IN THE SUPREME COURT OF OHIO

PATRICIA BURRIS, Plaintiff-Appellant, v. HERRNSTEIN CHRYSLER, INC., ET AL., Defendant-Appellee.	: : : : : : : : : : :	Case No. 2020-0142 On Appeal from the Ross County Court of Appeals, Fourth Appellate District Court of Appeals Case Number 19 CA 0003676

APPELLEES HERRNSTEIN CHRYSLER, INC. AND JOHN BRANT, III'S MEMORANDUM IN OPPOSITION TO JURISDICTION

Peter D. Traska (#0055431)
Michelle L. Traska (#0095237)
Traska Law Firm, LLC
4352 Pearl Road, Suite A
Cleveland, Ohio 44109
Telephone: (216) 675-0088
Facsimile: (216) 342-7078
ptraska@traskalawfirm.com
mtraska@traskalawfirm.com
Attorneys for Plaintiff-Appellant

Jonathan W. Philipp (#0043705)
LAW OFFICE OF JONATHAN W. PHILIPP
1299 Zurich Way, Suite 150
Schaumburg, IL 60196
Telephone: (440) 237-3210
Facsimile: (412) 750-0910
jonathan.philipp@zurichna.com
Attorneys for Defendants-Appellees

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STATEMENT OF THE CASE AND FACTS

I. Factual Summary

This is an appeal from a personal injury case. Plaintiff-Appellant Patricia Burris ("Plaintiff") sought to hold Defendants-Appellees Herrnstein Chrysler, Inc. ("Herrnstein") and John Brant, III ("Brant," or collectively with Herrnstein, "Defendants") liable after she was injured in an automobile accident with a vehicle being test-driven by co-Defendant Hidy Richards ("Richards").

On November 7, 2015, Richards and friend, Tijuanna Zerrei ("Zerrei"), went to Herrnstein's automobile dealership. Brant was the salesperson who assisted Richards and Zerrei. Zerrei was interested in purchasing a vehicle; Richards was simply there to help Zerrei. Zerrei, however, did not have her driver's license with her, so she could not perform a test drive. Brant therefore obtained a copy of Richards's driver's license and permitted Richards to drive instead.

Richards was employed by U.S. Postal Service. She had worked the previous night from 10:00 p.m. to 6:30 a.m. That was the shift she normally worked. After she finished her shift on the date at issue, Richards, went home and got some sleep. No evidence adduced below even suggests that Richards was tired, sleepy, or otherwise fatigued while she was at Herrnstein's dealership. Further, no evidence below established what Richards's sleep cycle was. In other words, Plaintiff did not show that Richards would even have been tired after finishing her shift, and it is entirely possible that Richards would have awoke from sleeping right before her shift began, just as most other workers do. Regardless, Brant was not aware that Richards had worked the night before, and he did not notice any unusual behavior that would suggest that Richards was unable or unfit to test drive the vehicle. Because Richards presented a facially valid driver's

license and proof of insurance, and she did not otherwise appear to be unfit to drive, she was permitted to test drive one of Herrnstein's vehicles.

While on the way back to the dealership from the test drive, Zerrei was sitting in the front passenger seat, and Brant was riding in the rear. Brant had given Richards general directions on how to get back, but he did not dictate the precise manner in which Richards was to drive. Both the exact route to get back and the manner in which the vehicle was handled were determined and controlled entirely by Richards.

Immediately before the accident, Richards was driving straight on River Road in Green Township, Ohio. She pulled up to the stop sign and looked for oncoming traffic twice, but she did not see any oncoming vehicles. Richards was not distracted, and she intended to go straight through the intersection. As Richards pulled forward, Plaintiff's vehicle collided with her. While Brant was able to see cross-traffic, he did not see Plaintiff's vehicle before the accident.

Further, aside from the initial paperwork filled out for Richards to perform a test drive, there were no agreements between Richards, Brant, and Herrnstein. And neither Richards nor Zerrei were in any way employed by or affiliated with Herrnstein.

II. Procedural History

As a result of injuries allegedly sustained in the subject accident, Plaintiff filed the underlying lawsuit against Richards and Defendants. Plaintiff asserted that Brant was negligent in failing to give Richards proper directions to return to the dealership, which somehow caused Richards to not properly yield to oncoming traffic. That was her only theory against Brant. Plaintiff also asserted claims against Herrnstein, which fell under two general theories of liability. First, Plaintiff sought to hold Herrnstein vicariously liable for the conduct of either Brant,

Richards, or both under the doctrine of respondeat superior. Second, Plaintiff sought to hold Herrnstein liable for Richards's negligent driving under a joint-venture theory.

Defendants moved for summary judgment below because – under the undisputed evidence – it was clear that Brant owed no duty, that Brant breached no duty, and that no legal basis existed to hold Herrnstein liable for Richards's driving. The trial court agreed and granted summary judgment in Defendants' favor. Plaintiff then appealed. On review, Plaintiff attempted to assert – for the first time – a claim for negligent entrustment. Plaintiff also argued that a joint venture theory was applicable to the facts of this case.

The appellate court rejected both arguments. Although the appellate court below elected to consider Plaintiff's negligent entrustment claim despite its initial appearance only on appeal, it nonetheless found that theory untenable. After a thorough discussion of the relevant and well settled principles both in Ohio and throughout the country, the lower court correctly found that an automobile dealership such as Herrnstein does not have some heightened duty of care with regard to test drivers. Rather, the general rules applicable to negligent entrustment apply, and under those general rules, the undisputed evidence on record was insufficient to hold Herrnstein liable.

Plaintiff now asks this Court to intervene. She asks this Court to reweigh the facts and find in her favor. But no basis exists under Ohio law to do so. This case is not one of sufficient import to invoke this Court's discretionary jurisdiction, and even if it were, Plaintiff's arguments on appeal remain untenable. Plaintiff's attempt to appeal to this Court's appellate jurisdiction must be rejected, and her request for this Court to review a simple matter of applying undisputed facts to settled law should be denied.

JURISDICTIONAL STATEMENT

This Court should not exercise jurisdiction over the present case. Plaintiff recognizes that the law in Ohio and throughout the country are consistent with the law applied by the courts below. Yet Plaintiff attempts to convince this Court that the circumstances of her accident and this case are somehow different from myriad similar cases such that they present an issue of great public and general importance. They do not. Rather, this case merely presents the routine application of an unambiguous, well-settled law to the uncontested facts involved. Plaintiff is simply unsatisfied with how that law applies to her facts.

Generally, cases that are of public or great general interest involve issues with the potential to impact society as a whole. *See James A. Keller, Inc. v. Flaherty*, 74 Ohio App.3d 788, 791-92, 600 N.E.2d 736 (10th Dist. 1991). A decision in such a case could affect citizens throughout a city or county or involve public issues of statewide significance. *See, e.g., Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 15; *W. Unity ex rel. Beltz v. Merillat*, 6th Dist. Williams No. WM-03-016, 2004-Ohio-2682, ¶ 17. Cases involving public or great general interest might also involve novel questions of law or procedure, unique issues, or cases of first impression. *See, e.g., Noble v. Colwell*, 44 Ohio St.3d 92, 94, 540 N.E.2d 1381 (1989); *Villas at the Pointe of Settlers Walk Condo. Ass'n v. Coffman Dev. Co.*, 12th Dist. Warren No. CA2009-12-165, 2010-Ohio-2822, ¶ 10.

By contrast, where a case was decided through routine application of settled law to facts, or where a case was decided based on the particular factual circumstances unique to a case, it will not likely be one of public or great general interest and will not invoke this Court's jurisdiction. *See, e.g., Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. Ohio Dep't of Transp.*, 104 Ohio App.3d 340, 344, 662 N.E.2d 44 (10th Dist. 1995). Even decisions that could affect a

small number of people will not necessarily be of such public or great general interest as to warrant this Court's attention. *See, e.g., State ex rel. Lancaster Sch. Dist. Support Ass'n v. Bd. of Educ.*, 10th Dist. Franklin No. 06AP-305, 2006-Ohio-5520, ¶ 18. And where the matter involves only resolution of questions specific to the case – rather than resolutions of law that affect the public in general – this Court's jurisdictional mandate is not satisfied. *See, e.g., Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 36, fn. 1.

Further, the sole determination for the Court to make at this initial stage is whether the matter presents a question of great import such that the Court should exercise jurisdiction and accept the appeal. *Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960). And the decision of whether the issues presented are sufficiently great or adequately affect the public fall within this Court's discretion. *Id.*

This case does not involve such considerations. As Plaintiff admits – and as the court below amply described – Ohio law on all relevant issues is clear and undisputed, and that law is consistent with how states across the country handle such issues. Further, the facts in this case are uncontested. Applying the settled law to the undisputed facts, Plaintiff simply has no viable claim against Defendants. Plaintiff's attempt to convince this Court that her case is anything other than a routine negligence case to which well-settled law applies must fail.

RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

In her Memorandum in Support of Jurisdiction, Plaintiff raises two arguments. First, Plaintiff argues that the well-settled law relating to causes of action for negligent entrustment must be fundamentally altered by vastly expanding the duty owed by motor vehicle dealers to conduct detailed and overly-intrusive investigations into those who test drive vehicles. Second, Plaintiff argues that motor vehicle dealers should be subject to strict liability for any negligence of a test-driver if a representative of the dealership is in the car at the time that negligence occurs. Neither of those propositions withstands even cursory scrutiny.

I. No justification exists to alter the law regarding negligent entrustment.

Plaintiff identifies her First Proposition of Law as follows: "A motor vehicle dealer can be liable for its own negligence in failing to ascertain whether a customer entrusted to test drive a vehicle was fit to drive." (Pl.'s Mem. in Supp. at 8.) Defendants agree that a motor vehicle dealer can – like any other entity that entrusts vehicles to others – be liable for negligent entrustment. But that is not in fact what Plaintiff asserts. Rather, Plaintiff argues that the law of negligent entrustment as it applies to motor vehicle dealers should be drastically altered.

The law on negligent entrustment in Ohio is clear. To maintain a claim under that theory, the plaintiff must show that "the vehicle was driven with the owner's permission and authority, that the person entrusted with the vehicle was an incompetent driver, and that the owner knew or should have known that the driver was incompetent when the vehicle was entrusted to him." *Hicks v. State Farm Mut. Auto. Ins. Co.*, 2017-Ohio-7095, 95 N.E.3d 852, ¶ 21 (2d Dist.) (quotation omitted). It is critical that the entrusting party not only knowingly entrust the vehicle, but also that it did so knowing that the driver was incompetent or otherwise unfit to operate a vehicle. *See Williamson v. Eclipse Motor Lines, Inc.*, 145 Ohio St. 467, 471, 62 N.E.2d 339 (1945).

The possession of a valid driver's license is important in determining whether a party was incompetent and whether the entrusting party knew of that incompetence. The absence of a license does not necessarily mean that a party was not competent to operate a vehicle. *Community Mut. Ins. Co. v. Kaczmarski*, 6th Dist. Lucas No. L-97-1220, 1998 Ohio App. LEXIS 1830, at *11-12 (May 1, 1998). But the possession of a driver's license is "at least an indicator that the state considers the licensee qualified and minimally competent to operate a motor vehicle." *Id.* And "[i]n an arms length transaction between strangers, a seller, lessor, donor or bailor would be entitled to presume that the buyer, lessee, donee or bailee was competent and qualified to operate the vehicle by virtue of his or her possession of a valid operator's license." *Id.* In other words, Ohio law is clear that when the borrower of a vehicle presents a valid license to a potential seller, the entrusting seller is definitively not negligent in entrusting the vehicle to the borrower absent knowledge of some other indicator of incompetence. *See id.* And here, the evidence below firmly establishes that Herrnstein had no knowledge or indicators suggesting that Richards was unfit to test drive the vehicle. Richards was not displaying any signs or symptoms of being tired, sleepy, or otherwise affected by her normal third-shift job.

Plaintiff now argues that automobile dealerships have a duty to do more than simply ensure that those who would test drive its vehicles have a valid driver's license. Plaintiff asserts that such businesses should undertake invasive personal questioning about the lives and sleep patterns of potential test drivers. That suggestion is both practically unworkable and irrelevant to the subject case.

First, requiring businesses to inquire into the personal lives of their customers would be unsound policy. Doing so would constitute an invasion of the privacy as to myriad Ohio citizens. Ohio business have no justification to ask about the habits – whether personal, work-schedule, or

sleep – of potential customers, less yet to those who are not even themselves contemplating purchasing a vehicle. Moreover, holding a valid driver's license is an objective standard. The license permits an entrustor to know with certainty that the individual has passed the state-required minimum mandate for operating a motor vehicle. Compelling an entrustor to inquire about and make decisions based on a test-driver's sleep schedule would be unnecessarily subjective. There is no workable standard for suggesting how much sleep a person should have had or within what period that sleep should have occurred to constitute "enough" rest to be permitted to drive a vehicle. Imposing such a requirement would simply be impractical and contrary to sound public policy.

Second, regardless of whether such a requirement existed, it would be irrelevant here. No evidence adduced below suggests that Richards was not well-enough rested to drive that vehicle or that she displayed any signs or symptoms of sleepiness. In other words, even assuming that a duty to inquire about a customer's restfulness did exist, and even if Herrnstein breached that duty by not asking, Plaintiff still could not show that such a breach was the proximate cause of the subject accident. To make such a showing, Plaintiff would have to rely solely on speculation and conjecture, which are insufficient either to prove an essential element of her claim or to oppose Defendants' underlying summary judgment motion. *See Boles v. Montgomery Ward & Co.*, 153 Ohio St. 381, 389, 92 N.E.2d 9 (1950) ("A verdict for plaintiff based on conjecture, guess, random judgment or supposition cannot be sustained."); *Fagerholm v. GE*, C.P. No. 593306, 2007 Ohio Misc. LEXIS 816, at *4-5 (Oct. 12, 2007) ("Mere conjecture or speculation presented by the nonmovant is insufficient to a defeat a summary judgment motion, as the movant must do more than merely present some 'metaphysical doubt' as to material facts."); *Youngerman v. Meijer, Inc.*, 2d Dist. Montgomery No. 15732, 1996 Ohio App. LEXIS 4046, at *11 (Sept. 20, 1996) ("Ohio

courts will not indulge in speculation and juries may not be allowed to base their decisions purely upon conjecture.").

In short, the law on negligent entrustment in Ohio is clear and well settled. Plaintiff's argument for the largescale alteration of that law – and the overly broad expansion of the duty established under it – is practically unworkable and legally unsound. And regardless, even accepting Plaintiff's proposed change to the law, it would remain irrelevant here because Plaintiff's claim must still fail even if the law were as she wished. Plaintiff's First Proposition of Law should therefore be rejected.

II. Merely riding in a vehicle without exercising control is not sufficient to impose liability on Defendants.

In her Second Proposition of Law, Plaintiff argues that the presence of a dealership representative in a test-driven car creates strict liability as to the dealership for any negligence that occurs during the test drive of that car. Plaintiff claims that that interpretation is consistent with Ohio law and the law applied throughout the nation. Plaintiff is incorrect.

At the outset, it bears repeating that – particularly with regard to Plaintiff's second legal proposition – Plaintiff's case does not raise issues of great or general public interest. This appeal again merely presents a straightforward application of well-settled law to undisputed facts.

Plaintiff begins her argument by stating that her position in her Second Proposition of Law is "nothing more than the general, nationwide rule." (Pl.'s Mem. in Supp. at 9.) Plaintiff supports her position by citing a case from Colorado and one from Ohio. The Colorado case that Plaintiff cites is *American Family Mutual Insurance Co. v. AN/CF Acquisition Corp.*, 2015 COA 129, 361 P.3d 1098. In that case, the court relied on Colorado's version of the joint venture doctrine to hold an automobile dealership liable for the negligence of a driver under the notion that both the driver and the dealership shared an interest in the test drive. *Id.* ¶¶ 12, 41. But Plaintiff fails to point out

critical issues related to that decision. First, Colorado law recognizes two distinct types of joint venture liability, one of which specifically involves joint ventures dealing with automobiles. *See id.* ¶¶ 11, 30. Second, the *AN/CF Acquisition* court itself conducted a multijurisdictional investigation into joint venture liability as applied to test drives, and in many of the cases it reviewed, no such liability was imposed. *See id.* ¶¶ 20-30. And third, the elements necessary for joint venture in Colorado are distinctly different from those used in Ohio. *Compare id.* ¶ 12 (noting the requirements for a joint venture test drive in Colorado, which do not include profit sharing, contract, intent, or contributions by each party) *with Ford v. McCue*, 163 Ohio St. 498, 505, 127 N.E.2d 209 (1955) (holding that joint control and profit sharing are required for a joint venture in Ohio) and *Cosic v. Kronberg*, 6th Dist. Ottawa No. OT-15-002, 2015-Ohio-5496, ¶ 7 (listing the Ohio elements for a joint venture).

The second case that Plaintiff relies on is the 1939 decision in *Dahnke v. Meggitt*. That case espoused the following rule:

> 1. The presence of an owner in an automobile, while it is being driven on his invitation by a prospective buyer of the automobile, creates a rebuttable presumption that the prospect is the agent of the owner in so driving it.
>
> 2. An automobile dealer who takes a prospective buyer for a ride to demonstrate to him one of his automobiles and in so doing invites and permits the prospect to drive it, is liable for the negligent acts of the prospect, unless the evidence shows the owner has abandoned to the prospect the right to control the operation of the vehicle.

Dahnke v. Meggitt, 63 Ohio App. 252, 252, 26 N.E.2d 223 (6th Dist. 1939), syllabus. Even were that case applicable here, it would still not permit Plaintiff to prevail. This is true because the undisputed evidence below affirmatively showed that Richards was not Herrnstein's agent and because Brant surrendered control of the vehicle to Richards. While Brant aided Richards by providing general directions to return to the dealership, he left the actual operation of the vehicle,

as well as the decision of precisely how to return to the dealership, to Richards. And although Plaintiff contends that Brant maintained a right to control the vehicle during the test drive simply by virtue of Herrnstein's ownership of that vehicle, Plaintiff cites no authority to support that assertion. And her ipse dixit does not create Ohio law.[1] Plaintiff's reliance on *Dahnke* is therefore misplaced.

Plaintiff also relies on *Suriano v. NAACP*. That reliance is somewhat baffling. While the courts in *Suriano* discussed the same joint-control requirement as did the court in *Dahnke*, the *Suriano* court did so in the context of a joint adventure theory. *Suriano v. NAACP*, 7th Dist. Jefferson No. 05 JE 30, 2006-Ohio-6131, ¶ 67-78. And as Defendants discussed in their arguments below, no such theory can persist absent some unity of interest between the parties. The appellate court correctly identified that no such interest exists in this case. And regardless, the *Suriano* court found no control under the facts there, specifically emphasizing that "[i]t is the duty of the passenger not to interfere with the driver, and in fact * * *, it is a criminal offense for a passenger to interfere with the driver." *Id.* ¶ 76.

Simply put, Brant did not have control over the vehicle at the time of the accident, and under Ohio law, it would have been unlawful for him to attempt to exercise such control. No theory of joint venture liability is permissible under the undisputed facts because no control existed and because there was no unity of interests between Defendants and Richards. Plaintiff's Second Proposition of Law must therefore be rejected.

CONCLUSION

This case does not present any issue of great or general public interest. This case involves only the application of well-settled Ohio law to undisputed material facts. And pursuant to that

[1] It also bears noting that, under the plain language of the rule expressed by the court in *Dahnke*, Herrnstein could not be held liable regardless because Richards was not even the "prospective buyer."

law and under those facts, Plaintiff has no basis to hold Defendants liable. That was true below and remains the case here. Plaintiff has offered this Court no plausible justification to entertain her appeal. Consequently, Plaintiff's request that this Court exercise its discretionary jurisdiction should be denied.

Respectfully submitted,

/s/ Jonathan W. Philipp
Jonathan W. Philipp (#0043705)
LAW OFFICE OF JONATHAN W. PHILIPP
1299 Zurich Way, Suite 150
Schaumburg, IL 60196
Telephone: (440) 237-3210
Facsimile: (412) 750-0910
jonathan.philipp@zurichna.com
Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February 2020 the foregoing *Appellees Herrnstein Chrysler, Inc. and John Brant, III's Memorandum in Opposition to Jurisdiction* was electronically filed through the E-filing portal with the Clerk of Court, which will then send a notification of such filing to the following, and served the foregoing via electronic mail upon the following:

Peter D. Traska (#0079036)
Michelle L. Traska (#0095237)
Traska Law Firm, LLC
4352 Pearl Road, Suite A
Cleveland, OH 44109
ptraska@traskalawfirm.com
mtraska@traskalawfirm.com
Attorneys for Plaintiff-Appellant Patricia Burris

Respectfully submitted,

/s/ Jonathan W. Philipp
Jonathan W. Philipp (#0043705)
LAW OFFICE OF JONATHAN W. PHILIPP
1299 Zurich Way, Suite 150
Schaumburg, IL 60196
Telephone: (440) 237-3210
Facsimile: (412) 750-0910
jonathan.philipp@zurichna.com
Attorneys for Defendants-Appellees