COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS APPEALS COURT

Appeals Court No. 2022-P-0671

MARIA BLANCA ELENA GARCIA and JOSÉ FAFIÁN SEIJO

Plaintiffs – Appellants,

v.

SHANITQUA STEELE, KOLAWOLE OKE, MBB AUTO, LLC d/b/a

MERCEDES BENZ OF BROOKLYN, and MBF AUTO, LLC d/b/a

MERCEDES BENZ OF CALDWELL

Defendants – Appellees

On Appeal from the Suffolk County Superior Court
Civil Action No. 1884CV02327

(Honorable)

APPELLANTS' BRIEF

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STATEMENT OF THE ISSUES

1. Whether the Superior Court erred in granting Appellees MBB Auto, LLC and MBF Auto, LLC a judgment as a matter of law on Count I of Appellants' Complaint.
2. Whether the Superior Court erred in granting Appellees MBB Auto, LLC and MBF Auto, LLC a judgment as a matter of law on Count III of Appellants' Complaint.
3. Whether the Superior Court erred in finding that the Graves Amendment applies to the claims against Appellees MBB Auto, LLC and MBF Auto, LLC and shields those parties from liability thereon.
4. Whether the Superior Court erred in granting Appellees MBB Auto, LLC and MBF Auto, LLC a judgment as a matter of law on Appellants' claims given that a material triable issue of fact exists concerning whether Appellee Kolawole Oke's use of the loaner vehicle was supported by consideration.
5. Whether the Superior Court erred in granting Appellees MBB Auto, LLC and MBF Auto, LLC a judgment as a matter of law on Appellants' claims given that a material triable issue of fact

exists concerning whether Appellees MBB Auto, LLC and MBF Auto, LLC acted negligently in their lending of the loaner car to Appellee Kolawole Oke.

6. Whether the Superior Court erred in granting Appellees MBB Auto, LLC and MBF Auto, LLC a judgment as a matter of law on Appellants' claims given that a material triable issue of fact exists concerning whether Appellees MBB Auto, LLC and MBF Auto, LLC owed a duty to Appellants.
7. Whether the Superior Court erred in granting Appellees MBB Auto, LLC and MBF Auto, LLC a judgment as a matter of law on Appellants' claims given that a material triable issue of fact exists concerning whether Appellees MBB Auto, LLC and MBF Auto, LLC's breach of their duty to Appellants caused injuries to Appellants.
8. Whether the Superior Court erred in finding that Mr. Seijo does not have a viable claim for loss of consortium against Appellees MBB Auto, LLC and MBF Auto, LLC.
9. Whether the Superior Court erred in granting Appellee Kolawole Oke a judgment as a matter of law on Count II of Appellants' Complaint.

10. Whether the Superior Court erred in granting Appellee Kolawole Oke a judgment as a matter of law on Count II of the Complaint given that a material triable issue of fact exists concerning whether Appellee Kolawole Oke gave Appellee Shanitqua Steele permission to operate the loaner vehicle.

STATEMENT OF THE CASE

This is an appeal by plaintiff-appellants Maria Blanca Elena Garcia ("Ms. Garcia") and José Fafián Seijo ("Mr. Seijo") (together "Appellants") from final judgments entered on December 13, 2021 in favor of defendant-appellees MBF and MBB and on April 27, 2022 in favor of Oke on Count II, which entered final judgment as a matter of law on the Superior Court's (Deakin, J.) Memorandum of Decision (the "Memorandum of Decision") dated June 2, 2021. RA-000366-000396.[1] These final judgments granted judgments as a matter of law to the appellees Kolawole Oke ("Oke"), MBB AUTO, LLC d/b/a Mercedes Benz Of Brooklyn ("MBB"), and MBF AUTO, LLC d/b/a Mercedes Benz Of Caldwell ("MBF"), (collectively the "Appellees") in the Superior Court

[1] Citations to the Record Appendix are cited as "RA."

Action as defined *infra*. Specifically, the Memorandum of Decision granted summary judgment in favor on Oke on Count II and summary judgment in favor of MBB and MBF. RA-000366-000396.

STATEMENT OF THE FACTS

This case arises out of the severe and life changing injuries sustained by Ms. Garcia, a Spanish national, on August 18, 2016, when she was struck by a vehicle driven by Appellee Shanitqua Steele ("Steele") (the "Incident"). RA-000011. The subject vehicle (the "Vehicle") was registered to MBF as owner of the Vehicle at the time of the accident. *Id.* Ms. Garcia sustained her injuries while crossing the street, in a crosswalk, at the corner of Washington Street and School Street in the Downtown Crossing area of Boston, Massachusetts when Steele drove through a red light into a crowd of people, included Ms. Garcia. RA-000368.

The car that was driven by Steele was a loaner car given to her then-husband Oke by MBF while his car was being repaired at MBF's New Jersey car dealership. RA-000368. Oke, who was not properly instructed by MBF on the permitted uses of the loaner Vehicle, then drove that car from New Jersey to Boston,

Massachusetts, in violation of the loaner car agreement, to visit Steele. RA-000368-000370. On August 18, 2016, Oke left Steele, whom he knew to be an incompetent and unlicensed driver, in the loaner car while it was illegally parked and with the car running. RA-000370.

Foreseeably, Steele was promptly ordered to move the Vehicle by a meter maid, and, while attempting to drive the Vehicle, Steele drove through a red light and into a crowd of pedestrians, including Ms. Garcia. RA-000012. Ms. Garcia suffered substantial physical injuries as a result of being hit by the Vehicle, including a fractured spine, a fractured pelvis, and a hematoma to the pelvis. RA-000012.

On July 27, 2018, Appellants filed their complaint against Steele, Oke, MBB and MBF in the Suffolk Superior Court, seeking to recover for the personal injuries suffered on account of those parties' actions culminating in the events of August 18, 2016 (the "Superior Court Action"). RA-000010. The Complaint asserted the following causes of action: (i) Negligence; (ii) Negligent Entrustment; (iii) Loss of Consortium. RA-000010-000014.

Following discovery and depositions, on December 12, 2019, MBB filed a motion for summary judgment seeking judgment as a matter of law on all counts against it in the Complaint. RA-000053.

On or around February 25, 2020, Oke filed a motion for summary judgment seeking judgment as a matter of law as to Count II of the Complaint. RA-000155.

On October 29, 2020, MBF filed a motion for summary judgment, seeking judgment as a matter of law in its favor on all counts of the Complaint, along with Appellants' opposition and MBF's reply. RA-000214.[2]

On April 13, 2021, the Superior Court (Deakin, J.) heard oral arguments on the three (3) summary judgment motions brought by MBB, Oke and MBF. RA-000308.

On June 2, 2021, the Court (Deakin, J.) entered its Memorandum of Decision granting the three summary judgment motions by MBB, Oke, and MBF. RA-000366.

On December 6, 2021, MBF and MBB filed motions for separate and final judgment, pursuant to Mass. R.

[2] Notably, Steele did not file a motion for summary judgment.

Civ. P. 54(b), as to the claims alleged against them RA-000398. On December 8, 2021, the Superior Court (Mulligan, J.) granted MBF and MBB's motions and in accordance therewith, on December 15, 2021, the Superior Court issued a final judgment, pursuant to Mass. R. Civ. P. 54(b), dismissing all claims alleged against MBB and MBF. RA-000397.

On January 14, 2022, Appellants filed a Joint Notice of Appeal of the Judgment dismissing their claims against MBB and MBF and on February 3, 2022, the Superior Court (Haggan, J.) conducted a hearing on said motion. RA-000308.

On January 5, 2021, Appellants filed a Motion seeking a separate and final judgment as to Count II of the Complaint against Oke, pursuant to Mass. R. Civ. P. 54(b) in accordance with the Court's Memorandum of Decision granting Oke's summary judgment motion. RA-000556. That motion was not opposed by any of the Appellees.

On April 27, 2022, the Court (Deakin, J.) entered its separate and final judgment dismissing Count II of the Complaint against Oke, without costs. RA-000401.

On May 9, 2022, Appellants filed their joint notice of appeal of the April 27, 2022 order. RA-000405. On July 18, 2022, notice of entry of appeal was entered by this Court in accordance with Massachusetts Rule of Appellate Procedure 10(a)(3). RA-000405.

SUMMARY OF ARGUMENT

The gravamen of this appeal is the Superior Court's erroneous finding that 49 U.S.C. §30106, the Graves Amendment, a federal statute applicable to "[a]n owner of a motor vehicle that *rents or leases* the vehicle to a person" is applicable to MBB and MBF. 49 USCS § 30106 (emphasis added). The Graves Amendment, if it were applicable, would bar presumptive liability against MBB or MBF based on their ownership of the Vehicle under M.G.L. c. 231 §85A.

In the instant action, the Superior Court erroneously concluded that those entities 'rented' the subject Vehicle that caused Appellants' injuries to Oke but ignored the plain text of the statute that conditioned its applicability. Specifically, as predicate matter, neither MBB nor MBF is engaged in the business of renting or leasing vehicles, and,

therefore, the Graves Amendment does not apply in the case at bar. Moreover, Oke paid no consideration for the Vehicle but was actually loaned that Vehicle by the MBF as a courtesy while his Mercedes Benz was being repaired at its service station in Caldwell, New Jersey. RA-000121-000123. Given the foregoing, the defense simply does not apply.

The Superior Court also erred in granting MBB and MBF a judgment as a matter of law on both Counts I, and III of Appellants' Complaint, as numerous material issues of triable fact exist concerning their negligence and loss of consortium claims against MBB and MBF.

The Superior Court similarly erred in granting Oke a judgment as a matter of law on Count II (negligent entrustment), because the facts in the record establish the existence of a substantial triable issue of fact concerning whether Oke gave Steele implied permission to drive the vehicle when he left her in the Vehicle with the keys in the ignition and illegally parked in downtown Boston.

The Superior Court further erred in granting MBB and MBF a judgment as a matter of law given that material triable issues of fact exist regarding

whether: (i) MBB and MBF acted negligently in their lending of the Vehicle to Oke, (ii) owed a duty to Appellants and/or (iii) breached their duty to Appellants.

Appellants further contend that their claims for loss of consortium against MBB and MBF were also erroneously dismissed, because the record is replete with triable issues of fact concerning those entities' liability under that claim. Further, as a result of MBB and MBF's own negligence in allowing Oke to use the Vehicle without confirming he received and understood the instructions relating to its use, Ms. Garcia suffered injuries severely impacting Mr. Seijo's life with his spouse.

The Appellants respectfully request that this court reverse the Superior Court's Judgments granting summary judgment in favor of MBB, MBF and Oke. In the alternative, Appellants request that this Court return this case to the Superior Court to reconsider the arguments, without applying the Graves Amendment to MBB and MBF.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo* to determine whether, when viewing the facts most favorably to the nonmoving party, the moving party is entitled to judgment as a matter of law. *Huang v. RE/MAX Leading Edge*, 101 Mass. App. Ct. 150, 175 (2022).

Mass. R. Civ. P. 56(c) provides that summary judgment shall be granted only "if the pleadings, depositions, answers to interrogatories, and responses to request for admission under Mass. R. Civ. P. 36, together with the affidavits show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56(c).

This Court must "recite[] the material facts in the light most favorable to the non-moving party… [and] draw[] all inferences from the underlying facts in favor of the party opposing summary judgment and resolve[] all doubt as to genuine issues of material fact against the party moving for summary judgment." *Nutt v. Florio*, 75 Mass. App. Ct. 482, 488 (2009).

II. The Superior Court Erred in Finding that the Graves Amendment Applies to the Claims Against Appellees MBB and MBF and Shields Those Parties from Liability Thereon

The Graves Amendment, 49 U.S.C. §30106, is a federal statute which precludes the owner of a rented or leased vehicle, who is in the business of renting or leasing vehicles in the transaction, from facing liability solely as a result of its status as the owner of a vehicle. The case at bar simply does not come within the ambit of the Graves Amendment.

The Superior Court erred in two respects. First, the Superior Court erred in implicitly finding that the Graves Amendment is applicable to the claims against MBB and MBF because neither MBF nor MBB are engaged in the business of renting vehicles during this transaction. Second, it erred by concluding that MBF's courtesy "loan" of the Vehicle constituted a rental or lease of the Vehicle to Oke within the meaning of the statute.

The record in this case is clear that MBB and MBF were not acting in their capacity of leasing or renting vehicles in this instance. On that basis, the Graves Amendment does not apply. Second, the record is clear that Oke received the Vehicle as a courtesy

loaner – not as rental or lease - while his car was being repaired at MBF's dealership in New Jersey—a loaner vehicle. RA-000121-000123.

Consequently, the Superior Court, erroneously construing the statute broadly to include courtesy loaner vehicles, erroneously concluded that the Graves Amendment preempts the evidentiary implications of MBB and MBF's ownership of the Vehicle under Mass. Gen. Laws ch. 231 § 85A ("Section 85A"). Massachusetts Courts have consistently held that Section 85A provides that in actions to recover for injuries resulting from motor vehicle accidents, proof that the defendant is the registered owner of the vehicle is 'prima facie evidence' of defendant's responsibility. *Covell v. Olsen*, 65 Mass. App. Ct. 359, 366 (2006).

The Superior Court reached this erroneous conclusion by ignoring the plain statutory textual requirement that the vehicle owner must be "engaged in the trade or business of renting or leasing motor vehicles." 49 U.S.C. §30106(a)(1). It further relied solely on non-binding precedent that stretched the definition of the terms "lease or rent" to include loaner vehicles.

The Superior Court's improper conclusion that the Graves Amendment applies to the conduct of the Appellees herein and its failure to apply Section 85A resulted in this improper grant of summary judgment.

In light of the foregoing, the Appellants respectfully request that this court vacate the entry of summary judgment for MBB and MBF. In the alternative, Appellants request that this Court remand this case to the Superior Court to reconsider the arguments, properly applying Section 85A.

A. The Text of the Graves Amendment Requires that a Vehicle be Actually Rented or Leased

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

> (a) 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) (emphasis added).

When construing a federal statute, "we begin with the plain language used by the drafters." *New Singular Wireless PCS LLC v. Commissioner of Revenue*, 98 Mass. App. Ct. 346, 355 (2020); see also *Green Valley Special Util. Dist. v. Cibolo, Tex.*, 866 F.3d 399, 342 (5th Cir. 2017), quoting *United States v. Uvalle-Patricio*, 478 F.3d 699, 703 (5th Cir. 2007). Accord *Atlanticare Med. Ctr. v. Commissioner of the Div. of Med. Assistance*, 439 Mass. 1, 6, 785 N.E.2d 346 (2003). It is well-settled that effect must be given to all a statute's provisions, so that none will be "inoperative" or "superfluous." *Wheatley v. Massachusetts Insurers Insolvency Fund*, 456 Mass. 594, 601 (2010), quoting *Bankers Life & Cas. Co. v. Commissioner of Ins.*, 427 Mass. 136, 140, 691 N.E.2d 929 (1998).

The clear language of the Graves Amendment indicates that, when applicable, it expressly preempts state law that imposes liability on an owner of a motor vehicle engaged in the business of leasing or renting such vehicle due to ownership. *Esposito v. Kiessling Transit, Inc.*, 2007 Mass. Super. LEXIS 411, 422 (2007)

("the Federal statute expressly preempts application of G.L.c. 231, §85A to owners of motor **vehicles who satisfy two conditions set forth in the statute**") (emphasis added). Critically, the law only applies to businesses that are engaged in the business of renting or leasing motor vehicles. *Moura v. Cannon*, 2021 U.S. Dist. LEXIS 184736 (2021). See also *Flagler v. Budget Rent A Car Sys., Inc.*, 538 F.Supp.2d 557, 558 (E.D.N.Y. 2008)("[t]he amendment preempts state laws that impose vicarious liability on businesses that rent or lease motor vehicles").

Significantly here, the Superior Court ignored the plain text of the statute, which provides that to establish the applicability of the Graves Amendment in the first instance, the owner of the vehicle must be in the business of renting vehicles. *Askew v. R & L Transfer, Inc.*, 676 F. Supp. 2d 1298 (2009)(for the Graves Amendment to apply, the owner must be "engaged in the trade or business of renting or leasing motor vehicles").

Ignoring that statutory predicate, the Superior Court determined, incorrectly, that the mere act of leaving his own car with MBF's service department formed sufficient consideration in order to deem the loaner car

transaction a "rental" or "lease". RA-000378. In essence, the Superior Court determined that any loaner car transaction qualifies as a "rental" or "lease" and thereby renders the Graves Amendment applicable, regardless of the statute's plain language limiting its threshold reach.

For this reason, the Superior Court erred and its final judgments should be vacated.

B. This Court Must Analyze the Meaning of the Graves Amendment Using the Recognized Definitions of the Words of the Statute

The Superior Court also erred in stretching the accepted meanings of the words 'lease' and 'rent' To include loaner cars like the Vehicle. Here, the Superior Court ignored the plain language of the statute and then failed to apply the plain language meanings of the relevant terms and instead engaged in mental gymnastics to transform what was, in reality, a gratuitous exchange between MBF and Oke into one supported by "consideration" where the undisputed facts in the record make clear that no such consideration was given.

When the statutory language is plain, the courts must enforce it according to its terms. *King v. Burwell*, 576 U.S. 473 (2015). The courts must read the

words "in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

This Court's inquiry must begin with the language adopted by the Legislature. *See, e.g., Hoffman v. Howmedica, Inc.*, 373 Mass. 32, 37 (1977) ("salient principle of statutory construction… [is] that the statutory language itself is the principal source of insight into the legislative purpose").

When the statutory language is plain, the courts must enforce it according to its terms. *King v. Burwell*, 576 U.S. 473 (2015); *Law v. Griffith*, 457 Mass. 349, 353 (2010)(where language of the statute is clear, courts interpret it according to its ordinary meaning. If a statute fails to specifically define its terms, court must "give them their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose." *Commonwealth v. Zone Book, Inc.*, 372 Mass. 366, 369 (1977. Courts must read the statutory words "in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

Unless the plain meaning of the statute requires it, this Court should not expand or limit its meaning. *See Norfolk & Dedham Mut. Fire Ins. Co. v. Morrison*, 456 Mass. 463, 468 (2010).

Here, in deciding whether or not the Graves Amendment protected MBB and MBF as the registered owners of the Vehicle, the Superior Court treated the critical inquiry as: whether MBB and MBF "rented" or "leased" the Vehicle to Oke when it was operated by Steele.

The Superior Court noted that "the Graves Amendment precludes liability against "[a]n owner of a motor vehicle" that is "rent[ed] or lease[d] to a person" if that liability stems from "being the owner of the vehicle." 39 U.S.C. §30106(a)(2). The Superior Court reasoned, however, that "a transaction qualifies as a 'rental' under the Graves Amendment when, in exchange for use of a vehicle, a party provides some form of consideration." RA-000380.

In doing so, the Superior Court improperly ignored the ordinary definitions of those terms which, if followed, evidence a clear difference between a 'rental,' 'lease,' and 'loan' as they relate to the Graves Amendment. *Romero v. Fields Motorcars of Fla.*,

Inc., 333 So. 3d 746, 761 (2022) (the Graves Amendment did not apply as the plain meaning of "rents or leases" in the Graves Amendment did not encompass dealership's gratuitous bailment of loaner vehicle).

Furthermore, in reaching its erroneous conclusion that the Graves Amendment applies to this case, the Superior Court relied on a non-binding, Florida federal district court case *Thayer v. Randy Marion Chevrolet Buick Cadillac, LLC,* 2021 U.S. Dist. LEXIS 45349, *8-*9 (M.D. Fla. 2021) to interpret the meaning of a 'rental'. *Thayer v. Randy Marion Chevrolet Buick Cadillac, LLC*, 30 F.4th 1290 (2022) (affirming the District Court's holding).

If Congress had intended to include "loans" within the preview of the statute, it would have done so. It is a standard canon of statutory construction that the primary source of insight into the intent of the legislature is the language of the statute. *Commonwealth v. Clerk-Magistrate*, 439 Mass. 352 (2003); Citing *International Fid. Ins. Co.* v. *Wilson*, 387 Mass. 841, 853 (1983). A court may not add words into a statute that the Legislature did not put there. *See Commonwealth v. Clerk-Magistrate*, 439 Mass. 352

(2003); *See also General Elec. Co.* v. *Department of Envtl. Protection*, 429 Mass. 798, 803 (1999).

When applying the plain language meaning of the statute, a court may use the definitions in Black's Law Dictionary as a standard. *Guzman v. Commonwealth*, 458 Mass. 354 (2010) (using Black's Law Dictionary definitions to separate a phrase into its component parts to interpret its true meaning). "Lease" is defined as "[t]o grant the possession and use of (land, buildings, rooms, moveable property, etc.) to another in return for rent or other consideration" (Lease, *Black's Law Dictionary* (11th ed. 2019). "Rent" is defined as "[c]onsideration paid, usually periodically, for the use or occupancy of property (esp. real property)." (Rent, *Black's Law Dictionary* (11th ed. 2019). "Loan" is defined as "[a]nything furnished for temporary use to a person at his request, on condition that it shall be returned, or its equivalent in kind, with or without compensation for its use" (Loan, *Black's Law Dictionary* (11th ed. 2019). *Commonwealth v. Thompson*, 56 Mass. App. Ct. 710 (2002). Indeed, the definition of the word "loan" is well-settled within the Commonwealth that. *Id.*

As the Superior Court correctly stated, there is no Massachusetts authority on point on the issue of the liability of a business offering free loaner cars to customers who bring cars in for service under the Graves Amendment. RA-000376.

Nevertheless, the holding in *Zizersky v. Life Quality Motor Sales, Inc.*, 21 Misc. 3d 871 (2008), is more compelling than those decisions cited by the Superior Court as it is a case on point regarding a loaner vehicle provided to a customer of a car dealership's service center and is supported by Massachusetts precedent. As stated *supra*, the Court in *Zizersky* held that the Graves Amendment can only apply to leases and rents because those transactions directly affect interstate commerce. *Id.*

Reading the statute as drafted by Congress, the Graves Amendment cannot shield an owner from liability where it merely loans the vehicle and receives no consideration. Therefore, the Graves Amendment does not apply to the instant facts and the Superior Court should not have applied it to shield MBB or MBF from liability herein.

C. MBB and MBF did not Lease or Rent the Vehicle to Oke

The fundamental dispute here is the applicability of the Graves Amendment to the subject 'loaner' Vehicle used, without charge, by Oke while his vehicle was being serviced at MBF's dealership in Caldwell, New Jersey. Simply put, the Graves Amendment has no applicability to the facts at issue herein. Indeed, the undisputed facts in the record show that Oke paid ***nothing*** for the use of the Vehicle and that he was provided the Vehicle on a short-term basis while his own car was being serviced by MBF. RA-000121-000123.

Courts outside the Commonwealth have determined that the Graves Amendment has no applicability to vehicles provided as short-term courtesy loaner cars to repair shop customers. *See e.g., Hussain v. Abuawwad*, 72 Misc. 3d 1223(A), (Sup. Ct. 2021) (Graves Amendment does not apply to "loaner vehicles" provided by car dealership to service center customers"); *Zizersky v. Life Quality Motor Sales, Inc.*, 21 Misc. 3d 871 (2008) (holding that the Graves Amendment does

not insulate the owner from vicarious liability where the vehicle involved was a "loaner" vehicle).[3]

Similarly, to the facts at issue herein, the court in *Zizersky v. Life Quality Motor Sales, Inc.* delt with the effect of the Graves Amendment on the liability of a repair shop car owner and found that the Graves Amendment is not applicable where the owner of the vehicle does not actually rent or lease the vehicle. *Zizersky*, 21 Misc. 3d at 880 (denying defendant car dealership's motion to dismiss and finding that the Graves Amendment did not apply to car dealership loaner vehicles"). The *Zizersky* Court recognized the difference between "rental companies," which are explicitly protected by the Graves Amendment, and other entities such as repair shop owners providing "loaner" vehicles, which are not protected by the Graves Amendment. *Id.* at 877. The *Zizersky* Court further addressed the distinction

[3] In fact, the *Zizersky* commented that the extension of the Graves Amendment to gratuitous loaner vehicles might exceed the bounds of the Commerce Clause as so applied. Zizersky, 21 Misc. 3d at 880 ("A construction of the statute, therefore, that would include 'loaner' vehicles under the circumstances presented here as "leased" or "rented" vehicles would appear both unrelated to the statutory purposes, and to raise a question about the constitutionality of the Amendment at least to that extent.")

between true rentals and other uses, such as a courtesy "loaner" vehicle. The Court determined that those distinctions are significant and the ordinary bailment of a "loaner" vehicle without charge is neither a "lease" nor a "rental" for the purposes of applying the Graves Amendment. *Id.* at 878.

The Court in *Zizersky* went on to hold that there is no suggestion that a "loaner" vehicle, "even if connected to the purchase or lease of another vehicle, has any effect whatsoever on the market for leased or rented vehicles, or contributes in any way to the problems Congress attempted to address with the Graves Amendment." *Id.* at 880. Thus, such a transaction cannot fall under the purview of the Graves Amendment.

It is clear from the undisputed facts herein, that MBF's provision of the Vehicle to Oke, for no charge while his car was being serviced, constitutes a "loan" – not a rental or lease of the Vehicle. The Superior Court's tortured determination that consideration in the form of Oke leaving his own car MBF's service repair shop somehow transformed that transaction from a "loan" to a lease or rental transaction is wholly unsupported by the plain text of

the statute and the Legislatures intent behind that Statute and should be reversed.

D. MBB and/or MBF's Own Negligence precludes the Invocation of the Graves Amendment

Moreover, the record in this case contains numerous triable issues of material facts which should have precluded the Superior Court's entry of a judgment as a matter of law, concerning MBF's independent liability for its negligent administration and supervision of its loaner car program. For this reason alone, the Graves Amendment cannot be employed by MBF as a shield from liability as the owner of the Vehicle. *See* 49 U.S.C. § 30106(a)(2) (barring protection thereunder for vehicle owners who act negligently).

E. Application of Section 85A

Section 85A does not change the substantive law of negligence, rather it states a rule of evidence. *Cheek v. Econo-Car Rental Sys of Boston, Inc.*, 393 Mass. 660, 663, 473 N.E.2D 659 (1985). In a motor vehicle agency context, Section 85A does not impair or modify the fundamental rights of a defendant who is free to overcome the prima facie evidence created by the statute. *Covell v. Olsen*, 65 Mass. App. Ct. 359 (2006). "In absence of

any evidence that a master-servant relationship did not exist between the driver of a vehicle and the registered owner of that vehicle, a plaintiff is entitled to a ruling that any negligence of a driver is to be imputed to the owner." *Esposito v. Kiessling Transit, Inc.*, No. 060883A, 2007 WL 3014703, at *1 (Mass. Super. Sept. 6, 2007) (citing *Cheek v. Econo-Car Rental Systems of Boston, Inc.*, 393 Mass. 660, 662 (1985)). Here, the Superior Court failed to follow Massachusetts precedent.

Where the owner of the subject vehicle offers evidence that no master-servant relationship exists, "the existence or nonexistence of a master-servant relationship becomes a question of fact." *Id.* (holding that Section 85A "precludes the grant of summary judgment in favor of the owner of the vehicle involved in an accident or collision"). The Supreme Judicial Court has determined that Section 85A "dispense[s] with proof that the person operating the automobile was the servant of the registered owner, acting within the scope of his employment, and makes it possible for the jury to find that he was such a servant without other evidence to that effect, and to disbelieve any evidence that he was not." *Arrigo v. Lindquist*, 324 Mass. 278, 280 (1949).

A jury may properly find that as the owner of the Vehicle, MBF controlled the action of the driver, here Steele, and disbelieve any evidence offered by MBF to the contrary. *See Arrigo*, 324 Mass. at 280 (Section 85A "makes it possible for the jury to find that he was such servant without other evidence to that effect, and to ***disbelieve any evidence that he was not***") (emphasis added).

Under Section 85A, "proof that the vehicle is registered in the name of the defendant will always be sufficient, standing alone, to defeat motions for summary judgment and a directed verdict on the issue of agency." *St. Pierre v. Penske Truck Leasing Corp.*, No. CIV. A. 00-4805-G, 2001 WL 1631564, at *5 (Mass. Super. Dec. 13, 2001) (citing *Arrigo*, 324 Mass. at 280); *see also Yuan Fu Lin v. Wnming Cheng*, 84 Mass. App. Ct. 1103 (2013) ("[t]he mere fact of registration in the name of a defendant as owner commonly carries the case to the jury so far as agency of the driver on behalf of the defendant is concerned."). However, by placing the burden of persuasion on the defendant, the statute makes it exceptionally difficult for the defendant to prevail on summary judgment. *Covell v. Olsen*, 65 Mass. App. Ct. 359 (2006).

Appellees MBB and MBF failed to prove the absence of this responsibility here. In fact, it is undisputed on the record that MBF did in fact own the Vehicle subject to the accident that caused Ms. Garcia's injuries. RA-000374. The burden is simply too high for MBF and MBF to prevail on summary judgment using the application of Section 85A. As a result of the Superior Court's incorrect finding that the Graves Amendment applies to the instant facts and failure to apply Section 85A, the Superior Court evidently improperly granted summary judgment for the MBB and MBF Appellees.

Thus, the Superior Court erred in finding that MBB and MBF were shielded from liability under the Graves Amendment, that Section 85A was not applicable, and in granting MBB and MBF a judgment as a matter of law.

III. The Superior Court Erred in Granting Appellees MBB Auto, LLC and MBF Auto, LLC a Judgment as a Matter of Law on Count I (Negligence) of Appellants' Complaint

To be entitled to summary judgment on a negligence claim, a moving party must "establish that the defendant owed [them] a legal duty, that the defendant breached that duty, and that the breach

proximately caused [their] injuries." *Docos* v. *John Moriarty & Assocs., Inc.*, 78 Mass. App. Ct. 638, 640, 940 N.E.2d 501 (2011). Summary judgment is rarely granted in negligence actions. *Zerfas v. Town of Reading*, 2021 Mass. App. Unpub. LEXIS 413 (2021) citing *Zavras v. Capeway Rovers Motorcycle Club*, 44 Mass. App. Ct. 17 (1997).

"Ordinarily, summary judgment is not an appropriate means" of resolving negligence cases because "the question of negligence" is usually one of fact. *Roderick v. Brandy Hill Co.*, 36 Mass. App. Ct. 948, 949 (1994), citing *Mullins v. Pine Manor College*, 389 Mass. 47, 56 (1983).

Here, the Superior Court erred in granting MBB and MBF judgment as a matter of law on Count I (Negligence) because the record contains numerous triable issues of fact concerning the negligent administration of MBB and MBF's loaner car program that should be left to the jury to decide. *Zavras v. Capeway Rovers Motorcycle Club*, 44 Mass. App. Ct. 17 (1997).

There exists a material triable issue of fact concerning whether Appellees MBB Auto, LLC and MBF owed a duty to Appellants, breached their duty to

Appellants, and in breaching that duty caused injuries to Appellants, all of which must be decided by a jury. Furthermore, this Court should find that MBB and MBF were not protected from liability under the Graves Amendment as they were negligent.

A. Applicable Legal Standard for Negligence Claims

The existence of a legal duty is a question of law determined by reference to existing social values and customs and appropriate social policy. That the duty was breached, and that the breach caused the injuries is ordinarily questions of fact for the jury. *Adams v. Congress Auto Insurance Agency, Inc.*, 90 Mass. App. Ct. 761 (2016). Existence of a duty in a negligence case is a question of law, reviewed *de novo*. *Santos v. U.S. Bank National Association*, 89 Mass. App. Ct. 687 (2016).

Whether such a duty exists is a question of law. In determining whether a defendant had a duty to be careful, this Court looks to existing social values and customs, as well as to appropriate social policy. *Wallace* v. *Wilson,* 411 Mass. 8, 12, 575 N.E.2d 1134 (1991), citing *Yakubowicz* v. *Paramount Pictures Corp., supra.*

B. A Material Triable Issue of Fact Exists Concerning Whether Appellees MBB and MBF Owed a Duty to Appellants

Fundamentally, the existence of a duty of care depends upon the foreseeability of a risk that the defendant has an ability to prevent. *Heath-Latson v. Styller*, 487 Mass. 581 (2021). A special relationship exists between a person posing a risk and the one who may prevent the harm. *Lev. Beverly Enterprises-Massachusetts*, 457 Mass. 234, 243 (2010). When a defendant may reasonably foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm, he may be held liable for his failure to do so. *Id.*

When a car dealership, such as MBB and MBF, loans a courtesy vehicle to a customer it is certainly foreseeable that the vehicle will be used on a highway or other public road. MBB and MBF owes a duty to protect both the customer using the loaned vehicle, as well as other people on the road with the loaned vehicle. The awareness of this duty is evidenced by the policies and procedures governing their employees' administration of the loaner car program.

MBB and MBF are fully cognizant of their ability to prevent the harm. In fact, their policy requires

them to take affirmative actions to prevent said harms. As MBF and MBB have testified during depositions, it is their policy to place certain restrictions on recipients of loaner cars including, but not limited to restrictions on the distance from the dealership the loaner car can be taken, who may drive the loaner car and further barring the consumption of alcohol while driving a loaner car. RA-000384-000385; RA-000368. Further, Katy Jacob, the CFO of MBF testified that it is MBF's policy that, prior to the issuance of a loaner vehicle, a loaner representative is required to review these foregoing restrictions with the client. *See* RA-000373-000374.

Upon review of the aforementioned facts, this Court should find that material triable issues of fact exist regarding the issue of whether MBB and MBF owed a duty to Appellants, which must be decided by a jury. Here, the Superior Court improperly ignored the material triable factual issues at the summary judgment stage, and those issues should have gone to the jury. *Adams v. Congress Auto Insurance Agency, Inc.*, 90 Mass. App. Ct. 761, 786 (2016).

C. A Material Triable Issue of Fact Exists Concerning Whether Appellees MBB and MBF Breached their Duty

Despite MBB and MBF's duty to protect Appellants from the foreseeable harm of giving a loaner vehicle to a customer who is not properly instructed on the restrictions placed on the vehicle, or whose driving credentials are not properly vetted, they failed to do so. The policies in place are meaningless as a result of MBB and MBF's failure to properly implement and administer them.

MBF's COO of fixed operations, Roger Pitman testified that the loaner car employees do not receive training on how to implement the policies and restrictions, but rather are taught to collect information and "fill in the blanks" of the loan car agreement. *See* RA-000381-000382. Following this initial training, MBF does not pursue follow up training for their loaner car representatives. RA-000375. In fact, Ms. Jacob testified that MBF takes no steps, whatsoever, to ensure that these restrictions are complied with at the time of issuance of a loaner car. *See* RA-000372.

While it is apparently MBF's policy to collect driver's license, insurance, and credit card

information for loaner car recipients, until 2017, Appellee MBF had no measures to verify that a person's proffered license and insurance information is genuine. *See* RA-000373. Further, according to MBF's testimony, its own staff members have no way to verify that the information is valid, effectively rendering this policy useless. *See* RA-000369. Based on MBF's testimony, all a client has to do is present a license, apparently whether valid or not, and that client will receive a loaner car. *See* RA-000371. MBF and MBB now claim, without providing any factual support, that "MBF went through the process of verifying Oke's license, proof of insurance, and credit card." RA-000255. This assertion has no factual basis. Instead, the record shows that MBF had no means to verify whether a license was valid at the time Oke received the Loaner Car, nor did MBF train its employees on how to verify the authenticity of a driver's license. RA-000255.

Perhaps most importantly, Oke was not instructed by MBF's loaner car representative on the restrictions placed on his use of the loaner car, including whether or not he was allowed to let others drive that car. *See* RA-000327-000328. The record shows that this was

Oke's first loaner vehicle, both with MBF and otherwise; he was precisely the person who would have benefitted most from being properly instructed on the rules and restrictions governing his use of a loaner vehicle. *Id.*

MBB and MBF failed to take any steps to ensure that Oke knew what he could and could not do with the loaner car. As a direct result, Oke drove the loaner car to Boston, (in violation of MBF's loaner car policy) and allowed his wife Steele to drive the vehicle (in violation of MBF's loaner car policy), neither of which he was explicitly instructed he could not do. The Superior Court erred in failing to allow these facts to be analyzed by a jury, as it should have on summary judgment.

D. A Material Triable Issue of Fact Exists Concerning Whether Appellees MBB and MBF's Breach of Their Duty to Appellants Caused Appellants' Injuries

A "plaintiff must show that the negligent conduct was a proximate or legal cause of the injury." *Kent v.* Commonwealth, 437 Mass. 312, 317, 771 N.E.2d 770 (2002). The injury must be a reasonably foreseeable result of the defendant's negligence. *See Jesionek v. Massachusetts Port Auth.*, 376 Mass. 101, 105-106, 378

N.E.2d 995 (1978). However, the intervening acts of a third party that are a reasonably foreseeable result of the original negligence will not break the chain of causation. *See Jupin v.* Kask, 447 Mass. 141, 148, 849, N.E.2d 829 (2006); *Mullins v. Pine Manor College*, 389 Mass. 47, 62, 449 N.E.2d 331 (1983). Causation is generally a factual question for the jury. See *Id.*

The Superior Court erred in finding that MBB and MBF did not breach their duty to Appellants, causing their injuries. RA-000382. As a direct result of MBB and MBF's breach of their duties to Appellants, Mr. Oke drove the loaner car to Boston, (in violation of Appellees' loaner car policy) and allowed his wife Steele to drive the vehicle (in violation of Appellees' loaner car policy), neither of which he was instructed he could not do. Had Mr. Oke been properly instructed and trained by MBF's staff, Ms. Garcia would not have been injured.

The facts in the record show that MBF's failure to properly administer its loaner car program likely resulted in Steele's having use of the Loaner Car. RA-000266-000269. MBF maintains a set of policies and procedures that govern their employee's administration of MBF's loaner car program, all of which were either

unenforced by MBF or rendered meaningless by MBF's failure to properly implement these policies. RA-000266-000269.

The Superior Court erred in granting MBB and MBF a judgment as a matter of law on Appellants' claims that they acted negligently in lending the Vehicle to Oke as material triable issues of fact exist. These issues must be resolved by a jury. Additionally, this Court has held that the Graves Amendment must not apply if there is evidence of negligence on part of the owner. *Diekan v. Blackwelder*, 2011 Mass. App. Div. 66 (2011). Thus, the Superior Court erred in finding that the Graves Amendment was applicable to MBB and MBF and shielded them from liability.

Based on the foregoing, this Court should find that the Superior Court erred in granting Appellees MBB and MBF a judgment as a matter of law on Appellants' claims.

IV. The Superior Court Erred in Granting Appellee Kolawole Oke a Judgment as a Matter of Law on Count II (Negligent Entrustment) of Appellants' Complaint

To succeed on a claim for negligent entrustment, the Appellants must prove (1) the Appellees entrusted property to an incompetent or unfit person whose incompetence or unfitness was the cause of his or her

injuries, (2) the Appellees gave specific or general permission to the operator to operate the property, and (3) the Appellees had actual knowledge of the incompetence or unfitness of the operator. *Vintimilla v. Nat'l Lumber Co.*, 84 Mass. App. Ct. 493(2013). "[A]n owner who permits operation of his car by one whose license has been suspended or revoked, regardless of whether he has actual knowledge of that fact, may himself be found responsible, on a negligent entrustment basis, for the negligent operation of the unlicensed driver." *Mitchell v. Hastings & Koch Enterprises, Inc.*, 38 Mass. App. Ct. 271, 277 (1995).

A. Oke Entrusted the Vehicle to an Incompetent Person who was the Result of Appellants' Injuries

The Superior Court erred in finding that there was no triable issue of material fact regarding Oke's entrustment of the Vehicle to Steele at the time of the Incident. Indeed, the only evidence that was before the Superior Court to establish the issue of Oke's alleged lack of permission given to Steele was his and Steele's self-serving testimony that, prior to the Incident, Steele did not have permission to drive any of Oke's cars and did not "believe" she had permission to drive the Vehicle at the time Oke left

her unattended while it was running on August 18, 2016. RA-000227-000228.

However, this testimony does not establish the absence of a triable issue of fact concerning whether Oke entrusted Steele with the Vehicle. In fact, the evidence shows that he left Steele, an unlicensed driver, in the Vehicle with the keys in it. And Oke has cited to no evidence that he actually told Steele that she did not have permission to drive the Vehicle on the day of the Incident. He apparently relied on some unspoken understanding between the two that Steele would not in fact drive the Vehicle. But Oke's liability under the negligent entrustment theory is not constrained by whether or not he gave express permission; rather his liability may also be established through a finding of general permission granted by him to Steele. *See O'Leary v. Fox* 84 Mass. App. Ct. 1119 (2013) ("the persons who owned and controlled the vehicle gave specific ***or general permission to the operator to drive the vehicle***") (emphasis added). Here, the Superior Court ignored the issue of implied consent and only dealt with express consent.

Far from establishing an absence of trial fact, this testimony relied on by Oke merely raises more questions, such as why, if Oke did not intend for his wife to be able to move the Vehicle if necessary, would he need to keep it running (which the keys in it) during his apparently brief absence? Such conduct raises the question of fact as to whether or not Oke implicitly entrusted the Vehicle to Steele.

Thus, there remains an unresolved issue of material fact, which should be left to the jury to decide and the Superior Court Erred in Granting Appellee Kolawole Oke a Judgment as a Matter of Law on Count II (Negligent Entrustment) of Appellants' Complaint.

V. The Superior Court Erred in Granting Appellees MBB Auto, LLC and MBF Auto, LLC a Judgment as a Matter of Law on Count III (Loss of Consortium) of Appellants' Complaint

Under Massachusetts law, an action for loss of consortium by either spouse may be maintained where such loss is shown to arise from personal injury to one spouse caused by the negligence of a third person. *Agis v. Howard Johnson Co.*, 371 Mass. 140 (1976). The purpose of a loss of consortium claim is to compensate a spouse for the loss of companionship, affection, and

sexual enjoyment of his spouse and it is undisputed that these can be lost because of physical harm. *Id.*

As a general rule, a claim for loss of consortium requires proof of a tortious act that caused the claimant's spouse's personal injury. Although a claim for loss of consortium is independent of the spouse's cause of action, there is an implicit prerequisite that the injured spouse have a viable claim. *Sena v. Commonwealth*, 417 Mass. 250 (1993).

A. Appellants' Loss of Consortium Claim

The Superior Court erred in finding that MBB, MBF, and Oke were not liable to Appellants for the injuries Ms. Garcia suffered, and as a result they are not responsible for the impact those injuries have had and continue to have on their marital relationship as a result. RA-000010. As a result of the errors on the underlying claims against MBB and MBF as set forth herein, the Superior Court erred in granting those entities a judgment as a matter of law on Count III (Loss of Consortium). RA-000552.

It is undisputed here that Appellants are husband and wife. RA-000010. Oke was provided the Vehicle as a loaner car by the service department at MBF, without complete instructions on the restrictions applicable

to the use of the Vehicle. RA-000266-000269. As a result of not knowing the restrictions regarding the use of the Vehicle, Oke then drove the Vehicle to Boston (in violation of the loaner agreement), parked illegally (in violation of the loaner agreement), and left his unlicensed wife Steele in control of the running and illegally parked (in violation of the loaner agreement). RA-000122.

It is undisputed that Ms. Garcia suffered substantial physical injuries as a result of being hit by the Vehicle, including a fractured spine, a fractured pelvis, and a hematoma to the pelvis, directly impacting Appellants. RA-000010. These injuries unarguably would cause loss of companionship, affection, and sexual enjoyment of one's spouse.

Appellants have provided ample evidence for the Superior Court to find in their favor on a claim of loss of consortium and the Superior Court certainly erred in granting MBB and MBF judgment as a matter of law on Count III (loss of consortium).

In light of the foregoing, the Superior Court erred in finding that Appellants do not have a viable claim for Loss of Consortium against Appellees MBB

Auto, LLC and MBF Auto, LLC as a proximate cause of Appellants' injuries.

CONCLUSION

Based on the foregoing, appellants Maria Blanca Elena Garcia and José Fafián Seijo respectfully request that this Court vacate the Superior Court's Order and Judgment, finding the appellees Shantiqua Steele, Kolawole Oke, MBB AUTO, LLC d/b/a Mercedes Benz of Brooklyn, and MBF AUTO, LLC d/b/a Mercedes Benz of Caldwell liable for the injuries sustained by Maria Blanca Elena Garcia and José Fafián Seijo.

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Respectfully submitted,

Maria Blanca Elena Garcia and
José Fafián Seijo,

By their attorneys,

/s/ Christopher Marks

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Dated: August 29, 2022

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 16(k) OF THE MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, Christopher Marks, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to the applicable portions of Mass. R. App. P. 16 and 20.

/s/ Christopher Marks
Christopher Marks
BBO# 705612

ADDENDUM

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NOTIFY 36

FINAL JUDGMENT
(Pursuant to MASS. R. CIV. P. 54 (b))

Trial Court of Massachusetts
The Superior Court

Michael Joseph Donovan, Clerk of Court

DOCKET NUMBER
1884CV02327

CASE NAME
Maria B Garcia et al
vs.
Shanitqua Steele et al

COURT NAME & ADDRESS
Suffolk County Superior Court - Civil
Suffolk County Courthouse, 12th Floor
Three Pemberton Square
Boston, MA 02108

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)
MBF Auto LLC Doing Business as Mercedez Benz of Caldwell
MBB Auto LLC Doing Business as Mercedes Benz of Brooklyn

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)
Garcia, Maria Blanca Elena
Seijo, Jose Fafian

This action came on before the Court, Hon. Maureen Mulligan, presiding, and upon above named defendant(s) Motion for Entry of Separate and Final Judgment pursuant to Mass. R. Civ. P. 54(b), and the Court having found and determined that there is no just reason for delay in the entry of final judgment and therefore allowed said motion, and upon consideration thereof,

It is **ORDERED AND ADJUDGED**:

That the complaint of the plaintiff(s) named above be and hereby is **DISMISSED** against the defendant(s) named above, without statutory costs.

JUDGMENT ENTERED ON DOCKET Dec 15 21
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

DATE JUDGMENT ENTERED	~~CLERK OF COURTS~~ / ASST. CLERK
12/13/2021	X

Date/Time Printed: 12-13-2021 14:48:26 SCV078: 10/2016

42

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CASE NO.: 1884CV2327E

MARIA BLANCA ELENA GARCIA and JOSÉ FAFIÁN SEIJO,
Plaintiffs,
v.

SHANITQUA STEELE, KOLAWOLE OKE, MBB AUTO, LLC d/b/a MERCEDES BENZ OF BROOKLYN, and MBF AUTO, LLC d/b/a MERCEDES BENZ OF CALDWELL,
Defendants.

SUFFOLK, ss. SUPERIOR COURT DEPT
(date) 04/19/2022
FILED
CLERK

~~[PROPOSED]~~ FINAL JUDGMENT[1]
(Pursuant to Mass. R. Civ. P. 54(b)

This action came before the Court, Hon. Patrick M. Haggan, presiding, upon the above named Plaintiffs' Motion for Separate and Final Judgment as to Count II of the Complaint against Defendant, Kolawole Oke ("Oke"), pursuant to Mass. R. Civ. P. 54(b) [(Dkt. No. 37] ("Motion"). Upon review of the Motion, with no opposition having been filed thereto, the pleadings filed on the Court's docket, and after conduction a hearing on February 3, 2022, in accordance with Mass. R. Civ. P. 54(b), the Court hereby **FINDS** as follows:

1. Plaintiffs commenced this action by filing their Complaint on July 27, 2018. *See* Dkt. No. 1.

[1] This constitutes the Court's certification and judgment pursuant to Mass. R. Civ. P. 54(b). *See Long v. Wickett*, 50 Mass. App. Ct. 380, 385-386 (2000) ("[A] valid rule 54(b) certification requires the confluence of four factors: (1) the action must involve multiple claims or multiple parties; (2) there must be a final adjudication as to at least one, but fewer than all, of the claims or parties; (3) there must be an express finding that there is no just reason for delaying the appeal until the remainder of the case is resolved; and (4) there must be an express direction of the entry of judgment'") (citing, Smith & Zobel, Rules Practice § 54.4, at 307 (1977 & Supp. 2000)).

Notice sent 5-4-22

JUDGMENT ENTERED ON DOCKET May 4 2022
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

2. This case stems from a motor vehicle accident which resulted in Plaintiff Maria Blanca Elena Garcia sustaining serious personal injuries when she struck by a motor vehicle while walking in a crosswalk in downtown Boston. Mrs. Garcia and her co-plaintiff husband, José Fafián Seijo, are residents of Spain. *See* Dkt. No. 1, *generally*.

3. The Complaint alleges three counts: Count I for negligence, Count II for negligent entrustment, and Count III for loss of consortium. *Id.*, ¶ 18-30.

4. On December 12, 2019, Defendant MBB Auto, LLC d/b/a Mercedes Benz of Brooklyn ("MBB") filed a summary judgment motion seeking judgment as a matter of law on all counts against it in the Complaint. *See* Dkt. No. 17.

5. On or around February 25, 2020, defendant Oke filed his motion for summary judgment, seeking judgment as a matter of law as to Count II of the Complaint (negligent entrustment) only. *See* Dkt. No. 19.

6. On October 29, 2020, MBF Auto, LLC d/b/a Mercedes Benz of Caldwell ("MBF") filed its motion for summary judgment, seeking judgment as a matter of law in its favor on all counts of the Complaint. *See* Dkt No. 27.

7. Defendant Shanitqua Steele ("Steele") did not file a motion for summary judgment. *See* Docket *generally*.

8. On April 13, 2021, the Court (Deakin, J.) heard oral argument on all three Summary Judgment Motions. *See* Docket, *generally*.

9. The Court entered its Order, granting said Motions on June 2, 2021. *See* Dkt. No. 30.

10. On December 6, 2021, MBF and MBB filed a motion for separate and final judgment, pursuant to Mass. R. Civ. P. 54(b), as to the claims alleged against them. *See* Dkt. No.

35.

11. On December 8, 2021, the Court (Mulligan, J.) granted the MBF and MBB's Motion (*see* Docket, *generally*), and in accordance therewith, on December 15, 2021, the Court issued a Final Judgment, pursuant to Mass. R. Civ. P. 54(b), dismissing all claims alleged against those defendants. *See* Dkt. No. 36.

12. On January 5, 2022, Plaintiffs filed a Motion for Separate and Final Judgment as to Count II of the Complaint against Oke, pursuant to Mass. R. Civ. P. 54(b) in accordance with the Court's Order granting Oke's Summary Judgment Motion. *See* Dkt. No. 37.

13. The Motion was not opposed by any of the Defendants. *See* Dkt. No. 37.

14. On January 14, 2022, Plaintiffs filed a Joint Notice of Appeal of the Judgment dismissing their claims against MBB and MBF. *See* Dkt. No. 40.

15. A hearing on the Motion took place before the Court (Haggan, J.) on February 3, 2022. *See* Docket, *generally*.

16. Upon consideration of the Motion, hearing thereon, and the prior pleadings filed herein, the Court finds that:

a. the action involves multiple claims and multiple parties;

b. there was a final adjudication as to some, but not all, of the claims or parties, with the Court having dismissed all claims against MBB and MBF and Count II against Oke, but all claims against Steele and Counts I and II against Oke remaining;

c. for the reasons stated in the Motion, including that there is already a pending appeal against MBB and MBF of the same Summary Judgment Order also involving dismissal of the negligent entrustment claim under Count II of the

Complaint, and the physical and financial harm to plaintiffs resulting from multiple trials, there is no just reason for delaying the appeal until the remainder of the case is resolved; and

d. judgment shall enter as set forth below.

17. The Court has not scheduled this case for trial.

NOW THEREFORE, it is hereby **ORDERED** and **ADJUDGED** that:

1. Count II of the Complaint is hereby **DISMISSED** against the defendant Kolawole Oke, without statutory costs.

Date Judgement Entered: Apr. 27, 2022

Ostrin , J.

NOTIFY

06/04V 30

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1884CV2327

MARIA BLANCA ELENA GARCIA & ANOTHER[1],

PLAINTIFFS,

vs.

SHANITQUA STEELE & OTHERS,[2]

DEFENDANTS.

Notice Sent 06.07.2 Mp A.R.R. MMLC LFB MMLY DMLII LOPLS REH MSAC AGH HHGLY ZJG MCU THC DCL PA CDN CAL NO

MEMORANDUM OF DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Maria Blanca Elena Garcia ("Garcia") and Jose Fafian Seijo ("Seijo") brought this action against Defendants Shanitqua Steele ("Steele"), Kolawole Oke ("Oke"), MBB Auto LLC ("MBB"), and MBF Auto LLC ("MBF") alleging negligence, negligent entrustment, and loss of consortium. The claims arise from an incident in which Steele, operating a vehicle owned by MBF and loaned to Oke, struck Garcia, resulting in serious injury. Oke, MBB, and MBF have each filed a Motion for Summary Judgment ("Motions," Paper Nos. 19, 17, and 27, respectively).[3] A hearing on the motions took place on April 13, 2021. For the following reasons, the Motions for Summary Judgment are **ALLOWED**.

[1] Jose Fafian Seijo

[2] Kolawole Oke; MBF Auto LLC d/b/a Mercedes Benz of Caldwell; MBB Auto LLC d/b/a Mercedes Benz of Brooklyn

[3] Oke moves for summary judgment as to Count II (negligent entrustment) only.

BACKGROUND[4]

On August 18, 2016, Garcia and Seijo, who are married, were visiting Boston and participating in a Freedom Trail walking tour. Comp. ¶¶ 9-10.[5] While crossing the street at the corner of Washington and School Streets, Garcia was struck by a motor vehicle. *Id.* ¶ 12. Garcia sustained physical injuries as a result including a fractured spine, a fractured pelvis, and a hematoma to the pelvis. *Id.* ¶ 17.

At the time of the accident, the vehicle that struck Garcia was owned by and registered to MBF in New Jersey. MBB SOF ¶ 10; MBF SOF ¶ 4; JA Ex. 4. On August 15, 2016, Oke brought his Mercedes Benz to MBF in Caldwell, New Jersey, for service. MBF SOF ¶ 11; JA Ex. 7. MBF provided Oke with a "loaner vehicle" to use while his personal vehicle was being serviced. Comp. ¶ 15; MBB SOF ¶ 11; MBF SOF ¶12. MBF has provided customers with loaner vehicles since the dealership opened in 2014 and regularly provides loaner vehicles to customers whose cars are being serviced for more than three hours. MBF SOF ¶¶ 19-20; JA Ex. 5. Before taking the loaner car, Oke signed a Loaner Car Authorization form and a Courtesy Car Agreement form. MBF SOF ¶¶ 14, 15; JA Ex. 6, 7, 9. The Courtesy Car Agreement stated, in

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[4] The facts set out in this section are either undisputed or, in the case of disputed facts, are viewed in the light most favorable to the plaintiffs as the non-moving parties.

[5] References to the Complaint are denoted by the abbreviation, "Comp.," followed by a paragraph citation. References to the "Joint Statement of Undisputed Facts," which is appended to "Plaintiffs' Memorandum in Opposition to Defendant Kolawole Oke's Motion for Summary Judgment," are denoted by the abbreviation, "Oke SOF," followed by a paragraph citation. References to the "Statement of Undisputed Material Facts in Support of Defendant, MBB Auto, LLC d/b/a Mercedes Benz of Brooklyn's Motion for Summary Judgment," are denoted by the abbreviation, "MBB SOF," followed by a paragraph citation. References to the "Superior Court Rule 9A(B)(5) Statement of Defendant, MBF Auto, LLC d/b/a Mercedes Benz of Caldwell," are denoted by the abbreviation, "MBF SOF," followed by a paragraph citation. References to the Joint Appendix of Exhibits are denoted by the abbreviation, "JA," followed by an exhibit citation.

part: "Loaner Cars: Limited in operation within 100 miles radius of Mercedes Benz of Caldwell[, New Jersey]" and, in all capital letters, "UNDERSIGNED CLIENT IS THE ONLY PERSON AUTHORIZED TO OPERATE VEHICLE." MBF SOF ¶ 16; JA Ex. 6. Prior to providing Oke with the loaner vehicle, MBF required Oke to present a driver's license, proof of insurance, and a valid credit card. MBF SOF ¶ 13; JA Ex. 7, 10.

At the time of the injury, Oke's then-wife, Steele, was driving the loaner car. Comp. ¶¶ 11, 16; MBF SOF ¶ 7; JA Ex. 7. Oke had left the vehicle idling, with Steele in the passenger's seat, while he met with his lawyer. JA Ex. 2, 7. A parking officer approached the car and informed Steele that it could not be parked where it was and needed to be moved. JA Ex. 15. Steele states that she moved to the driver's seat of the vehicle to "take the key out of the car and shut the blinker off." JA Ex. 15. The car, however, began to move. *Id.* While driving the loaner car, Steele failed to stop at a red light and struck Garcia, who was walking in the middle of a crosswalk. Comp. ¶ 12. At the time, Steele did not have a driver's license. Comp. ¶ 13; Oke SOF ¶ 1; MBF SOF ¶ 8; JA Ex. 3. Oke was aware that Steele did not have a driver's license and had never been in a motor vehicle operated by Steele. Oke SOF ¶¶ 2-3. At the time of the incident, Steele was aware that she did not have permission from Oke – or from MBB or MBF – to operate the vehicle. MBB SOF ¶ 16; JA Ex. 2-3.

DISCUSSION

Summary judgment is appropriate if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56; *Cassesso* v. *Commissioner of Corr.*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank* v. *Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may

satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner* v. *Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991).

I. Negligence (Count I)

Garcia argues that MBF and MBB acted negligently in loaning the vehicle to Oke, who, in turn, acted negligently in allowing Steele to drive it. "To prevail on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty, that damage resulted, and that there was a causal relation between the breach of the duty and the damage." *Jupin* v. *Kask*, 447 Mass. 141, 146 (2006). "[A] defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." *Id.* at 147. "The general rule is that '[t]he act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen.'" *Jesionek* v. *Massachusetts Port Auth.*, 376 Mass. 101, 105 (1978), quoting *Lane* v. *Atlantic Works*, 111 Mass. 136, 139-140 (1872).

A. MBB

Pursuant to G.L. c. 231, § 85A, in actions to recover for injuries resulting from motor vehicle accidents, proof that the defendant is the registered owner of a motor vehicle is "prima facie evidence" of the defendant's responsibility for the actions of the driver of the motor vehicle. *Covell* v. *Olsen*, 65 Mass. App. Ct. 359, 362 (2006). Under the statute, the burden is on the defendant to prove the absence of that responsibility. *Id.* at 362-363. MBB argues that it

bears no responsibility for the actions of Steele because it is not, and was not on the date of the accident, the registered owner of the loaner car. Plaintiffs concede that, at the time of the accident, the loaner vehicle was owned by and registered to MBF in the state of New Jersey. MBB SOF ¶ 10. Additionally, the title and registration of the loaner vehicle indicate that MBF owns the vehicle. JA Ex. 4. These facts are sufficient to establish that G. L. c. 231, § 85A, is inapplicable to MBB. As a result, there is no evidence in the summary judgment record supporting MBB's liability for Steele's actions. The negligence claim against MBB thus fails.

B. MBF

MBF does not dispute that it was the owner of the vehicle in question. MBF contends, however, that, as a business engaged in the renting or leasing of motor vehicles, it cannot be held liable for the actions of the driver of a loaner car under the Federal Graves Amendment, 49 U.S.C. § 30106. The Graves Amendment provides, in relevant part:

> (a) In general. An owner of a motor vehicle that rents or leases the vehicle to a person . . . 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).

49 U.S.C. § 30106. The plaintiffs argue that MBF neither rented nor leased the loaner car to Oke, and, therefore, the Graves Amendment offers it no protection. Additionally, the plaintiffs argue that, even if the Graves Amendment were applicable because MBF was a business engaged in renting and/or leasing motor vehicles, MBF negligently administered its loaner car program, making the Graves Amendment inapplicable.

The plaintiffs contend that the Graves Amendment is inapplicable because MBF neither rented nor leased the vehicle to Oke. The plaintiffs concede that MBF maintains a loaner car fleet of approximately 125 Mercedes Benz vehicles and has provided its customers with loaner vehicles since the dealership opened in 2014. MBF SOF ¶¶ 19, 21. Further, the plaintiffs acknowledge that "MBF regularly provides loaner vehicles to customers as a courtesy when a customer's car is being serviced for more than three hours." *Id.* at ¶ 20. The parties also agree that, on the day of the accident, MBF had loaned Oke the vehicle as a courtesy while his car was being serviced. Comp. ¶ 15; MBB SOF ¶ 11; MBF SOF ¶ 12. The question is whether these undisputed facts result in a relationship that triggers the Graves Amendment.

The applicability of the Graves Amendment to businesses that offer free loaner cars to persons who bring their cars in for service appears to be a question of first impression in Massachusetts. The parties have directed the court's attention to no Massachusetts authority on point, and the court has not found any. The Graves Amendment precludes liability against "[a]n owner of a motor vehicle" that is "rent[ed] or lease[d] to a person" if that liability stems from "being the owner of the vehicle." 49 U.S.C. § 30106(a). "[A] transaction qualifies as a 'rental' under the Graves Amendment when, in exchange for use of a vehicle, a party provides some form of consideration." *Thayer* v. *Randy Marion Chevrolet Buick Cadillac, LLC*, 2021 U.S. Dist. LEXIS 45349, *8-*9 (M.D. Fla. 2021). Under this interpretation of the Graves Amendment, the question is whether Oke's use of the loaner vehicle was supported by some form of consideration.

The approach taken by the District Court for the Middle District of Florida in *Thayer* is persuasive. The *Thayer* Court found that the Graves Amendment applies if a car dealership requires that an individual leave a vehicle for service in order to be provided with use of a loaner

vehicle. *Id.* at *9. Like the plaintiff in *Thayer*, the plaintiffs contend that MBF did not "rent" the vehicle to Oke because Oke did not pay MBF an additional cost for use of the vehicle. The *Thayer* Court, however, concluded – and this Court agrees – that construing the term "rental" to require payment of money would unduly restrict the consideration that could underlie a rental. *Id.* Consideration need not involve payment of money "'but may [instead] consist of either a benefit to the promisor or a detriment to the promisee.'" *Id.*, citing *Florida Power Corp.* v. *Public Serv. Comm'n*, 487 So. 2d 1061, 1063 (Fla. 1986). It is undisputed that MBF provides loaner vehicles to customers whose personal cars are being serviced for more than three hours. It follows that, if a customer's personal vehicle is not being serviced by MBF for more than three hours, MBF will not provide the customer with a loaner vehicle. In order to receive a loaner vehicle, therefore, Oke was required to leave his personal vehicle with MBF for more than three hours to be serviced. This is sufficient consideration to trigger the applicability of the Graves Amendment in this case. See *Thayer*, 2021 U.S. Dist. LEXIS 45349, *9-*10.

The plaintiffs further argue, correctly, that, if MBF acted negligently in loaning the vehicle to Oke, the Graves Amendment would not shield MBF from liability. See 49 U.S.C. § 30106(a)(2). In order for Garcia to maintain a negligence claim against MBF, MBF must have had a duty to Garcia, which it breached. See *Jupin*, 447 Mass. at 146. The plaintiffs argue that MBF "[has] a duty to ensure that it lends cars to validly licensed individuals and properly instruct those individuals on the proper use of said car" and that MBF "maintains a set of policies and procedures that govern its loaner car program, all of which were either unenforced by MBF or rendered meaningless by MBF's failure to properly implement these policies." Plaintiffs' Opposition to Defendant MBF Auto, LLC's Motion for Summary Judgment, at 9. Specifically, the plaintiffs contend that MBF negligently failed to enforce its own policies including: "(i)

restrictions on the distance from the dealership the loaner car can be taken, (ii) restrictions on who may drive a loaner car, (iii) restrictions on the consumption of alcohol while driving a loaner car, (iv) restricting the issuance of loaner cars to persons with valid driver's licenses, and (v) restricting the issuance of loaner cars to persons with valid insurance coverage." JA Ex. 12. The plaintiffs argue that MBF "conducted no training of its employees in the administration and control of the Loaner program and took no precautions generally to ensure that [its] own policies were followed." *Id.*

Oke signed both a Courtesy Car Agreement and Loaner Agreement prior to MBF loaning him the motor vehicle. JA Ex. 6, 9. The Courtesy Car Agreement stated, in part: "Loaner Cars: Limited in operation within 100 miles radius of Mercedes Benz of Caldwell[, New Jersey]" and "UNDERSIGNED CLIENT IS THE ONLY PERSON AUTHORIZED TO OPERATE VEHICLE." MBF SOF ¶ 16; JA Ex. 6. The provision of the Courtesy Car Agreement restricting who may drive the vehicle is written in all capital letters in bold in a font size larger than the rest of the document. Even if MBF's employees failed to review with Oke the restriction on who may drive the loaner vehicle, Oke had notice of the restriction via the document itself. Further, there is no evidence that Oke entrusted the vehicle to anyone else. Thus, the plaintiffs have established no causal link between the alleged failure of MBF to notify Oke orally of the restriction on drivers and Steele's ultimate operation of the car.

The Courtesy Car Agreement also informed Oke regarding the restriction on how far the vehicle could be driven from the dealership. If MBF failed to orally notify Oke of the restriction on the distance he could drive the vehicle, such failure was not causally related to the accident. The plaintiffs have come forward with no evidence suggesting that the distance restriction was a safety measure. Thus, the plaintiffs have not established that MBF was under a duty to anyone –

the plaintiffs or anyone else – to ensure that the car was not driven more than 100 miles from the dealership. Further, the intervening act of a third party is a superseding cause that breaks the chain of causation if a defendant could not have reasonably foreseen the act. *Copithorne* v. *Framingham Union Hosp.*, 401 Mass. 860, 862 (1988). MBF loaned the vehicle to Oke, after confirming that he had a driver's license and registration. MBF made Oke aware that he was the only person authorized to drive the loaner vehicle. It was not reasonably foreseeable to MBF that another individual would decide to drive the vehicle without permission.

Finally, MBF required Oke to present a driver's license and proof of insurance before he received the loaner car. MBF SOF ¶ 13. The plaintiffs contend that MBF was negligent because it allegedly did not require Oke to show a *valid* driver's license or *valid* proof of insurance. The plaintiffs, however, have presented no evidence showing that either Oke's driver's license or proof of insurance was not valid at the time the vehicle was loaned to him. There is no evidence that alcohol played any part in the accident, and the plaintiffs have presented no evidence that MBF violated its policy restricting the consumption of alcohol while driving a loaner car or that, if MBF did violate such a policy, it is material to this matter.

Assuming MBF owed a duty to Garcia, the plaintiffs have not put forth any evidence indicating that MBF breached that duty in a manner that led to Garcia's injuries. Garcia's injuries were caused by Steele, who did not have a driver's license, operating the loaner car after Oke left the car idling with Steele in it. Prior to loaning him the vehicle, MBF made Oke aware that he was the only individual authorized to operate the vehicle, and Oke signed an acknowledgment of such. MBF SOF ¶ 16; JA Ex. 6. The plaintiffs have not presented any action MBF failed to take that caused the injuries suffered by Garcia when Steele operated the motor vehicle without

authorization. Because the Graves Amendment applies and MBF did not breach a duty to Garcia resulting in injury, the negligence claim against MBF fails.

II. Negligent Entrustment (Count II)

Garcia contends that MBF and MBB negligently entrusted the motor vehicle to Oke, who, in turn, negligently entrusted it to Steele. To make out a claim for negligent entrustment of a motor vehicle, "it is necessary for the plaintiff to show . . . that the defendant owned or controlled the motor vehicle concerned, and that the defendant gave the driver permission to operate the vehicle." *Alioto* v. *Marnell*, 402 Mass. 36, 40 (1988); *Peters* v. *Haymarket Leasing, Inc.*, 64 Mass. App. Ct. 767, 771 (2005). Additionally, the plaintiff must establish that: 1) the driver was incompetent or unfit; 2) such incompetence or unfitness was the cause of the plaintiff's injuries; and 3) the defendant had actual knowledge of the incompetence or unfitness of the operator to drive the motor vehicle. *Picard* v. *Thomas*, 60 Mass. App. Ct. 362, 369 (2004).

A. Oke

The parties agree that, at the time of the accident, Oke controlled the loaner vehicle, Steele did not have a valid driver's license, and Oke knew Steele did not have a valid driver's license. Comp. ¶¶ 13, 15; Oke SOF ¶¶ 1-3; MBB SOF ¶ 11; MBF SOF ¶¶ 8, 12; JA Ex. 3, 8. Plaintiffs alternately concede and dispute that, at the time of the accident, Steele did not have permission from Oke to operate the motor vehicle. See MBB SOF ¶ 16.; MBF SOF ¶ 9. In both deposition testimony and interrogatory answers, however, Steele acknowledged that she did not have permission to operate the vehicle. JA Ex. 2. Oke's deposition testimony and answers to interrogatories also reflect that Steele did not have permission to operate the vehicle. JA Ex. 8. Plaintiffs have not provided any evidence to contradict either Steele or Oke's statements that Oke

did not give her permission to operate the vehicle. Consequently, the negligent entrustment claim against Oke fails.

B. MBF

There is no dispute that MBF owned the loaner vehicle and gave Oke permission to drive it. JA Ex. 4, 6, 7. The plaintiffs have not presented any evidence, however, that Oke was incompetent or unfit to operate the vehicle at the time MBF loaned it to him. Further, even if there were evidence that Oke was incompetent or unfit to operate the vehicle, there is no evidence that MBF knew of that unfitness or incompetence. At the time MBF loaned the vehicle to Oke, he was required to present a driver's license and proof of insurance and sign multiple documents related to the loaner vehicle. MBF SOF ¶¶ 13-15. Without evidence that Oke was incompetent or unfit to operate the vehicle at the time MBF loaned it to him, the negligent entrustment claim against MBF fails.

C. MBB

As previously discussed, there is no dispute that MBF, not MBB, owned the loaner car. The plaintiffs have presented no evidence that, having no connection to the loaner car, MBB controlled it in any way. Further, it is undisputed that MBB had no contact at any time with Oke or Steele and did not give either permission to use the vehicle. Consequently, the negligent entrustment claim against MBB fails.

III. Loss of Consortium (Count III)

Seijo claims loss of consortium against Oke, MBF, and MBB. "As a general rule, a claim for loss of consortium requires proof of a tortious act that caused the claimant's spouse personal injury." *Sena* v. *Commonwealth*, 417 Mass. 250, 264 (1994). It is an implicit prerequisite of a loss of consortium claim that the injured spouse have a viable claim. See *id.* Garcia does not

have a viable claim against MBB, as it was not the registered owner of the loaner vehicle and had no part in the loaning the vehicle to Oke. Consequently, Seijo does not have a valid claim for loss of consortium against MBB. Garcia also does not have a viable claim against MBF, as the Graves Amendment shields MBF from liability and there is no evidence that MBF negligently entrusted the loaner vehicle to Oke. Therefore, Seijo does not have a valid claim for loss of consortium against MBF.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that:

(1) Oke's Motion for Summary Judgment as to Count II (negligent entrustment) only is **ALLOWED**.

(2) MBB's Motion for Summary Judgment be **ALLOWED**; and

(3) MBF's Motion for Summary Judgement be **ALLOWED**.

David A. Deakin
Associate Justice

Dated: June 2, 2021

RULES OF CIVIL PROCEDURE

Civil Procedure Rule 36: Requests for admission

EFFECTIVE DATE:

07/01/1974

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(a) Request for admission

A party may serve upon any other party a written request for admission, for purposes of the pending action, only, of the truth of any matters within the scope of Rule 26(b) (/rules-of-civil-procedure/civil-procedure-rule-26-general-provisions-governing-discovery#-b-scope-of-discovery) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the

genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission either (1) a written statement signed by the party under the penalties of perjury specifically (i) denying the matter or (ii) setting forth in detail why the answering party cannot truthfully admit or deny the matter; or (2) a written objection addressed to the matter, signed by the party or his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of **Rule 37(c)** (/rules-of-civil-procedure/civil-procedure-rule-37-failure-to-make-discovery-sanctions#-c-expenses-on-failure-to-admit), deny the matter or set forth reasons why he cannot admit or deny it. Each admission, denial, objection, or statement shall be preceded by the request to which it responds.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of **Rule 37(a)(4)** (/rules-of-civil-procedure/civil-procedure-rule-37-failure-to-make-discovery-sanctions#-a-motion-for-order-compelling-discovery) apply to the award of expenses incurred in relation to the motion.

(b) Effect of admission

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of **Rule 16** (/rules-of-civil-procedure/civil-procedure-rule-16-pre-trial-procedure-formulating-issues) governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

Reporter's notes

(1973) Rule 36, tracking amended Federal Rule 36, governs Requests for Admission, a procedure long familiar to Massachusetts practitioners as "Notices to Admit", GL c. 231, § 69 (https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleII/Chapter231/Section69). Although the matters subject to such request under Rule 36 are somewhat broader than those under the statute, Rule 36 should cause no difficulty; to expended response period (30 days, as opposed to 10 under GL c. 231, § 69 (https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleII/Chapter231/Section69)) should in fact permit more flexible use of this discovery device.

Downloads

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RULES OF CIVIL PROCEDURE

Civil Procedure Rule 56: Summary judgment

EFFECTIVE DATE:

05/01/2002

UPDATES:

Amended March 7, 2002, effective May 1, 2002

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(a) For claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36 (/rules-of-civil-procedure/civil-procedure-rule-36-requests-for-admission), together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Reporter's notes

(2002) The 2002 amendment to Rule 56(c) deletes the phrase "on file" from the third sentence, in recognition of the fact that discovery documents are generally no longer separately filed with the court. See Rule 5(d)(2) and Superior Court Administrative Directive No. 90-2. The previous reference to admissions has also been replaced by a reference to "responses to requests for admission under **Rule 36** (/rules-of-civil-procedure/civil-procedure-rule-36-requests-for-admission)." The amendment is merely of the housekeeping variety and no change in practice is intended.

(1973) Except in a narrow class of cases, Massachusetts has up to now lacked any procedural device for terminating litigation in the interim between close of pleadings and trial. Under G.L. c. 231, §§ 59 and 59B, only certain contract actions could be disposed of prior to trial. In all other types of litigation, no matter how little factual dispute involved, resolution had to await trial.

Rule 56, which, with a small addition, tracks Federal Rule 56 exactly, responds to the need which the statutes left unanswered. It proceeds on the principle that trials are necessary only to resolve issues of fact; if at any time the court is made aware of the total absence of such issues, it should on motion promptly adjudicate the legal questions which remain, and thus terminate the case.

The statutes, so far as they went, embodied this philosophy. They aimed "to avoid delay and expense of trials in cases where there is no genuine issue of fact." **Albre Marble & Tile Co., Inc. v. John Bowen Co., Inc., 338 Mass. 394** (http://masscases.com/cases/sjc/338/338mass394.html), 397 (1959). Rule 56 will extend this principle beyond contract cases. Thus in tort actions where the facts are not disputed, summary judgment for one party will be appropriate. Should the facts concerning liability be undisputed, but damages controverted, Rule 56(c) authorizes partial summary judgment: the court may determine the liability issue, leaving for trial only the question of damages.

The important thing to realize about summary judgment under Rule 56 is that it can be granted if and only if there is "no genuine issue as to any material fact." If any such issue appears, summary judgment must be denied. So-called "trial by affidavits" has no place under Rule 56. Affidavits (or pleadings, depositions, answers to interrogatories, or admissions) are merely devices for demonstrating the absence of any genuine issue of material fact. Introduction of material controverting the moving party's assertions of fact raises such an issue and precludes summary judgment.

On the other hand, because Rule 56 recognizes only "genuine" material issues of fact, Rule 56(e) requires the opponent of any summary judgment motion to do something more than simply deny the proponents allegations. Faced with a summary judgment motion supported by affidavits or the like, an opponent may not rely solely upon the allegations of his pleadings. He bears the burden of introducing enough countervailing data to demonstrate the existence of a genuine material factual issue.

If, however, the opponent is convinced that even on the movant's undisputed affidavits, the court should not grant summary judgment, he may decline to introduce his own materials and may instead fight the motion on entirely legal (as opposed to factual) grounds. Indeed, the final sentence of Rule 56(c) makes clear that in appropriate cases, summary judgment may be entered against the moving party. This is eminently logical. Because by definition the moving party is always asserting that the case contains no factual issues, the court should have the power, no matter who initiates the motion, to award judgment to the party legally entitled to prevail on the undisputed facts.

Downloads

Massachusetts Rules of Civil Procedure

(https://www.mass.gov/doc/massachusetts-rules-of-civil-procedure/download) (PDF 1.86 MB)

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UPDATES:

Amended March 7, 2002, effective May 1, 2002

49 U.S. Code § 30106 - Rented or leased motor vehicle safety and responsibility

U.S. Code Notes

(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).

(b) Financial Responsibility Laws.—Nothing in this section supersedes the law of any State or political subdivision thereof—

(1) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or

(2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.

(c) Applicability and Effective Date.—
Notwithstanding any other provision of law, this section shall apply with respect to any action commenced on or after the date of enactment of this section without regard to whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before such date of enactment.

(d) Definitions.—In this section, the following definitions apply:

(1) Affiliate.—
The term "affiliate" means a person other than the owner that directly or indirectly controls, is controlled by, or is under common control with the owner. In the preceding sentence, the term "control" means the power to direct the management and policies of a person whether through ownership of voting securities or otherwise.

(2) Owner.—The term "owner" means a person who is—

(A) a record or beneficial owner, holder of title, lessor, or lessee of a motor vehicle;

(B) entitled to the use and possession of a motor vehicle subject to a security interest in another person; or

(C) a lessor, lessee, or a bailee of a motor vehicle, in the trade or business of renting or leasing motor vehicles, having the use or possession thereof, under a lease, bailment, or otherwise.

(3) Person.—
The term "person" means any individual, corporation, company, limited liability company, trust, association, firm, partnership, society, joint stock company, or any other entity.

(Added Pub. L. 109–59, title X, § 10208(a), Aug. 10, 2005, 119 Stat. 1935.)

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Part III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

Title II ACTIONS AND PROCEEDINGS THEREIN

Chapter 231 PLEADING AND PRACTICE

Section 85A PRIMA FACIE EVIDENCE OF OWNER'S RESPONSIBILITY FOR OPERATION OF MOTOR VEHICLE

Section 85A. In all actions to recover damages for injuries to the person or to property or for the death of a person, arising out of an accident or collision in which a motor vehicle was involved, evidence that at the time of such accident or collision it was registered in the name of the defendant as owner shall be prima facie evidence that it was then being operated by and under the control of a person for whose conduct the defendant was legally responsible, and absence of such responsibility shall be an affirmative defence to be set up in the answer and proved by the defendant.

CERTIFICATE OF SERVICE

I, Christopher Marks, counsel for the Plaintiffs - Appellants, hereby certify that on August 29, 2022, I caused the Brief of the Plaintiffs - Appellants to be served on counsel for Defendants - Appellees, Melissa Curran, Esq., David M. Lentiti II, Esq. Lawrence F. Boyle, Esq. and David F. Lanoie, Esq., via email.

/s/ Christopher Marks
Christopher Marks
BBO# 705612