

<b>Herrera v Metropolitan Suburban Bus Auth.</b>
2012 NY Slip Op 31219(U)
March 25, 2012
Sup Ct, Nassau County
Docket Number: 7089/10
Judge: F. Dana Winslow
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SCAN

**SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 3  
NASSAU COUNTY**

**ANGELA HERRERA and CHRISTHIAN  
NOLASCO,**

**Plaintiffs,**

**MOTION DATE: 1/5/12**

**-against-**

**MOTION SEQ. NO.: 001  
INDEX NO.: 7089/10**

**METROPOLITAN SUBURBAN BUS  
AUTHORITY and WADE A. DAWSON,**

**Defendants.**

**The following papers read on this motion (numbered 1-3):**

**Notice of Motion .....1**  
**Memorandum of Law.....1a**  
**Affirmation in Opposition.....2**  
**Reply Affirmation.....3**

Plaintiff ANGELA HERRERA (“HERRERA”) age 24, alleges that on January 8, 2010 at approximately 4:40 p.m., she was the operator of a motor vehicle owned by plaintiff CHRISTHIAN NOLASCO (“NOLASCO”) which came into contact with a vehicle owned by defendant METROPOLITAN SUBURBAN BUS AUTHORITY (“MSB”) and operated by defendant WADE A. DAWSON (“DAWSON”) (collectively, the “Defendants”). The accident occurred on Old Country Road at or near its intersection with Carleton Street, Nassau County. The Defendants now move for an order dismissing the complaint of plaintiff HERRERA pursuant to CPLR §3212 on grounds that HERRERA failed to sustain a “serious injury” within the meaning of Insurance Law §5102(d). The claim by plaintiff NOLASCO is for property damage only. The motion is determined as follows.

Insurance Law §5102(d) provides that a “serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined

injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" (numbered by the Court). The Court's consideration in this action is confined to whether HERRERA's injuries constitute a significant disfigurement (3), a permanent consequential limitation of use of a body organ or member (7), a significant limitation of use of a body function or system (8), or a medically determined injury which prevented HERRERA from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of her motion for summary judgment, HERRERA submits (1) an affirmed report of examination of neurologist Maria Dejesus, MD, dated April 21, 2011, covering an examination of that date; (2) an affirmed report of examination of orthopedist Richard Weiss, MD, dated May 12, 2011, covering an examination of that date; and (3) portions of the transcript of a deposition of HERRERA conducted on January 13, 2011.

Dr. Dejesus reported that physical examination of HERRERA's cervical and lumbar spines revealed normal range of motion results, comparing the results to norms. Dr. Dejesus' other reported findings, which specified the neurologic tests performed, also revealed normal findings. Dr. Dejesus diagnosed (1) resolved lumbosacral and cervical sprain/strain; (2) "subjective complaints of on and off numbness radiating down the right upper extremity and right lower extremity without the presence of objective clinical findings"; and (3) complaints of "generalized headaches."

Dr. Weiss reported that physical examination of HERRERA's cervical and lumbar spines, and shoulders, revealed normal range of motion results, comparing the results to norms. Dr. Weiss' other reported findings, which specified the orthopedic tests performed, also revealed normal findings. Dr. Weiss diagnosed resolved cervical and lumbosacral sprain/strain, bilateral shoulder sprains and bilateral knee contusions.

Plaintiffs argue that Defendants failed to meet their burden with respect to plaintiffs' claim that HERRERA's scar on her chin resulting from injuries sustained in the accident, constitutes a significant disfigurement under **Insurance Law 5102(d)**. The Court finds that Defendants have established *prima facie* that the scar fails to constitute a significant disfigurement based on HERRERA's own deposition testimony that she only received butterfly stitches in the form of tape on the wound, rather than sutures, and that the scar is only one inch long. In any event, plaintiffs fail to offer admissible evidence to raise an issue of fact. See **Lynch v. Iqbal**, 56 AD3d 621; **Sirmans v. Mannah**, 300 AD2d 465; **Loiseau v. Maxwell**, 256 AD2d 450; **Estrella v. Marano**, 255 AD2d 358.

The Court finds that the reports of HERRERA's examining physicians are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examinations, to satisfy the Court that an "objective basis" exists for their opinions. Accordingly, the Court finds that Defendants have made a *prima facie* showing, that plaintiff ANGELA HERRERA did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiffs to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

In opposition, plaintiffs submit (1) an affirmation of neurologist Bogan Negrea, MD, dated January 5, 2012, covering an examination of that date, and annexing and affirming his report covering EMG/NCS testing conducted on February 1, 2011; (2) an affirmation of orthopedist David Benatar, MD, dated January 5, 2012, annexing and affirming copies of his examination reports covering the period January 14, 2010 through October 13, 2010; (3) an affirmation of orthopedist Sebastian Lattuga, MD, dated December 30, 2011, annexing and affirming his report covering an examination conducted on June 28, 2010; (4) an affirmation of radiologist Mark Shapiro, MD, dated September 30, 2010, annexing and affirming an MRI report covering an MRI of HERRERA's lumbar spine conducted on March 1, 2010; (5) an affirmation of Dr. Shapiro, dated 'September , 2010', annexing and affirming an MRI report covering an MRI of HERRERA's cervical spine conducted on March 30, 2010; (6) an affidavit of HERRERA, sworn to on October 10, 2011; and (7) the transcript of a deposition of HERRERA conducted on May 7, 2010.

The Court finds that the totality of plaintiffs' medical evidence is sufficient to raise an issue of fact as to whether HERRERA suffered a serious injury, under the permanent consequential or significant limitation categories of **Insurance Law §5102(d)** as a result of the accident. *See Perl v. Meher*, 18 NY3d 208; **Kyoung Yun Kim v. Emkay Inc. Trust**, 91 AD3d 830; **Franco v. Supreme Poultry, Inc.**, 91 AD3d 818; **Wright v. Simpson**, 90 AD3d 1035.

HERRERA's medical evidence reveals both contemporaneous and recent deficits in range of motion of her cervical and lumbar spines. The affirmation of Dr. Negrea provides recent quantitative range of motion results, the examination reports of Dr. Benatar provide contemporaneous range of motion results, some of which are quantitative, and the examination report of Dr. Lattuga provides quantitative range of motion results approximately five months post accident. The Court notes that Dr. Benatar's failure in several of his contemporaneous reports to compare the range of motion results to normal ranges, is not fatal in light of **Perl v. Meher**, *supra* which

eliminated the requirement of contemporaneous quantitative measurements in order to demonstrate "serious injury". The Court finds that the MRI reports which reveal a herniation at L4-5 and focal bulges at C4-5 and C5-6 impinging on the neural canal, and an EMG report which reveals an "abnormal study suggestive of a lower lumbo-sacral radiculopathy bilaterally," together with the aforementioned medical affirmations, are sufficient to raise an issue of fact as to whether HERRERA suffered a serious injury to her cervical and lumbar spines under the permanent consequential or significant limitation categories of **Insurance Law §5102(d)**.

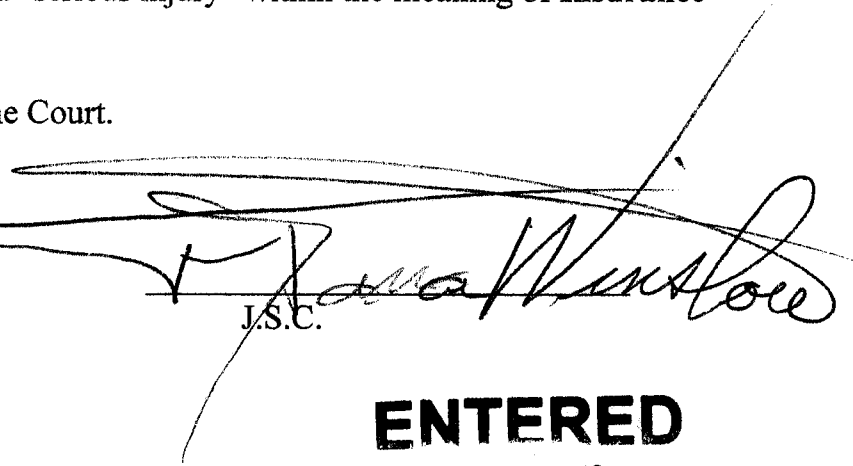
Despite inconsistent responses in HERRERA's Bill of Particulars as to her ability to work after the accident, the Court also finds that plaintiffs have raised an issue of fact as to whether HERRERA sustained a medically determined injury which prevented her from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9). The Court notes that Defendants' orthopedist Dr. Weiss stated that HERRERA lost eight weeks of work as a result of the accident while Defendants' neurologist Dr. Dejesus stated that HERRERA lost eight months of work. HERRERA herself testified at her deposition conducted on January 13, 2011 that she was out of work for ten to eleven months, and that she tried to go back to work to her previous place of employment before that time but she "could not do it because the work there is heavier." Furthermore, in his examination report of October 13, 2010, Dr. Benatar opined that HERRERA's return to work at that time would result in worsening pain.

On the basis of the foregoing, it is

ORDERED, that the motion by Defendants METROPOLITAN SUBURBAN BUS AUTHORITY and WADE S. DAWSON for summary judgment pursuant to CPLR §3212 dismissing the complaint of plaintiff ANGELA HERRERA on the grounds that plaintiff HERRERA failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is denied.

This constitutes the Order of the Court.

Dated: *March 25*, 2012

  
J.S.C.

**ENTERED**  
APR 26 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE