COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

RICHARD HELMS, ET AL.	:	
Plaintiffs	:	**CASE NO. 2020 CVC 00419**
vs.	:	**Judge McBride**
AARON J. MANTER, ET AL.	:	**DECISION/ENTRY GRANTING JOHN 3:16 AUTO SALES, LTD.'S MOTION FOR SUMMARY JUDGMENT**
Defendants	:	

Thomas A. Sweeney and Olivia Amlung, counsel for the plaintiffs Richard Helms and Kelli Helms, executrix of the Estate of Joyce D. Helms, 40 West Pike Street, Covington, Kentucky 41011.

William M. Cussen, counsel for the defendant Aaron J. Manter, as administrator of the Estate of Christian L. Spivey, 600 Vine Street, Suite 800, Cincinnati, Ohio 45202.

Brian T. Winchester and Chad A. Schmitt, counsel for the defendant John 3:16 Auto Sales, Ltd., 4608 St. Clair Avenue, Cleveland, Ohio 44103.

This cause is before the court for consideration of the motion for summary judgment filed by the defendant John 3:16 Auto Sales, Ltd. on June 22, 2020. Following the completion of additional discovery pursuant to Civ.R. 56(F), none of the parties requested oral argument, and the court took the motions under advisement on February 4, 2021.

Upon consideration of the motion, the written arguments of counsel, the record of the case, the evidence submitted for the court's consideration, and the applicable law, the court renders this written decision.

UNDISPUTED FACTS

The complaint stems from allegations arising from a fatal vehicle collision. On June 7, 2019, the plaintiff Richard Helms was driving on Beechwood Road, with his wife Joyce Helms being a

passenger in the vehicle.[1] Christian Spivey was traveling in his Honda Element vehicle southbound on Beechwood Road when, according to the plaintiffs, he failed to properly turn at a curve in the road.[2] Spivey's vehicle collided with the Helms' vehicle head-on.[3] Spivey and Joyce Helms did not survive.[4] The plaintiff Richard Helms sustained significant injuries from the collision.[5]

The defendant John 3:16 Auto Sales, Ltd. (hereinafter referred to as "John 3:16") owned Spivey's vehicle, which it had leased to him.[6] Josh Frisby owns John 3:16.[7] John 3:16 is in the business of leasing, renting, and selling automobiles.[8]

John 3:16 either employed Spivey as an employee or used him as an independent contractor.[9] Spivey's main job was changing car tires in the car lot.[10] John 3:16 also employs Stormy Bonea, who is Spivey's sister, as an administrative secretary and/or sales person.[11] At the time of the collision, Bonea insured the Honda Element that Spivey was leasing.[12]

In spite of the lease agreement with Spivey, John 3:16 claims that at the time of the accident, it had no control or right to control Spivey's vehicle.[13] John 3:16 also maintains that Spivey was not acting as its employee or agent,[14] and it had no reason to believe that Spivey was an incapable or incompetent driver.[15]

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[1] Am. Compl., ¶ 8.
[2] Am. Compl., ¶¶ 9-10; J. Frisby Dep., pg. 29 (Dec. 23, 2020).
[3] Am. Compl., ¶ 12; J. Frisby Dep., pgs. 24-25.
[4] Am. Compl., ¶ 12.
[5] Am. Compl., ¶ 15.
[6] J. Frisby Aff., ¶ 4; J. Frisby Dep., pgs. 24-25; Ex. A to Frisby Dep.
[7] J. Frisby Dep., pg. 9.
[8] J. Frisby Dep., pg. 22.
[9] Defs. Mot., pg. 7; J. Frisby Dep., pgs. 43-44.
[10] J. Frisby Dep., pgs. 46-47; Ex. B to J. Frisby Dep.
[11] J. Frisby Dep., pgs. 14-15; S. Bonea Dep., pg. 6 (Dec. 28, 2020).
[12] S, Bonea Dep., pgs. 20, 65-66.
[13] J. Frisby Aff., ¶ 5.
[14] J. Frisby Aff., ¶ 6.
[15] J. Frisby Aff., ¶ 9; J. Frisby Dep., pgs. 64-65.

PROCEDURAL BACKGROUND

On May 8, 2020, the plaintiffs Richard Helms and Kelli Helms, executrix of the Estate of Joyce Helms, filed suit against the defendants Aaron J. Manter, administrator of the Estate of Christian L. Spivey, deceased (hereinafter referred to as the "Spivey Estate"), and John 3:16. The complaint included causes of action for (1) negligence against the Spivey Estate, (2) negligence *per se* against the Spivey Estate, (3) negligent entrustment against John 3:16, (4) *respondeat superior* against John 3:16, and (5) wrongful death against both defendants.

John 3:16 filed its answer on June 8, 2020. The Spivey Estate filed its answer on June 10th. On June 22nd, John 3:16 filed a motion for summary judgment as to the claims against it. In support of the motion, it submitted an affidavit from Frisby.

On June 30, 2020, the plaintiffs filed a response in opposition requesting that the court deny the motion for summary judgment, or alternatively, grant them a Civ.R. 56(F) continuance to conduct discovery. That same day, the plaintiffs served discovery requests upon John 3:16. On July 20th, the defendant John 3:16 filed a reply in support of its motion.

By way of an agreed order, filed on October 14, 2020, the court granted leave to the plaintiffs to file an amended complaint to remedy a defect in the attorney signature line of the original complaint. Because the only difference between the original complaint and amended complaint was the signature line, the court ordered that the first amended complaint was deemed answered by the defendants' prior answers. That same day, the plaintiffs filed a first amended complaint, which corrected the above error.

None of the parties requested oral argument, and the court took the motions under advisement on October 12, 2020. On November 2, 2020, the court granted the plaintiffs' Civ.R. 56(F) motion, and permitted the parties to engage in additional discovery.

On January 21, 2021, John 3:16 filed a motion for leave to amend its motion for summary judgment. In it, John 3:16 posits that it errantly referred to Spivey as an employee in its original summary judgment motion. It points to portions of the record to demonstrate that, contrary to its characterization of Spivey as an employee, it contests whether he was an employee or independent contractor.

On January 26, 2021, the plaintiffs filed a supplemental response in opposition to John 3:16's motion for summary judgment. In addition to maintaining that genuine issues of material facts exist preventing summary judgment, the plaintiffs argue that the court should not allow John 3:16 to amend its original motion. The plaintiffs argue that the motion to amend is untimely and immaterial to the outcome of the summary judgment motion.

On February 2, 2021, John 3:16 filed a reply in support of its motion. None of the parties requested oral argument on the motion. The court took the motion under advisement on February 4, 2021.

LEGAL STANDARD

The court must grant summary judgment, as requested by a moving party when:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."[16]

[16] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

The court must view the evidence in a light most favorable to the nonmoving party.[17] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[18] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[19]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[20] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[21]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[22] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[23] "To this end, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment."[24] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[25]

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[17] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

[18] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

[19] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

[20] Id. at 251-52.

[21] Id. at 250.

[22] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

[23] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

[24] *Heard v. Dayton View Commons Homes*, 2d Dist. No. 27706, 2018-Ohio-606, 106 N.E.3d 327, ¶ 7, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996).

[25] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains.[26] The duty of the nonmoving party is more than that of resisting the motion's allegations.[27] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[28] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[29] It may not rely on the pleadings or unsupported allegations.[30]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[31] The trial court maintains the sound discretion to admit or exclude relevant evidence.[32] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[33]

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[34] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information

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[26] *Dresher*, 75 Ohio St.3d at 293.
[27] *Wells Fargo*, 2013-Ohio-855 at ¶ 25.
[28] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[29] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[30] Id.
[31] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[32] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.
[33] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).
[34] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

or hearsay."[35] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[36] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[37]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[38] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[39]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."[40] If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[41]

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[42] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[43]

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[35] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[36] Id., citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[37] Id.
[38] Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[39] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist. 1989).
[40] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).
[41] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[42] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[43] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

LEGAL ANALYSIS

A. PRELIMINARY ISSUES

There are two preliminary issues the court must address before examining the merit of John 3:16's motion. First, John 3:16 filed a motion for leave to amend its motion for summary judgment. John 3:16 claims that it errantly referred to Spivey as an employee in its summary judgment motion. It then highlights portions of the record wherein it contests that Spivey was an employee.

The plaintiffs filed a supplemental response in opposition to John 3:16's motion for summary judgment. They object to John 3:16's motion to amend on the basis that it is untimely and immaterial to the outcome of the summary judgment motion.

The court agrees that this fact is immaterial to the outcome of the motion for summary judgment. Finding no prejudice to the plaintiffs in allowing John 3:16 to correct its typographical error, the court overrules the plaintiffs' objection and grants John 3:16's motion to amend.

Second, both sides have cited to evidence that is not properly before the court on summary judgment. John 3:16 submitted additional evidence attached to its reply in support. The new evidence is an affidavit from Frisby and proof of Spivey's insurance. Per Civ.R. 56(C), a summary judgment movant must file its evidence with its motion. Since John 3:16's newly submitted evidence was filed with its reply, after the plaintiffs filed their response, it shall not be considered.

The plaintiffs also cite to evidence outside the parameters of Civ.R. 56(C). In their supplemental response in opposition, they refer to alleged traffic violations that Spivey was convicted of in a different court case. However, they did not submit these court documents as part of a properly framed affidavit.[44] Although it is also "axiomatic that a trial court may take judicial

[44] *Martin*, 70 Ohio App.3d at 89.

notice of its own docket[,]"[45] this matter was not before the court. "[C]ourts have said that a trial court cannot take judicial notice of court proceedings in another case and may not take judicial notice of prior proceedings in the court even if the same parties and subject matter are involved; a court may take judicial notice of only the court proceedings in the immediate case."[46] As such, the court shall not consider this information.

B. MERIT OF MOTION FOR SUMMARY JUDGMENT

John 3:16 maintains that the plaintiffs' causes of action against it are supplanted by federal preemption under the Graves Amendment.[47] "Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision."[48] When "the statute contains an express pre-emption clause," applying the clause "must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."[49]

State law is also preempted "when [it] conflict[s] with federal law."[50] "Conflict preemption occurs when compliance with both federal and state laws is impossible, and when a state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[51] "What is a sufficient obstacle is a matter of judgment, to be informed by examining the

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[45] *Whitehead v. Skillman Corp.*, 12th Dist. Butler No. CA2014-03-061, 2014-Ohio-4893, ¶ 8, quoting *Indus. Risk Insurers v. Lorenz Equip. Co.*, 69 Ohio St.3d 576, 580 (1994).
[46] *Mansour v. Croushore*, 194 Ohio App. 3d 819, 824, 2011-Ohio-3342, 958 N.E.2d 580, ¶ 18 (12th Dist.), citing *Charles v. Conrad*, 12th Dist. Franklin No. 05AP-410, 2005-Ohio-6106, ¶ 26.
[47] Because the Graves Amendment has not been interpreted by any Ohio state court, this court has examined persuasive cases from other state and federal jurisdictions.
[48] *Arizona v. United States*, 567 U.S. 387, 399, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012).
[49] *CSX Trans., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993).
[50] *Arizona*, 567 U.S. at 399.
[51] *Keller v. City of Fremont*, 719 F.3d 931, 940 (8th Cir. 2013), quoting *Arizona*, 567 U.S. at 399, 132 S.Ct. 2492.

federal statute as a whole and identifying its purpose and intended effects[.]"[52] "In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress."[53]

In 2005, the United States Congress passed 49 U.S.C. 30106, referred to as the Graves Amendment. The Graves Amendment ordinarily preempts state law vicarious liability of owners of motor vehicles who are in the business of renting or leasing motor vehicles if a motor vehicle is involved in an accident through no fault of the owner-renter or owner-lessor.[54] The Graves Amendment contains an express preemption clause.[55]

The Graves Amendment was adopted by Congress primarily to deregulate the auto rental and leasing industry by "eliminating state-imposed laws and lawsuits Congress reasonably believed to be a burden" on the industry.[56] The Graves Amendment extended deregulation previously enacted for the airline industry, and then the trucking industry, to the auto rental and leasing industry.[57] As a result, the Graves Amendment "precludes the imposition of liability of an entity engaged in the trade or business of renting or leasing motor vehicles solely as a result of the ownership of the vehicle in question."[58]

The Graves Amendment, codified in 49 U.S.C. 30106, provides as follows:

> "**(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—

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[52] *Crosby v. Nat'l. Foreign Trade Council*, 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000).
[53] (Internal quotations omitted). *Arizona*, 567 U.S. at 400.
[54] *Stratton v. Wallace*, W.D.N.Y. No. 11-CV-74-A, 2016 WL 3552147, *1 (Apr. 5, 2016).
[55] *Subrogation Div. Inc. v. Brown*, 446 F.Supp.3d 542, 551 (D.S.D. 2020).
[56] *Stratton*, 2016 WL 3552147 at *1, quoting *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1252 (11th Cir. 2008).
[57] *Stratton*, 2016 WL 3552147 at *1, quoting *Dan's City Used Cars, Inc. v. Pelkey*, 133 S.Ct. 1769, 1778 (2013).
[58] *Buzzerd v. Flagship Carwash of Port St. Lucie, Inc.*, M.D.Pa. No. 3:06-0981, 2009 WL 10685457, *2 (Sept. 28, 2009).

> (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)."[59]

The Graves Amendment, 49 U.S.C. 30106, "limits vicarious liability for owners of vehicles that are involved in accidents caused by the negligence of the lessee of the vehicle. However, in order to avoid liability, the owner of the vehicle must establish the absence of negligence on * * * its part * * *."[60] "The Graves Amendment was enacted to limit vicarious liability for companies in the business of renting or leasing vehicles and who could not prevent a lessee from driving a vehicle to a state which might hold a vehicle owner strictly liable for the negligence of the driver."[61] "Stated another way, the Graves Amendment does not exempt a lessor from liability for its own negligent acts—the exemption only applies to the negligent acts of a lessee."[62]

Section 30106(a)(2) has been described as "a savings clause which allows an owner of a leased vehicle to be found directly liable for the owner's negligence or criminal wrongdoing"; however, the clause is "rarely applicable and should be cautiously applied in light of Congress' clear intent to forestall suits against vehicle leasing companies."[63]

The plaintiffs in the instant case do not dispute that John 3:16 was engaged in the business of renting and leasing motor vehicles, and the undisputed facts demonstrate as much. Thus, the question is whether the plaintiffs have asserted an actionable *direct* negligence claim against John 3:16; if so, preemption is inapplicable pursuant to 49 U.S.C. 30106(a)(2) because a direct negligence claim falls within the savings clause.

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[59] 49 U.S.C. 30106(A).
[60] *Parker v. Miller*, S.D.Ohio No. 2:16-CV-1143, 2018 WL 2268146, *1 (Apr. 12, 2018).
[61] *Parker v. Miller*, S.D.Ohio No. 2:16-CV-1143, 2018 WL 898981, *3 (Feb. 15, 2018), citing *Stratton v. Wallace*, No. 11-CV-74-A HKS, 2014 WL 3809479, at *6 (W.D.N.Y. Aug. 1, 2014).
[62] *Carton v. Gen. Motors Acceptance Corp.*, 639 F.Supp.2d 982, 995 (N.D.Iowa 2009).
[63] *Guinn v. Great W. Cas. Co.*, W.D. Okla. No. CIV-09-1198-D, 2010 WL 4811042, *4 (Nov. 19, 2010), quoting *Carton v. General Motor Acceptance Corp.*, 611 F.3d 451, 457 (8th Cir.2010).

The three claims that the plaintiffs have asserted against John 3:16 – negligent entrustment, *respondeat superior*, and wrongful death – have all been found to be preempted by the Graves Amendment and not subject to its savings clause. "Courts have found that the Graves Amendment savings clause (49 U.S.C. § 30106(a)(2)) only applies 'to claims predicated on criminal wrongdoing and negligent maintenance claims – not claims of negligent entrustment.'"[64] Thus, the claim of negligent entrustment is barred under the Graves Amendment.[65] Further, "courts regularly apply the Graves Amendment to bar vicarious liability claims against business renting and leasing vehicles."[66] "[T]he most common form of derivative or vicarious liability is that imposed by the law of agency, through the doctrine of *respondeat superior*."[67] Hence, the Grave Amendment also preempts a claim of *respondeat superior*. Likewise, courts have found that the Graves Amendment preempts wrongful death claims.[68]

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[64] *Moran v. Ruan Logistics*, S.D.Ohio No. 1:18-CV-223, 2018 WL 4491376, *4 (Sept. 19, 2018), citing *Dubose v. Transp. Enter. Leasing, LLC*, 2009 WL 210724, * 5 (M.D. Fla. Jan. 27, 2009).

[65] *Moran*, 2018 WL 4491376 at *4. *See Carton*, 639 F.Supp.2d at 996 (dismissing the vicarious liability claims against the defendant-lessor where the complaint failed to assert that the defendant-lessor committed any criminal acts or was negligent in maintaining the vehicle).

[66] *Moran*, 2018 WL 4491376 at *5, citing *Moye v. Avis Budget Group*, 2015 WL 410515, *2 (D. Md. Jan 27, 2015). *See Hack v. SAI Rockville L, LLC*, D. Md. No. WDQ–14–1985, 2015 WL 795853, *4 (Feb. 24, 2015), quoting *Green v. Toyota Motor CreditCorp*, 605 F.Supp.2d 430, 434 (E.D.N.Y.2009) ("It is well settled that the Graves Amendment 'bar[s] recovery against car rental and leasing companies based on vicarious liability.'").

[67] *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶ 20, quoting *Albain v. Flower Hosp.*, 50 Ohio St.3d 251, 255, 553 N.E.2d 1038 (1990), overruled on other grounds by *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 444-445, 628 N.E.2d 46 (1994).

[68] *See Guinn*, 2010 WL 4811042 at *8 (finding a wrongful death claim preempted by the Graves Amendment because it sought to hold the owner of a vehicle vicariously liable as a commercial lessor for the negligence of its lessee and/or a third party); *Garcia*, 540 F.3d 1242 (wrongful death claims against Florida motor vehicle lessor were clearly within scope of Graves Amendment's preemption clause; lessor was in rental car business, owned rental car driven by allegedly negligent motorist and leased it to him, accident occurred during lease period, and plaintiffs sought to recover solely under vicarious liability theory. *Cf. Guinnane v. Dobbins*, D. Mont. No. CV 19-85-M-DWM, 2020 WL 4719099, *3 (Aug. 13, 2020) (in wrongful death action against, among others, a vehicle's owner, fell outside of the purview of 49 U.S.C. 30106 because the plaintiffs alleged the defendant-owner engaged in negligent maintenance of the vehicle involved in the accident).

Even so, the plaintiffs maintain that the Graves Amendment savings clause, 49 U.S.C. 30106(a)(2), is applicable because John 3:16 was *per se* negligent by in entrusting its vehicle to Spivey.[69] As stated above, negligent entrustment claims are barred under the Graves Amendment, and the particular facts involved in this case compel the same result. Here, the plaintiffs assert that R.C. 4507.212 and R.C. 4509.101 required Spivey to maintain insurance on the leased vehicle, but there is no evidence in the record that he did so.[70] The plaintiffs argue:

> "Thus, Spivey's failure to maintain insurance on the vehicle rendered him unqualified to operate the same and posed a great risk to other innocent drivers – such as the Helms family – in the event of an accident. And, John 3:16's entrustment of the vehicle to Spivey – aware that he did not provide proof of any insurance – is a direct violation of R.C. § 4509.101 [*sic*] and per se display of negligence."[71]

Courts have considered the plaintiffs' argument in the context of the Graves Amendment and found it unavailing. For example, in *Escaleria v. Powell*, 44 Conn. L. Rptr. 468 (Conn.Super.Ct. 2007), the plaintiff asserted a negligence claim against the defendant-lessor for injuries that the plaintiff allegedly sustained during an automobile collision caused by the driver of a vehicle rented from a defendant-lessor. In his complaint, the plaintiff alleged that his "injuries and damages were caused by [the defendant-lessor's] negligence and carelessness because it failed to ensure that [the driver] maintained adequate automobile insurance coverage for the duration of all rental agreement periods."[72] The defendant-lessor moved to strike the claim. The court granted the motion, explaining:

> "* * * the motor vehicle accident and the resulting injuries and damages was caused, if at all, by the negligent operation of a third party ([the driver] Powell), not by virtue of Choice's [the lessor's] negligence in failing to assure that the third party had insurance coverage. The necessary relationship between Choice's negligence in assuring insurance coverage, and the direct cause, i.e. the alleged

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[69] Pls. Supp. Resp., pg. 3.
[70] Pls. Supp. Resp., pg. 4. The record indicates that his sister, Stormy Bonea, maintained insurance on the Honda element.
[71] Pls. Supp. Resp., pgs. 4-5.
[72] *Escaleria v. Powell*, 44 Conn. L. Rptr. 468 (Conn.Super.Ct. 2007).

> negligence of [the driver's] operation of a motor vehicle, is lacking. Imposing liability on Choice in this situation would hold it accountable for limitless unforeseen consequences of a third party's actions. Therefore, even if an alleged duty existed and construing the complaint in favor of [the plaintiff], the lack of proximate cause renders her negligence claim insufficient."[73]

Other courts examining claims against a lessor predicated upon a lack of the lessee's insurance in the context of the Graves Amendment have reached the same result.[74] Courts applying the Graves Amendment also reach the same conclusion when the negligence is alleged to stem from a lessor's failure to investigate a lessee's driving records.[75]

Although the above cases are only persuasive authority, Twelfth District Court of Appeals precedent concerning the type of negligence the plaintiffs allege leads this court to follow the same guidance. As cited above, courts apply the Graves Amendment to preempt negligence claims against lessors that are based on a failure of the lessee to carry insurance on the vehicle.

Similarly to *Escaleria*, in *Hundemer v. Partin*, 12th Dist. Clermont No. CA2007-01-006, 2007-Ohio-563, the plaintiff was injured in a collision by a person who had only put a down payment on a car but had not completed purchasing the car. The person who still owned the car no longer carried insurance on the car. The plaintiff argued that the owner should be liable under negligence *per se* because R.C. 4509.101(A)(1) provides that a person who owns a car is required to maintain insurance

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[73] Id. at 470.

[74] *Dubose v. Transport Ent. Leasing, LLC*, M.D.Fla. No. 6:08-cv-385-Orl-31DAB, 2009 WL 210724, *4 (Jan. 27, 2009) ("[U]nless a State specifically imposes a legal duty on lessors to ensure that their lessees maintain adequate insurance or to ensure that their lessees have adequate driving records, § 30106(a)(2) only appears to apply to claims predicated on criminal wrongdoing and negligent maintenance claims—not claims of negligent entrustment").

[75] *See Vedder v. Cox*, 18 Misc.3d 1142(A), 859 N.Y.S.2d 900 (N.Y. 2008) (finding no evidence or legal basis from which to conclude that rental company had a duty to investigate the driving record of a defendant who had a "history of suspended driving privileges," particularly without proof that the company rented the vehicle to the defendant "during a time that his driving privileges were suspended"); *Sigaron v. Elrac, Inc.*, No. 350273-2008, 2008 WL 5381494, *6 (N.Y.Sup.Ct. Dec. 23, 2008) (in deciding whether the defendant fell into the Graves Amendment's savings clause, it found a failure to state a cause of action when "[p]laintiffs failed to cite any legal authority that ELRAC was under an obligation to check Fernandez's driver's record beyond verifying that he had a valid driver's license").

on the car. The court observed that the plaintiffs suffered tragic injuries to person and tangible property as a result of the driver's negligence. However, the owner's "failure to maintain financial responsibility insurance on the automobile was not the efficient cause of [the plaintiffs'] injury and had no causal connection with it."[76] As such, a negligence per se claim against the owner failed.[77]

Likewise, the plaintiffs here have argued that Spivey's noncompliance with R.C. R.C. 4509.101 means that John 3:16 is liable for negligence *per se* in entrusting its vehicle to Spivey.[78] However, the Twelfth District Court of Appeals has found that a vehicle owner would not be liable under these facts. Thus, even if the court set aside other federal and non-Ohio state case law concluding that the Graves Amendment preempts the three specific causes of action at issue here, the court would still reach the same conclusion that the savings clause in the Graves Amendment is not triggered. To trigger the savings clause in the Graves Amendment, the defendant must have engaged in criminal conduct or direct negligence. The plaintiffs allege that the savings clause applies because Spivey's failure to maintain insurance violated R.C. 4509.101, and thus John 3:16 made a "per se display of negligence,"[79] but the Twelfth District Court of Appeals has found that this is not actionable negligence. As a result, there is no direct negligence here that would bring the plaintiffs' claims against John 3:16 within the ambit of the savings clause. Therefore, the Graves Amendment preempts the plaintiffs' claims against John 3:16.

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[76] *Hundemer v. Partin*, 12th Dist. Clermont No. CA2007-01-006, 2007-Ohio-563, ¶ 20, citing *Gulla v. Straus*, 154 Ohio St. 193, 198, 93 N.E.2d 662 (1950).

[77] *See Cohen v. Hohenfeld Kramer*, 8th Dist. Cuyahoga No. 83517, 2004-Ohio-2397, citing R.C. 4509.101(A)(1). (Injured motorist's allegation that former owner of other automobile involved in motor vehicle accident negligently permitted automobile to be driven without insurance coverage, in violation of statute governing operation of motor vehicles, failed to state a cause of action against former owner; any violation of such statute was not a proximate cause of the damage suffered by motorist).

[78] Pls. Supp. Resp., pg. 5.

[79] Pls. Supp. Resp., pg. 5.

CONCLUSION

For the foregoing reasons, the court finds that the defendant John 3:16 Auto Sales, Ltd.'s motion for summary judgment is well-taken and is hereby granted.

IT IS SO ORDERED.

DATED: 6-3-21

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Decision/Entry were e-mailed on this 4th day of June 2021 by e-mail to Olivia Amlung, at OAmlung@aswdlaw.com, and Thomas A. Sweeney, at sweeney@sweeneyandfiser.com, Attorneys for the Plaintiffs, to William M. Cussen, Attorney for the Defendant Aaron J. Manter, as Administrator of the Estate of Christian L. Spivey, at wmcussen@mimlaw.com, and to Brian T. Winchester, Attorney for the Defendant John 3:16 Ltd, at btw@msablaw.com.

Judicial Assistant to Judge McBride