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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2260-20**

**MONICA R. VARGAS-  
AGUACONDO,**

**Plaintiff-Appellant,**

**v.**

**DAVID W. ECKENRODE  
and COUNTY OF UNION,<sup>1</sup>**

**Defendants-Respondents.**

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Submitted March 28, 2022 – Decided April 25, 2022

Before Judges Sabatino, Natali, and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-2023-18.

Kuhrt, Femia & Kuhrt, LLC, attorneys for appellant (David W. Kuhrt, on the brief).

Bruce H. Bergen, Union County Counsel, attorney for respondents (William T. Donegan, Assistant County Counsel, on the brief).

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<sup>1</sup> Improperly pled as Union County Police.

## PER CURIAM

Plaintiff Monica R. Vargas-Aguacondo appeals from a February 5, 2021 Law Division order dismissing her personal injury complaint because she failed to establish her injuries qualified as a "permanent loss of bodily function" as required by N.J.S.A. 59:9-2(d)<sup>2</sup> of the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3. She also challenges the court's March 24, 2021 order denying her motion for reconsideration. We affirm.

We derive the following facts from evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in the light most favorable to plaintiff. R. 4:46-2(c); Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

On June 23, 2017, plaintiff, then sixty years old, was involved in a motor vehicle accident with a Union County police car driven by defendant David Eckenrode. The police report states that as plaintiff proceeded through the

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<sup>2</sup> "No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of \$3,600." N.J.S.A. 59:9-2(d).

intersection, the cars collided when defendant turned in front of plaintiff's car. Plaintiff was taken by ambulance to Trinitas Hospital Emergency Department and complained of right shoulder pain worse than the left shoulder. She was evaluated and released on the same day. At the time of the accident, plaintiff was employed, but she thereafter stopped working for approximately six months.

Following the accident, she continued to complain of right shoulder pain, as well as low back pain, and worsening of prior right knee pain. Plaintiff received chiropractic treatment from September 8, 2017 through January 2, 2018. According to plaintiff, the accident caused her to "suffer severe injuries to her neck, back, and right shoulder including a full thickness tear of her rotator cuff."

After plaintiff's preliminary treatments failed to sufficiently alleviate her right shoulder pain, she underwent arthroscopic surgery. On May 15, 2018, Dr. Bryan Massoud performed a right shoulder arthroscopy, bursectomy, acromioplasty, repair of a supraspinatus tendon tear, debridement of a labral tear, synovectomy, and the excision of a distal clavicle on plaintiff. She received physical therapy from September 15, 2017 through September 14, 2018.

Plaintiff asserted a negligence claim in the complaint filed in June 2018. She alleged under the TCA that she "suffer[ed] severe and permanent injuries to multiple parts of her body" proximately caused by defendants' negligence. She certified in her responses to Form A interrogatories in December 2019 that she was no longer receiving medical treatment. Plaintiff testified in her deposition that she was unable to carry grocery bags, needed assistance with reaching up to shelves and taking out heavy trash, and continued experiencing back and right shoulder pain.

Plaintiff thereafter underwent an orthopedic independent medical examination conducted, at her behest, by Dr. Kevin C. Aurori on December 11, 2018. Dr. Aurori reviewed plaintiff's medical records and issued a report on December 12, 2018, wherein he noted plaintiff's then-current complaint of right shoulder pain was aggravated by movement. She expressed pain localized to the outer aspect of the right elbow and forearm, intermittent pain on the front of the right knee and low back pain. In the section titled "Discussion," Dr. Aurori stated:

The claimant's diagnosed conditions relative to her right shoulder are determined to be casually related to the motor vehicle accident which occurred on June 23, 2017. Complaints of right elbow pain noted at time of today's examination are within a reasonable degree of medical probability attributable to a lateral

epicondylitis. This condition is determined not be causally related to claimant's involvement in the motor vehicle accident which occurred on June 23, 2017. She stated that symptoms in this area started approximately two months prior to the date of this examination.

Dr. Aurori concluded that plaintiff reached "maximum medical improvement" in the orthopedic specialty relative to her right shoulder, mid-back, and right knee. As a result, he did not recommend any additional treatment.

Dr. Howard M. Pecker conducted a defense medical examination of plaintiff on June 18, 2020. Dr. Pecker noted in his subsequent report that plaintiff's then-current complaint of "pain in her right shoulder especially when she trie[d] to lift her arm up." He also reported "[n]o neck or back pain." He noted "[n]o numbness or tingling in [plaintiff's] extremities."

In the section of the report titled "Impression and Discussion," Dr. Pecker stated:

Based on history, physical exam, and review of documentation the diagnosis is status post arthroscopic surgery of the RIGHT shoulder for tendinosis and senescent tearing of the rotator cuff.

The above-noted diagnoses and injuries are not causally related to the subject auto accident. This opinion takes into account a review of [the] Police Report, previously performed tests, proposed treatments, recorded and documented findings both positive and negative, and neurologic tests.

Dr. Pecker further opined that "[t]he findings are consistent with the claimant's age and senescent findings commonly noted in the rotator cuff. There is no evidence of injury to the neck or back. There are no deficits."

Defendants thereafter moved for summary judgment seeking dismissal of plaintiff's complaint on the ground that she had not sustained a permanent substantial loss of a bodily function pursuant to N.J.S.A. 59:9-2(d). Defendants further argued that there was no objective evidence in the record of such a loss of a bodily function. In support of the motion, defendants relied upon Dr. Pecker's expert report, which found no causal connection between the accident and plaintiff's injuries.

Plaintiff opposed the motion, contending she satisfied the requirements of N.J.S.A. 59:9-2(d) by submitting sufficient objective medical evidence of her injuries. She also argued that those injuries had a significant impact on her life, and she could no longer take part in several of the activities she had enjoyed prior to the accident.

The motion judge granted defendants summary judgment motion in a February 5, 2021 order accompanied by a written opinion. In rendering his opinion, the judge relied upon the test applying N.J.S.A. 59:9-2(d) articulated in Gilhooley v. Cty. of Union, 164 N.J. 533, 540-41 (2000) (citing Brooks v.

Odom, 150 N.J. 395, 402-03 (1997)) (Brooks/Gilhooley test). The test requires that a plaintiff must show "(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." Gilhooley, 164 N.J. at 540-41 (citing Brooks, 150 N.J. at 402-03).

After considering the applicable governing principles, the motion judge concluded:

Here, Plaintiff's injury does not present an objective impairment manifesting permanent loss of substantial bodily function. Instead, the impairment, here is at most more akin to "an impairment of plaintiff's health and ability to participate in activities," which does not meet the second prong of the Brooks/Gilhooley test. [citing Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 333 (2003).]

The motion judge noted that plaintiff had ceased medical treatment. The judge also found that "Dr. Pecker attribute[d] [p]laintiff's impairments to "overuse-type injury" common with the aging process."

Plaintiff moved for reconsideration which was denied on March 25, 2021. In the written opinion accompanying the order, the motion judge found "no appropriate basis to modify or change its February 5, 2021 Order[.]" This appeal followed.

On appeal, plaintiff argues the trial court erred in granting summary judgment by "overlooking the severity of plaintiff's limitations and complaints"

and "how her injuries have permanently affected her life and amount to a substantial loss of bodily function." Plaintiff further asserts that the trial court relied too heavily on Dr. Pecker's findings, notwithstanding, Dr. Autori's report, which determined "the [plaintiff's] diagnosed condition relative to her right shoulder are determined to be causally related to the motor vehicle accident which occurred on June 23, 2017."

We review the grant of summary judgment de novo, applying the same standard used by the trial court, which

Mandates that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

[Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (quoting R.4:46-2(c)).]

We also consider "whether the competent evidential materials presented, as previously noted, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395 (2014) (quoting Brill, 142 N.J. 520, 540). If the evidence presented "show[s] that there is no real material issue, then



summary judgment should be granted." Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 258 (App. Div. 1987).

We reject plaintiff's contention that the trial court erred given plaintiff's responses to interrogatories, deposition testimony, and affidavit submitted in opposition to defendants' motion and the associated medical reports. From our review of the motion record, we review anew whether plaintiff's injuries resulted in a permanent and substantial loss of bodily function. We find they have not.

To recover for pain and suffering under the TCA, a plaintiff must show "(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." Gilhooley, 164 N.J. at 540-41 (citation omitted)). We note the parties have stipulated to objective medical evidence of a permanent bodily injury under prong one, and this issue need not be considered on appeal.

Consequently, we review whether plaintiff's injuries has satisfied the second prong of the Brooks/Gilhooley test. Whether a plaintiff has met this second prong requires "a fact-sensitive analysis" focusing on the "nature or degree of the ongoing impairment." Knowles, 176 N.J. at 331 (quoting Ponte v. Overeem, 171 N.J. 46, 53 (2002); Kahar v. Borough of Wallington, 171 N.J. 3, 15 (2002) (identifying "the degree of injury and impairment" as the appropriate focus). To that end, the burden is on a plaintiff to provide objective

evidence of a "substantial" impairment to vault the N.J.S.A. 59:9-2(d) threshold. Gilhooley, 164 N.J. at 540.

Whether plaintiff's injuries are "substantial" must be interpreted within the context of the case law discussed in Knowles. Id. at 331. Injuries causing blindness, disabling tremors, paralysis, and loss of taste or smell meet both prongs as "such injuries, by their very nature, are objectively permanent and implicate the substantial loss of a bodily function (e.g., sight, smell, taste, and muscle control)." Gilhooley, 164 N.J. at 541 (citing Brooks, 150 N.J. at 403). Similarly, a fractured patella, impeding the plaintiff's ability to climb stairs, stand from and sit on a chair, and walk efficiently, was found to satisfy the second prong because the knee "could not function without permanent pins and wires to re-establish its integrity." Id. at 541-42.

The second prong has likewise been found to be satisfied by losing feeling in an extremity or when an injury permanently renders a limb or bodily organ "substantially useless but for the ability of modern medicine [to] supply replacement parts to mimic the natural function[.]" Knowles, 176 N.J. at 332-33. A severely torn rotator cuff requiring surgical repair that shortened the tendon and resulted in a forty percent reduction in range of motion in the arm has also been found to meet prong two. Kahar, 171 N.J. at 15-16.

It is a plaintiff's reduced ability that makes her injury "substantial," not the discomfort she suffers when performing certain tasks. Knowles, 176 N.J. at 332 (quoting Gilhooley, 164 N.J. at 540). On the other hand, "[a]n injury causing lingering pain, resulting in a lessened ability to perform certain tasks because of the pain, will not suffice because '[a] plaintiff may not recover under the [TCA] for mere subjective feelings of discomfort.'" Ibid. However, "neither an absence of pain nor a plaintiff's ability to resume some of [her] normal activities is dispositive of whether [she] is entitled to pain and suffering damages under the TCA." Ibid.

For example, a plaintiff's herniated disc that restricted some neck movement, failed to satisfy the substantiality requirement despite a plaintiff experiencing some restriction of neck movement, where the plaintiff returned to teaching, albeit in a different capacity, without missing any work, and continued to play sports and perform household chores, and taking appropriate breaks. Heenan v. Greene, 355 N.J. Super. 162 (App. Div. 2002).

Similarly, no substantial loss was found under the TCA where a plaintiff's knee injury, which required surgery, continued to restrict him "in performing his work responsibilities, household chores, yard work, or in his weightlifting or biking activities" as here with the motion judge. Ponte, 171 N.J. at 54.

In his written opinion, the motion judge correctly pointed out that plaintiff's medical proofs did not establish a permanent injury. Dr. Pecker's report issued approximately three years after the accident expressly stated that "[p]laintiff's injury [did] not present any objective impairment manifesting permanent loss of substantial bodily function." He determined that "[t]here was no mechanism of injury secondary to the motor vehicle accident to cause the findings noted at the time of surgery or on the reported MRI findings." In addition, "the findings are consistent with the [plaintiff's] age and senescent findings commonly noted in the rotator cuff. " Dr. Pecker's opinion refutes the existence of a permanent injury sufficient to vault the TCA threshold.

Applying these principles, we agree with the motion judge that plaintiff's injuries are not "objectively permanent" nor do they "implicate the substantial loss of bodily function[.]" Knowles, 176 N.J. at 332 (quoting Gilhooley, 164 N.J. at 541). Plaintiff failed to present objective evidence that her injuries satisfied the TCA's requirement of a "permanent loss of a bodily function." Plaintiff has no medical restriction imposed on her ability to perform her daily activities. Neither Dr. Aurori's nor Dr. Pecker's reports attribute any permanent restriction to the accident. Plaintiff's limitations, if any, are predominately attributed to her age.

Plaintiff contends that her right shoulder injury, which required surgical intervention, has caused her pain, discomfort when performing some household tasks, and limited ability to put on clothing, household chores, care for her grandchildren, and park her car. However, it is undisputed that plaintiff remains able to perform her daily activities and routine tasks. Therefore, plaintiff's complaints are subjective feelings of discomfort, and they are not "substantial" as required by the statute. Knowles, 176 N.J. at 332. Affording plaintiff every reasonable inference from the evidence developed in the motion record, the motion judge correctly found there is no objective evidence that plaintiff's injuries are permanent and substantial. Hence, summary judgment was properly granted to defendants.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION