SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 19832

DONNA L. SOTO, Administratrix of the
Estate of Victoria L. Soto, et al.,
Plaintiffs-Appellants,

v.

BUSHMASTER FIREARMS
INTERNATIONAL, LLC, a/k/a, et al.,
Defendants-Appellees.

BRIEF OF AMICI CURIAE PROFESSORS NORA FREEMAN ENGSTROM, ALEXANDRA D. LAHAV, ANITA BERNSTEIN, JOHN J. DONOHUE, III, MICHAEL D. GREEN, GREGORY C. KEATING, JAMES KWAK, DOUGLAS KYSAR, STEPHAN LANDSMAN, ANTHONY J. SEBOK, W. BRADLEY WENDEL, JOHN FABIAN WITT, AND ADAM ZIMMERMAN WITH ATTACHED APPENDIX (A1-A11)

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STATEMENT OF INTEREST OF THE AMICI CURIAE

Amici are law professors at schools throughout the United States. We have no personal interest in the outcome of this case. Rather, we have a professional interest in seeing tort law develop in a way that is consistent with accepted common law principles and in keeping with tort's aims of compensation, deterrence, and corrective justice. The issues addressed by this amicus curiae brief—namely, the scope of the common law tort "negligent entrustment" and whether the common law of torts adapts to broad changes in society—present classic questions of law in which we have deep professional interests.[1]

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[1] No one other than the undersigned wrote or funded any portion of this brief. Institutional affiliations are given for identification purposes only. This case involves a wide range of issues. Amici, as experts on common law torts, focus on only two issues germane to our particular expertise: (1) the scope of common law negligent entrustment liability, and (2) the common law's capacity to evolve and adapt, in response to changing societal circumstances.

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SUMMARY OF ARGUMENT

Plaintiffs' complaint alleges that defendants, through their actions, carelessly facilitated Adam Lanza's acquisition of a weapon of war, thereby enabling the slaughter of twenty first-grade children and six adults. This allegation states a claim for negligent entrustment as that common law tort is properly construed; a rigid or formulaic analysis is not required. Alternatively, to the extent it must adapt existing law in order to endorse plaintiffs' cause of action, this Court should do so, recognizing that the common law's "genius" is its "flexibility" and capacity for "adaptation." *State v. Skakel*, 276 Conn. 633, 691 (2006) (internal quotation marks omitted).

ARGUMENT

I. NEGLIGENT ENTRUSTMENT IS SIMPLY A FOCUSED APPLICATION OF BASIC NEGLIGENCE PRINCIPLES, ALLOWING A COURT TO IMPOSE LIABILITY WHERE THE DEFENDANT PAVES THE WAY FOR A TRULY RECKLESS INDIVIDUAL TO INFLICT SERIOUS INJURY ON THE PUBLIC.

The theory of negligent entrustment has been available for more than a century, and it is broadly accepted in Connecticut and throughout the United States. At its "essence," the doctrine creates liability whenever the defendant "pave[s] the way for a truly reckless individual" to impose "serious risks of injury on the public at large." Robert L. Rabin, *Enabling Torts*, 49 DePaul L. Rev. 435, 439 (1999). When an individual or entity acts in such a way that he or she actively, negligently, and foreseeably facilitates a third party's infliction of serious harm, traditional tort principles support liability. *Id.*

A. As in Negligence Cases Generally, Liability May Be Imposed When the Defendant Failed to Take Reasonable Precautions Given the Magnitude of the Apparent Risk.

The negligent entrustment tort boils down to one question: In entrusting his property to another, did the defendant take adequate precautions given the magnitude of the foreseeable risk? Courts have necessarily looked to various factors in answering this

question. At times, some have even hardened their chosen factors, turning them into something like prerequisites. This was the mistake made by the trial court in this case. In fact, the doctrine of negligent entrustment is best understood not as some exotic creature, with its own elaborate requirements and fussy demands, but as a focused application of basic and familiar tort law principles. *See Ransom v. City of Garden City*, 743 P.2d 70, 75 (Idaho 1987) ("[T]he negligent entrustment rule is nothing more than a particularized application of general tort principles."); *Moning v. Alfono*, 254 N.W.2d 759, 768 (Mich. 1977) ("The doctrine of negligent entrustment is . . . an ordinary application of general principles for determining whether a person's conduct was reasonable in light of the apparent risk.").

The *Restatement (Third) of Torts* endorses this view. It provides: "The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of . . . a third party." Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 19 (2010).[2] According to the *Third Restatement*, when D actively facilitates T's injury to P—as the plaintiffs allege that defendants did here—no special rules are required.[3]

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[2] Though the words "negligent entrustment" are not used, there is no doubt that the ALI means to refer to the tort of negligent entrustment. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 19 cmt. e (2010) ("This Section addresses conduct by defendants that increases the likelihood that the plaintiff will be injured on account of the misconduct of a third party. For example, the defendant's conduct may make available to the third party the instrument eventually used by the third party in inflicting harm . . . .").

[3] This Court has declined to adopt the *Restatement (Third) of Torts: Product Liability* (1998). *Bifolck v. Philip Morris, Inc.*, 324 Conn. 402, 407-08 (2016). This Court, however, has cited the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2010), with approval. *See, e.g., Ruiz v. Victory Props., LLC*, 315 Conn. 320, 335, 351 (2015). Though these authorities have similar names, they are, in fact, distinct. They were published at different times, comprise "discrete projects," and cover different areas of law.

Consistent with this position, numerous courts have taken a flexible, commonsense approach to negligent entrustment claims. As we demonstrate below, courts have permitted plaintiffs to bring negligent entrustment claims (1) in a range of social settings, including when (2) the defendant does not know the identity of the ultimate entrustee, (3) there are multiple entrustments, and (4) the defendant lacked specific knowledge of the entrustee's incompetence.

1. Negligent entrustment is a flexible tort that has been applied to a range of domains, including firearms.

While the tort of negligent entrustment has largely developed around automobiles,[4] courts have also applied the theory in cases involving a wide range of everyday items. *See, e.g.*, *Hardsaw v. Courtney*, 665 N.E.2d 603 (Ind. Ct. App. 1996) (a dog named "Buster"); *Barsness v. Gen. Diesel & Equip. Co.*, 383 N.W.2d 840 (N.D. 1986) (crane); *Moning v. Alfono*, 254 N.W.2d 759 (Mich. 1977) (slingshot); *Hudson-Connor v. Putney*, 86 P.3d 106 (Or. Ct. App. 2004) (golf cart); *Dee v. Parish*, 327 S.W.2d 449 (Tex. 1959) (horse). Relevant for this case, the tort of negligent entrustment also—very frequently—applies to firearms. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 19 cmt. e (2010) ("Most cases of negligent entrustment concern the products of cars and guns."); *see also, e.g., Shirley v. Glass*, 308 P.3d 1 (Kan. 2013); *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200 (Fla. 1997).[5]

See Michael D. Green, *Symposium, Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts*, 37 Wm. Mitchell L. Rev. 1011, 1012 (2011).

[4] This is true of much of tort law, for the simple reason that most tort cases (writ large) are car wreck cases. *See* Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise,"* 61 DePaul L. Rev. 303, 303 (2012) (noting that auto claims account "for the majority of all injury claims and three-quarters of all injury damage payouts").

[5] True, New York has rejected a negligent entrustment claim, as applied to handgun manufacturers. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001), *op. after*

2. Tort of negligent entrustment can apply, even if the defendant does not know the identity of the ultimate entrustee.

Where injury is a sufficiently foreseeable result of an entrustment, courts do not necessarily require that the defendant know the ultimate entrustee's identity. In *Rios v. Smith*, 744 N.E.2d 1156 (N.Y. 2001), for example, the New York Court of Appeals held that liability could be imposed on the owner of two ATVs after he entrusted the vehicles to his son, who, in turn, lent one of them to his sixteen-year-old friend. When that friend subsequently crashed the ATV, the friend's passenger—the eventual plaintiff—suffered severe injuries. A jury found the ATV's owner liable for those injuries under a theory of negligent entrustment, despite the fact that the owner-defendant was not on the property and did not know who would be riding his ATVs on the day in question. The court affirmed the jury's verdict because the defendant "could have clearly foreseen that his son's access to and use of the ATVs could involve riding one of the vehicles while lending the other to a friend and that such use might expose passengers on the ATVs to injury." *Id.* at 1160.

Likewise, in *Moning v. Alfono*, 254 N.W. 2d 759 (Mich. 1977), a twelve-year-old boy lost his eyesight in one eye when he was struck by a pellet fired from a slingshot by his

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certified question, 264 F.3d 21 (2d Cir. 2001). But *Hamilton* is readily distinguishable. *Hamilton*, after all, involved the routine distribution of everyday handguns. Here, plaintiffs instead focus on a narrow class of exceptionally dangerous military-grade assault rifles, specifically marketed to a niche group of civilians. What's more, language in *Hamilton* actually supports plaintiffs' position. In particular, the *Hamilton* court noted that, as the government continues to collect data on handgun sales, evidence could surface that "might alter the duty equation." *Id.* at 1064, n.5. Indeed, the court allowed that "[t]he negligent entrustment doctrine might well support the extension of a duty to manufacturers" if the manufacturers furnished weapons to distributors with actual or constructive knowledge that the distributors were behaving unreasonably. *Id.* at 1064. Here, plaintiffs allege just such conduct. *See, e.g.,* First Am. Compl. ¶¶ 179, 219, 224. *Wood v. O'Neil*, 90 Conn. 497 (1916), is similarly distinguishable because it, too, involved the entrustment of an ordinary shotgun, not an exceptionally dangerous military-grade weapon.

eleven-year-old playmate, Joseph. The boy initiated a negligent entrustment action against not just the slingshot's retailer, but also its manufacturer and wholesaler. The trial court thought this went too far—but the Michigan Supreme Court held otherwise. The court ruled for the plaintiff even though the slingshot's manufacturer and wholesaler did not directly furnish the slingshot to Joseph and were, of course, entirely unaware of his identity. Liability could be imposed because the "manufacturer, wholesaler and retailer of slingshots can be expected to foresee that they will be used to propel pellets and that a person within range may be struck." *Id.* at 765.[6] Indeed, even the dissent in *Moning* is instructive. The dissenting justice worried that the case classified as a "dangerous instrumentality" a more-or-less ordinary children's toy. *Id.* at 777-78 (Fitzgerald, J., dissenting). But even he would presumably agree that a military-grade weapon is the type of dangerous instrumentality that requires the imposition of a duty of care in its distribution.

3. Tort of negligent entrustment can apply, even if there are multiple entrustments.

Relatedly, some courts have imposed liability under a negligent entrustment theory even when, as here, there are multiple entrustments. 57A Am. Jur. 2d *Negligence* § 320 (2017) ("The fact that a case involves two entrustments is not a bar to recovery under the negligent-entrustment theory. . . . [T]he duty of an owner or possessor of a dangerous instrument to entrust the instrument to a responsible person may extend through successive, reasonably anticipated, entrustees."); *Moore v. Myers*, 868 A.2d 954, 966 (Md.

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[6] Similarly, some courts have imposed liability when a defendant inadequately secured property that a third party sneakily gained access to and used to inflict harm. *See, e.g., Gallara v. Koskovich*, 836 A.2d 840 (N.J. Super. Ct. Law Div. 2003) (involving stolen firearms). In these cases, of course, the defendant did not and could not know the thief's identity, but this ignorance is no liability shield.

Ct. Spec. App. 2005) ("It is not necessary that the person furnish the chattel to the entrustee in a direct transfer in order to be found liable.") (internal quotation marks omitted).

In *LeClaire v. Commercial Siding Maintenance Co.*, 826 S.W.2d 247 (Ark. 1992), the existence of multiple entrustments did not defeat plaintiff's claim. There, Commercial Siding entrusted its vehicle to its employee, Garcia, who got drunk and loaned the vehicle to an unnamed driver, who subsequently injured the plaintiff. The Arkansas Supreme Court noted that "[t]he real rub in this case is the fact that it involves two entrustments." *Id.* at 249. But because Commercial Siding could not show that "the injury . . . ought [not] to have been foreseen in the light of the attending circumstances," the claim survived a motion to dismiss. *Id.* at 250 (internal quotation marks omitted).

In *Collins v. Arkansas Cement Co.*, 453 F.2d 512 (8th Cir. 1972), the Eighth Circuit imposed liability following an even more attenuated chain. There, an employee of Arkansas Cement Co. was "carousing around on a Sunday afternoon" (concededly not within the scope of his employment) when he obtained cherry bombs from his employer.[7] *Id.* at 513-14. The employee then gave one of the cherry bombs to Diane McGuire, a fifteen-year-old girl, who gave it to Vicki Collins, age six, in whose hand it exploded. *Id.* at 513. Though Arkansas Cement Co. had no connection whatsoever with Diane, much less Vicki, the Eighth Circuit affirmed the jury's verdict on Vicki's behalf. In rejecting defendant's appeal, the court pointed to defendant's conduct in the face of foreseeable risk: Because Arkansas Cement Co. had "reason to know of the misuse to which the cherry bombs were being put

[7] The court acknowledged that it was "not clear . . . whether [the employee] received these particular bombs from the foreman or took them off the dock" and found that the "only basis" on which plaintiff could recover was negligent entrustment. 453 F.2d at 513-14.

and the possible tragic results upon such instrumentalities coming into the hands of children, especially those of a tender age," liability could be properly imposed. *Id.* at 515.

4. Tort of negligent entrustment can apply, even where the defendant lacks specific knowledge of the direct entrustee's incompetence.

Finally, there is some support for the commonsense proposition that liability may be imposed even if the defendant lacks specific knowledge of the entrustee's incompetence, as long as the circumstances attending the entrustment present a high probability of serious harm. *See, e.g.*, *Rios*, 744 N.E.2d at 1160 (imposing liability while focusing not on the entrustee's incompetence, but rather on the danger of all-terrain vehicles, which "could attain speeds of 20 to 30 miles per hour" and were to be driven on "approximately 40 acres of rural property"); *Collins*, 453 F.2d at 512 (imposing liability while focusing not on the employee's incompetence, but rather on the ease with which his employer entrusted him with a highly dangerous exploding device); *Short v. Ross*, 2013 WL 1111820, at *4, *10 (Conn. Super. Ct. Feb. 26, 2013) (denying motion to strike based on the "proposed usage" of the dangerous instrumentality, rather than any individual characteristic of the entrustee, despite the defendant's argument that the plaintiff had failed to allege it "knew or had reason to know that [the enstrustee] was incompetent").

B. Because Negligent Entrustment Cases Are Simply a Specific Application of Basic Negligence Principles, Courts Should Engage in a Familiar Liability Inquiry, Weighing the Probability and Gravity of Harm Against the Burden of Precautions.

As explained above, what we call "negligent entrustment" is merely a focused application of basic tort principles for determining whether a defendant's affirmative conduct was reasonable in light of the foreseeable risk and consequent injury. This means that, as in tort cases generally, negligent entrustment liability depends on whether the defendant took adequate precautions in light of the risk's probability and gravity. *United States v.*

Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (reasoning that "if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [is] less than PL"); Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 19 cmt. d (2010) (explaining that liability for negligent entrustment depends on the "foreseeable likelihood of improper conduct on the part of the . . . third party," the "severity of the injury that can result if a harmful episode occurs," and the "burden of precautions available to the defendant that would protect against the prospect of improper conduct by the . . . third party").

Because courts balance the probability and gravity of harm (P x L) against the burden of precautions (B), when "the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less." W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 31, at 171 (5th ed. 1984). When harm is grave and "it could easily have been prevented by the defendant, a lesser degree of foreseeability may be sufficient to impose liability." *Vendrella v. Astriab Family Ltd. P'ship*, 311 Conn. 301, 332 (2014). And, as the gravity and probability of the harm *both* increase, the precautions the defendant must take also increase, concomitantly. Conn. Judicial Branch Civil Jury Instructions § 3.6-4 (2008) ("It is common sense that the more dangerous the circumstances, the greater the care that ought to be exercised.").

Applying these familiar principles, the question is whether a jury could find that defendants should have foreseen that aggressively marketing this weapon to the narrow class of civilians who are attracted to military-grade weapons (and whom defendants knew or should have known lacked the proper training or supervision to handle such weapons) might result in death or injury to innocent persons—and whether defendants took adequate

precautions in the face of this apparent risk.[8] In so doing, the jury must first assess the gravity of the danger posed by AR-15s. *Cf. Moning*, 254 N.W.2d at 771 (weighing the risk of slingshots and recognizing that they "cause hundreds of serious injuries each year to school age children"). Next, the jury must assess the probability of harm, considering the weapons' deadly track record. *See* Mark Follman, et al., *More Than Half of Mass Shooters Used Assault Weapons and High-Capacity Magazines*, Mother Jones (Feb. 27, 2013) (counting thirty-three mass shootings in the U.S. between 1982-2012 in which the shooter used an assault weapon or high-capacity magazine). Finally, the jury must determine whether, given the extraordinary, grave, and obvious danger posed by AR-15s, the defendants took sufficient care to prevent these weapons from falling into the wrong hands.

II. EVEN IF PLAINTIFFS DO NOT STATE A CLAIM FOR NEGLIGENT ENTRUSTMENT AS THAT TORT HAS TRADITIONALLY BEEN CONSTRUED, THIS COURT CAN AND SHOULD ADAPT THE TORT TO THESE CIRCUMSTANCES.

Even if plaintiffs have not stated a claim for negligent entrustment as the tort has traditionally been construed, this Court can and should adapt its doctrine to changing times and circumstances. As this Court has recognized, "[t]he common law is not static, but is a dynamic and growing thing and its rules arise from the application of reason to the changing conditions of society." *Goodrich v. Waterbury Republican-Am., Inc.*, 188 Conn. 107, 127 (1982) (internal quotation marks omitted).

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[8] Because this appeal follows an order striking the plaintiffs' amended complaint, the Court must "construe the complaint in the manner most favorable to sustaining its legal sufficiency." *Vacco v. Microsoft Corp.*, 260 Conn. 59, 65 (2002). Where reasonable minds could disagree about whether an injury was foreseeable, foreseeability is a question for the factfinder. *Ruiz*, 315 Conn. at 330. What, if anything, the defendants might have done to mitigate the risk (the "B"), and whether the omission of that precaution renders the defendants negligent, are similarly questions for the factfinder to address, once the plaintiffs have had an opportunity to conduct discovery.

The story of the common law in general—and of tort law in particular—is one of continuous doctrinal evolution in response to societal shifts and technological change. When confronted with products that pose new kinds of danger, courts have, again and again, displayed a willingness to expand doctrinal boundaries to advance tort's aims. *See, e.g., Thomas v. Winchester*, 6 N.Y. 397, 397 (1852) (creating an exception to the traditional privity rule for "[a] dealer in drugs and medicines, who carelessly labels a deadly poison as harmless medicine"); *Moning*, 254 N.W.2d at 774 (imposing negligent entrustment liability on the manufacturers and wholesalers of a slingshot because, inter alia, "the common law is not immutable, unable to respond to changes in society and technology"). Of course, AR-15s pose a different danger than medications or slingshots or cherry bombs—a unique danger that makes other negligent entrustment cases seem quaint. In adapting the tort of negligent entrustment to permit the imposition of liability on those who carelessly peddle military-grade assault weapons to an untrained civilian population, this Court would be executing a central and well-established function of common-law courts.

CONCLUSION

The heart of plaintiffs' claim is that defendants paved the way for Adam Lanza, a truly reckless individual, to inflict carnage on a massive scale. While the AR-15's path to Lanza's hands was surely less direct than in a typical negligent entrustment case, a jury might reasonably conclude that, given the glaring and highly-publicized danger posed by AR-15s, defendants failed to take adequate care to prevent these weapons from falling into the wrong hands. Such a finding would be consistent with the tort of negligent entrustment. Alternatively, to the extent the Court must adapt existing law in order to endorse plaintiffs' cause of action, in so doing, the Court would be on solid—and time-honored—terrain.

Respectfully Submitted,

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CERTIFICATION OF SERVICE

The undersigned hereby certifies, on behalf of the Applicants in the above-entitled matter, that the foregoing complies with §§ 62-7, 67-2, and 67-7 of the Rules of Appellate Procedure; that an electronic version of the Brief of the Amici Curiae with Attached Appendix has been filed pursuant to § 67-2; that the Brief and Appendix is a true copy of the Brief and Appendix that was submitted electronically, pursuant to § 67-2; that the Brief and Appendix has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure; that the foregoing complies with all applicable rules of appellate procedure; and that a copy of the foregoing motion has been emailed and mailed to all counsel of record on April 17, 2017, as follows:

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2013 WL 1111820

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Haven.

Sarah SHORT
v.
Brendan ROSS et al.

No. NNHCV126028521S.
|
Feb. 26, 2013.

Attorneys and Law Firms

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WILSON, J.

I

FACTS

*1 On January 14, 2013, the plaintiff, Sarah Short, filed a five-count amended complaint against the defendants, Brendan Ross, U–Haul of Connecticut (U–Haul)[1] and Sigma Phi Epsilon Fraternity, Inc., for damages arising out of an automobile-pedestrian accident that occurred at a Harvard Yale football game in 2011. In her complaint, the plaintiff alleges the following. On November 19, 2011, the plaintiff was a pedestrian located within the tailgating[2] area of the Harvard Yale football game. Ross drove a U–Haul box truck into the tailgating area and collided with several pedestrians and vehicles, including the plaintiff, causing the plaintiff various and severe injuries. The plaintiff alleges that Ross was negligent in the following ways: he drove the truck too fast for conditions then and there existing; he failed to keep the truck under reasonable control; he failed to keep a proper lookout; he failed to yield the right of way to pedestrians; he failed to turn to the left or the right; he failed to sound his horn or give warnings; and he failed to ensure that the truck was functioning, accelerating and braking properly.

The plaintiff alleges that U–Haul negligently entrusted the truck, which it owned and/or rented, to Ross because it "knew, or should have known reasonably, that its truck would be used to haul and dispense alcohol in a college tailgating environment, that its truck would be operated within and around a pedestrian-dense environment, and/or that its truck would be operated in a college tailgating and pedestrian-dense environment by someone with insufficient experience operating large box trucks within this environment."

The plaintiff further alleges that U–Haul was negligent in the following ways: it failed to ensure that the box truck was operating, functioning, braking and accelerating properly before renting and/or delivering it to Ross; it failed to maintain the box truck in proper working order in terms of braking and acceleration; and it failed to warn or instruct Ross regarding the use and operating of the box truck, the use and operation of a box truck in a pedestrian-dense environment and relevant differences between the operation of a box truck and the operation of traditional motor vehicles.

The plaintiff alleges that as a result of the collision she suffered damages including lost wages, income and time from school, and has further incurred and will continue to incur costs for medical care, rehabilitation and overall impairment of her earning capacity and ability to enjoy life's activities.

In count one, the plaintiff alleges a cause of action for common law negligence against Ross. In count two, the plaintiff alleges a cause of action for negligent entrustment against U–Haul. In count three, the plaintiff alleges a cause of action for common law negligence against U–Haul. In count four the plaintiff alleges a cause of action for products liability against U–Haul pursuant to General Statutes § 52–572m et seq., the Connecticut Products Liability Act (CPLA).[3] In count five the plaintiff alleges a cause of action for vicarious liability against Sigma Phi Epsilon Fraternity, Inc., for the negligence of its member, Ross.

*2 On August 21, 2012, U–Haul filed the present motion to strike counts two and three of the plaintiff's amended complaint on the following grounds: (1) The plaintiff fails

to allege sufficient facts in count two to state a cause of action for negligent entrustment because the plaintiff does not allege that the defendant knew that the entrustee was incompetent, (2) the court should strike count two because the defendant, as a matter of law, owed no duty to investigate the driving history of the entrustee, (3) count two is barred by the Graves Amendment, 49 U.S.C. § 30106,[4] (4) counts two and three are both precluded by the CPLA, General Statutes § 52–572m et seq.[5] The motion is accompanied by a memorandum of law. The plaintiff filed a memorandum in opposition on September 27, 2012. U–Haul filed a memorandum in reply on October 16, 2012. The court heard argument at short calendar on January 22, 2013.

II

DISCUSSION

"Whenever any party wishes to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted ... that party may do so by filing a motion to strike the contested pleading or part thereof." Practice Book § 10–39. "The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "[I]t is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Coe v. Board of Education*, 301 Conn. 112, 116–17, 19 A.3d 640 (2011). A motion to strike "does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." (Internal quotation marks omitted.) *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 588, 693 A.2d 293 (1997). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC v. Ganim*, 303 Conn. 205, 213, 32 A.3d 296 (2011).

With respect to its first claim, U–Haul argues that in Connecticut, in order to assert properly a claim for negligent entrustment, a plaintiff must allege that the defendant knew or ought reasonably to know that the entrustee was incompetent. U–Haul contends that count two must be stricken because the plaintiff has not alleged incompetence. Specifically, the plaintiff has not alleged that U–Haul knew or had reason to know of Ross' incompetence as a driver.

With respect to its second claim, U–Haul argues: "Connecticut law is clear that a rental company does not have a legal duty to investigate a potential renter's [driving] history. Our legislature has enacted a statutory scheme establishing requirements for rental car companies, and this scheme only requires that a rental company confirm that the customer possess a valid driver's license." Therefore, U–Haul contends that count two must be stricken because U–Haul, as a matter of law, did not owe a duty to the plaintiff to investigate Ross' driving history.

*3 With respect to its third claim, U–Haul argues that the Graves Amendment 49 U.S.C. § 30106 preempts all state law claims of vicarious liability against rental car companies unless there is evidence of negligence or criminal wrong doing by the rental company itself and that, here, the plaintiff's claim in count two is precluded because she has failed to allege independent negligence on the part of U–Haul and, further, even if she had, U–Haul is under no duty to investigate its customers' driving histories.

With respect to its fourth and final claim, U–Haul argues that the CPLA, § 52–572m, et seq., contains an exclusivity provision that makes the product liability act the exclusive means by which a party may secure a remedy for an injury caused by a defective product. U–Haul contends that because the plaintiff bases its claims in counts two and three upon alleged defects in the braking and acceleration systems of the truck, her claims in those counts are excluded by the CPLA.

In response to U–Haul's first claim, failure to allege incompetence, the plaintiff contends that the defendant's argument misconstrues the law of negligent entrustment. Specifically, the focus of a negligent entrustment claim is not the ultimate negligence of the entrustee, but whether it was negligent for the entrustor, in light of surrounding circumstances of which the entrustor had actual or constructive knowledge, to permit the entrustee to assume possession and control of the chattel which

inflicted the injury. Here, the plaintiff argues, the claim for negligent entrustment is based upon an unreasonable risk of injury that U–Haul created when it rented a vehicle to an individual, inexperienced in the operation of such a vehicle, when U–Haul knew of that individual's purpose to operate the vehicle in a pedestrian-dense, unregulated and alcohol-rich environment. Thus, the plaintiff argues, the crux of count two is not what U–Haul knew of Ross' *driving history*, but, rather, the dangers that should have been apparent to U–Haul based upon its knowledge of Ross' *proposed use* of the truck.

In response to U–Haul's second claim, that no legal duty exists, the plaintiff contends that, in count two, it does not attempt to allege liability on U–Haul's failure to investigate Ross' driving record at the time it rented the truck to him.

In response to U–Haul's third claim, the Graves Amendment, the plaintiff contends that count two is not preempted by 49 U.S.C. § 30106 because count two does not allege a claim of vicarious liability; rather, count two alleges a claim for the direct negligence of U–Haul in the act of entrusting the truck to Ross.

Finally, in response to U–Haul's fourth claim, products liability preclusion, the plaintiff contends that count two is not precluded by the CPLA because that count is not premised upon any alleged physical defects in the truck but, rather, upon U–Haul's negligent entrustment of the truck to Ross. The plaintiff argues further that count three is also not precluded by the CPLA because count three is not based upon alleged defects resulting from the manufacture of the truck but, rather, upon the maintenance of the truck, and therefore focuses upon the inaction of U–Haul.

*4 In response, the defendant argues in its memorandum in reply that as to count two, the plaintiff's interpretation of the law of negligent entrustment not only misconstrues the meaning of "incompetence" as that term is defined by the common law, but also would lead to a vast expansion of a rental agency's legal duty to investigate a prospective renter's intended usage of a vehicle. The defendant also argues that, as to count two, because the plaintiff cannot allege a duty on the part of U–Haul, count two must fail because the plaintiff cannot show independent negligence of the type required for the count to pass scrutiny under the Graves Amendment. Finally, the defendant argues in its memorandum in reply that claims of negligent maintenance prior to the issuance of a lease fall within the ambit of the Connecticut Product Liability Act, § 52–572m, et seq.

A

Count Two: Negligent Entrustment

1

Incompetence

A number of Superior Court decisions have summarized the law of negligent entrustment of an automobile as follows: "The essential elements of the tort of negligent entrustment of an automobile [are] that the entrustor knows or ought reasonably to know that one to whom he entrusts it is so incompetent to operate it upon the highways that the former ought to reasonably anticipate the likelihood of injury to others by reasons of that incompetence, and such incompetence does result in injury ... Liability cannot be imposed on a defendant under a theory of negligent entrustment simply because the defendant permitted another person to operate the motor vehicle ... Liability can only be imposed if (1) there is actual or constructive knowledge that the person to whom the automobile is loaned is incompetent to operate the motor vehicle; and (2) the injury resulted from that incompetence." (Internal quotation marks omitted.) *Ellis v. Jarmin*, Superior Court, judicial district of New London, Docket No. CV 09 5010839 (December 17, 2009, Cosgrove, J.) (49 Conn. L. Rptr. 1, 2); see also *Kaminsky v. Scoopo*, Superior Court, judicial district of New Haven, Docket No. CV 08 6002084 (July 30, 2008, Bellis, J.) (46 Conn. L. Rptr. 82, 82–83); *Griffin v. Larson*, Superior Court, judicial district of Ansonia–Milford at Derby, Docket No. CV 02 0079364 (August 18, 2004, Lager, J.).

U–Haul argues that because the plaintiff fails to allege that U–Haul knew or had reason to know that Ross was incompetent—that is to say, that Ross possessed dangerous propensities or was otherwise incompetent so that he was incapable of exercising due care—the plaintiff has failed to allege sufficient facts supporting a cause of action for negligent entrustment. In response, the plaintiff contends that competence is not to be assessed in a

vacuum, but is a concept that requires consideration of all the surrounding circumstances. Thus, under the plaintiff's view, "incompetence" is a broader concept, and it can include that a prospective entrustee will use the chattel in an unsafe environment and/or in a manner that is unsafe.

*5 As noted by several Superior Court decisions; see, e.g., *Angione v. Bloom*, Superior Court, judicial district of Stamford, Docket No. CV 09 5012285 (January 5, 2012, Adams, J.T.R.) (53 Conn. L. Rptr. 347); *Snell v. Norwalk Yellow Cab, Inc.*, Superior Court, judicial district of Stamford, Docket No. CV 10 013455 (May 24, 2011, Jennings, J.T.R.) (52 Conn. L. Rptr. 43); there is no appellate authority regarding the doctrine of negligent entrustment of an automobile beyond the first decision that recognized the cause of action as cognizable in Connecticut—*Greeley v. Cunningham*, 116 Conn. 515, 165 A. 678 (1933). That case involved a claim that the owner of a vehicle was negligent when he entrusted that vehicle to a driver who, in turn, was in the process of preparing to take a driver's licensing examination. The court first recognized that "[a]n automobile, while capable of doing great injury when not properly operated upon the highways, is not an intrinsically dangerous instrumentality to be classed with ferocious animals or high explosives ... and liability cannot be imposed upon an owner merely because he entrusts it to another to drive upon the highways." (Citations omitted.) *Id.*, at 518, 165 A. 678. The court continued, however, that "[i]t is ... coming to be generally held that the owner may be liable for injury resulting from the operation of an automobile he loans to another, when he knows or ought reasonably to know that the one to whom he entrusts it is so incompetent to operate it, by reason of inexperience *or other cause*, that the owner ought reasonably to anticipate the likelihood that in its operation injury will be done to others." (Emphasis added.) *Id.* Consequently, the court concluded that "[w]hen the evidence proves that the owner of an automobile knows or ought reasonably to know that one to whom he entrusts it is so incompetent to operate it upon the highways that the former ought reasonably to anticipate the likelihood of injury to others by reason of that incompetence, and such incompetence does result in such injury, a basis of recovery by the person injured is established. That recovery rests primarily upon the negligence of the owner in entrusting the automobile to the incompetent driver." *Id.*, at 520, 165 A. 678.

By noting in its analysis that an entrustee may be incompetent "by reason of inexperience *or other cause*," the Supreme Court intimated that the notion of incompetence may include more than simply that the entrustee was known to lack driving skill. Instead, the concept of incompetence contemplates the possibility of "other cause" by which the entrustor either knows or ought to know that a vehicle should not be entrusted to the particular individual.

This conclusion is supported by the law of negligent entrustment as it is stated in 2 Restatement (Second), Torts § 390, which is relevant to this analysis because, as long recognized by the decisions of the Superior Court, *Greeley* "virtually adopted" the approach provided by the Restatement. See, e.g., *Jordan v. Sabourin*, Superior Court, judicial district of New London, Docket No. 53 70 41 (November 22, 1996, Hurley, J.T.R.) (18 Conn. L. Rptr. 269) (*Greeley* utilizes restatement approach to negligent entrustment); *Morin v. Keddy*, Superior Court, judicial district of Hartford–New Britain at Hartford, Docket No. 90 0701113 (October 25, 1993, Hennessey, J.) (10 Conn. L. Rptr. 281) (same); *Hughes v. Titterton*, Superior Court, judicial district of Hartford–New Britain at Hartford, Docket No. 29 20 24 (July 13, 1987, Wagner, J.) (same).

*6 The Restatement (Second), *supra*, at § 390, provides: "One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, *or otherwise*, to use it in a manner involving *unreasonable risk of physical harm* to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them." (Emphasis added.) The commentary to the Restatement explains that "one who supplies a chattel for the use of another who knows its exact character and condition is not entitled to assume that the other will use it safely if the supplier knows or has reason to know ... that the other, though otherwise capable of using the chattel safely, has a propensity or fixed purpose to misuse it." 2 Restatement (Second), *supra*, at § 390, commentary. Accordingly, pursuant to the Restatement approach, the concept of incompetence is broadly drawn to include more than lack of driving skill, and may also include knowledge that the individual will somehow misuse the chattel.

The notion that "incompetence" includes more than a mere lack of driving skill further appears in those

decisions of the Superior Court that have previously interpreted and applied *Greeley*, including this Court's own analysis on that issue. See, e.g., *Peterson v. Swain*, Superior Court, judicial district of New Haven, Docket No. CV 05 5001192 (April 6, 2010, Wilson, J.) (denying motion for summary judgment as to negligent entrustment claim, noting issue of fact remained regarding whether lessor had constructive knowledge of lessee's fraudulent lease application because lessee claimed to be dentist with forty years experience and presented driver's license showing older individual when, in fact, lessee was only twenty-seven, all of which rendered lessee unfit to lease vehicle); *Ellis v. Jarmin, supra*, 49 Conn. L. Rptr. at 1 (denying motion to strike negligent entrustment claim where plaintiff alleged that defendant knew or should have known that driver had outstanding arrest warrant, thereby making driver predisposed to flee police and drive recklessly); *Kaminsky v. Scoopo, supra*, 46 Conn. L. Rptr. at 83 (granting motion to strike negligent entrustment claim where plaintiff alleged driver was negligent on date of accident and defendant knew or should have known that driver would be negligent on date of accident, but plaintiff did not allege knowledge of prior history or of other facts by which defendant should anticipate negligence; noting that "[a]dmittedly, this is a close call").

In *Ellis v. Jarmin, supra*, 49 Conn. L. Rptr. at 1, the court considered a rental car company's motion to strike a negligent entrustment claim. There, the defendant rented a vehicle to a driver who later offered a ride to the plaintiff. Simultaneously, the defendant was wanted by the police and had outstanding criminal arrest warrants. While operating the vehicle with the plaintiff as a passenger, a police officer attempted to stop the driver causing the driver to use the vehicle to attempt to flee. The plaintiff demanded to be let out of the vehicle, causing the driver to stop. While the plaintiff was exiting the vehicle, however, the defendant suddenly accelerated before the plaintiff was clear, causing the plaintiff to fall from the vehicle and sustain physical injuries.

*7 The plaintiff in *Ellis* brought an action for negligent entrustment against the car rental company, alleging that the company rented the car to the driver even though it knew or should have known that the driver had outstanding criminal arrest warrants. The rental company moved to strike, claiming, *inter alia*, that a car rental company is under no duty to perform a background check upon a potential customer. The court denied the motion, noting that the plaintiff's claim for negligent entrustment relied primarily upon the rental company's own negligence. The court stated that "while [the plaintiff's] complaint does not specifically claim the source of [the rental company's] constructive notice of [the driver's] outstanding warrants, [the] complaint's allegation that [the rental company] should have known that [the driver] was wanted by the police implies the allegation that [the driver's] status as a wanted man was readily discoverable and should have put [the rental company] on notice that [the driver] was incompetent to operate a motor vehicle." *Id.*, at 2.

Finally, a review of our state's common law of negligent entrustment outside of the context of automobiles shows that the essence of the tort includes circumstances where an entrustor should know that there is cause why a chattel ought not to be enstrusted to another. For example, in *Turner v. American District Telegraph & Messenger Co.*, 94 Conn. 707, 110 A. 540 (1920), the court considered a claim that the defendant was negligent in entrusting a loaded revolver to a night watchman on the theory that the defendant knew or should have known that the night watchman was prone to anger. Although a jury in that case ultimately returned a verdict against the plaintiff for lack of evidence showing that the defendant possessed a choleric personality, at no time did the Supreme Court, during its review of the jury verdict, question the underlying theory of liability. Instead the court assumed the theory to be valid, stating "[a]nother condition stated is that the defendant, when it sent [the night watchmen] forth with a revolver, knew, or ought to have known, that he was a reckless person, liable to fall into a passion, and *unfit to be entrusted with a deadly weapon upon such an occasion.* We have examined with care the testimony [from the trial], and fail to find even a scintilla of evidence that the defendant had, or ought to have had, knowledge or even suspicion that [the night watchmen] possessed any of the traits rightly or wrongly attributed to him by the plaintiff. Without this vitally important fact, the plaintiff's claim falls to the ground, since plainly it cannot be regarded as negligence to supply effective weapons of protection to one who goes upon a night errand such as was that upon which [the night watchman] was sent." (Emphasis added.) *Id.*, at 716, 110 A. 540.

Accordingly, the court finds that in the context of a cause of action for negligent entrustment of an automobile,

incompetence does not mean a mere lack of driving skill but, instead, is more broadly defined to include other cause by which an entrustor knows or ought reasonably to know that a vehicle should not be entrusted to the entrustee.

*8 Here, the plaintiff pleads in count two that "[her] injuries, harms and losses were proximately caused by ... [U–Haul's] ... negligent entrustment of the rented box truck to Brendan Ross when it knew, or should have known reasonably, that its truck would be used to haul and dispense alcohol in a college tailgating environment, that its truck would be operated within and around a pedestrian-dense environment, and/or that its truck would be operated in a college tailgating and pedestrian-dense environment by someone with insufficient experience operating large box trucks within this environment." In her memorandum, she contends that the allegations pleaded in her complaint, fairly read, are that "the defendant knowingly rented its vehicle to a driver lacking experience and familiarity with a vehicle of the type involved and who planned to operate it in a dangerously chaotic and unregulated venue for the purpose of promoting and facilitating the consumption of alcohol" and further contends that a college tailgating environment is an environment "densely populated by pedestrians and ungoverned by many of the rules, restrictions, signage and road markings that guide vehicle operation on public roads." The defendant, arguing only that the plaintiff misconstrues the meaning of incompetence, does not respond to this specific contention.

In the court's estimation, the facts pleaded in the complaint, when fairly read, allege that U–Haul knew or ought reasonably to have known that Ross proposed to utilize the truck in an environment where the danger and risk of injury was considerably higher than that typically attendant to the use of a vehicle on the open road. This is because the proposed environment was pedestrian-dense, unregulated by the rules of the road and would contain a large number of individuals who had recently consumed alcohol and who would therefore be less capable of exercising their faculties to avoid moving vehicles, and might, in fact, stumble in front of moving vehicles.

It is not clear from the complaint precisely how or why U–Haul knew or ought reasonably to have known of Ross' proposed usage of the truck. Nevertheless, the present motion is a motion to strike, and our Supreme Court has stated that "[w]hat is necessarily implied [in an allegation] need not be expressly alleged ... It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted ... Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted). *Violano v. Fernandez*, 280 Conn. 310, 318, 907 A.2d 1188 (2006); see also *Tracy v. New Milford Public Schools*, 101 Conn.App. 560, 566, 922 A.2d 280, cert. denied, 284 Conn. 910, 931 A.2d 935 (2007) ("[A] motion to strike is essentially a procedural motion that focuses solely on the pleadings ... It is, therefore, improper for the court to consider material outside of the pleading that is being challenged by the motion." [Internal quotation marks omitted.]).

*9 The court, mindful that its obligation under the present motion is to construe the factual allegations pleaded in the complaint as true, concludes that the plaintiff has sufficiently pleaded the elements of negligent entrustment of an automobile, including that U–Haul knew or ought reasonably to have known that Ross was incompetent, because the plaintiff pleads that U–Haul knew or ought reasonably to have known that Ross proposed to use the truck in an unsafe environment and/or a manner that was unsafe. Consequently, under the facts alleged, U–Haul ought reasonably to have anticipated that injury to others would result from Ross' proposed use of the truck.

Accordingly, this court concludes that the plaintiff's allegations are legally sufficient to state a claim for negligent entrustment.

2

Duty to Investigate Driving History

One of the "essential elements of a cause of action in negligence ... [is] duty ... Contained within the ... element [of] duty, there are two distinct considerations ... First, it is necessary to determine the existence of a duty, and then, if one is found, it is necessary to evaluate the scope of that duty ... The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty

in the particular situation at hand ... If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant." (Internal quotation marks omitted.) *Sic v. Nunan*, 307 Conn. 399, 406–07, 54 A.3d 553 (2012). "It is unnecessary to allege any promise or duty which the law implies from the facts pleaded." Practice Book § 10–4.

U–Haul argues in its memorandum that, under Connecticut law, a rental company does not have a legal duty to investigate a potential renter's driving history, and instead is required by statute to ensure only that the potential renter possesses a valid driver's license. Therefore, U–Haul argues, count two must fail. The plaintiff counters that the allegations pleaded in count two do not posit liability on a failure by U–Haul to investigate Ross' driving history but, instead, are premised on U–Haul's knowledge of facts concerning Ross' proposed use of the vehicle and, as a result of that knowledge, U–Haul should not have rented the truck to Ross at all. Thus, the plaintiff contends, liability under count two is not based upon a failure to investigate, but upon U–Haul's conduct at the time the truck was still under its control. U–Haul argues in its memorandum in reply that there is no allegation in count two that it failed to follow the vehicle rental requirements imposed by statute and that the plaintiff's position if adopted by courts would impose a duty upon rental companies to investigate prospective renters' driving histories and intended usage of their vehicles.

The precise duty imposed by law upon a rental company is an issue that has not been addressed by our state's Appellate Courts. The authoritative Superior Court decision on the issue is *Chapman v. Herren*, Superior Court, judicial district of New London, Docket No. CV 07 5005067 (June 24, 2010, Cosgrove, J.) (50 Conn. L. Rptr. 228), wherein the court addressed whether a rental car company had a duty to investigate a prospective renter's driving record when that renter had presented a valid driver's license. There, the plaintiff argued that *Greeley v. Cunningham, supra*, 116 Conn. at 515, 165 A. 678, imposed a duty on an entrustor to investigate an entrustee's driving history. The court disagreed, stating "[w]hile *Greeley* undoubtedly recognizes the validity of a negligent entrustment cause of action, it cannot be said that the case recognizes or creates a legal duty upon rental car companies to investigate a renter's driving record." *Chapman v. Herren, supra*, 50 Conn. L. Rptr. at 232. Moreover, the court noted, "[o]ur legislature has already enacted a statutory scheme governing the requirements of rental car companies. General Statutes § 14–153 provides, in relevant part, that '[a]ny person, firm or corporation which rents a motor vehicle ... shall inspect or cause to be inspected the motor vehicle operator's license of the person initially operating such motor vehicle, [and] shall compare the signature on such license with that of the alleged licensee written in his presence ...' Under this statute, a rental car company is not required to investigate a potential renter's driving record; rather, the rental car company must only assess the facial validity a driver's license before renting to that driver. The legislature could have mandated that rental car companies run driving record reports if it intended that such a duty would exist. Here, legislation exists at both the federal and the state level regulating the rental car industry. This makes for a difficult arena for the court to impose a duty where there is silence in the statutory scheme ... However, given the legislative silence and the absence of case law imposing an obligation on rental car companies to investigate renters' driving records, this court cannot find that rental car companies have a legal duty to investigate renters' driving records." (Citations omitted.) *Id.*, at 232–33.

***10** Subsequent decisions of the Superior Court have affirmed the propriety of the position in Chapman that there is no legal duty imposed upon a rental company to investigate a prospective renter's driving history. See, e.g., *Donnelly v. Rental Car Finance Corp.*, Superior Court, judicial district of Hartford, Docket No. CV 10 6016545 (May 17, 2011, Wanger, J.T.R.) (51 Conn. L. Rptr. 899) (rental car company under no duty to investigate prospective renter's driving history); *Hollis v. Alamo Financing, LP*, Superior Court, judicial district of Hartford, Docket No. CV 08 5024043 (February 4, 2011, Robaina, J.) (51 Conn. L. Rptr. 434) (same). Consequently, under the interpretation propounded by *Chapman*, with which this court also agrees, *Greeley* does not impose a duty upon a renter to investigate a renter's driving history and the existence of comprehensive state and federal statutory schemes regulating the rental car industry strongly suggest that no such duty exists.

The court agrees with the defendant that Connecticut does not impose a duty upon a rental company to investigate a prospective renter's driving history or proposed usage of a rental vehicle. The court also agrees with the plaintiff, however, that the allegations pleaded in count two are

not based upon the theory that U–Haul was under a duty to perform an investigation of Ross' driving history. Instead, the allegations pleaded by the plaintiff in count two are that, despite a lack of duty to investigate, the fact remains that U–Haul did know that Ross resolved to use the truck in an unsafe environment and/or in a manner that was unsafe and that, for the purposes of the present motion, the court is required to accept this fact as true. The plaintiff further contends that, at the point U–Haul came to possess this knowledge, it was negligent for U–Haul to entrust the truck to Ross and to permit Ross to drive off the lot. Under this theory of liability, the duty imposed upon U–Haul is not a duty to investigate but, rather, that general duty imposed by law upon all actors to avoid harm to foreseeable victims. In light of the foregoing, the court concludes that although U–Haul was under no legal duty to investigate Ross' driving history or proposed usage of the truck, the facts pleaded in the complaint, when fairly read, base liability upon U–Haul's actual or constructive knowledge ~f Ross' purpose to use the truck in an unsafe environment and/or in a manner that was unsafe. Therefore, count two does not fail to allege the existence of a duty because the duty upon which count two is premised is the duty to avoid harm to others, not a duty to investigate a renter's driving history.

Accordingly, the plaintiff's allegations of duty in count two are legally sufficient.

3

The Graves Amendment

The Graves Amendment, 49 U.S.C. § 30106, provides, in pertinent part: "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)."

***11** "The Graves Amendment was enacted by Congress on August 10, 2005, as part of a comprehensive transportation bill entitled the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ... The [a]ct deals generally with motor vehicle safety, primarily providing billions of dollars in funding allocations for transportation projects ... The Amendment was included in the act as a tort reform measure intended to bar recovery against car rental and leasing companies on the basis of vicarious liability." (Citations omitted; internal quotation marks omitted.) *Rodriguez v. Tesia*, 296 Conn. 1, 9, 993 A.2d 955 (2010).

U–Haul argues that the Graves Amendment precludes any liability on the part of U–Haul because the plaintiff has failed to show negligence or criminal wrongdoing on the part of U–Haul itself. The plaintiff responds that, because count two is based upon the active negligence of U–Haul in entrusting the truck to Ross when it knew or ought reasonably to have known that he possessed a purpose to use the truck in an unsafe environment, the allegations pleaded in count two do allege negligence on the part of U–Haul and, therefore, the Graves Amendment does not apply because count two does not allege a claim for vicarious liability. The defendant argues in its reply memorandum that, assuming count two does attempt to allege negligence on the part of U–Haul, the claim is based upon a duty that does not exist at law and, therefore, the claim in count two is preempted by the Graves Amendment.

The court has already concluded that count two alleges sufficiently a cause of action for negligent entrustment against U–Haul and that said claim is based upon allegations that U–Haul itself was negligent. Therefore, the Graves Amendment does not preclude liability under count two.

4

Connecticut's Product Liability Act

General Statutes § 52–572n(a) provides, in pertinent part: "A products liability claim as provided in sections 52–240a, 52–240b, 52–572m to 52–572q, inclusive, and 52–577a may be asserted and *shall be in lieu of* all other claims against product sellers, including actions of negligence,

strict liability and warranty, for harm caused by a product." (Emphasis added.)

In *Pereira v. North Carolina Granite Corp.*, Superior Court, judicial district of New Haven, Docket No. CV 09 5031427 (August 5, 2011, Wilson, J.) (52 Conn. L. Rptr. 417, 419), this Court stated "[t]he Connecticut Product Liability Act, General Statutes § 52–572m et seq., ... became effective on October 1, 1979. *Elliot v. Sears Roebuck and Co.*, 229 Conn. 500, 505 n. 6, [642 A.2d 709] (1994). 'In adopting the act, the legislature intended to incorporate in a single cause of action an exclusive remedy for all claims falling within its scope ... In doing so, the legislature was merely recasting an existing cause of action and was not creating a wholly new right for claimants harmed by a product.' (Citations omitted; internal quotation marks omitted.) *Id.*, at 504–05, 642 A.2d 709. 'The intent of the legislature was to eliminate the complex pleading provided at common-law.' *Id.* 'A claim may be asserted successfully under [the product liability act] notwithstanding the claimant did not buy the product from or enter into any contractual relationship with the product seller.' [General Statutes] § 52–572n(b). 'Product seller' means any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use or consumption. The term 'product seller' also includes lessors or bailors of products who are engaged in the business of leasing or bailment of products.' [General Statutes] § 52–572m(a). A 'product liability claim' is defined as 'all claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product.' [General Statutes] § 52–572m(b). A 'product liability claim' shall include, but is not limited to, all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent.' ... § 52–572m(b). *Zarikos v. Signature Building Systems, Inc.*, Superior Court, complex litigation docket at Stamford–Norwalk, Docket No. X08 CV 04 4000284 (March 24, 2009, Jennings, J.)." (Internal quotation marks omitted.)

*12 U–Haul argues that count two must be stricken because the CPLA is the exclusive remedy available to any plaintiff alleging liability for harm caused by a defective product. It further contends that count two must fail because the plaintiff alleges in count four that the truck was defective and further alleges in count two that it was Ross' use of the truck that ultimately caused the injury. The plaintiff responds that "[i]t is entirely obvious that the negligent entrustment claim has nothing whatever to do with any purported defect in 'the product,' i.e., U–Haul's rental truck. Instead, that count is focused entirely on U–Haul's negligence in renting it to Mr. Ross." To this argument, U–Haul counters in its memorandum in reply that, because there is no independent negligence on which to form the basis of a negligent entrustment claim in count two, it follows that count two must be premised on the alleged failure of U–Haul to properly maintain the truck and the claim is therefore precluded by the CPLA. U–Haul's argument here turns on the court's conclusion as to whether the plaintiff has alleged sufficient facts stating a cause of action for negligent entrustment of an automobile.

The defendant is correct that the CPLA provides the exclusive remedy to a plaintiff who claims liability as a result of a defective product. The defendant is incorrect, however, in its assertion that count two alleges that a defective product caused the injury. As discussed, *supra*, the plaintiff has alleged sufficiently a claim for negligent entrustment in count two. Accordingly, in count two the plaintiff necessarily alleges independent negligence, not negligence based upon allegations that the truck was defective. Thus, count two is not precluded by the CPLA's exclusivity provisions.

Accordingly, the CPLA's exclusivity provision does not preclude the claim of negligent entrustment alleged in count two.

B

Count Three: Negligence

The elements of a cause of action in negligence are duty, breach, causation and damages. *RK Constructors, Inc. v. Fusco Corp.*, 231 Conn. 381, 384, 650 A.2d 153 (1994). As previously noted, the CPLA provides the exclusive remedy to a plaintiff claiming liability for damage caused by a defective product. This includes "lessors or bailors of products who are engaged in the business of leasing or

bailment of products." *Pereira v. North Carolina Granite Corp., supra,* 52 Conn. L. Rptr. at 419. In addition, a " '[p]roduct liability claim' includes all claims or actions brought for personal injury, death or property damage caused by the ... warnings [or] instructions ... of any product." General Statutes § 52–572m(b).

Pursuant to the Appellate Court's holding in *Rodia v. Tesco Corp.,* 11 Conn.App. 391, 396, 527 A.2d 721 (1987), a claim for products liability includes a claim that a lessor failed to maintain a product prior to leasing it. This is because "[t]he characterization of the types of conduct or activity enumerated in General Statutes § 52–572m(b) must be broadly construed in light of the purposes of the statute. A principal purpose of the product liability statute is to protect people from harm caused by defective and hazardous products ... The terms enumerated in General Statutes § 52–572m(b) are simply generic categories of conduct which must be read broadly and in relationship to one another in order to accomplish the purposes of the statute. Thus, such generic, categorical terms as 'preparation ... installation, [and] testing,' read in light of the principal purpose of the statute which we have identified, are quite broad enough to include the failure to maintain and repair a product prior to placing it in the stream of commerce." *Id.*

*13 U–Haul argues that the court should strike count three of the complaint because it is based on allegations that the truck was defective. Specifically, the plaintiff alleges in count three: "The plaintiff's injuries, harms and losses were proximately caused by defendant U–Haul Co. of Connecticut's negligence in one or more of the following ways: a) it failed to ensure that the box truck was operating, functioning, braking and accelerating properly before renting and/or delivering it to Brendan Ross; b) it failed to keep and maintain the box truck in proper working order in terms of braking and acceleration; and c) it failed to warn or instruct Brendan Ross regarding the use and operation of the box truck, the use and operation of a box truck in pedestrian-dense environments, and relevant differences between the operation of a box truck and the operation of traditional motor vehicles." U–Haul argues that all of these facts allege a defective product claim. This includes the allegation that U–Haul failed to warn or instruct Ross in the proper use of the truck because the CPLA includes warnings and instructions concerning the use or operation of a product among those defined as product liability claims.

In response, the plaintiff counters that count three sets forth three separate specifications of negligence, none of which falls within the scope of the CPLA. More particularly, the plaintiff argues that the first two allegations of negligence both specify the failure of U–Haul to maintain the truck in proper working order, and therefore concern active negligence. In relation to the third allegation of negligence, the plaintiff concedes that "it is at least arguable that this specification of negligence might be characterized as a products liability claim based on warnings or instructions concerning the product," but she argues that it is unnecessary to address that possibility because U–Haul has sought to strike count three as a whole and our Rules do not permit a court to strike individuals' paragraphs.[6] The defendant responds in its memorandum in reply that because all of the three specifications of negligence in count three fall within the scope of the CPLA, count three must be stricken in its entirety.

Here, the first two allegations of negligence specified by the plaintiff each concern a failure on the part of U–Haul to properly maintain the truck prior to leasing it to Ross. In congruence with the holding of *Rodia v. Tesco Corp., supra,* 11 Conn.App. at 391, 527 A.2d 721, these allegations are properly classified as allegations of a defective product and, therefore, fall under the scope of the CPLA's exclusivity provisions. Similarly, the third allegation of negligence, the failure of U–Haul to warn Ross, also falls within the scope of the CPLA's exclusivity provisions because, pursuant to § 52–572m(b), product liability claims include damages caused by inadequate warnings or instructions. Thus, all of the specifications of negligence alleged by the plaintiff in count three are within the scope of the CPLA's exclusivity provisions and are, therefore precluded by that statute.

*14 Accordingly, the defendant's motion to strike count three is granted because the CPLA precludes the claims alleged therein.

CONCLUSION

For the foregoing reasons, the motion to strike count two is denied and the motion with respect to count three is granted.

All Citations

Not Reported in A.3d, 2013 WL 1111820, 55 Conn. L. Rptr. 668

Footnotes

1 The plaintiff alleges in the complaint that U–Haul of Connecticut is a Connecticut corporation in the business of, *inter alia,* leasing box trucks within the state.

2 According to the complaint, "tailgating" is a term that refers to "eating, drinking, congregating and socializing."

3 General Statutes § 52–572n(a) provides, in pertinent part: "A products liability claim as provided in sections 52–240a, 52–240b, 52–572m to 52–572q, inclusive, and 52–577a may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product."

4 49 U.S.C. § 30106, the Graves Amendment, provides, in pertinent part: "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)."

5 U–Haul filed the present motion to strike on August 12, 2012. The plaintiff filed a motion to cite additional party and amend complaint on January 14, 2013, which was granted by the court, Frechette, J., on January 28, 2013. U–Haul did not refile its motion to strike in response to the subsequent complaint. Pursuant to Practice Book § 10–61, U–Haul's motion to strike "shall be regarded as applicable so far as possible to the amended pleading." The amended complaint, which is the operative complaint, does not materially change any of the allegations to which U–Haul directs its motion to strike. Neither Ross nor Sigma Phi Epsilon Fraternity, Inc., are parties to the present motion.

6 "[A]lthough there is a split of authority, most trial courts follow the rule that a single paragraph of a pleading is subject to a motion to strike *only* when it attempts to set forth all of the essential allegations of a cause of action or defense ... Arguably under the present rules, a motion to strike may properly lie with respect to an individual paragraph in a count ... However, the weight of authority in the Superior Court is that the motion does not lie, except possibly where the subject paragraph attempts to state a cause of action." (Emphasis added; internal quotation marks omitted.) *MacLean v. Perry,* Superior Court, judicial district of New London, Docket No. CV 11 5009597 (February 16, 2012, Martin, J.) [53 Conn. L. Rptr. 497].

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