

**Horn v D & A Sand & Gravel Inc.**

2019 NY Slip Op 31434(U)

March 7, 2019

Supreme Court, Nassau County

Docket Number: 10205/15

Judge: Jeffrey S. Brown

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN  
JUSTICE**

-----X		<b>TRIAL/IAS PART 11</b>
<b>DIANE HORNE and BRIAN HORN,</b>		
	<b>Plaintiff,</b>	<b>INDEX # 10205/15</b>
	<b>-against-</b>	<b>Mot. Seq. 5</b>
		<b>Mot. Date 1.10.19</b>
		<b>Submit Date 2.1.19</b>
<b>D &amp; A SAND &amp; GRAVEL INC. d/b/a D &amp; A SAND AND GRAVEL; and FRANK R. VELEZ,</b>		
	<b>Defendants.</b>	
-----X		

The following papers were read on this motion:	Documents Numbered
Notice of Motion/Cross-motion, Affidavits, Exhibits Annexed.....	1
Answering Affidavit .....	2

Plaintiffs, Diane and Brian Horn move pursuant to CPLR 4404(a) to set aside the verdict rendered in this case as against the weight of the evidence and directing a verdict in favor of the plaintiffs.

In this motor vehicle action, the jury delivered a verdict finding that the subject accident of July 27, 2015 was not a substantial factor in causing the plaintiff to suffer a significant limitation of use of a body organ or member or a permanent consequential limitation of use of a body organ or member. Because the jury found that the plaintiff did not meet the threshold required to maintain an action under New York's Insurance Law § 5104(a), the plaintiff was unable to recover damages for non-economic loss.

By this motion, plaintiff contends that the evidence submitted by her treating orthopedist Craig Levitz, M.D. showed that she had suffered herniated cervical discs and that these injuries were both casually related to the motor vehicle accident and permanent in nature, making her a candidate for surgery.<sup>1</sup> Further, according to the plaintiff, Dr. Levitz testified that there was

<sup>1</sup> The court notes that the plaintiffs have not annexed Dr. Levitz's trial testimony to this motion.

no indication on imaging studies that the plaintiff's injuries were pre-existing. Further, plaintiff disputes the testimony of defendant's expert witnesses, examining expert Dr. Jay Eneman and radiologist Dr. Jonathan Lerner. Plaintiff concludes that "[i]t flies in the face of logic that a jury would simply choose to ignore the treatment assessment and plans of the doctors who actually treated the plaintiff, which records clearly show a 'significant and permanent injury' to a system (the nervous system) . . . ."

CPLR 4404 (a) provides that "[a]fter a trial . . . the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action . . . where the verdict is contrary to the weight of the evidence, in the interest of justice . . . ." "[A] jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (*Lolik v Big V Supermarkets*, 86 NY2d 744, 745-746 [1995]; *Nicastro v Park*, 113 AD2d 129, 130 [2d Dept 1985])." (*Vittiglio v Gaurino*, 100 AD3d 987, 988 [2d Dept 2012]). "In considering such a motion, 'the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant.'" (*Wilson v. Philie*, 107 A.D.3d 700, 701 [2d Dept 2013] [quoting *Hand v. Field*, 15 A.D.3d 542, 543 [2d Dept 2005]).

With respect to a significant limitation, the jury was instructed, in sum:

"A limitation of use of a body function or system means that the function or system does not operate at all or operates only in some limited way. It is not necessary for you to find that there has been a total loss of the body function or system or that the limitation of use is permanent. However, the limitation of use must be significant, meaning that the loss is important or meaningful. A minor, mild or slight limitation of use is not significant.

"If you find that plaintiff sustained a limitation of use as a result of the accident on [state date of accident] and that the limitation is significant, you must answer the question 'yes.' If you find that plaintiff did not sustain a limitation of use as a result of the accident on [state date of accident], or that the limitation is not significant, you must answer the question 'no.'"

With respect to a permanent consequential limitation of use of a body organ or member, the jury was instructed, in sum:

"A limitation of use of a body organ or member means that the body organ or member does not operate at all or operates only in some limited way. It is not necessary for you to find that there has

been a total loss of the use of the body organ or member. The limitation of use must be consequential, which means that it is significant, important or of consequence. A minor, mild or slight limitation of use is not significant, important or of consequence.

“If you find that, plaintiff sustained a permanent limitation of use as a result of the accident, and that the limitation is consequential, as I have defined it, you must answer the question ‘yes.’ If you find that there is no permanent limitation as a result of the accident on [state date of accident], or that the limitation is not consequential, you must answer the question ‘no.’”

In opposition to this motion, the defendant submits the trial testimony of its experts. Dr. Lerner testified that he reviewed the MRI's performed on the plaintiff's cervical spine on October 8, 2015 and in 2016 and 2017, which he opined showed degenerative discs as evidenced by dessication and bulges at several levels. He stated that this would not have occurred in the weeks following the accident but had formed over a period of years. With respect to the MRI of plaintiff's shoulder performed February 24, 2016, Dr. Lerner opined that a tear present was a rotator cuff partial thickness tear secondary to impingement syndrome.

Dr. Eneman examined the plaintiff on November 10, 2016. He testified that he tested plaintiff's cervical range of motion with the use of a goniometer and also examined both shoulders. He found a normal clinical examination save for a limited range of motion of the cervical spine. Further, he determined that the plaintiff had tenderness over the acromioclavicular joint of the shoulder. He opined that the “range of motion was limited by the purposes of the claimant rather than the injuries of the shoulder [and cervical spine].” His diagnosis was that the plaintiff had a sprain/strain of the cervical spine that was resolved and the injuries to her shoulder had resolved and required no further treatment. He further testified that with the information that he was given, the plaintiff's sprains and strains were related to the accident but were not permanent in nature.

Dr. Eneman also referred to progress notes from plaintiff's treating physician that found no objective sensory changes and full range of motion shortly after the accident. He concluded that the plaintiff did not sustain a significant limitation or permanent consequential injury with respect to her neck or left shoulder.

On this record, although defendant's expert radiologist opined that the plaintiff's conditions were solely degenerative in nature, this is inconsistent with Dr. Eneman's finding that the accident was the cause of plaintiff's injuries. Nonetheless, Dr. Eneman opined, based on his examination, that the plaintiff's conditions had resolved by the time of his exam with no objective finding of continuing limitations. Thus, there was conflicting expert testimony concerning whether the plaintiff indeed sustained a serious injury as defined by New York's Insurance Law. The conflicting expert evidence presented precludes a finding that the verdict

[\* 4]  
was against the weight of the credible evidence as the jury was free to credit the opinion of one expert over that of another. Accordingly, there are insufficient grounds to set aside the jury's verdict.

For these reasons, the motion must be **denied**.

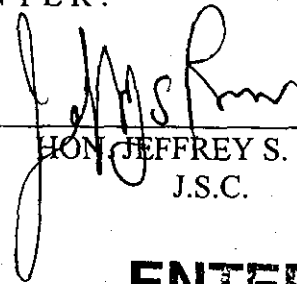
This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York  
March 7, 2019

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ENTER:



HON. JEFFREY S. BROWN  
J.S.C.

**ENTERED**

MAR 08 2019

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