SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 9

X

CLAUDIA M. WELLS and
STACEY NICOLE WELLS,

Plaintiffs,

-against-

Index No.: 601976/17
Motion Sequence...03
Motion Date...08/16/18

AMERICAN TIRE DISTRIBUTORS, INC.,
HUB TRUCK RENTAL CORP., and
JOSEPH R. SIGNORELLI

Defendant.

X

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion by the Defendants seeking an Order pursuant to CPLR § 3212 granting them summary judgment and dismissing the action on the basis that the Plaintiff did not sustain a serious injury pursuant to § 5102 (d) of the Insurance Law, and dismissing the action as against the Defendant, HUB TRUCK RENTAL CORP. ("HUB TRUCK"), pursuant to the Transportation Equity Act of 2005, Section 14, 49 U.S.C., Chapter 301, §30106 (the "Graves Amendment"), is determined as provided herein.

The Plaintiffs bring this action to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that took place on August 25,

2015. In their Verified Bill of Particulars, the Plaintiff CLAUDIA M. WELLS ("CLAUDIA") alleges, *inter alia,* that she sustained the following injuries as a result of the accident: straightening of the normal lumbar lordosis; L1-2, L3-4 disc bulging; L4-5, L5-S1 disc herniations with impingements; lumbar sprain/strain, dysarthria; cervical sprain/strain, radiculopathy, and dysarthria; thoracic sprain/strain and dysarthria; left shoulder sprain/strain; chronic myofascial pain syndrome; subluxation at sacrum, L5, L4, T10, T9, T8, T7, C6, C5 and C4; sprain of sacroiliac joint; sprain of muscle and tendon of wall of thorax (*See* Plaintiffs' Bill of Particulars at ¶10, annexed to the Defendants' Motion as Exhibit "C"). It is claimed that the foregoing injuries required an extensive course of physical therapy.

The Plaintiff, STACEY NICOLE WELLS ("STACEY"), alleges, *inter alia,* that she sustained the following injuries as a result of the accident: C3-4 through C5-6 disc bulges impressing upon the ventral thecal sac; C6-7 disc herniation; cervical radiculopathy, sprain/strain and dysarthria; L1-2, L2-3 disc bulges; L3-4, L4-5 disc bulges impressing the ventral thecal sac; L5-S1 disc bulge impressing the ventral epidural space; facet hypertrophic changes and ventral extension of the discs L4-5 and L5-S1; lumbar sprain/strain and dysarthria; curvature of the lumbar spine; T4-5 through T10-11 disc bulges impressing the ventral thecal sac; thoracic sprain/strain and dysarthria; left shoulder sprain/strain; and chronic myofascial pain syndrome (*Id.*)

Both Plaintiffs claim that the foregoing injuries required an extensive course of physical therapy. The Bill of Particulars further alleges that CLAUDIA was not employed at the time of the accident but was totally disabled for approximately two weeks

following the accident and remains partially disabled. At the time of the accident, STACEY was employed as a hostess for a TGIF located in Massapequa Park. STACEY alleges that she was totally incapacitated from employment and totally disabled for a period of two weeks following the accident and continues to be partially disabled. (*Id.*)

CLAUDIA testified at her Examination Before Trial ("EBT") that she was employed by Recco Home Care as a home health aide at the time of the accident (*See* CLAUDIA EBT Transcript at p. 10, annexed to Defendants' Motion as Exhibit "F"). She worked approximately 12 hours per day and 39 hours per week. CLAUDIA could not recall when she returned to work following the accident, nor could she recall whether she missed any time from work as a result of the accident (*Id.* at pp. 15, 35). CLAUDIA subsequently testified, however, that she missed approximately one year of work as a result of the accident (*Id.* at p. 35).

Immediately following the accident, CLAUDIA refused medical assistance when asked by the police at the scene (*Id.* at p. 30). CLAUDIA's mother picked her up from the scene of the accident. She could not recall whether she went straight to the hospital from the scene of the accident (*Id.* at p. 31). CLAUDIA presented to the emergency room at South Nassau Community Hospital with complaints of pain to her lower back and upper back (cervical neck area) (*Id.*) The staff at South Nassau Community Hospital prescribed medication for the pain and advised CLAUDIA to follow up with her primary care physician (*Id.* at p. 33).

CLAUDIA testified that she began treatment with a chiropractor "some days" after the accident on referral of her first attorney (*Id.* at p. 34). She treated with the

chiropractor for approximately two months until October/November 2015 when she moved to Florida. She then began seeing another chiropractor in Florida. She further testified that the chiropractor referred her for MRI's due to complaints of head pain and headaches which she began experiencing approximately one day after the accident (*Id.* at pp. 36-37). CLAUDIA testified that the chiropractor in Florida did not recommend any treatment beyond physical therapy and chiropractic treatment. (*Id.* at pp. 34-42).

Upon moving back to New York in November 2016, CLAUDIA began seeing another chiropractor on referral of her second attorney (*Id.* at p. 43). CLAUDIA treated with the chiropractor in New York for an additional six months. She testified that this chiropractor also did not recommend any treatment beyond physical therapy and chiropractic treatment. (*Id.* at p. 43, 45).

At the time of CLAUDIA's deposition, she was employed by All Metro Healthcare where she is currently still employed, full-time, working approximately 8-12 hours per day, and approximately 40 hours per week (*Id.* at pp 9, 50).

CLAUDIA testified that prior to the accident, she would take Zumba classes at the gym on her days off (*Id.* at p. 16). As a result of the accident, CLAUDA testified that activities which involve reaching overhead have been limited. As to activities that she was able to perform prior to the accident but can only perform in a limited manner thereafter include walking long distances, sitting for long periods of time, going to the gym and cleaning (*Id.* at p. 49). As to activities that she can no longer perform at all, CLAUDIA testified that she can no longer go to the gym or take Zumba classes (*Id.*).

STACEY testified at her EBT that she did not request medical attention immediately following the accident (*See* STACEY EBT Transcript at p. 32, annexed to Defendants' Motion as Exhibit "G"). STACEY left the scene of the accident and presented to the emergency room of South Nassau Community Hospital with complaints of pain to neck, right knee and right hip (*Id.* at pp. 34-35). The hospital staff took x-rays and administered pain medication. STACEY did not recall whether she went to work the next day or what she did the rest of that week (*Id.* at p. 37).

STACEY testified that she presented to her primary care physician within one week of the accident with complaints of neck pain, lower back pain and headaches (*Id.* at p. 38). Her primary care physician recommended treatment with a chiropractor. Within a couple of days thereafter, STACEY began treatment with a chiropractor on referral of her first attorney (*Id.* at p. 39). In total, STACEY treated with the chiropractor for approximately two months (*Id.* at p. 40). MRI's were performed on her cervical, lumbar and thoracic spine on referral of the chiropractor. STACEY testified that she ceased treatment with the first chiropractor in October 2015 because she relocated to Florida. She did not treat with anyone between October 2015 and January 2016. In January 2016, STACEY began treatment with a chiropractor in Florida who she treated with for about a year. (*Id.* at pp. 42-44). This chiropractor did not make any other recommendations for treatment other than chiropractic care (*Id.* at p. 45). Upon moving back to New York, STACEY treated with another chiropractor on referral of her second attorney for approximately eight additional months. This chiropractor never referred STACEY for any

other treatment beyond chiropractic care (*Id.* at pp. 46-47). STACEY testified that her right knee pain resolved after about eight months following the accident (*Id.* at p. 47).

Activities that STACEY was able to perform prior to the accident but can only perform with limitations thereafter include bending over and lifting items. She also sustains frequent headaches, neck pain, lower back pain and spasms. STACEY testified that she continues to experience neck and back pain daily (*Id.* at pp. 50-51).

In support of their motion, the Defendants submit employment attendance records from Recco Home Care Services, Inc., in response to duly executed authorizations from CLAUDIA WELLS. Contrary to the assertions in the Bill of Particulars, the employment records reflect that CLAUDIA WELLS did not miss any time from work as a result of the accident and, in fact, worked full-time hours (39 hours/week) until she moved to Florida in October 2015 (*See* Exhibit "I" annexed to Defendants' Motion).

The Defendants proffer an affirmed report of their orthopedic expert, Leon Sultan, M.D. (*See* Affirmation of Dr. Sultan, annexed to Defendants' Motion as Exhibit "J"). Dr. Sultan examined the Plaintiff, CLAUDIA, on March 1, 2018. Dr. Sultan's range of motion testing of CLAUDIA's cervical spine, obtained with goniometric measurement, revealed normal ranges of motion for head and neck extension, flexion, rotation to the right and left, and tilting to the right and left. Dr. Sultan did not detect any reactionary spasms or any resistance to range of motion testing. Upon examination, Dr. Sultan also found normal range of motion for CLAUDIA's left shoulder and thoracolumbar spine. Dr. Sultan noted that the lumbar spine MRI testing performed on October 19, 2015 reported positive findings, including "levosclerotic curvature with lumbar straightening and peripheral disc

bulging at L1-2 and L3-4 with L4-5 broad-based central subligamentous disc herniation with similar findings noted at the L5-S1 level" (*See* Affirmation of Dr. Sultan at p. 2). Dr. Sultan opined that his orthopedic examination with regard to CLAUDIA's cervical spine, lumbar spine and left shoulder "reveals her to be orthopedically stable and neurologically intact" and that "[t]oday's examination does not confirm any ongoing causally related orthopedic or neurological impairment in regard to the occurrence of 8/25/15" (*Id.* at p. 3). He further opined that there is no correlation between his spinal examination and the aforementioned lumbar MRI findings.

Dr. Sultan also examined the Plaintiff, STACEY, on March 1, 2018 (*See* Affirmation of Dr. Sultan, annexed to Defendants' Motion as Exhibit "M"). His findings upon examination of STACEY's left shoulder and thoracolumbar spine were virtually identical to the findings pertaining to CLAUDIA. However, Dr. Sultan found that range of motion testing of STACEY's cervical spine was accompanied with "voluntary resistance" (*Id.* at pp. 2-3). His report reflects that, as a result of the accident, STACEY reported having lost about two days from work as a TGIF hostess, resuming work activity for one day, then stopping all work activity for the following three months. As to the MRI testing, Dr. Sultan noted the findings of the cervical spine MRI testing reported C4-5 through C5-6 posterior annular disc bulging along with C6-7 posterior subligamentous disc herniation along with left foraminal disc herniation at C7-T1. He further noted the findings of the thoracic spine MRI testing reported T4-5 through T10-11 posterior subligamentous disc bulging along with curvature of the thoracic spine convex to the left at the upper thoracic levels and to the right at the mid to lower thoracic levels. Lastly, he noted the

findings of the lumbar spine MRI reported posterior subligamentous disc bulging at L1-2 and L2-3 with posterior annular disease bulging at L3-4 and L4-5 in addition to posterior subligamentous disc bulging along with facet hypertrophic changes and ventral extension of the disc at L4-5 and L5-S1 along with curvature of the lumbar spine, convexed to the left (*See* Affirmation of Dr. Sultan at p. 2, Exhibit "M"). He concluded that STACEY was "otherwise orthopedically stable and neurologically intact" and that there is "no correlation between [his] spinal examination and the above described multiple spinal MRI readings."

The Defendants further proffer the affirmed report of their neurology expert, Freddie M. Marton, M.D., FAAP (*See* Affirmation of Dr. Marton, annexed to Defendants' Motion as Exhibit "K"). Dr. Marton examined CLAUDIA on February 19, 2018, based on which he opined that she did not exhibit any spinal tenderness or restricted range of motion of the cervical spine or lumbar spine. Notably, Dr. Marton does not indicate how the measurements were taken. Nor does he specify any numeric ranges or compare the patient's range of motion to what is considered normal for those body parts (*See* Affirmation of Dr. Marton at p. 2). Dr. Marton's impression was that CLAUDIA "has a cervical lumbar strain and sprain syndrome which at the time of [his] evaluation has entirely resolved" and that there "is no neurological disability" (*Id.*).

As to the Plaintiff, STACEY, Dr. Marton similarly opined that she did not exhibit any spinal tenderness or restricted range of motion of the cervical spine or lumbar spine, again without specifying numerical ranges or comparing the patient's range of motion to what is considered normal for those body parts (*See* Affirmation of Dr. Marton as to STACEY, annexed to Defendants' Motion as Exhibit "N").

The Defendants further proffer the affirmed report of their radiology expert, Sheldon P. Feit, M.D. (*See* Affirmation of Dr. Feit, annexed to Defendants' Motion as Exhibit "L"). Dr. Feit's review of the brain and lumbar spine MRIs performed on CLAUDIA just under two months following the accident revealed disc bulges at the L4-L5 and L5-S1 levels; degenerative spondylosis; and associated herniation at L5-S1 (*Id.* at p. 2). Dr. Feit concluded that the positive MRI findings of CLAUDIA's lumbar spine revealed "pre-existing degenerative change". He further blanketly concludes that "[d]isc bulges are not posttraumatic but are degenerative secondary to annular degeneration and/or chronic ligamentous laxity" (*Id.*).

Upon his review of the MRIs performed of STACEY's cervical spine, Dr. Feit opined that it was a "normal study" and concluded that there are no discernible abnormalities (*See* Affirmation of Dr. Feit as to STACEY, annexed to Defendants' Motion as Exhibit "O"). With regard to the thoracic spine MRI testing, Dr. Feit's impression was dextroscoliosis[1], but otherwise it was a normal study. Lastly, as to the MRI of the lumbar spine, his impression was mild levoscoliosis[2], but otherwise found it to be a normal study. Notwithstanding his impression of the thoracic spine and lumbar spine MRIs, Dr. Feit somehow concluded that they demonstrate "no discernible abnormalities." He further concluded that there are no abnormalities causally related to the accident of August 25, 2015 (*See* Dr. Feit Affirmation at pp. 2-3, annexed to Defendants' Motion as Exhibit "O").

[1] Dextroscoliosis is a deformity that results in a sideways curve of the spinal column to the right.

[2] Levoscoliosis is a deformity where the spine curves toward the left side of the body in a "C" shape.

In moving for summary judgment, the Defendants must make a *prima facie* showing that the Plaintiffs did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the Plaintiffs to come forward with evidence to overcome the Defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*See Pommels v. Perez*, 4 N.Y.3d 566 [2005]; *see also Grossman v. Wright*, 268 A.D. 2d 79, 84 [2d Dept. 2000]).

Within the scope of the defendant's burden, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (*See Qu v. Doshna*, 12 A.D.3d 578 [2d Dept. 2004]; *Browdame v. Candura*, 25 A.D.3d 747 [2d Dept. 2006]; *Mondi v. Keahan*, 32 A.D.3d 506 [2d Dept. 2006]).

The defendant is not required to disprove any category of serious injury which has not been properly pled by the plaintiff (*See Melino v. Lauster*, 82 N.Y.2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including the plaintiff's own testimony and his submitted exhibits (*See Michaelides v. Martone*, 186 A.D.2d 544 [2d Dept. 1992]; *Covington v. Cinnirella*, 146 A.D.2d 565, 566 [2d Dept. 1989]).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician (*See Pagano v. Kingsbury*, 182 A.D.2d 268 [2d Dept 1992]). Essentially, in order to satisfy the statutory serious injury

threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems,* 98 N.Y.2d 345 (2002), stated that the plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, *supra* at 353). However, the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff (*Toure v. Avis Rent A Car Systems, supra*). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (*See Gonzalez v. Vasquez*, 301 A.D.2d 438 [1st Dept. 2003]).

Even where there is ample objective proof of the plaintiff's injury, the Court of Appeals held in *Pommels v. Perez,* 4 N.Y.3d 566 [2005], that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of the plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a pre-existing condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, *supra*).

In this matter, the Plaintiffs do not dispute that their injuries do not fall under the first six (6) categories of "serious injury" as defined by Insurance Law § 5102 (d). Thus, the categories of "death", "dismemberment", "significant disfigurement", "fracture", "loss of a fetus", and "permanent loss of use of a body organ, member, function or system" categories are not applicable here. As such, this Court will restrict its analysis to the remaining three categories of the statute, *to wit*, "permanent consequential limitation of use of a body organ or member"; "significant limitation of use of a body function or system";

and that the Plaintiffs were unable to perform substantially all of their daily activities for the period required to satisfy the 90/180 category.

Under the no-fault statute, to meet the threshold of a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*See Licari v. Elliot*, 57 N.Y.2d 230 [1982]; *Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*See Licari v. Elliot*, *supra*; *Grossman v. Wright*, 268 A.D.2d 79, 83 [2d Dept. 2000]).

Furthermore, when, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" category, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable (*See Toure v. Avis Rent A Car Systems, Inc.,* 98 N.Y.2d 345 [2002]). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*Id.*). The Court of Appeals in *Perl v. Meher*, held that a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later in connection with litigation (*Perl v. Meher*, *supra*).

Preliminarily, the Court finds that the Defendants have established their *prima facie* entitlement to judgment as a matter of law as to the 90/180 category of serious injury relating to both Plaintiffs. As to CLAUDIA, the Defendants submitted employment time sheets which show she did not lose any time from work following the accident (*See* RECCO Time Sheets, annexed as Exhibit "I" to Defendants' Motion). As to STACEY, the Defendants sufficiently established via her deposition testimony and Bill of Particulars that she did not suffer a serious injury in the 90/180 category. In opposition, the Plaintiffs failed to raise an issue of fact. As such, the branch of the Defendants' motion seeking dismissal of the Plaintiffs' claims on the grounds that they did not suffer a serious injury under this category, is **GRANTED**.

However, as to the remaining two categories of serious injury relating to the Plaintiffs, CLAUDIA and STACEY, the Court finds that the Defendants failed to meet their *prima facie* burden.

In his examination report of CLAUDIA, the Defendants' orthopedist, Dr. Sultan, noted that his examination did not confirm any "ongoing" causally related orthopedic impairment with regard to the subject accident. As to the positive MRI findings of CLAUDIA's lumbar spine, Dr. Sultan merely opined that there is no correlation between his spinal examination and such findings, while failing to opine whether the findings are causally related to the subject accident. In his examination report of STACEY, Dr. Sultan noted "voluntary resistance" to motion testing of her cervical spine. While he found no restriction on activities of daily living, he neglected to address whether the positive MRI findings relating to STACEY's cervical, thoracic and lumbar spine were causally related

to the accident of August 25, 2015. Dr. Sultan also noted that STACEY reported having stopped "all work activity for the following three months" after working one day post-accident. Accordingly, Dr. Sultan's report is insufficient to warrant judgment as a matter of law.

The Defendants' neurologist similarly failed to establish that the Plaintiffs did not suffer a "serious injury" as defined by the statute. In this regard, Dr. Marton's examination report relating to both Plaintiffs failed to set forth the details of his measurements as well as the norms that he measured them against when performing range of motion testing of the Plaintiffs' cervical spine and lumbar spine. Dr. Marton also concluded that STACEY sustained a cervical and lumbar strain and sprain syndrome which at the time of his evaluation had allegedly resolved, but did not address whether STACEY's injuries were causally related to the subject accident. Dr. Marton likewise concluded that CLAUDIA sustained a cervical lumbar strain and sprain syndrome but neglected to address causation.

Moreover, Dr. Feit's examination reports relating to both Plaintiffs raise clear issues of fact as to whether their injuries are causally related to the accident or degenerative in nature.

The Court will next address the branch of the Defendants' motion which seeks judgment as a matter of law dismissing the Plaintiffs' Complaint as to the Defendant, HUB.

In support of its motion, the Defendants proffer a sworn Affidavit by Jennifer Gelber, Insurance Manager employed by HUB (*See* Gelber Affidavit ¶ 1, annexed to

Defendants' Motion). Ms. Gelber attests that she is authorized to submit the affidavit on behalf of HUB. Ms. Gelber authenticated the lease agreement dated November 10, 2014 that was entered into between the Defendant, American Tire Distributors, lessee, and HUB, lessor for the vehicle operated by the Defendant, JOSEPH R. SIGNORELLI, involved in the subject accident ("Lease Agreement") (*See* Lease Agreement, annexed to Defendants' Motion as Exhibit "P"). Ms. Gelber further attests that HUB is in the regular business of leasing and renting motor vehicles on and before the date of the accident. On August 25, 2-15, the subject motor vehicle was being operated by the Defendant, Signorelli, an authorized operator and employee of the Defendant, AMERICAN TIRE DISTRIBUTORS, INC. (*Id.* at ¶¶ 5-7). According to Ms. Gelber, HUB's only connection to the subject vehicle on the date of the accident was that of lessor and it did not operate, direct, or control the vehicle at that time, nor did HUB employ, control or direct SIGNORELLI.

The Court notes that the Lease Agreement does reflect that HUB is responsible for maintenance and repairs to be provided from HUB's facilities (*See* Exhibit "P" at ¶ 4). However, Ms. Gelber attests that her search of the HUB records and the police report as to the subject accident "show no complaints nor any mechanical issues concerning the vehicle in question, its maintenance or repair. Counsel for the Defendants also points to the EBT testimony of the Defendant, SIGNORELLI, wherein he testified that he did not experience any mechanical issues with respect to the subject vehicle at the time of the accident, and that the brakes, wheels and steering mechanisms were all in working order (*See* Signorelli EBT Transcript, annexed to Defendants' Motion as Exhibit "H").

The effect of the Graves Amendment is to preempt Vehicle and Traffic Law § 388[3]. Confirmed as constitutional by the Appellate Division, Second Department, the Graves Amendment acts as a bar to an action against a rental or leasing company for injuries and/or damages based solely on a theory of vicarious liability (*Graham v. Dunkley*, 50 A.D.3d 55 [2d Dept. 2008]). The Graves Amendment (49 USC § 30106) provides, in pertinent part:

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

Under the Graves Amendment, in order for recovery to be barred, the owner, or an affiliate of the owner, must be engaged in the trade or business of renting or leasing motor vehicles, and the owner, or its affiliate, must not be negligent (*Khan v. MMCA Lease, Ltd.*, 100 A.D.3d at 834).

[3] VTL § 388: "Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

In the instant case, the Defendant, HUB, established its entitlement to the protections under the Graves Amendment through its submission of the Lease Agreement and the sworn Affidavit of Ms. Gelber who had sufficient personal knowledge to authenticate the lease for the subject vehicle. Via the Affidavit of Ms. Gelber, HUB established that it is in the business of leasing vehicles. While HUB is responsible for the maintenance and repair of the vehicle pursuant to the Lease Agreement, the record is devoid of any evidence that the vehicle was not in good working repair at the time of the accident. Nor is there evidence to rebut HUB's prima facie showing that the operator of the vehicle, Defendant Signorelli, was an employee or agent of HUB at the time of the accident. The arguments raised in opposition to this branch of the Defendants' motion are without merit.

Accordingly, it is hereby

ORDERED, that the branch of the Defendants' motion seeking an Order pursuant to CPLR § 3212, granting them summary judgment on the grounds that the Plaintiffs failed to meet the serious injury threshold required by Insurance Law § 5102 (d) with respect to the "significant limitation of use of a body function or system" and "permanent consequential limitation of use of a body organ or member" categories, are DENIED; and it is further

ORDERED, that the branch of the Defendants' motion seeking an Order pursuant to CPLR § 3212, granting them summary judgment on the grounds that the Plaintiffs failed to meet the serious injury threshold required by New York State Insurance Law § 5102 (d) with respect to the "medically determined injury or impairment of a non-

permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment", is **GRANTED**; and it is further

ORDERED, that the branch of the Defendants' motion seeking an Order pursuant to CPLR § 3212, granting summary judgment dismissing the action as against the Defendant, HUB TRUCK RENTAL CORP., pursuant to the Transportation Equity Act of 2005, Section 14, 49 U.S.C., Chapter 301, §30106, is **GRANTED**.

This decision constitutes the decision and Order of this Court.

DATED: Mineola, New York
December 28, 2018

Hon. Randy Sue Marber, J.S.C.