IN THE SUPREME COURT
OF THE STATE OF MICHIGAN

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

Plaintiff-Appellee,

v.

LADARIUS DEANGELO JOHNSON,

Defendant,

and

U-HAUL CO. OF MICHIGAN,

Defendant-Appellant.

MSC No. 159531
MCOA No. 337961
LC No. 15-010455-NI
(Wayne County Circuit Court)

AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF U-HAUL CO. OF MICHIGAN

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QUESTION PRESENTED

Amicus curiae Chamber of Commerce of the United States of America (U.S. Chamber) addresses the following issue:

Whether this Court should grant U-Haul leave to appeal a decision by the Court of Appeals imposing a new duty on motor vehicle lessors to protect the public from accidents involving unknown drivers who have no relationship to the lessor and are beyond the lessor's control.

Trial Court:	No.
Court of Appeals:	No.
Plaintiff-Appellee:	No.
Defendant-Appellant:	Yes.
Amicus U.S. Chamber:	Yes.

INTEREST OF *AMICUS CURIAE*

The U.S. Chamber is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members or its counsel, made a monetary contribution intended to fund the preparation or submission of the brief.

regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The U.S. Chamber supports U-Haul's application for leave to appeal because the Court of Appeals' decision takes Michigan tort law in an extreme new direction. The ruling below departs from Michigan's traditional, balanced and fair jurisprudence on motor vehicle lessors' liability and represents instead what businesses view as "deep-pocket jurisprudence" that presents a harbinger of results-oriented and unfair treatment.

Deep pocket jurisprudence occurs when courts stop applying the law impartially and adopt a novel theory—such as the unprecedented "negligent leasing" theory in this case—to connect a remote defendant to a plaintiff's harm. This typically occurs when a "sympathetic plaintiff has been injured . . . but the party responsible for causing the harm is unknown or cannot pay the damages. So the plaintiff sues someone else, often a peripheral or attenuated business, to pay the claim," such as U-Haul in this case. Victor E. Schwartz et al., *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 Okla L Rev 359, 359 (2018). "Deep-pocket jurisprudence is law without principle." *Huck v. Wyeth*, 850 NW2d 353, 380 (Iowa 2014) (citation omitted).

Further, the new duty created by the Court of Appeals will leave motor vehicle lessors guessing as to their obligations and the extent of their liability. This

is another hallmark of deep-pocket jurisprudence: "the lack of any real limiting principle." Schwartz et al., 70 Okla L Rev at 367. If permitted to stand, the Court of Appeals' decision will impose substantial burdens and costs on motor vehicle lessors and may reduce economic activity in Michigan to the detriment of U.S. Chamber members.

SUMMARY OF THE ARGUMENT

This matter arises out of a fatal motor vehicle accident caused by a criminally negligent, unlicensed driver operating a rented U-Haul truck he obtained through a friend, the truck's lessee. There is no evidence that the truck was unfit for the road or that U-Haul negligently entrusted the vehicle to the lessee. U-Haul is in this matter because it owned the truck at issue and has a "deep pocket."

Under traditional tort law principles, plaintiff has a claim against the negligent driver who caused the accident and potentially against the lessee for negligently entrusting an unqualified driver with the truck, but no claim against U-Haul. To facilitate a recovery against U-Haul, the Court of Appeals adopted a novel "negligent leasing" duty that has never been adopted in any state to our knowledge, is inconsistent with Michigan's approach to defining tort duties under the common law, and inconsistent with the letter and spirit of Michigan and federal laws limiting motor vehicle lessors' tort liabilities. This is classic "deep pocket jurisprudence."

Allowing the Court of Appeals' decision to stand would be contrary to well-established legal principles. The Michigan Legislature and courts alike have recognized that motor vehicle lessors should not be treated as "'deep pockets' [with] unlimited liability." *DeHart v. Joe Lunghamer Chevrolet, Inc.*, 239 Mich App 181, 186; 607 NW2d 417 (1999). Michigan should not impose tort liability on businesses to make them pay for others' tortious conduct that is beyond their control. Such unlimited liability can "inhibit[] the growth of the industry and threaten[] to drive some companies out of the state." *Id.*

Further, motor vehicle lessors will face unpredictable liability and higher costs due to the vague and ill-defined nature of the "negligent leasing" tort. The Court of Appeals offered no guidance as to what this new duty entails or how it is to be satisfied.

The Court should grant U-Haul's Application for Leave to Appeal and reverse the Court of Appeals' decision.

ARGUMENT

I. LEAVE TO APPEAL SHOULD BE GRANTED TO CLARIFY THAT MOTOR VEHICLE LESSORS OWE NO DUTY TO PERSONS INJURED BY UNAUTHORIZED DRIVERS

Duty is a fundamental element of a negligence claim. Duty principles operate as an anchor for justice, keeping tort liability sound, fair, and predictable. Duty rules also act as an engine for economic growth: when a potential defendant

can anticipate its legal responsibility, it can rationally allocate its resources among preventing possible harm, compensating actual harm, and conducting its ordinary business. Insurers can best predict and price risks in tort environments that are stable and predictable.

In Michigan, "the question whether the defendant owes an actionable legal duty to the plaintiff is one of law which the court decides after assessing the competing policy considerations for and against recognizing the asserted duty." *Friedman v. Dozorc,* 412 Mich 1, 22; 312 NW2d 585 (1981). The inquiry involves factors such as "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *In re Certified Question from Fourteenth District Court of Appeals of Texas*, 479 Mich 498, 505; 740 NW2d 206 (2007) (quoting *Dyer v. Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004)).

"The most important factor is the relationship of the parties." *In re Certified Question,* 479 Mich at 505; see also *Dyer*, 470 Mich at 49 ("[A] duty arises out of the existence of a relationship 'between the parties of such a character that social policy justifies' its imposition.") (quoting Prosser & Keeton, Torts (5th ed.), § 56, p. 374). As this Court further stated in *Buczkowski v. McKay*, 441 Mich 96, 103; 490 NW2d 330 (1992), "Our ultimate decision turns on whether a sufficient

relationship exists between a retailer and a third party to impose a duty under these circumstances."

"[W]hen there is no relationship between the parties, no duty can be imposed." *In re Certified Question*, 479 Mich at 508. Here, there was no relationship between U-Haul and the unauthorized driver of its vehicle, precluding any duty on U-Haul's part with respect to the subject accident.

Plaintiff argues that motor vehicles lessors' duty cannot be based on a relationship test because "it would mean that [U-Haul] would enjoy an immunity to any liability for its negligence associated with renting a car with defective brakes or some other defect that causes injury to a third person." Appellee's Resp to Appl'n for Leave to Appeal, at 27.

Plaintiff's analogy fails because there are critical differences between "negligent entrustment" and "negligence maintenance" claims against motor vehicle lessors and the "negligent leasing" theory adopted by the Court of Appeals.

Most importantly, in the negligent entrustment and unsafe vehicle situations, there is a relationship between the lessor and lessee that establishes a duty. And once that duty is established, third parties may sue if they are injured by its breach. See *Perin v. Peuler (On Rehearing)*, 373 Mich 531, 539-40, 130 NW2d 4, 9 (1964) (in negligent entrustment action, "the plaintiff's injury must be proximately connected to some negligent act or omission for which either the entrustor or the

entrustee is legally responsible."), *overruled on other grounds by McDougall v. Schanz*, 461 Mich 15, 597 NW2d 148 (1999). In contrast, there was no relationship between U-Haul and the criminally reckless driver in this incident that would serve as a bridge to liability for plaintiff's harm.

Further, in the negligent entrustment and negligent maintenance situations, the relationship between the lessor and lessee—bringing with it the ability to control—allows lessors to avoid insurer-like liability. A lessor can avoid negligent entrustment liability by not entrusting its vehicle to someone the lessor knows at the time of the entrustment is incompetent or unqualified to operate the vehicle. See *Perin*, 373 Mich at 539; *Bennett v. Russell*, 322 Mich App 638, 643-44; 913 NW2d 364 (2018). Similarly, a lessor can avoid negligent maintenance claims by properly maintaining its fleet and not entrusting lessees with unsafe vehicles. In contrast, the Court of Appeals' opinion leaves motor vehicle lessors guessing as to the steps that are needed to avoid "negligent leasing" liability. What is clear is that, in cases such as this one, a lessor may face insurer-like liability for harms caused by unknown drivers beyond its control.

This Court should make clear that there is no cause of action for negligent leasing that obligates motor vehicle lessors to protect the public from third parties.

II. APPLYING TRADITIONAL DUTY PRINCIPLES IN THIS CASE SERVES IMPORTANT POLICY INTERESTS

Businesses such as motor vehicle lessors respond rationally to risk. They will invest in cost effective precautions, take out insurance when they can, and avoid activities that cost more in litigation than they offer in revenue. These rational activities require liability that is roughly predictable, so that the business knows which actions to take.

Once a potential defendant's liability depends more on the vagaries of jury sentiment than established law, that predictability is lost. Liability can become too uncertain to insure (or self-insure) cost-effectively. Consumers may be forced to pay inflated prices to cover the cost of litigation and liability—a "tort tax."

It also cannot be forgotten that motor vehicle lessors, such as U-Haul, provide an important service for consumers, but they do not have unlimited funds. Michigan would benefit far more if companies such as U-Haul put their resources toward newer vehicles and frequent maintenance to promote safety, avoidance of price increases on consumers, and wages and benefits for workers than trying to satisfy the undefined duty created by the Court of Appeals. See *In re Certified Question*, 479 Mich at 525 ("[T]he ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of doing so.").

Michigan has recognized that limiting the liability of motor vehicle lessors is sound policy. Under MCL 257.401(3), motor vehicle lessors are vicariously liable when permissive users are negligent and cause accidents injuring others, but damages are generally capped at $20,000 for each injured person to a maximum of $40,000 for each accident. The Legislature capped motor vehicle lessors' liability under MCL 257.401(3) to reduce the industry's insurance and operation costs. See *Phillips v. Mirac, Inc.*, 470 Mich 415, 435; 685 NW2d 174 (2004).

The Legislature sought to relieve motor vehicle lessors from unlimited and unpredictable liability to help foster the industry's growth. See *DeHart*, 239 Mich App at 186. The Legislature also appreciated that lowering lessors' costs would "increase[] the number of providers from which Michigan consumers may choose" and may "enhance automobile sales for our leading domestic industry as more lessors transact business in the state." *Phillips*, 470 Mich at 435.

The importance of protecting motor vehicle lessors from unreasonable liability also led Congress to enact a federal law called the Graves Amendment, 49 USC 30106. The Graves Amendment provides that motor vehicle lessors cannot be held vicariously liable for the negligence of their customers.[2] As the Eleventh Circuit explained in upholding the constitutionality of the Amendment:

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[2] The Graves Amendment provides in relevant part:

> (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

> It is plain that *the rental car market has a substantial effect on interstate commerce*. It is also apparent that Congress rationally could have perceived strict vicarious liability for the acts of lessees as a burden on that market. The reason it could have done so is that *the costs of strict vicarious liability against rental car companies are borne by someone, most likely the customers, owners, and creditors of rental car companies. If any costs are passed on to customers, rental cars—a product which substantially affects commerce and which is frequently an instrumentality of commerce—become more expensive,* and interstate commerce is thereby inhibited.

Graves v. Vanguard Rental USA, Inc., 540 F3d 1242, 1253 (11th Cir. 2008) (internal footnote omitted) (emphasis added); see also *id.* at 1253 n.6 (the law's proponents "perceived vicarious liability as a burden on consumers."); *Jasman v. DTG Operations, Inc.*, 533 F Supp 2d 753, 757 (W.D. Mich. 2008) ("the Graves Amendment 'unquestionably affect[s] the channels of interstate commerce….'") (citation omitted).

These policy considerations support rejection of a duty in this case. Given the importance of the motor vehicle leasing industry, and the policy of Michigan

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> 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).

49 USC 30106(a).

and federal law to limit liability for motor vehicle lessors, it is illogical to conclude that the Legislature would protect the industry from unlimited liability under MCL 257.401(3) for accidents by authorized drivers over whom lessors have a duty relationship and some control, yet leave lessors exposed to unlimited liability for accidents by unauthorized drivers over whom they have no control.

CONCLUSION

For these reasons, the U.S. Chamber requests that the Court grant U-Haul's Application for Leave to Appeal and reverse the Court of Appeals' decision.

Respectfully submitted,

Dated: September 18, 2019

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