

CERTIFIED TO BE  
A TRUE COPY

SUPERIOR COURT OF NEW JERSEY  
CAPE MAY COUNTY-LAW DIVISION

**FILED**  
MAY 11 2015  
CIVIL DIVISION  
SUPERIOR COURT-CAPE MAY COUNTY

Estate of Shirley Woodington et  
al,

Plaintiff,

v.

City of Wildwood et al,

Defendants

Civil Action

DOCKET NO.: CPM L 535-12  
ORDER

This matter being opened to the Court on a motion filed by Defendant, City of Wildwood for summary judgment; and the court having heard argument and reviewed the submissions submitted; and for good cause shown

**IT IS ON THIS 11<sup>th</sup> day of May, 2015 ORDERED that:**

1. Defendant's motion for summary judgment dismissing Plaintiff's claims for pain and suffering with prejudice is granted.
2. A copy of this order shall be served on all attorneys of record within seven (7) days of receipt.

  
J. Christopher Gibson, J.S.C.

MEMORANDUM OF DECISION IS ATTACHED.

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE  
COMMITTEE ON OPINIONS**

**CERTIFIED TO BE  
A TRUE COPY**

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
CAPE MAY COUNTY**

**FILED**  
MAY 11 2015

**TO:**

**Erin R. Thompson, Esquire  
POWELL BIRCHMEIER POWELL  
1891 State Highway 50  
P.O. Box 582  
Tuckahoe, NJ 08250**

**CIVIL DIVISION  
SUPERIOR COURT-CAPE MAY COUNTY**

**CASE:**

**Estate of Shirley Woodington et al v City of Wildwood  
CPM L 535-12**

**DOCKET NO.**

**NATURE OF**

**APPLICATION:**

**DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT**

**MEMORANDUM OF DECISION ON MOTION**

---

**NATURE AND BACKGROUND OF MOTION**

The complaint in this matter was filed on November 2, 2012. The discovery end date was March 1, 2015. Defendant the City of Wildwood now brings the within motion for summary judgment seeking to dismiss Plaintiff's complaint with prejudice.

The Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

**LEGAL ANALYSIS**

R. 4:46-2(c), governing motions for summary judgment, provides, in pertinent part, that:

the judgment or order sought shall be rendered forthwith 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. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[:]  
firmly based, a substantial argument." Ibid., internal citations omitted. Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid., internal citations omitted.

Additionally, R. 4:46-5 provides, in pertinent part, that

when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:42-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be

had, or may make such order as may be appropriate.

In determining whether a genuine issue of material fact exists, the motion judge must “engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” Id. at 533. This weighing process “requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a ‘genuine’ issue of material fact.” Id. at 533-34. In short, the motion judge must determine “whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Id. at 540.

#### **MOVANT'S POSITION**

Defendant provides that the within matter arises from an accident which occurred on June 23, 2011 wherein the decedent Shirley Woodington, was being pushed on the boardwalk in a rollator/walker by her son-in-law Charles Gilbert and at some point she fell out of her rollator/walker and sustained injuries. Defendant contends that it is entitled to summary judgment as Plaintiff's injuries do not rise to the threshold level of compensation set forth in N.J.S.A. § 59:9-2(d).

Defendant asserts that in order to recover damages for pain and suffering against a public entity, a plaintiff must first meet the threshold of the statute which requires that "no damages shall be awarded against the public entity or public employee for pain and suffering resulting from any injury, provided however, that this limitation on recovery of damages for pain and suffering should not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment." N.J.S.A. § 59:9-2(d). Defendant contends that a plaintiff's failure to meet the threshold bars recovery for pain and suffering, which includes damages sustained as a result of anguish, fear, anger, apprehension and humiliation. Ayers v. Jackson Twp., 106 N.J. 557, 570 (1987).

Defendant cites our Supreme Court for the proposition that in order to recover for pain and suffering, the plaintiff must prove by objective medical evidence that the injury is permanent. Brooks v. Odum, 150 N.J. 395, 402-03 (1997). Defendant submits that in order to cross the pain and suffering threshold, a plaintiff must show: (1) an objective permanent injury; and (2) a permanent loss of a bodily function that is substantial. Gihooley v. Cnty. of Union, 164 N.J. 533, 541 (2000). Defendant provides that in Ponte v. Overeem, 171 N.J. 446, 54 (2002), the plaintiff required arthroscopic surgery as a result of being rear-ended by a State transit bus and the Court found that there was no showing of permanent instability of the knee and the plaintiff was not restricted because of his knee in performing activities such as work duties and household chores.

Defendant contends that our Supreme Court in Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 332 (2003) noted several past precedents in classifying whether an injury was substantial or minor. First, injuries causing blindness, debilitating tremors, paralysis and loss of taste and smell satisfy the threshold as they are objectively permanent and implicate a substantial loss of a bodily function. Ibid. Second, injuries that permanently render a bodily organ or limb substantially useless, but for the ability of modern medicine to supply replacement parts to mimic the natural function meet the threshold. Ibid. Third, there must be a physical manifestation of a claim that the injury is permanent and substantial. Finally, neither an absence of pain nor plaintiff's ability to resume some of his normal activities is dispositive of whether he is entitled to pain and suffering damages. Ibid.

Defendant maintains that although Plaintiff sustained traumatic subarachnoid hemorrhage, closed fracture of the nasal bone, closed fracture of the right humerus and right front scalp hematoma, these injuries do not rise to the level of permanency required to pursue a claim under the Tort Claims Act. Defendant submits that Plaintiff's daughter Linda Gilbert testified that Plaintiff bounced back from her injuries and resumed all of her activities. Defendant reiterates that any injury causing lingering pain resulting in a lessening in an ability to perform certain tasks is not sufficient to overcome the Tort Claims Act. Knowles, 176 N.J. at 333.

Defendant maintains that Plaintiff failed to produce any medical evidence documenting a permanent functional impairment which is

substantial. Defendant contends that it is entitled to summary judgment as a matter of law.

### OPPOSITION

Plaintiff's counter statement of material facts provides that Plaintiff continued to experience pain and reduced functionality in the arm that was broken and skeletal pain under her eye requiring her to use a different style of eyeglasses. See Report attached as Plaintiff's Exhibit "E"; Linda Gilbert Dep. 54:4-14 attached as Plaintiff's Exhibit "F." Additionally, Plaintiff submits that her doctors suggested that she undergo plastic surgery to correct the facial deformities caused by scarring and fractures from the fall. See Linda Gilbert Dep. 55:4-9. Plaintiff also asserts that prior the fall, she was able to move about her house without a walker, and was able to browse the Wildwood Boardwalk shops with only the help of a walker. See Linda Gilbert Dep. 26:21-24; 35:16-36:14. Plaintiff submits that as a result of the fall, she was severely disabled as the range in her right arm was reduced and required human assistance when traversing steps and uneven surfaces. See Report attached as Plaintiff's Exhibit "E."

Plaintiff contends that questions of fact preclude the entry of summary judgment. See R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954).

Plaintiff asserts that N.J.S.A. § 59:9-2(d) contains two requirements for a plaintiff to recover pain and suffering damages, a permanency qualification and a \$3,600 medical expense qualification. Plaintiff argues that

even if a claimant does not meet these qualifications, the plaintiff can still recover for damages other than pain and suffering. Thorpe v. Cohen, 258 N.J. Super. 523, 528 (App. Div. 1992). Plaintiff notes that "if the victim of a healed fracture of the patella, as a result of age or pre-condition can no longer ambulate, she will have met" the threshold. Gilhooley v. Cnty. of Union, 164 N.J. 533, 541 (2000).

Additionally, Plaintiff contends that N.J.S.A. § 59:9-2(d) permits recovery of pain and suffering damages if the claimant suffers a permanent disfigurement. To be a disfigurement, "a scar must 'impair or injure the beauty, symmetry, or appearance of a person or thing . . . render[ing its bearer] unsightly, misshapen or imperfect, [or] . . . deform[ing her] in some manner.'" Hammer v. Twp. of Livingston, 318 N.J. Super. 293, 308 (1999), quoting, Falcone v. Branker, 135 N.J. Super. 137, 145 (Law Div. 1975). Plaintiff also notes that other factors "including appearance, coloration, existence and size of the scar, as well as, shape, characteristics of the surrounding skin, remnants of the healing process, and any other cosmetically important matters" may be considered. Gilhooley, 164 N.J. at 544.

Plaintiff asserts that the complaint stated that she has been permanently injured, disabled and scarred which is supported by Linda Gilbert's deposition testimony that her mother's fall left her with scarring and other physical defects on her face. See Linda Gilbert Dep. 55:4-9. Plaintiff submits that the facial scarring is a permanent disfigurement that



overcomes N.J.S.A. § 59:9-2(d)'s threshold as they impacted her beauty, symmetry, and appearance. Hammer, 318 N.J. Super. at 308.

Plaintiff submits that she is also permitted to recover pain and suffering damages as permanently lost a bodily function. Plaintiff asserts that she fractured her right humerus in the fall. See Plaintiff's Exhibit "C." Plaintiff contends that the break impaired the functioning of her arm, her ability to ambulate, and her ability to stand for any significant period of time whereas prior she was able to walk around her home without the aid of a walker. See Linda Gilbert Dep. 26:21-24. Plaintiff asserts that after her fall, she required human assistance when traversing steps and uneven surfaces and her right arm's range of motion was significantly decreased. See Report attached as Plaintiff's Exhibit "E."

In the alternative, should the court dismiss Plaintiff's claims for pain and suffering, Plaintiff asserts that her other claims for damages should not be dismissed. Plaintiff asserts that if she does not meet the thresholds of N.J.S.A. § 59:9-2(d), she still may recover for claims such as economic damages. Beauchamp v. Amedio, 164 N.J. 111, 121 (2000). Accordingly, Plaintiff requests that the within motion for summary judgment be denied.

### REPLY

Initially, Defendant notes that Plaintiff did not consult with a doctor for any scarring and did not submit any photographs depicting any permanent scarring. Furthermore, Defendant asserts that Plaintiff did not mention scarring as a result of her fall in her answers to interrogatories.

Defendant reiterates that in order to meet the requirements for disfigurement, the disfigurement must be permanent and substantial. Hammer v. Twp. of Livingston, 318 N.J. Super. 298, 308 (App. Div. 1999). Defendant cites our Supreme Court which held that the threshold of "significant disfigurement or significant scarring . . . is satisfied only if an objectively reasonable person would regard the scar or disfigurement as substantially detracting from . . . the victim's appearance of the injury so impairs the beauty, symmetry, or appearance of a person as to render him unsightly, misshapen, or imperfect. Soto v. Scaringelli, 189 N.J. 558, 578 (2007).

Defendant asserts that the trial court is empowered to rule on a motion for summary judgment in scar cases. However, Defendant notes that Plaintiff passed away on August 18, 2013, due to heart failure unrelated to the accident. Plaintiff purportedly did not consult with any doctors concerning her scar and there were not any photographs provided depicting any such scar. Defendant maintains that there is no objective evidence that Plaintiff suffered a scar which was permanently distracting and substantial as a result of her fall within the meaning of the Tort Claims Act.

Next, with regard to Plaintiff's purported suffered a permanent injury, Defendant reiterates that Linda Gilbert testified that her mother bounced back following the fall. Defendant submits that Plaintiff must establish (1) an objective permanent injury and (2) a permanent loss of a bodily function that is substantial. Gilhooley 164 N.J. at 541. Defendant submits that based on

the foregoing, Plaintiff's claims fail to meet the permanency requirements of N.J.S.A. § 59:9-2(d).

### DISCUSSION

The Court finds that Defendant is entitled to the relief requested pursuant to R. 4:46-2 and Plaintiff cannot establish claims for pain and suffering pursuant to N.J.S.A. § 59:9-2(d).

The New Jersey Tort Claims Act precludes recovery of pain and suffering damages against a public entity

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 \$ 3,600.00. For purposes of this section medical treatment expenses are defined as the reasonable value of services rendered for necessary surgical, medical and dental treatment of the claimant for such injury, sickness or disease, including prosthetic devices and ambulance, hospital or professional nursing service.

N.J.S.A. § 59:9-2(d). The Court notes that failure to reach the objective thresholds of the statute does not bar all causes of action but only bars recovery for pain and suffering. Beuchamp v. Amedio, 164 N.J. 111, 121 (2000).

Our Supreme Court "has established a two-pronged test that a plaintiff must satisfy in order to collect pain and suffering damages under N.J.S.A. § 59:9-2(d)." Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 329 (2003). The 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).

With regard to the first prong, “[t]emporary injuries, no matter how painful and debilitating, are not recoverable. Further, a plaintiff may not recover . . . for mere ‘subjective feelings of discomfort.’” Brooks v. Odom, 150 N.J. 395, 403 (1997), quoting, Ayers v. Twp. of Jackson, 106 N.J. 557, 571 (1987). Failure to present objective evidence of an injury has precluded recovery for pain and suffering. See Rocco v. N.J. Transit Rail Operations, 330 N.J. Super. 320, 333 (334 (App. Div. 2000) (holding only continuing symptoms following injury was subjective complaint of pain); Hammer v. Twp. of Livingston, 318 N.J. Super. 298, 305-06 (holding complaints of pain were subjective and unsupported by objective medical evidence). However, “permanent injury resulting in a permanent loss of bodily function” may be considered to satisfy the first prong “even if modern medicine can supply replacement parts to mimic the natural function.” Gilhooley, 164 N.J. at 542 (2000).

Proof of permanency may be proven by objective and credible medical evidence. Mack v. Passaic Valley Water Com’n, 294 N.J. Super. 592, 598-99 (App. Div. 1996). In Mack, the Appellate Division looked to our Supreme Court’s interpretation of this State’s “automobile ‘no fault’ law, NSJA § 39:6A-8(a),” in Oswin v. Shaw, 129 N.J. 290 (1992), which is similar to “cases against public employees and entities.” Id. at 598. The Appellate Division noted that “once ‘a court determines that evidence bearing on plaintiff’s

injuries could, if believed by the factfinder, satisfy the statutory verbal-threshold requirement, any disputed issues regarding the nature and extent of those injuries must be decided by the jury.” Mack, 294 N.J. Super. at 598, (quoting Oswin, 129 N.J. at 313). In Mack, the Appellate Division noted that the plaintiff’s expert “conclude[d] based on his medical tests that plaintiff has a [temporomandibular joint-]TMJ injury and that it is permanent” which was based on objective medical tests Id. at 599-600. The Appellate Division found that the expert’s report satisfied the permanency threshold under N.J.S.A. § 59:9-2(d) for purposes of creating a genuine issue of fact to be determined by a jury. Id. at 600-01.

Our Supreme Court in Knowles provided the following in reviewing past precedents in classifying injuries as either “substantial” or minor. Knowles, 176 N.J. at 331.

First, we have recognized that “injuries causing blindness, disabling tremors, paralysis and loss of taste and smell” satisfy the threshold because they are inherently “objectively permanent and implicate the substantial loss of a bodily function (e.g., sight, smell, taste, and muscle control).” Gilhooley, supra, 164 N.J. at 541 (citing Brooks, supra, 150 N.J. at 403). Second, we have held that when a plaintiff suffers 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,” that injury meets the threshold. 164 N.J. at 542-43. Third, we have concluded that there must be a “physical manifestation of [a] claim that [an] injury ... is permanent and substantial.” Ponte[v. Overeem], 171 N.J. 46, 54 (2002)]. An 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 Tort Claims Act for mere 'subjective feelings of discomfort.'" Gilhooley, *supra*, 164 N.J. at 540 (quoting Brooks, *supra*, 150 N.J. at 403 (citation omitted)). Finally, we have recognized that neither 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 [Tort Claims Act]. Kahrar v. Borough of Wallington, 171 N.J. 3, 15-16 (2002)].

Id. at 332. "If 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. Kahrar, 171 N.J. at 15.

Finally, with regard to specific disfigurement or scarring, our Supreme Court held that "a scar must impair or injure the beauty, symmetry, or appearance of a person, rendering the bearer unsightly, misshapen or imperfect, deforming her in some manner." Gilhooley, 164 N.J. at 544. Factors which also may be considered in determining whether a scar qualifies include the "appearance, coloration, existence and size of the scar, as well as, shape, characteristics of the surrounding skin, remnants of the healing process, and any other cosmetically important matters." Ibid. There also remains the requirement that the scar be "substantial." Ibid. Furthermore, where the "record raises a factual dispute concerning plaintiff's claim that her scars constitute permanent and substantial disfigurements . . . it is not the judge's function to weigh the evidence and determine the truth of the

matter but only to determine where there is such a dispute.” Hammer v. Twp. of Livingston, 318 N.J. Super. 298, 310 (App. Div. 1999).

Defendant submits that it is entitled to summary judgment dismissing Plaintiff's claims for failure to establish the pain and suffering threshold pursuant to N.J.S.A. § 59:9-2(d). Initially the Court determines that Defendant is not entitled to dismissal of the complaint because Defendant has only raised arguments concerning the pain and suffering threshold and therefore Plaintiff's claims for economic damages remain viable. See Beauchamp v. Amedio, 164 N.J. 111, 121 (2000).

Additionally, the Court notes that Defendant did not raise the argument that Plaintiff does not establish the monetary threshold. Defendant supplied as Exhibit “G” an invoice from Cooper Hospital totaling \$43,061.26 and therefore Defendant has met the \$3,600.00 threshold of N.J.S.A. § 59:9-2(d).

The Court determines that Plaintiff does not raise a genuine issue of material fact as to the first prong of Brooks, whether Plaintiff's injuries were objectively permanent. Plaintiff's discharge summary from Cooper University Hospital, attached as Defendant's Exhibit “E,” provides that Plaintiff's injuries as a result of the fall “include subarachnoid hemorrhage, nasal fracture, right humeral head, and humeral neck fracture.” Additionally, Plaintiff fractured her right humerus in the fall. See Reports attached as Plaintiff's Exhibit “C.”

However, Plaintiff's daughter, Linda Gilbert, testified at deposition that after her mother was discharged from home therapy, Plaintiff "did very well. She bounced back better than we really thought she would. She really, you know, did a complete turn-around and, like I said, she bounced back very good. I was worried about the fall that it would, you know, I'm not – these are my words, 'do her in.' I mean, you know it was a very bad fall. I mean, the bleed in the brain alone was a very big concern." See Linda Gilbert Dep. 58:7-14 attached as Plaintiff's Exhibit "H."

The Court notes that the parties' submissions do not include expert reports concerning whether Plaintiff's injuries were permanent based upon objective medical evidence. In the absence of lay or expert testimony as to whether decedent's injury is permanent, the Court finds that Plaintiff cannot establish a claim for pain and suffering pursuant to N.J.S.A. § 59:9-2(d). Due to this Court's finding that Plaintiff cannot establish the first prong of Brooks, the Court does not address whether Plaintiff's injuries were substantial.

Next, for purposes of completeness, the Court addresses whether there exists a genuine issue of material fact as to whether Plaintiff's injuries were substantial. Our Supreme Court recognized that "neither 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." Knowles, 176 N.J. at 332, citing, Kahrar, 171 N.J. at 15-16. Although Defendant submits that Plaintiff was able to do crossword puzzles, read, and



do needlepoint, these facts are not dispositive. See Linda Gilbert Dep. 70-72 attached as Plaintiff's Exhibit "H."

Plaintiff submits that decedent continued to experience pain and reduced functionality in the arm that had been broken. See Report attached as Plaintiff's Exhibit "E." Additionally, Plaintiff-decedent purportedly experienced skeletal pain under her eye requiring her to use a different style of eyeglasses. See Linda Gilbert Dep. 54:4-14. Furthermore, Linda Gilbert testified that Plaintiff's doctors suggested that she undergo plastic surgery to correct the facial deformities caused by scarring and fractures from the fall which Plaintiff declined. See Linda Gilbert Dep. 55:4-9. Finally, Exhibit "E" also provides that a CT of the Facial Bones and Nasal Bones provided that "there is a mildly angulated fracture of the right side of the nasal bones. There is a right frontal scalp hematoma."

The Court finds that there are sufficient factual issues as to whether decedent's injuries were sufficiently substantial warranting the issue to go before a fact-finder. While there are issues of fact concerning Plaintiff's quality of life and her ability to do certain household tasks, the Court determines that there exists objective medical evidence and thus creating genuine issues of material fact. However, the pain and suffering threshold requires showing of both an objective permanent injury and a substantial loss of bodily function. See Gilhooley, 164 N.J. at 540-41. Consequently, Defendant is entitled to summary judgment because Plaintiff cannot establish that her injuries were objectively permanent.

Finally, the Court determines there does not exist a genuine issue of fact regarding whether Plaintiff was permanently disfigured as a result of the accident which preclude a finding of summary judgment at this stage. Unfortunately, due to Plaintiff's passing, the Court and the Parties can no longer photograph Plaintiff's purported scars. However, the Court looks to the deposition testimony of Linda Gilbert wherein she testified that "they wanted to do plastic surgery to – I don't even understand what they wanted to do, to be honest with you. To fix the fractures and the - - and I'm like – and she had a little, few scars or whatever, I'm like, no, it's – it doesn't make sense." See Linda Gilbert Dep. 55:4-7.

Pursuant to Hammer, it is not this Court's function to weigh the credibility of evidence or testimony and only to determine whether, taking all facts in favor of the non-movant, there exists a genuine issue of material fact. However, based upon the foregoing testimony and the lack of photographs of the decedent's scars, the Court determines that Plaintiff cannot establish that the subject scars impaired or injured the beauty, symmetry, or appearance of a plaintiff rendering her unsightly, misshapen or imperfect, deforming her in some manner. See Gilhooley, 164 N.J. at 544. Furthermore, based upon the testimony of decedent's daughter, the Court determines that no reasonable juror would find that Plaintiff's purported scars surpassed the pain and suffering threshold as Ms. Gilbert testified that she did not understand why the doctors wanted to do plastic surgery and that she only had "a little, few scars[.]" See Linda Gilbert Dep. 55:4-7.

Accordingly, the Court finds that Plaintiff fails to raise genuine issues of material fact concerning the threshold requirements of N.J.S.A. § 59:9-2(d) to sustain her claim for pain and suffering. Defendant's motion for summary judgment is granted.

### CONCLUSION

The motion is opposed. The Court finds that Plaintiff fails to raise genuine issues of material fact as to whether her injuries are objectively permanent under N.J.S.A. § 59:9-2(d); Gilhooley v. Cnty. of Union, 164 N.J. 533, 540-41 (2000). Accordingly, Defendant's motion for summary judgment dismissing Plaintiff's claims for pain and suffering are granted.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

May 14, 2015

  
J. Christopher Gibson, J.S.C.