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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2343-21**

CHILD T.R.C., a minor, by
his g/a/l ADA CARDENAS,
individually,

Plaintiff-Appellant,

v.

HARRISON IN DISTRICT
DAY SCHOOL, HARRISON
BOARD OF EDUCATION,
TOWN OF HARRISON, and
HUDSON COUNTY,

Defendants-Respondents.

Argued September 18, 2023 – Decided October 18, 2023

Before Judges Sabatino and Marczyk.

On appeal from the Superior Court of New Jersey, Law
Division, Hudson County, Docket No. L-2054-20.

Yelena Kofman-Delgado argued the cause for appellant
(Vlasac and Shmaruk, LLC, attorneys; Yelena Kofman-
Delgado, of counsel and on the briefs).

Albert C. Buglione argued the cause for respondents Harrison In District Day School and Harrison Board of Education (Buglione, Hutton & DeYoe, LLC, attorneys; Albert C. Buglione, of counsel and on the brief).

Niti G. Raval argued the cause for respondent Town of Harrison (Florio Kenny Raval, LLP, attorneys; Niti G. Raval, of counsel; Christopher K. Harriott, on the brief).

PER CURIAM

Plaintiff T.R.C., a minor, through his guardian ad litem Ada Cardenas, appeals from the March 10, 2022 Law Division orders dismissing his personal injury complaint against defendants, Harrison Board of Education, Harrison In District Day School, and the Town of Harrison, because he failed to establish his injuries qualified as a "permanent loss of bodily function" as required by N.J.S.A. 59:9-2(d) of the Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 to 12-3. Following our review of the record and the applicable legal principles, we reverse and remand for further proceedings.

I.

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)).

Plaintiff was enrolled in the preschool program at the Harrison In District Day School. On December 21, 2017, he and his classmates were taken to a playground near the school during recess. While playing on the playground equipment, plaintiff fell from a platform and landed on his left arm.

As a result of the fall, plaintiff underwent surgery to repair a displaced lateral condyle fracture in his left elbow. The surgery required the placement of two pins. Following the surgery, plaintiff was put in a long arm cast for five weeks, after which the pins were removed. Plaintiff then completed a year of physical therapy following the surgery.

Plaintiff filed a complaint against defendants in June 2020, and the parties thereafter engaged in extensive discovery. Because the trial court limited its decision to the issue of whether plaintiff demonstrated he sustained a permanent loss of bodily function, we confine our discussion of the facts to those related to plaintiff's injury.

Plaintiff testified at his deposition he can no longer participate in gym class because of his injury. He further claims he can no longer write using his left arm. Plaintiff's answers to interrogatories assert he is "unable to partake in

his favorite pastimes such [as] playing sports, playing with friends, [and] playing at the playground." Plaintiff's mother testified he is unable to dress himself. Plaintiff's father testified plaintiff is embarrassed about his scars and that he now eats with his right hand instead of his left.

Plaintiff's orthopedic expert, Dr. Sean Lager, concluded in his report plaintiff "more likely than not, . . . sustained a permanent injury that will have permanent residual sequelae." He further noted, "there was a direct causal relationship between [plaintiff's] complaints and objective findings, and the fall that occurred on December 21, 2017."

Plaintiff's plastic surgery expert, Dr. Sheila Bond, reported plaintiff's left elbow has several scars. The larger scar is five centimeters by one centimeter. Plaintiff also has three smaller scars that are all hypopigmented. She opined the scars are permanent in nature. Moreover, because of the location of the scars "at the elbow [they] are very difficult to revise."

Dr. Mark Gurland, an orthopedic expert for the Town of Harrison, conducted an independent medical examination. He opined plaintiff "does have some permanent losses including scars about the lateral elbow" along with loss of range of motion (about ten degrees lack of pronation and supination in the left arm) and a loss of grip strength. Dr. Gurland concluded "within a reasonable

degree of medical certainty that [plaintiff's injuries] are permanent and not likely to improve with time."

Following discovery, defendants moved for summary judgment. On March 10, 2022, the trial court granted both motions for summary judgment and dismissed plaintiff's claims with prejudice. This appeal followed.

II.

Plaintiff argues he marshaled sufficient evidence to overcome summary judgment as to the permanent loss of a bodily function issue. Plaintiff asserts his experts, coupled with the testimony of plaintiff's family members and the concessions of the Town of Harrison's expert, presented sufficient evidence to raise a factual issue as to whether plaintiff overcame the TCA's injury threshold.¹

"The court's grant or denial of summary judgment is reviewed de novo, subject to the Rule 4:46-2 standard that governs a . . . ruling on a summary judgment motion." Schwartz v. Menas, 251 N.J. 556, 570 (2022) (citing Nicholas v. Mynster, 213 N.J. 463, 477-78 (2013); R. 4:46-2(c)). That standard requires us to "determine whether 'the pleadings, depositions, answers to

¹ Plaintiff also advances several arguments regarding the TCA defenses raised by defendants in their motions for summary judgment. We do not recount those arguments here because we are restricting our decision to the issues involving N.J.S.A. 59:9-2(d).

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.'" Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (quoting R. 4:46-2(c)). "To decide whether a genuine issue of material fact exists, [we] must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (second alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)).

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 v. Cnty. of Union, 164 N.J. 533, 540-41 (2000) (citation omitted). The trial court assumed for the purposes of the summary judgment motion plaintiff had presented objective medical evidence of a permanent bodily injury under prong one. Therefore, this issue need not be considered on appeal.

Consequently, we review whether plaintiff's injuries satisfied the second prong of Gilhooley. Whether a plaintiff has met this second prong requires "a fact-sensitive analysis" focusing on the "nature or degree of the ongoing impairment" See Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324,

331 (2003) (quoting Ponte v. Overeem, 171 N.J. 46, 53 (2002); Kahrar 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 540-41.

Whether plaintiff's injuries are "substantial" must be interpreted within the context of the case law discussed in Knowles. Knowles, 176 N.J. 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. 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 536, 541-42.

In Kahrar, the plaintiff suffered a tear of her rotator cuff that required surgery to "remove[] a portion of the bone in her shoulder and reattach[] the severed tendon to the shoulder." Kahrar, 171 N.J. at 7. The plaintiff "had approximately forty percent loss of full motion in her left shoulder." Id. at 8.

The Court held that "[i]f the loss of bodily function is permanent and substantial, . . . a plaintiff's eligibility to recover pain and suffering damages will not be defeated merely because she can perform some routine functions almost as well as she could prior to her injury." Id. at 15. The Court considered several objective factors such as the seriousness of the injury, the invasiveness of the surgery, and the extent of reduction in normal range of motion. Id. at 16.

In Knowles, the Court explained the types of injuries that satisfy the permanent and substantial threshold. 176 N.J. at 332. These include "an injury that permanently would render a bodily organ or limb substantially useless but for the ability of 'modern medicine [to] supply replacement parts to mimic the natural function,'" Id. at 332 (quoting Gilhooley, 164 N.J. at 542-43). "[N]either an absence of pain nor a plaintiff's ability to resume some of his or her normal activities is dispositive of whether he or she is entitled to pain and suffering damages under the TCA." Ibid. (citing Kahrar, 171 N.J. at 15-16). It is a plaintiff's reduced ability that makes their injury "substantial," not the discomfort they suffer when performing certain tasks. Knowles, 176 N.J. at 332 (quoting Gilhooley, 164 N.J. at 540).

Here, the trial court's analysis rested entirely on the question of whether plaintiff established a permanent loss of a bodily function that is substantial. As

noted, the court assumed plaintiff established a permanent injury under the first prong of Gilhooley, but concluded plaintiff failed to demonstrate, through objective medical evidence, a permanent loss of a bodily function that was substantial under prong two of Gilhooley.

We are convinced, for the purposes of summary judgment, plaintiff raised a genuine issue of material fact as to whether he sustained a permanent loss of a bodily function that is substantial. Despite plaintiff's surgery and a year of physical therapy, it is undisputed by the Town of Harrison's orthopedic expert that plaintiff still had a ten-degree decreased range of motion in his elbow, along with reduced grip strength in his left hand, as a result of his injury. This—coupled with his alleged inability to dress himself, participate in gym class, participate in sports, and write with his left hand—creates a legitimate fact issue.²

The objective medical evidence, viewed in a light most favorable to plaintiff, demonstrates permanent limitations in plaintiff's grip strength and the range of motion in his left elbow, albeit less than was the case of the plaintiff in

² Dr. Lager opined "there was a direct causal relationship between [plaintiff's] complaints and objective findings, and the fall that occurred on December 21, 2017."

Kahrar. However, given plaintiff's young age, significant life expectancy, and the genuine prospect he may face a lifetime of limitations for these permanent residuals, a jury could find plaintiff demonstrated a permanent loss of a bodily function that is substantial. At the very least, it is a fact question for the jury.

Because we are remanding for further proceedings, we briefly address the issue of plaintiff's scarring. Although the court noted plaintiff produced an expert report as to the permanency of plaintiff's scars, the court determined plaintiff did not provide any "caselaw or citations to objective medical evidence showing how such scars meet the second [TCA verbal threshold] prong." Plaintiff argues before us his scars constitute a "permanent disfigurement." The record is unclear regarding whether this issue was briefed before the trial court. Moreover, there is no indication as to whether plaintiff provided the court with photos of the scars or offered to have plaintiff appear before the court so as to give the judge an opportunity to observe the scars.

On remand, plaintiff shall brief the issue and provide the court with photos or an opportunity to view the scars in person in order to properly develop the record. The trial court would then be in an informed position to perform the requisite analysis as required under the applicable case law. See Gilhooley, 164 N.J. at 544 (holding that in order to be considered "a permanent disfigurement"

under the TCA, a scar must impair or injure the beauty, symmetry, or appearance of a person, rendering the bearer unsightly, misshapen or imperfect, or deforming them in some manner); see also Hammer v. Twp. of Livingston, 318 N.J. Super. 298, 308-09 (App. Div. 1999).

Lastly, defendants raised a variety of other TCA defenses before the trial court. Because the court did not rule on these matters, we decline to address the issues for the first time on appeal.

We conclude for purposes of summary judgment, plaintiff has demonstrated a material factual dispute as to whether his elbow injuries meets the requirements of the TCA. We therefore reverse the summary judgment orders and remand this matter to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

Reversed and remanded.

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


CLERK OF THE APPELLATE DIVISION