

<b>Daughterty v Sheehan</b>
2015 NY Slip Op 32823(U)
August 21, 2015
Supreme Court, Erie County
Docket Number: 800588-2013
Judge: Timothy J. Drury
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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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**JOELLE DAUGHTERTY**

**Plaintiff**

**DECISION**

v.

**Index No. 800588-2013**

**DENNIS J. SHEEHAN, DIANE SHEPHERD,  
and MICHAEL J. SHEPHERD**

**Defendants**

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**Dennis J. Bischof, Esq.  
Dennis J. Bischof, LLC  
Attorney for Plaintiff**

**Joan M. Richter, Esq.  
Law Office of Daniel R. Archilla  
Attorneys for Defendants, Diane Sheppard and  
Michael J. Sheppard**

**Tiffany L. D'Angelo, Esq.  
Law Office of John Trop  
Attorneys for Defendant, Dennis J. Sheehan**

**TIMOTHY J. DRURY, J.S.C.**

The Defendant Dennis J. Sheehan owned and drove a vehicle that allegedly rear ended the vehicle driven by the Defendant Diane Sheppard and owned by her husband Dennis J. Sheppard. The Plaintiff is Joell Daugherty, Mrs. Sheppard's daughter, who was a passenger in the vehicle at the time. The Plaintiff and the Sheppards have moved for Summary Judgment on the issue of negligence. The Defendant Sheehan has not opposed this motion. Also, the Defendant Sheehan has not opposed the motion addressed to the withdrawal of the affirmative defenses of seat belt and jurisdiction. What is left is the Defendant Sheehan's motion for Summary Judgment on the issue of serious injury. The Plaintiff has alleged serious injury in the categories of fracture, significant

limitation, permanent consequential limitation and 90/180 limitation of daily activities. She has claimed she sustained an annular tearing at L4-5 with a diffuse broad based disc bulge and an annular tearing at L5-S1 with left posterior disc herniation, among other injuries. She has claimed she suffers from disabling neck and back pain as a result of the accident.

The accident allegedly occurred on May 21, 2011. The Plaintiff's medical records indicate that she injured her spine when she fell down the stairs in her home on or about October of 2008. She was treated for these injuries by the office of Eugene J. Gosy, MD in 2008 and 2009 and by Loubert S. Suddaby MD in 2010. In April 2010 Dr. Suddaby's notes indicate that she was suffering from lower back pain and that the pain had been progressing for almost a year. The notes also state that she was starting to develop leg pain as well. The Plaintiff underwent x-rays, MRIs and CT scan of the lumbar spine, abdomen and pelvis in 2008 and 2010. She also underwent similar scans in these areas in 2011 and 2012 as a result of her current complaints.

The Defendant Sheehan has submitted the affirmation of Angelo M. DelBalso, a radiologist, who compared the scans taken before the instant accident with those taken after. His opinion is that the abnormalities revealed in the scans are all the same. He has stated that the injuries revealed in the post accident scans existed prior to the accident. Dr. DelBlaso has stated that none of the film studies conducted after the accident show any new injuries to the Plaintiff's abdomen or lumbar spine. He has stated that the scans do demonstrate degenerative changes unrelated to the accident. His opinion was that there is no objective medical or radiologic evidence that can be causally related to the instant accident.

The Defendant Sheehan also has cited the Plaintiff's treatment at Mercy Hospital on the date of the accident and at WNY Medical on May 24, 2011. The reports from both treatments indicate that the Plaintiff did not exhibit obvious injury or limitations.

In response the Plaintiff has submitted the affidavit of Julius Horvath, D.C., who has treated the Plaintiff. Dr. Horvath stated that the Plaintiff had limited range of motion in her lumbar spine. He examined the Plaintiff on or about August 3, 2011. In his affirmation, Dr. Horvath set forth the limitations he had observed in comparison to normal ranges of motion. Some of the deficits the Plaintiff exhibited were significant. He also detailed positive orthopedic tests he performed on the Plaintiff, such as straight leg raising.

The Defendant Sheehan correctly takes issue with the Plaintiff's Response since it does not address the issue of causation that has been raised in the Defendant Sheehan's motion papers. The Defendant Sheehan also questions whether Dr. Horvath had used objective tests in his examination of the Plaintiff. The Defendant Sheehan has also taken issue with whether the degree of limitations exhibited by the Plaintiff are significant. The Defendant Sheehan has pointed out that Dr. Cameron B. Huckell's report has not addressed the causation issue; as a matter of fact, Dr. Huckell stated in his report that the Plaintiff has had no previous injury to her spine.

Therefore, the Defendant Sheehan has sustained his burden of proof and shown that there is no objective evidence of new injuries that were caused by the instant accident. However, the Plaintiff has stated in her Bill of Particulars that in the alternative she is pleading an exacerbation of a pre-existing condition. The Defendant Sheehan has prevailed as to evidence of new injuries but has not addressed exacerbation of pre-existing injuries. The Defendant Sheehan's submissions of the radiologist's affirmation and the Plaintiff's medical reports were sufficient as far as they went,

but there was no independent medical exam conducted which would have addressed the sufficiency of the exacerbation of the pre-existing injuries.

The Defendant Sheehan's submission of the results of the medical exams performed soon after the accident, which indicated little or no pain or impairment, do not suffice to prove a lack of serious injury, in light of Dr. Horvath's entire affirmation. Therefore, while the Defendant Sheehan's Motion is granted dismissing the Plaintiff's claim as to any new injuries, it is denied as to an exacerbation of old injuries because of a failure of the Defendant Sheehan to make out a prima facie case.

The Defendant Sheehan's counsel has attempted to equate the limitations exhibited in the Plaintiff's range of motion as observed by Dr. Horvath with findings made by Dr. Gosy's office and by Dr. Suddaby prior to the accident in question. Dr. Gosy's reports of Oct 20, 2008 and November 5, 2008 state that retroflexion is absent and left and right straight leg raise is negative. On January 30, 2009 Dr. Gosy's report states that retroflexion is absent and left and right straight leg raise is positive. Dr. Suddaby's report of April 1, 2010 states that there is a mild restriction in the Plaintiff's lumbar spine ROM. Counsel for the Defendant Sheehan equates retroflexion in Dr. Gosy's report with flexion in Dr. Horvath's affirmation but there is no proof of that. The positive straight leg raising is the same in both reports, but there is only one report by Dr. Gosy's office of a positive finding. As to Dr. Suddaby's report, there is no specific number to explain what he meant by a mild restriction in the Plaintiff's lumbar spine ROM. Taken together these various earlier findings by treating doctors do not equate with the limitations observed by Dr. Horvath.

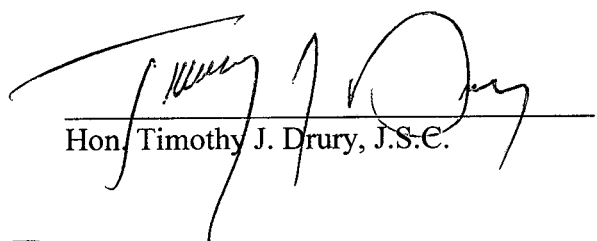
Therefore, while the Defendant Sheehan's motion is granted dismissing the Plaintiff's claim as to any new injuries, it is denied as to an exacerbation of old injuries because of the failure of the Defendant Sheehan to make out a prima facie case.

Finally, the Plaintiff's claim for punitive damages, if there is one, is dismissed because it does not lie given the allegations made by the Plaintiff.

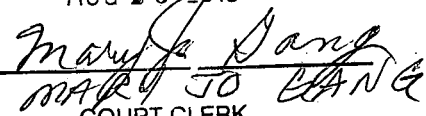
The Plaintiff is directed to submit an Order embodying the instant Decision.

**SUBMIT ORDER.**

Buffalo, New York  
August 21, 2015

  
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Hon. Timothy J. Drury, J.S.C.

**GRANTED**

AUG 25 2015  
BY   
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MARY JO LANG  
COURT CLERK