

**SUPREME COURT - STATE OF NEW YORK**

PRESENT: HON. R. BRUCE COZZENS, JR.  
Justice.

TRIAL/IAS PART 7  
NASSAU COUNTY

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STANLEY FELD and HAYA FELD,  
Plaintiff(s),

-against-

HERTZ VEHICLES, LLC, HERTZ RENT-A-CAR,  
JERMAINE LEON HARPER,  
Defendant(s).

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MOTION #003, 004  
INDEX#7511/2007  
MOTION DATE:  
February 10, 2009

The following papers read on this motion:

Notice of Motion.....	1
Notice of Cross-Motion.....	1
Answering Affidavits.....	2

Upon the foregoing papers, it is ordered that the defendants' motion for summary judgment pursuant to Insurance Law §5102 [d] and pursuant to 49 USC §30106; and the cross-motion for summary judgment by defendant on the counter claim, Stanley Feld, are determined as hereinafter set forth.

The plaintiffs commenced this action alleging personal injuries as the result of a motor vehicle accident that occurred on September 10, 2006. It is alleged that the defendants were negligent in the ownership and operation of their motor vehicle.

In support of their motion, the defendants maintain that the plaintiffs have failed to sustain a "serious injury" pursuant to Insurance Law §5102 [d]. In addition, the defendant Hertz Vehicles, LLC/Hertz Rent-a-Car maintains that it is not a proper party in this action pursuant to 49 USC §30106, in that as an entity that rents motor vehicles it shall not be liable for harm to persons or property that results or arises out of the use, operation or possession of the vehicle.

In support of the cross-motion, the defendant on the counterclaim, Stanley Feld, maintains that if the defendants' motion is granted, then the counterclaim should be dismissed.

The affirmed reports of Stephen M. Newman, M.D., a neurologist, have been submitted. Dr. Newman examined both plaintiffs. As it related to the plaintiff Haya Feld, Dr. Newman opines after examination that Ms. Held has not sustained any neurological injury or disability as the result of the accident of September 10, 2006. As it relates to Stanley Feld, Dr. Newman opines that Mr. Feld has not sustained any neurological injury or disability as the result of the

accident of September 10, 2006. The affidavit of Bob Frankel, a claims administrator, has been submitted. Mr. Frankel states that the vehicle in question was rented to the defendant Harper.

"[A] defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law §5102 [d] by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support plaintiff's claim (see, *Turchuk v Town of Wallkill*, 255 AD2d 576, 681 NYS2d 72). With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions that a serious injury was sustained within the meaning of the Insurance Law (see, *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176.) The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (see, *Powell v Hurdle*, 214 AD2d 720, 625 NYS2d 634; *Giannakis v Paschilidou*, 212 AD2d 502, 622 NYS2d 112). Further, this court has consistently held that a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings (see, *Kauderer v Penta*, 161 AD2d 365, 689 NYS2d 190; *Carroll v Jennings*, *supra*). Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff (see, *Kauderer v Penta*, *supra*). In that vein, any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained (see, *Smith v Askew*, 264 AD2d 834, 695 NYS2d 405)." *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233, 237 [2nd Dept., 2000].

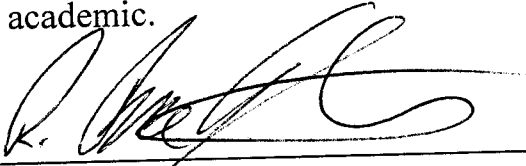
The Court finds that the defendants have established that the respective plaintiffs' injuries are not serious within the meaning of Insurance Law §5102 [d], thereby shifting the burden to the plaintiffs.

In opposition to the motion, the plaintiffs have submitted the medical records of Jamaica Hospital, Drs. Sarkissian, Gregorace and Goldstein, as well as the physical therapy records of Bruce Goodheart, P.T. In addition, the affidavits of Chester Bogdan D.C. and Melvin Leeds M.D., a radiologist, have been submitted. Dr. Bogdan opines that Haya Feld, as a result of the accident, has sustained a permanent loss of use of her cervical spine; cervical herniated discs at the C4-C5, C6-C7 and C7-T1 levels and bulge at the C5-C6 level and a significant limitation of use of her cervical spine. Dr. Bogdan opines that as the result of the accident, Stanley Feld has sustained a permanent loss of use of his cervical, upper thoracic and lumbosacral spine; a lumbar herniated disc at the L4-L5 and a significant limitation of use of his cervical, upper thoracic and lumbosacral spine.

In the instant matter, the Court finds there to be questions of fact as to whether the respective plaintiffs have sustained a serious injury pursuant to Insurance Law §5102 [d]. However, the defendant Hertz Vehicles, LLC/Hertz Rent-a-Car has established entitlement to judgment as a matter of law pursuant to 49 USC §30106.

As such, that branch of the defendant's motion seeking dismissal pursuant to Insurance Law §5102 [d] is denied. That branch of the motion seeking dismissal as against Hertz Vehicle LLC/Hertz Rent-a-Car pursuant to 49 USC §30106 is granted. The cross-motion of Stanley Feld, the defendant on the counterclaim, is denied as academic.

Dated: **MAY 4 2009**



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J.S.C.

**ENTERED**

MAY 12 2009

NASSAU COUNTY  
COUNTY CLERK'S OFFICE