STATE OF MICHIGAN

IN THE SUPREME COURT

ESTATE OF MARTEL ROBERTSON, by LEOLA ROBERTSON, Personal Representative,

Plaintiff/Appellee,

v.

LADARIUS DEANGELO JOHNSON,

Defendant,

and

U-HAUL CO. OF MICHIGAN,

Defendant/Appellant.

/

Supreme Court No. _____

Court Of Appeals Case No. 337961

Wayne County Circuit Court
Case No. 15-010455-NI

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DEFENDANT-APPELLANT U-HAUL CO. OF MICHIGAN'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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The Michigan Owner's Liability Act

MCL 257.401:

(1) This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family.

….

(3) Notwithstanding subsection (1), a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle under a lease providing for the use of the motor vehicle by the lessee for a period of 30 days or less is liable for an injury caused by the negligent operation of the leased motor vehicle only if the injury occurred while the leased motor vehicle was being operated by an authorized driver under the lease agreement or by the lessee's spouse, father, mother, brother, sister, son, daughter, or other immediate family member. Unless the lessor, or his or her agent, was negligent in the leasing of the motor vehicle, the lessor's liability under this subsection is limited to $20,000.00 because of bodily injury to or death of 1 person in any 1 accident and $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident.

(4) A person engaged in the business of leasing motor vehicles as provided under subsection (3) shall notify a lessee that the lessor is liable only up to the maximum amounts provided for in subsection (3), and only if the leased motor vehicle was being operated by the lessee or other authorized driver or by the lessee's spouse, father, mother, brother, sister, son, daughter, or other immediate family member, and that the lessee may be liable to the lessor up to amounts provided for in

subsection (3), and to an injured person for amounts awarded in excess of the maximum amounts provided for in subsection (3).

(5) Subsections (3) and (4) shall not be construed to expand or reduce, except as otherwise provided by this act, the liability of a person engaged in the business of leasing motor vehicles or to impair that person's right to indemnity or contribution, or both.

….

The Federal Graves Amendment

49 USC § 30106. Rented or leased motor vehicle safety and responsibility:

(a) In general.—An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—

(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and

(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

(b) Financial responsibility laws.—Nothing in this section supersedes the law of any State or political subdivision thereof—

(1) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or

(2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.

(c) Applicability and effective date.—Notwithstanding any other provision of law, this section shall apply with respect to any action commenced on or after the date of enactment of this section without regard to whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before such date of enactment.

(d) Definitions.—In this section, the following definitions apply:

(1) Affiliate.—The term "affiliate" means a person other than the owner that directly or indirectly controls, is controlled by, or is under common control with the owner. In the preceding sentence, the term "control" means the power to direct the management and policies of a person whether through ownership of voting securities or otherwise.

(2) Owner.—The term "owner" means a person who is—

(A) a record or beneficial owner, holder of title, lessor, or lessee of a motor vehicle;

(B) entitled to the use and possession of a motor vehicle subject to a security interest in another person; or

(C) a lessor, lessee, or a bailee of a motor vehicle, in the trade or business of renting or leasing motor vehicles, having the use or possession thereof, under a lease, bailment, or otherwise.

(3) Person.—The term "person" means any individual, corporation, company, limited liability company, trust, association, firm, partnership, society, joint stock company, or any other entity.

STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT

On January 22, 2019, the Court of Appeals, in a 2-1 opinion, affirmed the Wayne County Circuit Court's denial of Defendant-Appellant U-Haul Co. of Michigan's ("U-Haul") motion for summary disposition. (The Court of Appeals' majority opinion and dissenting opinion are attached as Exhibits A and B. The Circuit Court's order is attached as Exhibit C.) U-Haul filed a motion for reconsideration on February 12, 2019, which was denied, again, 2-1, on March 22, 2019. This Application for Leave to Appeal is filed on May 2, 2019, and is therefore timely submitted pursuant to MCR 7.305(C)(2)(c). For the reasons stated herein, U-Haul requests that this Court grant this Application for Leave to Appeal, reverse the Court of Appeals and Circuit Court, and remand for entry of judgment in favor of U-Haul.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Defendant U-Haul leased a pickup truck to a non-party renter, an entrustment Plaintiff does not claim was negligent. The renter allowed his friend, Defendant Ladarius Johnson, an unlicensed driver, to drive the truck, and Johnson caused an accident that killed Plaintiff's decedent. Plaintiff sued Johnson for negligence, and sued U-Haul, apparently claiming owner's liability — a theory Plaintiff later abandoned, as it is preempted by federal law. The Circuit Court denied U-Haul's motion for summary disposition and the Court of Appeals affirmed, 2-1, on a ground Plaintiff had expressly disclaimed. Specifically, the Court of Appeals' majority held that, even though Plaintiff argued that she was claiming only common-law "ordinary negligence" against U-Haul, Plaintiff's claim survived summary disposition on a theory that amounts to "statutory negligence." MCL 257.401 allows a person injured in an accident to sue the owner of a motor vehicle if the accident resulted from the negligent operation of that vehicle with the owner's consent or knowledge. With rental agencies or other temporary lessors, however, subsection (3) of the statute limits owner liability to injuries caused by authorized drivers under the lease or the lessee's immediate family members, and, where owner liability exists, limits damages to statutory caps unless the lessor "was negligent in the leasing of the motor vehicle." The majority held that this portion of the statute, which limits owners' liability and caps their damages, silently created a cause of action for "negligent leasing," unrelated to the entrustment, and imposes a new duty on rental agencies to protect the general public from third parties' negligent acts.

Should this Court grant leave to appeal and on appeal, reverse, where:

I. the Court of Appeals' decision involves legal principles of major significance to the state's jurisprudence because it:

   (a) creates a new cause of action that makes Michigan the only exception to the otherwise universal rule that vehicle rental companies may only be held liable for the negligence of their renters under the theory of negligent entrustment;

   (b) creates a new duty owed by rental companies to protect the public from third parties, even though such a duty is not stated in the statute and does not otherwise exist under common law;

   (c) is contrary to the legislative intent that rental companies not be driven out of the state by imposing liability on them for injuries caused by third-parties; and

II. the Court of Appeals' decision is clearly erroneous and will cause material injustice because:

   (a) MCL 257.401(3) does not expand liability by creating a new cause of action, but limits both liability and damages, which was the legislative intent;

   (b) the statute likewise does not purport to create a duty beyond one to not engage in negligent entrustment, which Plaintiff has disclaimed; and U-Haul owed no common law duty to Plaintiff's decedent;

(c) the statute does not apply to our facts and has been held to be preempted by federal law, and

(d) the majority based its decision on an argument not made or argued below and expressly abandoned by Plaintiff?

Defendant-Appellant U-Haul answers:	Yes
Plaintiff-Appellee would answer:	No
The Circuit Court would answer:	No
The Court of Appeals would answer:	No
This Court should answer:	Yes

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INTRODUCTION

The Court of Appeals, in a 2-1 decision, affirmed the denial of summary disposition to U-Haul for injuries caused by the negligence of a third party to a rental transaction. In so doing, the majority created a new cause of action against, and imposed a new duty on, rental car and truck companies doing business in Michigan, turning a statute intended to limit the liability of, and damages against, such short-term lessors, into one that expands their potential liability. The majority's decision not only contradicts the pleadings and Plaintiff's claims of what she is and is not alleging, it also contradicts the language and purpose of the statute on which the majority relied, and the law of the other states to address the issue.

Under the majority's opinion, Plaintiff may proceed against U-Haul for statutory "negligent leasing," separate from negligent entrustment (which Plaintiff admits she cannot establish), even though U-Haul did not rent the vehicle to the driver who caused the accident at issue. The majority was apparently concerned with the circumstances surrounding extensions of the rental agreement (which are not themselves uncommon, and which, given the very nature of truck rentals, are frequently done over by the phone or by someone on the renter's behalf.) The majority found U-Haul could have been put on notice that someone other than the renter was driving the pickup, without also finding that U-Haul had notice of any such driver's dangerous propensities. Thus, the majority held that the Michigan Owner's Liability Act, MCL 257.401(3), created both a cause of action for "negligent leasing" and a separate duty on the part of rental companies to protect the public from the unforeseeable negligent (or criminal) acts of third parties. Such a holding is not dictated by the plain language of the statute, and is contrary to its legislative intent. To compound the error, the portion of the Act at issue: (1) does not even apply to our case, because it purports to impose liability on a rental company only when an authorized driver or family member was driving the vehicle, which is not the case here, as the driver was an

unlicensed (and therefore not authorized) family friend; and (2) has been held to be preempted by federal law. To further compound the error, the majority reached this holding without briefing or argument on the issue. Plaintiff repeatedly stated she is not bringing a claim under the Act, and did not argue that the Act created a cause of action or a duty. When one examines the claim that Plaintiff herself repeatedly insisted is the one she is bringing—a claim for ordinary negligence—it is clear that U-Haul did not owe a duty to Plaintiff, and should have been granted summary disposition.

Besides being clear error, this holding has broad-sweeping consequences:

- It makes Michigan an outlier, as all other jurisdictions that have addressed the issue have limited claims against vehicle renters to negligent maintenance or negligent entrustment, neither of which are alleged here.
- It contradicts the clear legislative intent to limit, not to extend, rental agencies' potential liability for third parties' negligence.
- It unreasonably extends the concept of a legal duty to protect the general public, going against numerous of this Court's holdings regarding the scope of legally cognizable duties.
- It holds rental agencies to an impossible standard and leaves many open questions about what such agencies must do going forward to avoid liability.

The Court of Appeals' decision involves legal principles of major significance to the state's jurisprudence, and the Court of Appeals' decision is clearly erroneous and will cause material injustice. This Court should grant leave and on appeal, reverse.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Rental Transaction

In the afternoon of April 1, 2015, non-party Robert Smith and (since dismissed) Defendant Ladarius Johnson went to the U-Haul Moving and Storage facility at 8055 E. 7 Mile in Detroit. Johnson testified that he asked family friend Smith to rent a truck for him because he needed to move. (Johnson Dep., Ex. A to U-Haul's Motion for Summary Disposition ("U-

Haul's Motion"), attached, with exhibits, as Ex. D, pp. 9-10.) According to Smith, Johnson asked him to rent the pickup because Johnson did not have a major credit card. (Smith Dep., Ex. B to U-Haul's Motion, pp. 23-25.) Johnson, however, said he needed Smith to rent the truck because he had no driver's license and Smith knew that. (Ex. A to Ex. D, p. 10.)

U-Haul center Assistant General Manager Sharon Patterson handled the rental transaction, which surveillance captured on soundless videos. (Ex. C to U-Haul's Motion.)[1] Patterson testified that she had rented to Smith before, and he was "a clean cut guy, very friendly." (Patterson Dep., Ex. D to U-Haul's Motion, p. 22.) Smith presented his driver's license and a major credit card and rented a 2014 GMC Sierra pickup truck. (Smith Dep., Ex. B to Ex. D, pp. 41-46.) Patterson handed Smith the Equipment Rental Contract and accompanying Addendum for a one-day rental, which Smith signed. (Ex. E to U-Haul's Motion; Smith Dep., Ex. B to Ex. D, p. 46.) The Rental Contract Addendum provision entitled "Authorized Driver" states: "Customer acknowledges that he/she possesses a valid driver's license and that he/she is over 18 years of age…. Any other individual that has Customer's express permission to operate the equipment and that is at least 18 years of age…and possesses a valid driver's license and possesses a good driving record." (Ex. E to U-Haul's Motion; Affidavit of David Ruff, Ex. H to U-Haul's Motion, ¶ 9.)

Johnson stayed to the side and slightly behind Smith, and did not sign any documents. (Johnson Dep., Ex. A to Ex. D, p. 44.) Smith did not tell Patterson or anyone else at U-Haul that he was renting the truck for Johnson. (Smith Dep, Ex. B to Ex. D, p. 50.) Plaintiff has taken the position that the video shows Johnson spoke with Patterson, but offers no evidence of the contents of any conversation. (Plaintiff's Court of Appeals Brief, attached as Ex. K, pp. 1, 14.)

[1] That exhibit is being filed separately by hard copy with this Court as it cannot be filed electronically.

Patterson does not recall having any conversations with Johnson, and Johnson denied speaking with Patterson. (Patterson Dep., Ex. D to Ex. D, pp. 59, 62; Johnson Dep., Ex. A to Ex. D, pp. 44, 96.) Neither Smith nor Johnson was intoxicated, and there is no evidence that either otherwise presented with dangerous propensities. (Smith Dep., Ex. B to Ex. D, p. 98; Johnson Dep., Ex. A to Ex. D, pp. 96-97.)

Outside surveillance videos show that U-Haul Customer Service Representative Kleon Kellam drove the pickup from the back parking lot to the receiving and dispatch area. (Ex. C to U-Haul's Motion.) Smith inspected the inside of the truck, and signed his copy of the Rental Contract to confirm the fuel level and mileage. (Smith Dep., Ex. B to Ex. D, pp. 57-62; Rental Contract Ex. G to U-Haul's Motion.) Smith also signed the receiving-and-dispatching tag. (Ex. F to U-Haul's Motion.) Neither Johnson nor Smith told Kellam that Smith was renting the truck for Johnson's use, and Johnson did not sign any paperwork. (Johnson Dep., Ex. A to Ex. D, pp. 44, 52-53; Smith Dep., Ex. B to Ex. D, pp. 50, 52-53.) A video shows exhaust coming out of the truck during the walk-around, suggesting that Kellam never removed the keys from the ignition to hand them to either man. (Smith Dep., Ex. B to Ex. D, pp. 64-65, 94-95.) The video then shows Kellam walking away with his back to the truck and Smith getting into his car and driving away. (Ex. C to U-Haul's Motion.) Johnson drove the truck out of the parking lot. (Johnson Dep., Ex. A to Exhibit D, pp. 16, 18-19.)

U-Haul allows renters to extend rental agreements either in person or by phone, personally or through a third party. (Ruff Affidavit, Ex. H to Ex. D, ¶ 7; Patterson Dep., Ex. D to Ex. D, p. 47.) Here, Johnson extended Smith's rental. The first time, he called U-Haul and said he "wanted to put an extension on Robert Smith's account." (Johnson Dep., Ex. A to Ex. D, p. 24.) U-Haul's records reflect that on April 3 the lease was extended because "customer called

running late…wants to keep 2 more days." (Ex. 3 to Plaintiff's Opposition to U-Haul's Motion ("Pl's Opp"), attached with exhibits as Ex. E.) On April 6, Johnson sent his fiancée to the U-Haul center to extend the contract through April 9, and to pay cash for the extension. U-Haul's records show the extension was signed in the name of "Robert Smith." (Johnson Dep., Ex. A to Ex. D, pp. 61-62; Ex. 4 to Pl's Opp.)

After business hours on April 9, 2015, the then-extended return deadline, Patterson called one of two phone numbers listed on the Rental Agreement and spoke with a man who identified himself as Smith. (Affidavit of Michael Saur and transcript of 4/9/15 call, Ex. F to U-Haul's Reply in Support of Motion, attached hereto as Ex. F.) Patterson advised him that the truck had been due by close of business, and needed to be returned the next morning. The speaker agreed to tell "them" to take it back. (*Id.*)[2] It is undisputed that Smith never called U-Haul to inquire about the pickup's return, to complain that any extensions for which U-Haul had charged his credit card were unauthorized, or to disclose that he had entrusted the truck to someone who was not an "Authorized Driver" under the rental agreement. (Smith Dep., Ex. 2 to Pl's Opp., pp. 104-08.)

The Accident

In the early hours of April 13, Antoine Robertson was driving a 2006 Pontiac sedan southbound on M-39. (Crash Report, Ex. I to U-Haul's Motion.) He pulled over to the right with a flat tire. (Testimony from Johnson's Preliminary Examination, Ex. J to U-Haul's Motion.) Johnson, driving the U-Haul pickup, rear-ended the Pontiac, causing it to collide with a third vehicle abandoned on the shoulder. (Crash Report.) Antoine's brother, Martel Robertson,

[2] The record contains two other extension documents, one dated April 10, reflecting the deadline of April 9 at 5pm, and one dated April 14, 2015, extending the return date to April 16, 2015. (Exs. 5 and 6 to Pl's Opp.) Plaintiff took no discovery on these documents, and offers only speculation and surmise as to how these extensions were obtained.

was a passenger in the Pontiac and was pronounced dead at the scene. (*Id*.) Johnson fled the scene because he had a gun in the pickup. (Johnson Dep., Ex. 1 to Pl's Opp., p. 65; Incident Report, Ex. M to Ex. D.) He is currently incarcerated for felony possession of a firearm, reckless driving causing death, and operating a vehicle with a suspended or revoked license, causing death. (Mich Dep't. of Corrections Offender Tracking Information System record, of which this Court can take judicial notice, attached as Ex. G.)

Circuit Court Proceedings

Plaintiff Leola Robertson, as personal representative of the estate of her son Martel, brought this suit in Wayne County Circuit Court against Robertson and 2013 U-Haul Titling, LLC. (Complaint, attached as Ex. H.) The Complaint contains no enumerated claims, and as to U-Haul Titling, says only that it owned the truck involved in the accident. (¶ 7.) Otherwise, Plaintiff alleges only that Johnson negligently violated the rules of the road. The parties agreed to substitute U-Haul Co. of Michigan (the entity that rented Smith the pickup) in place of U-Haul Titling (the entity that owned the pickup) as a Defendant. (December 21, 2016 Stipulation.) Plaintiff later dismissed her clams against Johnson with prejudice. (July 21, 2017 Stipulation of Dismissal.) Plaintiff has never amended the Complaint.

U-Haul moved for summary disposition under MCR 2.116(C)(10) (Ex. D.) U-Haul argued that there was no evidence of negligent entrustment—both because U-Haul had not entrusted the pickup to Johnson (but rather to Smith) and, even if it had, U-Haul had no reason to believe Johnson might be a negligent driver. U-Haul cited *Jackson v Enterprise Leasing Co of Detroit*, unpublished opinion of the Court of Appeals, issued Aug. 5, 2015 (Case Nos. 314653, 318005) (Ex. N to Ex. D) and cases from around the country that found no negligent entrustment when, as here, the renter himself, and not the rental company, entrusted the vehicle to a

purportedly negligent driver. (Ex. D, pp. 9-10.) U-Haul explained that Michigan law does not require a rental company to inquire into a driver's background "absent sufficient notice of unsafe peculiarities or propensities of the entrustee," of which there was no evidence here. (*Id.*, pp. 11-12.) U-Haul also argued that Plaintiff could not establish that U-Haul's actions were a proximate cause of the accident because Johnson's third-party criminal acts—felony reckless driving—superseded any purported negligence by U-Haul. (*Id.*, p. 14, n. 3.) Finally, in case Plaintiff intended to pursue vicarious owner's liability (the only theory she had pled), U-Haul argued that as against rental agencies, that claim was preempted by the Graves Amendment to the Federal Transportation Equity Act, 49 USC 30106(a). (*Id.*, pp. 15-16.)

In response, Plaintiff explained that she is not alleging negligent entrustment, because that theory "focuses exclusively on the circumstances as they existed *at the time the defendant first placed the vehicle in the hands of another party*," while her theory is "based on the events that transpired *after* April 1, 2015, associated with the extensions of the rental[.]" (Ex. E, p. 9, n. 1 (emphasis in original).) Instead, Plaintiff stated, she is pursuing an "alternative theory of negligence…completely independent of the law which applies to negligent entrustment." (*Id.*, p. 8.) She argued that because "every person is under the general duty to act, or to use that which he controls, as not to injure another," (*id.*, p. 13, (quoting *Clark v Dahlman*, 379 Mich 251, 261; 150 NW2d 755 (1967)), U-Haul owed an additional common-law duty, beyond that recognized by negligent entrustment, to somehow prevent any person to whom Smith entrusted the vehicle from injuring the general public. According to Plaintiff, a jury could find that U-Haul breached this alleged duty by either failing to notify Smith earlier that the rental truck had not been

returned, or by failing to recognize that someone other than Smith was driving the truck. (Ex. E, p. 12.)[3] U-Haul filed a reply brief (Ex. F).

At oral argument Plaintiff referred to MCL 257.401(3) for the first time, arguing that because there is an exception to the damages cap when a lessor is negligent in the leasing of the motor vehicle, the statute somehow recognizes her common-law theory of rental company "negligent leasing". (April 6, 2017 Transcript, attached as Ex. I, p. 20.) The Circuit Court denied U-Haul's motion in a form order, stating "after review of the surveillance, Defendant's motion is denied for the reasons stated in Plaintiff's well written brief filed in opposition and his oral argument." (Ex. C.)

Court of Appeals Proceedings

U-Haul sought interlocutory appeal, which was granted.[4] (June 16, 2017 Order.) U-Haul argued, among other things, that no Michigan court has allowed a claim for ordinary negligence in connection with a vehicle leasing transaction (as distinct from claims for negligent entrustment) absent evidence of a problem with the vehicle, and that other states have rejected such a theory. U-Haul further argued that even if Plaintiff could bring such a claim, it would fail because she could not establish a legal duty that U-Haul owed to her decedent, as they had no relationship and the harm was not foreseeable; nor could she establish proximate cause. (U-Haul's Brief on Appeal, attached as Ex. J.)

In her brief, Plaintiff stressed that although she is not making a negligent entrustment claim, her claim is at common law: "Ms. Robertson is not contending that MCL 257.401(3) *creates* a cause of action against U-Haul for the negligence of its agents committed in the course

[3] But Plaintiff offered no evidence showing how either would have prevented the accident.

[4] The Circuit Court granted a stay of proceedings pending appeal.

of a rental agreement. What she is arguing, instead, is that MCL 257.401(3) *recognizes* the existence of such a claim of negligence." (Plaintiff's Brief on Appeal, attached as Ex. K, p. 13, emphasis in original; *see also*, pp. 6, 8, 10, 11 (claim is one for "ordinary negligence" under "common law.")) As for an alleged duty, Plaintiff argued there is "no doubt" U-Haul had a common-law duty to protect the general public from Johnson's driving, again citing *Clark.* (*Id.*, pp. 21-22.) U-Haul filed a reply. (Attached as Ex. L.)

The Court of Appeals affirmed on January 22, 2019 in a 2-1 decision. The majority (Judges M. Kelly and Meter) held that "plaintiff has expressly disavowed reliance on a common-law negligent entrustment theory and instead asserts that liability arises under MCL 257.401(3)." (Ex. A, p. 4.) Relying on the phrase in MCL 257.401(3) that the damages limitation does not apply when the owner-lessor was "negligent in the leasing of the motor vehicle," the majority held that, "Michigan law permits a plaintiff to bring a claim for *any* negligence in the leasing process regardless of whether or not the elements for negligent entrustment can be satisfied under the circumstances." (*Id.*, emphasis in original.)

"[H]aving determined that plaintiff may sustain a claim for negligent leasing under MCL 257.401(3)," the majority stated it "must determine whether U-Haul owed any legal duty to plaintiff's decedent[.]" (*Id.*, pp. 4-5.) Acknowledging that there was no contractual relationship between U-Haul and Plaintiff's decedent, and that "plaintiff concede[d]" she was not pursing "the common-law theory of negligent entrustment," the majority held it must "examine whether a duty arises under MCL 257.401." (*Id.*, p. 5.) The majority stated that whether a statute can be found to impose a "duty of care" depends on two factors: (1) whether its purpose "is to prevent the type of injury and harm actually suffered" and (2) whether the injured person is "within the class of persons which the statute was designed to protect." (*Id.*, citing *Cipri v Bellingham*

Frozen Foods, Inc, 239 Mich App 181, 189; 607 NW2d 417 (1999).) As to the first factor, the majority reasoned that because the Legislature "set forth" that "a short-term lessor would be liable for negligence, including negligence in the leasing of the motor vehicle," and did not limit damages for "negligent leasing," the Legislature somehow "signaled its recognition" that the "general public needed additional protection" in that "area." (*Id.*) The majority found from this a statutory purpose to "prevent the loss of life caused by negligent operation of a motor-vehicle leased on a short term basis, which is the exact type of harm that occurred in this case." (*Id.*, pp. 5-6.) As to the second *Cipri* factor, the majority held that the statute "was designed to protect the general public from the risk of harm caused by the negligent leasing of a motor vehicle; therefore, plaintiff's decedent is within the class of individuals the statute is designed to protect." (*Id.*, p. 6.) With that, the majority held "there is a statutory basis for imposing a duty on U-Haul in this case." (*Id.*)

In a footnote, the majority found that "[b]ecause plaintiff is not raising a common-law claim in this case and is instead raising a statutory claim," analyzing whether a duty to protect Plaintiff's decedent exists at common law is "unnecessary." (*Id.*, p. 6, n. 3.) In another footnote, the majority held both that the statute "imposes a duty" on lessors "to not engage in negligent leasing" and that "there is a fact question as to whether U-Haul breached that duty by knowingly extending the lease to a stranger to the contract…." (*Id.*, p. 5, n. 2.)

Judge O'Brien dissented. She began by noting that, "Plaintiff expressly disavowed that she is asserting a claim under MCL 257.401(3) and she repeatedly stressed that she is asserting a claim for common law negligence. Because plaintiff cannot establish a duty that U-Haul owed Martel Robertson aside from its duty under a negligent-entrustment theory, I would hold that her claim fails as a matter of law." (Ex. B, p. 1.) Judge O'Brien pointed out the numerous places in

Plaintiff's brief that insisted she was claiming ordinary negligence, and expressly disclaimed arguing that the statute creates a cause of action, concluding:

> There is no other way to read this statement: contrary to the majority's opinion, plaintiff is *not asserting a claim under MCL 257.401(3).* Instead, plaintiff is asserting a claim for ordinary negligence undertaken by the lessor during the course of its lease. She makes this abundantly clear throughout her brief[.]

(*Id.*, emphasis in original.)

The dissent disagreed with the majority's conclusion that MCL 257.401(3) creates a cause of action. (*Id.*, p. 2.) She noted that MCL 257.401(5) states that MCL 257.401(3) shall not be construed to expand the liability of motor vehicle lessors, "yet the majority does just that." (*Id.*, p. 3.) She explained that the majority's holding that the statute establishes a duty by U-Haul to Plaintiff's decedent "expand[s] the liability of lessors of motor vehicles in a way that is not provided in the act, which is in direct contradiction of the plain language of MCL 257.401(5)." (*Id.*) Here too, Judge O'Brien recognized that Plaintiff never argued that the statute created a duty, and only ever argued that U-Haul owed her decedent a common-law duty. "Without any explanation, the majority premises its holding on an issue that has clearly been waived. Even more troubling, as plaintiff has never made the statutory-duty argument relied on by the majority, U-Haul has never had an opportunity to respond to that argument. That is fundamentally unfair to U-Haul." (*Id.*, p. 3, n. 2.)

Per the dissent, the relevant question is whether U-Haul owed Plaintiff's decedent a duty under common-law. And under this Court's decision in *In re Certified Question from Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498; 740 NW2d 206 (2007), there is no such duty. That case expressly rejected the idea that under *Clark*, U-Haul owed a duty to the general public, which is the exact argument Plaintiff makes. The dissent explained that when the actual duty test is applied—looking at the relationship between the parties, the foreseeability of

the harm, the burden that would be imposed on the defendant, and the nature of the risk—no such duty arose. (*Id.*, pp. 4-5.) The dissent concluded that U-Haul had a duty to the general public under a negligent entrustment theory, but that is all — "there is no statute, contractual relationship, or common law rule giving rise to a different duty U-Haul owed to the general public, or to [decedent] under these facts." (*Id.*, p. 5) Thus, the dissent would have reversed and granted summary disposition to U-Haul.[5]

U-Haul timely moved for reconsideration on February 12, 2019 (attached as Ex. M) arguing, among other things, that the majority's decision to affirm based on a theory Plaintiff had expressly abandoned (and which U-Haul therefore did not brief), denied U-Haul due process. In that motion, U-Haul offered to brief the issue. On March 22, 2019, that motion was denied 2-1 (Judge O'Brien would have granted reconsideration). (March 22, 2019 Order.)

ARGUMENT

STANDARD OF REVIEW

Whether to grant leave to appeal is within this Court's discretion. To obtain review by this Court, an appellant must show the case meets one or more of the criteria set forth in MCR 7.305(B), including that: the issue involves a legal principle of major significance to the state's jurisprudence; and/or the Court of Appeals' decision is clearly erroneous and will cause material injustice.

Should the Court grant leave, this Court would review the matter *de novo.* Appellate courts review decisions on motions for summary disposition *de novo*. *See, e.g., DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). This Court also

[5] Indeed, one option for this Court would be to peremptorily reverse, adopt the dissent as its opinion, and remand for entry of judgment in favor of U-Haul.

reviews *de novo* issues of statutory interpretation. *See, e.g., Stanton v City of Battle Creek*, 466 Mich 611, 614; 647 NW2d 508 (2002).

I. THE COURT OF APPEALS' DECISION INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE.

The liability of motor vehicle short-term leasing companies, whether they rent trucks like U-Haul, or cars like Hertz, has been the subject of much litigation and legislation nationwide. Over the years, the laws have limited, and often eliminated, these lessors' liability, so as to allow them to stay in business at reasonable costs to the consumer.

At common law, as a general rule, "there is no duty that obligates one person to aid or protect another." *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). Until the Court of Appeals' majority decision, an owner of a chattel (such as a vehicle) owed no common-law duty to protect the public from injuries caused by the chattel's use, aside from ensuring that the chattel itself was not unreasonably dangerous and not negligently entrust it to one with known unsafe particularities. *Fredericks v General Motors Corp*, 411 Mich 712, 719; 311 NW2d 725 (1981). Retailers likewise owed no common-law duty to protect the public from the dangerous or unlawful use of a product they sell. *Buczkowski v McKay*, 441 Mich 96, 108; 490 NW2d 330 (1992). And retailers could assume customers would follow the law and the terms of their contracts. *Id.*, 441 Mich at 108, n 16; *see also Fredericks*, 411 Mich at 720–21 (1981) ("[i]n light of" the employer's statutory duty to maintain safe working conditions, "we cannot hold as a matter of law that it was foreseeable to defendant that the product it supplied would be used in an unsafe manner"); *DeHart v Joe Lunghamer Chevrolet, Inc.*, 239 Mich App 181, 188; 607 NW2d 417 (1999) ("the portion of the lease contract wherein the lessee agrees that 'the vehicle will not be used ... in any illegal manner' protects the lessor from liability when the vehicle is driven by a person with a revoked license, who is also uninsured and intoxicated").

As for statutory liability, the Michigan Legislature first passed the Owner's Liability Act in 1949, and amended it over the years. The original statute imposed liability on motor vehicle owners for the negligent driving of others but only when "the motor vehicle is being driven with [the owner's] express or implied consent or knowledge," which was presumed for family members:

> (1) This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family.

MCL 257.401.

In 1995, the Legislature amended the statute for rental agencies, both limiting liability to injuries caused by negligence "by an authorized driver under the lease agreement" or by an immediate family member of the lessee, and, where liability exists, limiting these companies' damages at $20,000 or $40,000, unless there was "negligence in the leasing" of the vehicle:

> (3) Notwithstanding subsection (1), a person *engaged in the business of leasing* motor vehicles who is the lessor of a motor vehicle under a lease providing for the use of the motor vehicle by the lessee for a period of 30 days or less is liable for an injury caused by the negligent operation of the leased motor vehicle *only if* the injury occurred while the leased motor vehicle was *being operated by an authorized driver under the lease* agreement *or* by the lessee's spouse, father, mother, brother, sister, son, daughter, or other *immediate family member*. *Unless the lessor, or his or her agent, was negligent in the leasing of the motor vehicle, the lessor's liability* under this subsection is *limited* to $20,000.00 because of bodily

> injury to or death of 1 person in any 1 accident and $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident.
>
> * * *
>
> (5) Subsections (3) and (4) shall not be construed to expand or reduce, except as otherwise provided by this act, the liability of a person engaged in the business of leasing motor vehicles or to impair that person's right to indemnity or contribution, or both.

MCL 257.401 (emphasis added).[6]

These limits to rental agencies' liability were enacted specifically because, the Legislature found, "where companies face unlimited and uncontrollable losses from harm done in incidents involving their vehicles, [it] inhibits the growth of the [rental car and truck] industry and threatens to drive some companies out of the state." House Legislative Analysis Section, House Bill 4679 (attached as Ex. N), p. 2.

In 2004, this Court upheld the validity of the statutory limitation on rental agencies' damages, finding that the statute was designed to "reduce insurance costs for automobile lessors" and to bring Michigan in line with other states that considered lessor liability absent independent actionable negligence on the part of the lessor, "unwise public policy":

> [W]e conclude that this statute, *obviously designed to reduce insurance costs for automobile lessors*, could have been seen as a measure that, because costs of operations are reduced, *increases the number of providers* from which Michigan consumers may choose,… [T]he amendment of MCL 257.401, *limiting lessor's liability* removed Michigan from the small remaining minority of states that still impose unlimited liability on automobile lessors. This could be seen as *joining with other states in viewing vicarious liability as unwise public policy*, at least in these circumstances.

Phillips v Mirac, Inc, 470 Mich 415, 435; 685 NW2d 174 (2004) (emphasis added).

[6] Subsection (4) requires the lessor to provide notice to the lessee of subsection (3)'s limitation of liability.

Shortly after this Court decided *Phillips*, the United States Congress passed the Graves Amendment, which preempted vicarious liability for *all* rental agencies across the country:

> An owner of a motor vehicle that rents or leases the vehicle to a person….*shall not be liable* under the law of any State….*by reason of being the owner* of the vehicle (or an affiliate of the owner)…for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if —(1) the owner… is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner….

49 USC 30106(a) (emphasis added).

Thus, even had the Michigan Legislature intended its 1995 amendments to impose liability on rental agencies for conduct that would not otherwise qualify as "negligence," the Graves Amendment prohibits that liability. Putting federal and state law together, the claims allowed against rental agencies in Michigan are only those where the driver was an authorized driver under the lease or a family member of the lessee, and where the rental company's conduct was negligent or criminal. And, given the duties imposed (and not imposed) on retailers under Michigan law, claims against rental agencies sounding in negligence are limited to those for negligent entrustment, or for negligent maintenance of the vehicle.[7]

Whether an injured party can assert a claim for negligence against a rental company aside from product condition or negligent entrustment appears to have been raised in Michigan only once before, and then quickly rejected by the Court of Appeals. In *Jackson*, the court held that the plaintiffs' suggestion that defendant Enterprise could be is liable "under a 'general negligence' action separate from their claim for negligent entrustment" was "merely another way of stating their claim for negligent entrustment." (Ex. N to Ex. D, n. 4.) The court found no need

[7] The cases Plaintiff relied on to support her claim that a common-law duty existed outside of a claim for negligent entrustment were all based on the condition of a product. Plaintiff, however, has never alleged that the pickup rented here was defective.

to "address this attempt to use formalistic labels to manufacture other claims where none exist." (*Id*.) In other words, the court had no trouble concluding that the only negligence claim that could be brought against a vehicle rental company regarding the lease itself (as opposed to the product) was one for negligent entrustment.

Other states to address the question of rental-agency negligence outside the product-condition context have uniformly held that such claims are limited to negligent entrustment. "The injury to the public from a car being negligently entrusted to a driver is adequately protected by negligent entrustment law, and no additional duties are owed to third parties by a defendant who entrusts a car to a driver who negligently injures the third parties." *Avalos v Brown Auto Ctr, Inc*, 63 SW3d 42, 46 (Tex Ct App, 2001). The Texas Court of Appeals went on, "[a]s long as the defendant does not entrust a vehicle to a driver that the defendant knows or should know is incompetent or reckless, the risk, foreseeability and likelihood of the driver causing injury to others is outweighed by the social value of having rental cars available and the consequences of requiring those who lend cars to develop standards to eliminate any possibility that someone seeking to borrow a car might be involved in an accident." *Id*.; *see also Francis v Crawford*, 732 So2d 152, 155 (La App 2 Cir, 1999) (rejecting claim that Hertz was negligent in not securing the prompt return of a rental car after rental payments were not timely made, holding "[i]t is well settled that the lessor of a vehicle is not liable for the negligent acts committed by the lessee" where there is no negligent entrustment); *Collette v Ledet*, 640 So2d 757, 760 (La App 3 Cir, 1994) (rejecting argument that rental company was negligent for failing to retrieve a vehicle after the renter was in an accident, stating, "it would be poor public policy to encourage car rental companies to tie up our state's law enforcement personnel every time a

rental vehicle is returned a day or two late absent some greater notice that the public is endangered").

Ours is, therefore, to U-Haul's knowledge, the first case, anywhere in the country, to hold that when a rental vehicle is involved in an accident, the rental company can be liable for negligence other than negligent entrustment or negligent maintenance. This holding goes against the trend—plus the Legislature's stated purpose—to limit, rather than expand, the potential liability of rental agencies.[8] If Michigan is going to be the anomaly, it should be this Court that makes that determination, not two persons on a three person Court of Appeals panel (who decided the issue without the benefit of briefing). The same is true for the question of whether the Michigan Owner's Liability Act, by narrowing rental agencies' liability and capping their damages, somehow simultaneously created a duty to the public on the part of such agencies that does not otherwise exist at common law. This Court has carefully limited the scope of duty for negligence purposes. It should be the one to determine if that law should be expanded by way of the Owner's Liability Act. In addition, the case law is now inconsistent, with one unpublished Court of Appeals case finding claims are limited to negligent entrustment (*Jackson*) and one finding they are not (this case). Rental agencies doing business in Michigan need a definitive answer as to what their potential liability is, so they can act accordingly. And don't let the unpublished nature of the Court of Appeals' opinion fool you – "published" or not, it is significant in that it creates both a new cause of action and a new duty.

There are also policy issues at stake. The Court of Appeals' opinion, if not reversed, implicates this Court's recognition that "imposing" a duty on retailers to "protect members of the general public from the criminal misuse of the products it sells" would effectively require

[8] Indeed, the Court of Appeals' majority opinion has caught the industry's attention and U-Haul anticipates the filing of an amicus brief.

"independent investigation to establish each buyer's fitness to use each product, leaving…commercial transactions open to unlimited expansion tantamount to imposing a fiduciary duty on the retailer for the benefit of unknown third parties." *Buczkowski*, 441 Mich at 108, n 16. This Court refused to find such a duty in *Buczkowski*, holding that the "likely result will be to make such products unavailable to law-abiding users, or to raise the price of a multitude of potentially harmful products as sellers redistribute the cost of potential liability to all consumers." *Id*. at 108; *accord Barksdale v Nat'l Bank of Detroit*, 186 Mich App 286, 291; 463 NW2d 258, 261 (1990) (holding that to impose a duty on a lessor to investigate potential lessee's driving records before entering a lease, "would place upon them an intolerable burden and would subject them to unwarranted liability where they retain no control over the lessee's use of the vehicle").

The majority's opinion seems to mean that – even though Smith was an eligible driver, neither Smith nor Johnson displayed dangerous particularities, and U-Haul had no knowledge that Johnson was an unauthorized driver – U-Haul nevertheless owed *additional* duties to the general public, including perhaps:

(1) to notify Smith (the person to whom it rented the vehicle) that the rental had been extended (and paid for);

(2) to determine who was driving the vehicle at the time of each extension and, without evidence of unsafe particularities, investigate whether that person was a qualified driver;

(3) to track down the pickup and, even though the extensions were paid for, to nevertheless "repossess" the truck; and/or

(4) to call the police on its customer. [9]

[9] Neither Plaintiff nor the Court of Appeals provided any basis to understand which of these things, if any, would be "reasonable" under the circumstances of a rental transaction like the one here.

There is no support in the Act for imposing any such additional burdens on Michigan lessors or renters. If the majority's opinion stands, and these sorts of burdens are imposed for *every* rental transaction, even where there has been no negligent entrustment, the cost of renting vehicles in Michigan will almost certainly go up, as will the cost of insurance for rental agencies doing business in the state. Some vehicle rental companies may decide it is too expensive to do business here and pick up their stakes and leave. Others will continue to do business here but will need to increase their rental costs, possibly significantly. These are the very concerns the Michigan Legislature cited in 1995, when it amended the Owner's Liability Act to *limit* rental agencies' common-law liability and cap their damages. *See* House Legislative Analysis Section, House Bill 4679 (Ex. N); *DeHart*, 239 Mich App at 188-189 (holding the legislative purpose in amending the Act was "to lessen the extraordinary losses to which (short-term) lessors were being subjected when they had no control over the vehicle after it was leased"). And they are the same concerns that motivated Congress to pass a federal law, the Graves Amendment, which prohibits states from imposing liability on rental agencies based on their ownership of rented vehicles. *See* 49 USC 30106.

Where the Michigan Legislature and Congress have acted to *limit* rental agencies' liability for the negligence of third parties to whom *a lessee* entrusts a vehicle, the Court of Appeals' majority opinion vastly *expands* liability, creating a cause of action and imposing duties to the public where there previously were none. The majority opinion's significance is further illustrated by its prominence in the local legal press, it garnered front-page attention in the Michigan Lawyer's Weekly. (Attached as Ex. O.) Because this case involves issues of significance to the state's jurisprudence, this Court should grant leave to appeal under MCR 7.302(B)(3), and on appeal, reverse.

II. THE COURT OF APPEALS' DECISION IS CLEARLY ERRONEOUS AND WILL CAUSE MATERIAL INJUSTICE.

A. The Court of Appeals erred in interpreting the statute to create a cause of action for "negligent leasing".

The Court of Appeals' majority put all of its eggs in the MCL 257.401(3) basket, holding that this subsection both creates a cause of action for "negligent leasing" by rental agencies distinct from common-law negligent entrustment, and imposes a duty on rental agencies, such as U-Haul, to protect the public from third parties. There are myriad problems with this holding. First, this statutory subsection does not apply here, because Johnson was neither an authorized driver under the rental agreement nor an immediate family member of Smith, and the subsection has been held to be preempted by the Graves Amendment.[10] Second, even putting these significant problems aside, the Court of Appeals' majority's interpretation is not dictated by the statutory language. And third, the majority's interpretation contradicts the legislative intent.

1. MCL 257.401(3) does not apply here and has been held to be preempted.

Under MCL 257.401(3), a lessor-owner of a vehicle can be "liable for an injury caused by the negligent operation of the leased motor vehicle *only if* the injury occurred while the leased motor vehicle was being *operated by an authorized driver* under the lease agreement or by the lessee's spouse, father, mother, brother, sister, son, daughter or other immediate family member." (emphasis added). The statute caps damages for any such liability, but lifts the caps if the lessor is found "negligent in the leasing of the motor vehicle." And the legislative history indicates one of the reasons for the amendment adding subsection (3) was so that "the company would no longer be liable when unauthorized persons operated the rental car or truck." (Ex. N, p. 2.)

[10] In addition, Plaintiff has made no argument, and provided no evidence, to establish that U-Haul Co. of Michigan, the current defendant, can be considered the vehicle owner under the Michigan Act.

Here, there is no genuine issue of material fact that Johnson was not an "authorized driver under the lease agreement." The Addendum required authorized drivers to be licensed to drive (see Exs. E, H, to Ex D.) But it is undisputed that that Johnson did not possess a valid driver's license, and was not Mr. Smith's "immediate family member". Therefore, the statute cannot apply to impose any potential liability on U-Haul for *this* accident.[11] This is likely the reason why Plaintiff repeatedly stressed that she is *not* bringing a claim under the Act.

In addition, the Graves Amendment (49 USC 30106(a)) prohibits state law from imposing vicarious liability on vehicle rental companies based solely on their ownership of a vehicle involved in an accident. But the Michigan Owner's Liability Act subsection (3) purports to impose ownership liability, albeit with caps on damages, which do not apply if the lessor is negligent. Put another way, the federal law *prohibits* vehicle rental company liability based solely on vehicle ownership, but, in the event of negligence or criminal conduct, allows liability. The Michigan statute, by contrast, *allows* vehicle rental company liability, and, in the event of negligence, merely lifts a damages caps. As U-Haul argued below, (Ex. D, pp. 15-16), to the extent the Michigan Owner's Liability Act allows liability against a rental agency for the mere act of vehicle ownership, without an act of negligence, it has been preempted by the Graves Amendment.

Specifically, subsection (3) passed in 1995, and was not amended after the Graves Amendment passed in 2005. Though the Michigan state courts have never addressed the inconsistencies in the two statutes, three federal courts have and all held that the Graves Amendment preempts the Michigan statute. *Jasman v DTG Operations, Inc*, 533 F Supp 2d 753,

[11] U-Haul did not make this argument below because Plaintiff repeatedly made clear that she was *not* bringing a claim under the Act, but was bringing a common law claim, and because U-Haul had previously argued that portion of the Act was preempted by federal law.

758 (WD Mich, 2008) held "the Court finds the Graves Amendment preempts Michigan's Motor Vehicle Civil Liability Act and that owners of vehicles, such as Dollar Rental, are not liable solely by reason of being the owner of the vehicle." *Layton v Russell*, unpublished opinion of the WD Mich, issued June 30, 2014 (Case No 13-325) (Ex. AA to Ex. D) and *Watson v Majewski*, unpublished opinion of the ED Mich, issued Oct. 11, 2011 (Case No 10-12910) (attached at Ex. P) found the same. This preemption problem may be another reason why Plaintiff repeatedly stressed she is *not* suing under the Michigan statute. In light of the Graves Amendment, the Michigan statute simply cannot provide the source of U-Haul's liability.[12]

In sum, the Court of Appeals' majority used an inapplicable (and likely invalid) statutory provision to create a new cause of action, premised on a new duty owed by *all* rental agencies to the general public. Respectfully, contrary to the majority's holding, it simply cannot be said that by enacting a statute limiting owner liability to when accidents are caused by *authorized* drivers, the Legislature intended to create a cause of action imposing owner liability when an accident is caused by *unauthorized* drivers. The Court of Appeals' majority opinion is clearly erroneous and will cause material injustice if not reversed.

2. The Act did not create a new cause of action.

The language the majority held created a cause of action—"negligent in the leasing of the motor vehicle"—was added to the Owner's Liability Act in 1995. Before that, this Court had held that the Owner's Liability Act did not supersede the pre-existing, common-law liability for negligent entrustment. "[T]he common-law liability for entrusting the operation of one's motor vehicle to a known, incompetent driver is not superseded thereby." *Perin v Peuler*, 373 Mich 531, 535; 130 NW2d 4 (1964), overruled on other grounds, *McDougall v Schanz*, 461 Mich 15;

[12] This also demonstrates the problem with the Court of Appeals' majority making its decision based on a theory Plaintiff disclaimed, and thus, that neither party briefed.

597 NW2d 149 (1999). This Court explained the *general rule* of owner-non-liability, and the *exception* allowing owner liability for negligence in entrusting a vehicle to a known "incompetent, reckless, or careless driver":

> The general rule that an *owner of an automobile is not liable for the negligence of one to whom the automobile is loaned* has no application in cases where the owner lends the automobile to another, knowing that the latter is an incompetent, reckless, or careless driver, and likely to cause injuries to others in the use of the automobile; in such in such [sic] cases the *owner is held liable* for injuries caused by the borrower's negligence on the ground of *his personal negligence in entrusting the automobile to a person who he knows is apt to cause injuries* to another in its use.

Id. at 536 (emphasis added).

When passing laws, legislative bodies are "assumed" to have "some knowledge of and regard to existing laws upon the same subject and decisions by the court of last resort in reference to them." *Lenawee Cty Gas & Elec Co v Adrian*, 209 Mich 52, 64; 176 NW 590, 595 (1920). Thus, when the Legislature passed subsection (3), it is presumed to have known of this Court's ruling in *Perin.* And nothing in the amendment indicates a legislative intent to expand liability beyond that common law. Quite to the contrary, the Legislature passed subsection (5) at the same time, stating explicitly that they did *not* intend to "expand or reduce" lessor liability other than as stated. In short, the Legislature recognized the availability of *common-law* causes of action, including for negligent entrustment, but showed no intent to create a new *statutory* cause of action for something *more* than negligent entrustment.

The Court of Appeals' majority in our case suggests at one point that, had Plaintiff not repeatedly waived the claim, she could have pursued a negligent-entrustment theory, stating "a claim for negligent entrustment is not necessarily limited to what the vehicle's owner knew at the time of the entrustment." (Ex. A, p. 4, quoting *Perin,* 373 Mich at 538.) This, of course, is not what Plaintiff argued. She disavowed a negligent entrustment theory precisely because it looks

only at what incompetency that the lessor knew or should have known at the time of the rental, and her claim is based on events that came later. In any event, the line the majority cited from *Perin* contains no analysis, and merely refers to conduct "known to the entrusting owner at the time of or during continuation of the entrustment…." Almost immediately after that line, however, the *Perin* Court set forth one element of negligent entrustment as: "that the owner knew *at the time of the entrustment* that the entrustee was incompetent or unqualified to operate the vehicle, or had knowledge of such facts and circumstances as would imply knowledge on the part of the owner of such incompetency." 373 Mich at 539 (emphasis added). To support its reference to a "continuation" duty, the *Perin* Court referred to its opinion issued the same day in *Tortora v General Motors Corp*, 373 Mich 563; 130 NW2d 31 (1964). There, the plaintiff alleged injuries from an accident caused by a GM employee driving a company car. The plaintiff sued GM on a negligent-entrustment theory, claiming GM should have known about its employee's lengthy poor driving record, which was publicly available. Plaintiff won at trial, and GM appealed. At issue on appeal was the trial court's instruction to the jury that GM could have chosen to inspect its employee's public driving records. This Court found the instruction "reversibly erroneous." 373 Mich at 570. The Court specifically criticized the plaintiff's argument that GM had a duty to keep abreast of the driving records of its employees who were using company cars, noting the plaintiff had cited "[n]o authority for such contention[.]" *Id.* at 567-68. In sum, to the extent *Perin* cites *Tortola* for the proposition that duties in negligent entrustment might extend *beyond* the time of entrustment, *Tortola* itself contradicts that position.

After this (erroneous and unnecessary) detour, the majority held that regardless of the viability of a negligent-entrustment theory, the Owners Liability Act does not limit claims against lessors to negligent entrustment. (Ex. A, p. 4.) But the majority opinion cites no case in

which a court allowed a non-vehicle-related claim to proceed against a lessor other than a claim for negligent entrustment. Indeed, all cases interpreting subsection (3) other than the current case have found the lessors' liability to be limited. In *Dehart*, the court affirmed the grant of summary disposition to the defendant car dealership, which loaned a vehicle to a woman while her car was being repaired. She allowed her son, whose license was suspended and who was drunk, to use the car. He then caused an accident that injured the plaintiff. The court found that plaintiff had no claim against the dealership, noting the purpose behind subsection (3) was that "the [car and truck rental] industry and its members were becoming 'deep pockets' to unlimited liability, with no way to control who was driving the vehicle,…" 239 Mich App at 185. The court also noted that the risk of damage or injury should be placed on the person who is in "immediate control" of a vehicle, that is, the lessee. *Id.* at 189. And the court noted that the defendant dealership was protected from liability by the provision in the lease that the car would not be used illegally, which the lessor violated. *Id.* at 188. In *Church Mut Ins Co v Save-A-Buck Rental Co*, 151 F Supp 2d 905, 910 (WD Mich, 2000), the court held that the phrase "negligent in the leasing" contained in subsection (3) "must refer to actions which would have made the lessor liable under common law, such as negligent entrustment…or negligence in failing to provide the lessee with a reasonably safe vehicle." The Sixth Circuit held the same thing in *Allstate Ins Co v Thrifty Rent-A-Car Sys*, 249 F3d 450, 456 (CA 6, 2001).

In sum, when passing MCL 257.401(3), the Legislature stressed that "negligent in the leasing of the motor vehicle" meant nothing more and nothing less than the types of claims that had been previously allowed against a vehicle lessor, none of which went beyond negligent entrustment or negligent maintenance. The Court of Appeals' majority erred in reading the

statute – assuming *arguendo* it were still valid and applicable to our case, which it is not – to create a new cause of action.

3. The Court of Appeals' ruling is contrary to the legislative intent.

When interpreting statutes, courts must "determine and effectuate the intent of the Legislature through reasonable construction in consideration of the purpose of the statute and the object sought to be accomplished." *Frankenmuth Mut Ins Co v Marlette Homes*, 456 Mich 511, 515; 573 NW2d 611 (1998). The determination that a statute creates a cause of action "should not only be consistent with legislative intent, but should further the purposes of the legislative enactment." *Lash v Traverse City*, 479 Mich 180, 193; 735 NW2d 628 (2007). Here, the clear legislative intent was to *not* create a new cause of action, and the purpose of the enactment was to *limit* lessors' liability.

The House Legislative Analysis of the amendment that added subsection (3) noted that at that time, Michigan was one of only approximately 10 states that imposed *any* liability on vehicle lessors based on ownership,[13] and, without a limitation on that liability, the rental industry's viability in Michigan was threatened. (Ex. N, p. 3.) It also noted the increased liability insurance costs for the rental industry in Michigan. (*Id.*, p. 1.) The Court of Appeals also previously held that the purpose of subsection (3) was to "lessen the extraordinary losses to which lessors were being subjected when they had no control over the vehicle after it was leased." *DeHart*, 239 Mich App at 189. Yet somehow, the majority found that under the statute, "Michigan law permits a plaintiff to bring a claim for *any* negligence in the leasing process regardless of whether or not the claims for negligent entrustment can be satisfied under the circumstances." (Ex. A, p. 4, emphasis in original.) The Court of Appeals erred in so holding,

[13] Of course now, as discussed above, under the Graves Amendment, no state can impose such liability on lessors like U-Haul based on vehicle ownership alone.

and such a holding is directly contrary to the legislative purpose of MCL 257.401(3). As the dissent explained, the Act did not create a new cause of action, and Plaintiff could proceed only if she had a common law claim against U-Haul. She does not, for the reasons discussed by the dissent and *infra*.

B. The Court of Appeals erred in holding that the statute creates a duty that does not otherwise exist under common law.

After finding a cause of action for "negligent leasing under MCL 257.401(3)," the Court of Appeals' majority said, "we must determine whether U-Haul owed any legal duty to plaintiff's decedent…." (Ex. A, p. 4.) It then held that such a duty was created by the statute itself. This holding, too, was clearly erroneous. According to the majority, "whether a plaintiff can use a statute to impose a duty of care on a defendant depends on (1) whether the purpose of the statute was to prevent the type of injury and harm actually suffered and (2) whether the plaintiff was within the class of persons which the statute was designed to protect," citing *Cipri* (Ex. A, p. 5.) The majority then held that under these factors, "there is a statutory basis for imposing a duty on U-Haul in this case." (*Id.*, p. 6.) The problem is, *Cipri* does not stand for this proposition, and even if it did, the factors do not support imposing a duty on U-Haul. The correct analysis is whether under the common law—again, what Plaintiff repeatedly said she is asserting—U-Haul owed a duty to Plaintiff's decedent, or a duty to the general public, other than to not engage in negligent entrustment or negligent maintenance of vehicles. When the correct analysis is performed, as was done by the dissent, it is clear that U-Haul has no such duty.

1. *Cipri* is not the proper test.

This Court has never applied *Cipri*. And even in *Cipri*, the court did not use the two-factor test that the majority relied on to determine whether a statute created a new duty. Instead, *Cipri* used its two factor test to determine whether a statutory violation evidenced a breach of an

existing duty. There, a defendant alleged to have violated an environmental statute argued it owed no duty to the plaintiff. The Court of Appeals first discussed the factors for "determining whether a duty exists":

> In determining whether a duty exists, courts look to different variables, including (1) the foreseeability of the harm; (2) degree of certainty of injury; (3) existence of a relationship between the parties involved; (4) closeness of connection between the conduct and injury; (5) moral blame attached to the conduct; (6) policy of preventing future harm; and (7) the burdens and consequences of imposing a duty and the resulting liability for breach.

235 Mich App at 14-15 (cites omitted). It then held that "the fact that defendant's conduct may have been in violation of a statute does not in and of itself shed light on whether defendant owed plaintiff a duty of care; however, once a duty is found, the violation of the statute can be prima facie evidence of negligence." *Id.* at 16. Then, and only then, did the court set forth the two-pronged test relied upon by the majority in our case.

Cipri has since been cited for the proposition that "whether a violation of a statute constitutes *evidence* of negligence depends on the statute's purpose and the class of persons it was designed to protect." *Lozar v Birds Eye Foods*, 678 F Supp 2d 589, 599 (WD Mich, 2009) (emphasis added). In other words, *Cipri* does not stand for the proposition that *if* the purpose of a statute is to prevent the type of injury suffered and the plaintiff is within the class of persons the statute was designed to protect, then the statute creates a *duty* on the defendant toward the plaintiff, as the majority held. Rather, *Cipri* stands for the proposition that *if* the defendant *already has a duty* to the plaintiff under traditional duty analysis, and these two additional factors are also met, then a statutory violation can constitute *evidence* of negligence. The Court of Appeals cited no case in which *Cipri* was found to impose a duty where one would not otherwise exist, based on a statute that makes no mention of imposing a new duty. The Court of Appeals' majority erred in applying *Cipri* to find that the statute imposes a duty on entities like U-Haul.

2. The statute is not meant to impose a duty here.

Even if the *Cipri* factors applied (and they do not, for the reasons discussed above), they would not support imposing a duty here. The goal of the Owners Liability Act as a whole is to give persons injured in certain types of accidents an automatic right of recovery (albeit limited) against the owners of the vehicles involved if they were being negligently operated by authorized persons. But the Graves Amendment has since made clear that is not a cognizable goal when it comes to vehicle lessors, absent actionable negligence. And subsection (3)'s particular purpose is to limit the liability of entities such as U-Haul. There is no reason to believe that the statutory goal was to prevent accidents, as the Act is not any sort of safety regulation. Nor is there anything in the legislative history indicating such a goal. Therefore, even if the *Cipri* factors were somehow relevant, they would not support a finding that the statute creates a duty on the part of U-Haul towards Plaintiff's decedent.

3. U-Haul has no cognizable common-law duty to Plaintiff's decedent.

None of this is to suggest that U-Haul is always exempt or immune from potential liability when there is an accident involving one of its vehicles. To the contrary, U-Haul has argued consistently that it could be held liable if a problem with one of its vehicles causes an injury, or if it negligently entrusted a vehicle to a person who negligently caused an injury, but that here, Plaintiff has established no genuine issue of material fact under either theory.[14]

[14] The elements of a negligent-entrustment claim are: that "the motor vehicle was driven with the permission and authority of the owner; that the entrustee was in fact an incompetent driver; and that the owner knew at the time of the entrustment that the entrustee was incompetent or unqualified to operate the vehicle, or had knowledge of facts and circumstances that would imply knowledge on the part of the owner of such incompetency." *Perin*, 373 Mich at 538-39. Here, U-Haul did not entrust the vehicle to Johnson, the driver. Numerous courts have dismissed negligent entrustment claims against a rental company where the renter, not the rental company, is the one who entrusted the vehicle to a third party. (*See* cases cited in U-Haul's Motion, Ex. D, pp. 9-10.) Nor is there evidence that U-Haul knew, or should have known, at the time of the rental, that Johnson was going to drive the truck, let alone that he was unlicensed, or the fact that

Plaintiff, for her part, has argued consistently that she is making a common-law negligence claim, with a duty created *not* by the Owner's Liability Act, but by the "basic rule of common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." (Ex. E, p. 13, quoting *Clark*, 379 Mich at 261.)

Plaintiff's problem, and the reason U-Haul should have been granted summary disposition, is that there is no such overarching duty to the general public. As this Court has noted, the portion of *Clark* that Plaintiff relied upon to support her broad theory of duty to the general public was followed immediately by the statement that "actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law." *In re Certified Question*, 479 Mich at 509, n. 10. Thus, contrary to Plaintiff's contention, as this Court has held, "*Clark* does not stand for the proposition that everybody owes a duty to everybody else." *Id.*; *accord Buczkowski*, 441 Mich at 332-33 ("Duty is actually a 'question of whether the defendant is under any obligation for the benefit of the particular plaintiff' and concerns 'the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other.'")

Rather, "in determining whether a defendant owes a duty to a plaintiff, competing policy factors must be considered." *In re Certified Question*, 479 Mich at 508. First and foremost is the relationship between the parties. "Where there is no relationship between the parties, no duty can be imposed, but where there is a relationship, the other factors must be considered to determine whether a duty should be imposed." *Id.* at 508-09. Plaintiff has not claimed, and cannot claim, that her decedent had a relationship with U-Haul. This should end the analysis.

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his being unlicensed suggested dangerous propensities rather than it being, for example, a simple administrative issue.

This Court could not have been more clear in recent years that it will not find a legal duty where there is no relationship between the parties. *See e.g., In re Certified Question* (finding no duty by defendant employer to plaintiff family member allegedly exposed to asbestos by washing her father's work clothes); *Hill* (finding defendant employees who installed an electric dryer had no duty to plaintiff homeowners); *Buczkowski* (retailer had no duty to protect public from unlawful use of ammunition by a drunk customer). Because there was no relationship between U-Haul and Plaintiff's decedent, U-Haul had no legal duty to him, and Plaintiff can make no negligence claim. It was error for the Court of Appeals' majority to make an end run around this fatal flaw in Plaintiff's claim by finding that the statute "imposed" a duty on U-Haul where one does not otherwise exist due to the lack of a relationship between the parties.

In addition, even if there had been a relationship between the parties, the harm must also be foreseeable for a duty to arise. "Where the harm is not foreseeable, no duty can be imposed". *In re Certified Question*, 479 Mich at 509. It was not foreseeable to U-Haul that Mr. Smith would, despite the terms of the rental agreement, lend the truck to an unlicensed driver, who would then drive in a criminally reckless matter and kill Plaintiff's decedent. *See Buczkowski*, 441 Mich at 108, n.16 (retailer can presume customer will follow the law); *DeHart*, 239 Mich App. at 188-189 (lessor not liable where lessee agreed under terms of the lease that the vehicle would not be used in an illegal manner). For this reason as well, U-Haul has no cognizable duty here.

The Court of Appeals' majority opinion raises more questions than it answers. What precisely does the Court of Appeals' majority believes U-Haul was obligated to do under these

facts? How would it have made a difference? And what are rental companies supposed to do going forward to avoid potentially unlimited claims of liability for "negligent leasing"?[15]

As the dissent correctly stated, since the pickup truck U-Haul rented was safe, the only duty U-Haul owed to Plaintiff's decedent, as a member of the general public, was to not negligently entrust the truck to someone with dangerous particularities. (Ex. B, p. 5.) Because Plaintiff did not allege negligent entrustment, the Court of Appeals erred in affirming the denial of U-Haul's motion for summary disposition.

C. The Court of Appeals erred by basing its decision on a theory Plaintiff expressly disavowed.

As the dissent acknowledged, Plaintiff stated in her Court of Appeals' brief that she "is not contending that MCL 257.401(3) *creates* a cause of action against U-Haul for negligence of its agents committed in the course of a rental agreement." (Ex. K, p. 13 emphasis in original.) And she repeatedly emphasized in that brief that she is bringing a claim for "ordinary," common-law, negligence. (*Id.*, pp. 6, 8, 10, 11.) And the only duty she ever cited was a common law duty. (*Id*., pp. 21-23.) Therefore, Plaintiff abandoned any argument that the statute creates a cause of action and duty, which precluded the Court of Appeals from affirming on that basis. *See, e.g., People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *Kleinschrodt v General Motors Corp*, 402 Mich 381; 263 NW3d 246 (1978); *Michigan Gun Owners, Inc v Ann Arbor Pub Schools*, 502 Mich 695, 709-10; 918 NW2d 756 (2018). By creating a new cause of action and duty that was not only not raised in the pleadings or addressed in the briefing, but which

[15] *See Delprete v Senibaldi*, unpublished opinion of the Conn Superior Ct, issued June 16, 2015 (Case No 116024795) (Ex. G to Ex. F) (rejecting plaintiff's claim that Enterprise Rent-A-Car acted negligently by failing to call the police when a rental car was not timely returned, because such a theory required it to "rely substantially on conjecture and surmise to determine that such an accident was foreseeable to that time and place…. Even assuming that there had been a search for the rental vehicle, one can only speculate as to whether an attempt on the part of [Enterprise] to try and find the rental vehicle would have succeeded.")

Plaintiff expressly *disavowed*, the Court of Appeals deprived U-Haul of its right to be heard on the issue. *See, e.g., Al-Maliki v La Grant,* 286 Mich App 483, 488; 781 NW2d 853 (2009). Yet when U-Haul pointed out this fundamental due process problem on reconsideration, and requested further briefing, its motion was denied (2 to 1) without discussion. This is yet another reason the Court of Appeals erred.

For all of these reasons, the Court of Appeals' opinion is clearly erroneous and will cause material injustice. Leave to appeal should be granted under MCR 7.305(B)(5).

CONCLUSION AND REQUEST FOR RELIEF

For these reasons, Defendant-Appellant U-Haul respectfully requests that this Court grant its Application for Leave to Appeal and on appeal, reverse the Court of Appeals' opinion and remand for entry of summary disposition and judgment in U-Haul's favor.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Dated: May 2, 2019

By: */s/ Jill M. Wheaton*

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INDEX TO EXHIBITS

A. Court of Appeals' majority opinion.

B. Court of Appeals' dissenting opinion.

C. Circuit Court order.

D. U-Haul's Motion for Summary Disposition with exhibits (except exhibit C, which is being provided to the Court and all parties on CD)

E. Plaintiff's Opposition to U-Haul's Motion, with exhibits.

F. Reply in Support of U-Haul's Motion, with exhibits.

G. Mich Dep't of Corrections Offender Tracking Information System.

H. Complaint.

I. April 6, 2017 Transcript.

J. U-Haul's Brief on Appeal (without exhibits).

K. Plaintiff's Brief on Appeal (without exhibits).

L. Reply Brief on Appeal (without exhibits).

M. U-Haul's Motion for Reconsideration.

N. House Legislative Analysis Section, House Bill 4679.

O. Michigan Lawyer's Weekly Article, "COA affirms ruling against U-Haul."

P. *Watson v Majewski*, unpublished opinion of the ED Mich, issued Oct 11, 2011 (Case No. 10-12910)

CERTIFICATE OF SERVICE

On May 2, 2019 I e-filed this Application For Leave To Appeal with the Michigan Supreme Court and served a copy of this Application upon:

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by enclosing copies of the same in envelopes properly addressed to Messrs. Granzotto and Raitt, and by depositing said envelopes in the United States Mail with postage thereon having been fully prepaid, and by electronic filing in the Court of Appeals and Circuit Court.

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