reasonable jury would likely find Moss to be a “passenger” because the ride was of mutual interest to both Peterson and Moss, such as in *Wagnon*. Peterson was receiving two benefits by driving on the night of the accident. First, Peterson was benefitting from Moss because Moss paid her fifteen dollars for her future service of driving Moss to the airport. (R. 18). Second, Peterson was benefitting from Hitch by furthering her work as a Hitch driver because she was en-route to pick up a Hitch passenger that she had accepted, similarly to *Russell*. (R. 36). Furthermore, Moss was benefitting by participating in an active Hitch ride, by tagging along to see a Hitch driver in action. (R. 20, 21, 36). Thus, since Moss paid Peterson for her service, both parties mutually benefitted from the ride, and it was not social, a reasonable jury could have found Moss to be a passenger and summary judgment was improper.

 Lastly, summary judgment is proper when there are no disputes of material fact. However, in this case there are disputes as to whether Moss was a “passenger” or a “guest”. While Peterson contends Moss was a guest, because Moss did not pay her for a ride, and the nature of the ride was social, there is evidence to support the opposite. (R. 13, 37). Moss was a passenger in Peterson’s car because Peterson was conferring benefits from Moss, who paid for the ride to the airport, and from Hitch, who paid her for being a Hitch driver at the time of the accident. (R. 18, 36). The court is required to review all evidence in the light most favorable to the nonmovant, and resolve all reasonable doubts from the facts in Moss’s favor. *Phillips v. United States Serv’s. Auto. Ass’n*, 988 So.2d 464, 467 (Ala. 2008). Therefore, when viewed in the light most favorable to Moss, as a passenger, Moss is not precluded from recovering damages for Peterson’s negligence and wantonness. Accordingly, granting summary judgment in favor of the defendants was inappropriate since there are disputes of material fact as and a reasonable jury could find that Moss was a passenger.

1. **Even if Moss was considered a “guest”, and not a “passenger”, Moss can still recover from Peterson’s wantonness because the Alabama Guest Statute does not extend to wanton claims and Peterson was wanton.**

The Alabama Guest Statute precludes a “guest’s” negligence claim, but does not preclude a wantonness claim. Wantonness is the “[c]onscious doing of some act or the omission of some duty under the knowledge of the existing conditions, and conscious that from the doing of such act or omission of such duty, injury will likely [ ] result.”  *Burns v. Moore*, 494 So. 2d 4, 5 (Ala. 1986) (citing *Kilcrease v. Harris*, 259 So. 2d 797, 801 (Ala. 1972)). The elements needed to satisfy a wantonness claim are (1) the omission of a duty, (2) with knowledge of danger and that injury would likely occur, and despite that knowledge a (3) conscious disregard or reckless indifference, and (4) causation. *See Glanton v. Huff*, 404 So. 2d 11, 13 (Ala. 1981). While Peterson alleges she did not act in a wanton manner, there is contradicting evidence supporting her wantonness, creating a dispute of material fact in which a reasonable jury could have found in favor of Moss; thus the trial court erred in ruling summary judgment proper.

1. Peterson had the duty to use reasonable care and control while driving and breached her duty.

Every driver has a legal duty to use reasonable care and control while driving their car as not to collide with any other vehicle. *See Glanton v. Huff*, 404 So. 2d 11, 13 (Ala. 1981). For example, in *Randolph*, a driver sped through a red light because he “was not looking” and “did not see” the red light. *Randolph v. Kessler*, 152 So. 2d 138, 139 (Ala. 1963). The court held that all drivers, as a matter of public safety, have a duty to look for other traffic and obey all traffic signals, including speed limit postings, and that his failure to look was a breach of that duty. *Id.; See also Glanton v. Huff*, 404 So. 2d 11, 13 (Ala. 1981) (holding a driver towing a trailer, who knew a longer stopping distance was required, breached his duty to use extra caution while driving so as not to collide with another car when he rear-ended another vehicle).

 In addition, Alabama has a law prohibiting drivers to engage in distracting activities while driving. Ala. Code § 32-5A-350 (2012). This statute states a person can not operate a vehicle on any public road while using a phone to “write, send, or read a text-based communication.” *Id.* Other states, such as Georgia, have similar laws, regarding the use of cameras while driving. *Williams v. State*, No. A15A1484, 2015 Ga. App. LEXIS 599, at \*599 (Ga. Ct. App. Oct 19, 2015). For example, in *Williams v. State*, a police officer stopped a driver handling a camera while driving. *Id.* The driver was charged with “failure to drive with due care, in that [the driver] was holding a camera that distracted him.” *Id.* The court held that handling the camera while driving was distracting in itself, and the use of the camera was evidence of the driver’s failure to use reasonable care. *Id.*

 In the current case, Peterson had a legal duty to use reasonable care and control when operating a vehicle, and not to engage in distracted activities, such as recording herself with a camera. *See* Ala. Code § 32-5A-350 (2012). Similar to *Williams, Randolph*, and *Glanton*, Peterson had the duty to continuously look for other drivers on the road so as to avoid collision. Despite this duty, she continued to engage in distracted driving by singing, dancing, and “lean[ing] in” for “selfies”, all while driving. (R. 39). This resulted in a collision with another car. (R. 36).

In conclusion,Peterson had a legal duty to use reasonable care, and despite that duty, she engaged in singing, dancing, and “lean[ing] in” to a video recording. (R. 37). In addition, the fact that there was a video of the collision is evidence that she was engaged in a distracted driving environment, similar to texting, because it requires the same amount of attention away from the road. (R. 37). This is sufficient evidence to show her omission of her duty, as a matter of law.

Furthermore, there are disputes of material fact regarding her omission of her duty to use reasonable care while driving. While Moss contends that Peterson was distracted by the phone, “clearly not paying attention to other drivers” whilst driving, Peterson contends that she was not distracted and was looking at the road. (R. 19, 21, 38). Accordingly, granting summary judgment in favor of the defendants was erroneous in this case because there are disputes of material fact concerning Peterson’s omission of her duty to use reasonable care while driving.

1. Peterson had knowledge of danger and that injury would likely occur.

Peterson had knowledge of the danger in engaging in distracted driving, and not obeying traffic laws, and that injury would likely result as shown by her familiarity with the roads and usual traffic, Hitch’s “Rules of Conduct”, her jerking of the wheel, and her traffic violations. (R. 18, 35, 37, 48).

Wantonness requires a “degree of conscious culpability” rather than just “mere… inadvertence”. *Williams v. Werner Enters.*, No. 1:11-CV-3671-VEH, 2013 U.S. Dist. LEXIS 176833, at \*9 (N.D. Ala. Dec. 17, 2013). More specifically, drivers are to be knowledgeable of their surrounding area and aware that if they fail to drive safely, injury would likely occur. *See Randolph v. Kessler*, 152 So. 2d 138, 139 (Ala. 1963) (holding a driver “should have had knowledge” of the traffic signals and speed limits posted in the area he was driving in, and should have been aware of the danger in speeding and that injury would likely result). Additionally, the Alabama Supreme Court held that surrounding circumstances could infer knowledge of wantonness.  *Burns v. Moore*, 494 So. 2d 4, 6 (Ala. 1986) (citing *Dixie Electric Co. v. Maggio*, 294 Ala.  411, 414 (1975)).

 To start, the Alabama Supreme Court has noted that anyone who obtains an Alabama drivers license is presumed to have knowledge of how to properly and safely operate a vehicle. *Phillips v. United Serv’s. Auto. Ass’n*, 988 So. 2d 464, 470 (Ala. 2008). This implies anyone in Alabama with a drivers license should have knowledge of the dangers in driving and if they do not drive safely, injury will likely result. *Id.*

 In addition, a driver’s familiarity of roads and residents can infer knowledge of danger and that injury would likely occur. *Burns*, 494 So. 2d at 6. For example, in *Burns*,Moore struck a pedestrian with her car while she was looking in the opposite direction for oncoming traffic.  *Id.* Moore was familiar with the road and aware of her surroundings but simply “omitted to [look ahead]” at the “critical time” that caused the accident.  *Id.* (citing *Culpepper & Stone Plumbing & Heating Co. v. Turner*, 276 Ala.  359, 365 (1964)).  The court held Moore’s familiarity with the road neighborhood residents were sufficient circumstances to infer Moore’s knowledge of danger and that injury would likely occur if she were to not look ahead for oncoming traffic, and that her “conscious indifference to probable consequences” was evidence of wantonness. *Id.*; *See also Randolph v. Kessler*, 152 So. 2d 138, 139 (Ala. 1963) (holding a driver who “was not looking” and “did not see” a red light “*should have had* knowledge” of his location and surroundings, including other vehicles, traffic signals, and intersections).

 Similarly, Alabama courts have stated that acknowledgement of a company’s safety rules is evidence of a driver’s knowledge of the danger imposed when improperly followed. *See Williams*, No. 1:11-CV-3671-VEH at \*5. These safety rules are implicated to prevent “inherently dangerous” driving actions. *Id.* at \*13 (citing *Ex parte Essary*, 992 So. 2d 5, 10 (Ala. 2007). In *Williams,* a driver was familiar with the area, and acknowledged his company’s safety regulations found in the “Werner’s Driver’s Handbook” and the “Federal Motor Carrier Safety Regulations” book. *Id.* at \*5. The driver caused an accident when he failed to follow a rule by parking on a road shoulder, and the court held he should have known of the danger because he was warned in the two handbooks. *Id.*

In the case at hand, Peterson, compared to *Phillips*, obtained a drivers license in Alabama, allowing the presumption that she knew how to properly and safely operate a vehicle and implies that she knew of the danger and that injury would likely occur if she drove in an unsafe manner. (R. 63). Furthermore, Peterson had traffic violations, such as failure to use a turn signal and speeding, that warned her of the dangers in driving unsafely and likely injury. *Id.* In addition, Peterson claimed the oncoming car “swerve[d] toward” her so she “jerked the wheel too hard”. (R. 37). Her “jerk[ing]” of the wheel implies she was aware of danger and that injury could have occurred if she collided with the oncoming vehicle.

Similar to *Randolph*, Peterson commented on the “light” traffic on the road that the accident occurred on, which is evidence of her knowledge of the area and the usual traffic conditions. (R. 36). There is no evidence to suggest she was using a GPS at the time of the accident because Moss’s phone was video-recording, and Peterson’s was in her purse, therefore, she likely knew her location (R. 21, 36).

Similar to *Burns*, Peterson was familiar with the roads and residents but was engaged in distracted driving, which caused her failure to look ahead at the “critical time” and collided with an oncoming vehicle. (R. 21). Furthermore, Peterson was required to sign a “rules of conduct” contract, similar to *Williams v. Werner Enters*, which disclosed her duty to obey all traffic laws and not engage in distracted driving while she was working for Hitch to ensure safe driving. (R. 48). Her signature indicated she acknowledged the rules, which put her on notice that contradicting conduct would be dangerous and injury would likely result. *Id.*

In conclusion, Peterson had knowledge of the danger in not using reasonable care while driving, including engaging in distracted driving, and that injury would likely result. Peterson’s familiarity with the roads and usual traffic flow indicated she should have been aware of the danger in colliding with other drivers. (R. 35). Also, Hitch’s “Rules of Conduct” contract put her on notice of the dangers in disobeying traffic laws and engaging in distracted driving. (R. 48). In addition, Peterson had traffic violations including failing to use a turn signal and a speeding violation, that also put her on notice of the dangers in disobeying traffic laws. (R. 63). Furthermore, Peterson jerked the wheel when she saw oncoming traffic, indicating her knowledge of the danger in driving too close to another vehicle. (R. 18, 37). Thus, a reasonable jury could have found Peterson’s knowledge of the danger and that injury would likely result, and summary judgment was improper.

Furthermore, there are disputes of material fact regarding Peterson’s knowledge of danger and that injury would likely occur. Peterson argues there is no evidence of her knowledge of danger or that injury would likely occur because Moss was holding the camera, thus she was not distracted. (R. 12, 36). However, there is contradicting evidence supporting Peterson’s knowledge of danger and that injury would likely occur. (R. 38). Moss contends Peterson was distracted by her “lean[ing] in” for “selfies”, which is evidence of her engagement in taking pictures. (R. 19, 39). Accordingly, granting summary judgment in favor of the defendants was inappropriate because there are disputes of material fact in which a reasonable juror could have found for the nonmovant, Moss.

1. Despite her knowledge of danger, Peterson acted with reckless indifference.

Peterson acted with a conscious disregard to her surrounding conditions by listening to music, dancing, looking at a phone, and not looking for other traffic. (R. 21, 37). Her reckless indifference at a critical time, despite her knowledge of the danger, resulted in a collision. (R. 21).

A person is considered to act in a wanton manner if they act with “reckless indifference” in omitting to exercise reasonable care. *Klaber*, 533 So. 2d at 578 (citing *Whitmore v. Burge*, 512 So. 2d 1320, 1327 (Ala. 1987)); *See also Burns v. Moore*, 494 So. 2d 4, 5-6 (Ala. 1986). More importantly, a driver’s act of “omitting” to look ahead at a “critical time” infers “conscious indifference to the likely [ ] consequences” and wantonness. *Burns*, 494 So. 2d at 6 (Ala. 1986) (citing *Culpepper & Stone Plumbing & Heating Co*, 162 So. 2d at 460). Furthermore, courts have held that wantonness could be proven through reckless indifference to consequences.  *Klaber v. Elliott*, 533 So. 2d 576, 578 (Ala. 1988) (holding a driver’s lack of using extra caution proved he “[a]cted recklessly with regard to the consequences while driving in an unsafe manner despite knowledge of bad weather and familiarity of the road); *See also Randolph v. Kessler*, 152 So. 2d 138, 139 (Ala. 1963) (holding a driver who failed to look for other traffic was a “conscious disregard” to traffic conditions and that injury would likely occur).

For example, in *Williams*, a driver, Oumer, was involved in an accident when he drove in front of oncoming traffic after being parked on a road shoulder, despite his notice of the danger in the work safety contracts. *Williams*, No. 1:11-CV-3671-VEH at \*5. The court held drivers who consciously failed to obey traffic signals and drove into a busy intersection, despite their familiarity of the surrounding area and knowledge of the dangerous traffic, acted wantonly. *Williams*, No. 1:11-CV-3671-VEH at \*18 (citing *Coca-Cola Bottling Co. United, Inc. v. Stripling*, 622 So. 2d 882 (Ala. 1993). The court further held that, regardless of their intent, if drivers know of the danger and take “chances on [other cars] giving way to his wrongful course… [he is considered] wanton”. *Id.* at \*19. Thus, the Northern Alabama District Court held Oumer acted with “reckless indifference or conscious disregard of the rights or safety of others by consciously” and “abruptly” changing lanes, while speeding, and failing to use turn signals. *Id.*

Likewise, in *Scott*, Villegas was speeding and shifting gears while driving in rain, causing the car to spin out of control. *Scott v. Villegas*, 723 So. 2d 642, 643 (Ala. 1998). Villegas experienced problems shifting gears earlier in the ride, including a stall and spins. *Id.*  The Alabama Supreme Court held that Villegas acted with reckless indifference, or conscious disregard of other’s safety, when he continued to drive the car while “knowing that he could not control it [in the rain]… and knowing that if he lost control… injury would likely… result.” *Villegas*, 723 So. 2d at 644. Thus, Villegas’ conduct was sufficient evidence of wanton behavior and was submitted to a jury for determination. *Id.*

On the other hand, a driver who acts inattentively or thoughtlessly is not considered to behave wantonly. For example, in *Phillips*, a driver who took her eyes off the road to wave to passing friends and lost control of the car was held to act with “lack of due care”, which constitutes negligence, but not wantonness, because wantonness requires more culpability than wantonness. *Phillips v. United Serv’s. Auto. Ass’n*, 988 So. 2d 464, 471 (Ala. 2008).

Unlike *Phillips*, Peterson’s accident was not a result of inattention or thoughtlessness, but rather a conscious disregard to the surrounding conditions and reckless indifference. As previously discussed, Peterson should have had knowledge of the danger in driving in an unsafe manner, and that injury would likely occur. Despite this knowledge, Peterson drove in a distracting environment, by allowing a phone to divert her attention away from oncoming vehicles, and acted with a conscious disregard to the safety of others by “veer[ing]” into another lane, similar to *Williams*. (R. 21, 36). In addition, Peterson’s actions put Moss in a state of alarm that caused her to “scream” Peterson’s name to gain her attention. (R. 21, 39). Thus, her failures to continuously look for traffic and to obey traffic laws, and her engagement in distracted driving, are evidence of reckless indifference. (R. 36).

Moreover, similar to *Scott*, Peterson experienced several driving violations within the previous two and a half years, including failing to use a right turn signal, parking tickets, and speeding in excess of the speed limit by 15 miles per hour. (R. 63). These traffic violations put Peterson on notice of her dangerous conduct in disobeying driving laws and her continued driving in an unsafe manner, as shown by this accident, are evidence of her reckless indifference to her surroundings.

In conclusion, Peterson had knowledge that her failure to use reasonable care would lead to dangerous conditions which would likely result in injury, and despite that knowledge, she continued to act with reckless indifference by driving while distracted and failing to continuously look for oncoming traffic. (R. 21, 37). In addition, the video recording of her singing and dancing while driving when the accident occurred is evidence of her reckless indifference. (R. 19, 37). This evidence is sufficient for a reasonable jury to find Peterson acted with reckless indifference despite her knowledge of danger and that injury would likely occur.

Furthermore, there are disputes of material fact regarding Peterson’s conscious disregard of other’s safety. Moss contends that Peterson was not looking at the road and other vehicles, but rather a cell phone, which indicates her reckless disregard to the surrounding vehicles. (R. 21). However, Peterson contends she was not recklessly indifferent because another car “veered” into her lane and she avoided the collision by turning in the opposite direction. (R. 38). Therefore, disputes of material fact exist and the trial court erred in granting summary judgment in favor of the defendants.

1. Peterson’s conduct proximately caused Moss’ injuries.

Peterson’s wanton conduct caused Moss’s injuries because she was driving Moss at the time of the accident. To recover in a wantonness claim, the wanton conduct must have proximately caused the injuries complained of by the injured party. *Dean v. Adams*, 30 So. 2d 903, 904 (Ala. 1947). The proximate cause is established when an injury is the “natural and probable consequence” of an “act or omission” that a reasonable person would reasonably foresee a resulting injury. *Peevy v. Alabama Power Co.*, 393 So. 2d 971, 973 (Ala. 1981). The Alabama Supreme Court ruled if a driver had knowledge that it was dangerous to drive in a manner in which they did, yet still engaged in driving in a wanton manner, with a conscious disregard to that danger, then a jury could find that the driver’s conduct caused injuries sustained thereupon. *Dean*, 30 So. 2d at 905. For example, in *Dean*, a driver knew he had a defective tire, loose steering, that he was tired, the road was wet, and that he was speeding, yet he continued to driver even though he knew he had passengers. *Id.* at 904. When the car overturned, his passenger sustained multiple injuries as a direct and proximate cause of the injury. *Id.* at 903. This evidence was then given a jury to determine if they were the natural and probable consequences of the driver’s driving. *Id.*

In the case at hand, Peterson’s wanton conduct caused the accident that Moss was a passenger in, directly resulting in Moss’s injuries. Moss’s injuries include several broken bones, cracked vertebrae, massive brain swelling, past and future expenses related to doctor, hospital, drug, and rehabilitation treatments. (R. 5). Furthermore, Moss suffered, and will continue to suffer, from physical pain, emotional stress, and mental anguish related to her *Id.*  Lastly, Moss has lost her educational scholarship and has been forced to withdraw from Florida State University, leaving her unable to obtain her chemical engineering degree and unable to accept her lucrative job offer with Dow and thus, suffers loss of future income. *Id.* Similar to *Dean*, Moss’s injuries should be disclosed to a jury to decide relief upon.

In conclusion,Peterson consciously disregarded vehicles around her when she was engaged in distracted driving and hit an oncoming car; thus she is liable for Moss’s injuries resulting from her wanton conduct. This collision was caused by Peterson’s lack of attention to other vehicles, which resulted in the car flipping and Moss sustaining multiple severe injuries. But for Peterson not seeing an oncoming vehicle, Moss would not be injured, therefore, Peterson’s wanton conduct proximately caused Moss’s injuries.

Furthermore, material disputes of fact are present in this case. Moss claims that Peterson caused her injuries by acting wantonly and “sideswip[ing]” another vehicle in an oncoming lane. (R. 4, 21). However, Peterson claims conflicting evidence that she did not cause Moss’ injuries because another car “veered” into her lane and she acted responsibly in trying to avoid collision. (R. 36). These disputes of fact present sufficient evidence in which a reasonable jury could have found that Peterson’s actions caused Moss’s injuries, thus summary judgment was improper and the trial court erred in granting summary judgment in the defendant’s favor.

**CONCLUSION**

The Alabama Guest Statute does not preclude “passengers” from recovering in claims of negligence or wantonness; therefore, Hitch and Peterson are liable for Moss’s negligence and wantonness claims because Moss was a passenger. Additionally, even if Moss was considered a “guest” in Peterson’s car, she is not precluded from recovering on wantonness claims because the Alabama Guest Statute does not extend to wantonness claims.

Peterson was wanton because she had the duty to use reasonable care while driving, and she omitted that duty when she engaged in singing, dancing, and video recording herself with a cell phone. Peterson had knowledge of the consequential danger and that injury would likely result by her breaching her duty, and despite her knowledge, she acted with a conscious disregard to Moss’s safety by engaged in a distracting atmosphere while driving, resulting in a collision with an oncoming car in an opposite lane of traffic, causing Moss’ injuries.

Furthermore, there are disputes of material fact in this case, as discussed previously. While Peterson contends Moss was a guest because Moss did not pay for services and the ride was social, there is sufficient evidence to support Moss was a “passenger” because she did pay Peterson to driver her to the airport and at the time of the accident the ride mutually benefitted both parties. Moss was a participant tagging along to see a Hitch driver in action, and Peterson was furthering Hitch’s work. Furthermore, Moss contends Peterson was acting wantonly, while Peterson contends she was not wanton, but rather acting safely.

Moreover, the court is required to view all evidence in the light most favorable to Moss, and resolve all reasonable doubts about the facts in Moss’s favor. *Phillips v. United States Serv’s. Auto. Ass’n*, 988 So.2d 464, 467 (Ala. 2008). Given the genuine disputes of material fact present in this case, Moss was entitled to have her claims heard by a jury. Therefore, granting summary judgment in favor of the defendants was inappropriate, and the case should be remanded and reversed *de novo*. Moss respectfully requests the Court of Appeals for the Eleventh Circuit to reverse the District Court’s grant of summary judgment on the foregoing negligence and wantonness claims and remand the case to the United States District Court for the Northern District of Alabama for a jury trial.

 RESPECTFULLY SUBMITTED this 29th day of March, 2016.



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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing on the counsel of record in this cause by placing a copy of same in the U.S. Mail, first-class postage prepaid, on this 29th day of March 2016, addressed to Lynn Hogewood Schuk, LH&S, LLP, 900 Lakeshore Parkway, Robinson, Suite 219, Birmingham Alabama, 35229.



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