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OF THE COMMITTEE ON OPINIONS

Alexander Rodriguez,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
Plaintiff,	:	ATLANTIC COUNTY
vs.	:	Docket No. ATL-L-1023-18
Stanley Kolbe, Jr., et als	:	CIVIL ACTION
Defendants.	:	OPINION

On May 9, 2016 the plaintiff, Alexander Rodriguez, was operating a motor vehicle northbound on English Creek Road near the intersection of English Creek Road and Route 40 (the Black Horse Pike) in Hamilton Township, New Jersey. The defendant, Stanley Kolbe, was also operating a vehicle northbound on English Creek Road. At the time of the accident, Mr. Kolbe was employed by the City of Pleasantville as a Captain in the Pleasantville Fire Department. Kolbe was acting within the scope of his employment with the Pleasantville Fire Department at the time of the motor vehicle accident. The plaintiff alleges that the defendant operated his vehicle in a negligent fashion and that the defendant's negligence was a proximate cause of the accident and injuries suffered by the plaintiff.

The Complaint was filed on May 9, 2018. The discovery end date was June 27, 2019. The matter has been scheduled for trial on December 16, 2019.

On August 26, 2019 a notice of motion for Summary Judgment was filed on behalf of the defendants, Kolbe and the City of Pleasantville. The motion for Summary Judgment is premised on the defendants' argument that the plaintiff's injuries do not meet the tort threshold as required by N.J.S.A. 59:9-2(d). The plaintiff filed a brief in opposition to the motion for Summary Judgment and the defendants filed a reply brief. Oral argument was conducted on October 11,

2019 and the Court reserved decision on the motion in order to re-review the holding in Brooks v. Odom, 150 N.J. 395 (1997) and its progeny.

N.J.S.A. 59:9-2(d) provides that:

“No damages shall be awarded against a public entity or a 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 bodily function....”

The Supreme Court in Brooks supra held that:

“To recover under the Act for pain and suffering, the plaintiff must prove by objective medical evidence that the injury is permanent. Temporary injuries, no matter how painful and debilitating, are not recoverable. Further, a plaintiff may not recover under the Tort Claims Act for mere subjective feelings of discomfort.” Brooks supra 150 N.J. at 402-403 (quoting Ayers v. Township of Jackson, 106 N.J. 557, 571 (1987)).

There is a two prong test that must be satisfied for the plaintiff to establish entitlement to damages for pain and suffering, disability and impairment against a public entity and/or a public employee in New Jersey. Gilhooley v. County of Union, 164 N.J. 533, 540-541 (2000). With regard to the first prong, the plaintiff must prove by objective medical evidence that the injury is permanent. Brooks supra at 403. The second prong requires the plaintiff to establish that “(he or she)...sustained a permanent loss of the use of a bodily function that is substantial.” Knowles v. Mantua Twp. Soccer Ass’n., 176 N.J. 324, 332-335 (2003). Ponte v. Overeem, 171 N.J. 46 (2002); Heenan v. Greene, 355 N.J. Super. 162 (App. Div. 2002).

The table below includes each reported and unreported opinion addressing the issue of whether or not a plaintiff may recover for pain and suffering in a claim made against a public entity and/or a public employee.

In the matter before the Court, the plaintiff was treated by Relievus between September 20, 2011 and April 11, 2016. The plaintiff was involved in a prior accident on July 21, 2010, which resulted neck, mid-back, right shoulder and low back complaints. In 1998, the plaintiff submitted to surgery on his low back. In 2007, a lumbar fusion was performed. Diagnostic tests, including MRIs of the cervical and lumbosacral spine were performed on December 20, 2016 and February 7, 2017, respectively. The MRI of the cervical spine revealed a herniated disc at C5-C6 and the MRI of the lumbar spine revealed the fusion at L4-L5 and L5-S1.

With respect to the plaintiff's complaints of effect on the activities of daily living, the plaintiff complains that he has been unable to engage in bike riding on weekends, he has been unable to play baseball or volleyball. Prior to the accident he could walk 5 minutes and perform 6 pushups without pain, but since the accident he is unable to perform the pushups and can only walk for 3 minutes. He drove to Florida in 2012 and 2013, but he is unable to take any long drives since the accident.

Dr. Peter Pryzbylkowski, a pain management specialist, wrote a report on August 23, 2019 indicating that after the motor vehicle accident the plaintiff had two epidural injections in his low back and one in his cervical spine. Dr. Pryzbylkowski also noted on physical examination some muscle spasm in the cervical spine as well as a decrease in the range of motion. Dr. Pryzbylkowski compared an MRI of the cervical spine which was performed on November 8, 2010 with the MRI of the cervical spine performed on December 20, 2016. Dr. Pryzbylkowski opined that the MRI of the cervical spine of November 8, 2010 was within normal limits whereas the MRI of December 20, 2016 revealed a herniated disc with impingement on the thecal sac at C5-C6. In the opinion of Dr. Pryzbylkowski, the plaintiff suffered a new injury at C5-C6 in the

form of a herniated disc and that there was an aggravation of the plaintiff's pre-existing injuries in the low back.

Obviously, the Court must engage in a case by case analysis to determine whether or not a plaintiff, in a matter against a public entity, has met the second prong of the Brooks v. Odom test. The Court must assume for purposes of the motion for Summary Judgment that all of the evidence submitted by the plaintiff, including any reasonable inferences that can be drawn from that evidence, is true. Dr. Pryzbylkowski in his report of August 23, 2019 indicates that in his opinion the plaintiff suffered a herniated disc at C5-C6 based upon Dr. Pryzbylkowski's interpretation of an MRI film study. Therefore, in the opinion of this Court, the plaintiff has met the first prong of the Brooks v. Odom test by establishing objective evidence of a permanent injury.

The ultimate issue which has to be addressed by the Court is whether the plaintiff meets the second prong of the Brooks v. Odom test, which is whether the plaintiff has established that there was a substantial loss of bodily function. Clearly, not every objective permanent injury results in a substantial loss of bodily function. Gilhooley supra 164 N.J. at 541.

Plaintiff relies primarily upon the holding in Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324 (2003) where the plaintiff was diagnosed with a herniated disc. In Knowles, the plaintiff was unable to stand, sit or walk comfortably for a substantial period of time or engage in activities or complete household chores. Plaintiff had to adjust his work schedule.

In the opinion of this Court, the plaintiff's complaints about the effect of the injury on the activities of daily living is simply not sufficient to establish that there is a permanent loss of the use of a bodily function *that is substantial* when compared with the complaints of the effect of other permanent injuries on the activities of daily living as described in other reported opinions.

Accordingly, the defendants' motion for Summary Judgment is granted. An appropriate Order has been entered. Conformed copies accompany this Memorandum of Decision. A copy of the Order and a copy of this Memorandum of Decision shall be served on of counsel of record within the next seven (7) days.

  
James P. Savio, J.S.C.

Case name	Court Information	Injuries	How injuries affect daily life	Outcome
<u>Brooks v. Odom</u> 150 N.J. 395 (1997)	Supreme Court of New Jersey  <u>Decided:</u> 7/15/1997	Persistent neck and back pain. Headaches, limited range of motion, post-traumatic myositis and fibromyositis.	Plaintiff can function in both her employment and her household duties.	Plaintiff has NOT sustained "a permanent loss of bodily function."
<u>Hammer v. Township of Livingston</u> 318 N.J. Super. 298	Superior Court of New Jersey  <u>Decided:</u> 2/18/1999	Injury to right side – right ankle, right shoulder, and right elbow. However, claimant was treated for injuries to her left side. Plaintiff also claimed PTSD.	Nothing in the record reflects that Plaintiff is prevented by her disorder or from carrying out her ordinary day-to-day functions.	Plaintiff's claim are neither supported by objective medical evidence nor permanent/substantial. However, Plaintiff's scars may be a permanent/substantial disfigurement.
<u>Geber v. Springfield Board of Education</u> 328 N.J. Super. 24	Superior Court of New Jersey, Appellate Division  <u>Decided:</u> 2/3/2000	Student – various nasal fractures, difficulty breathing, nasal dryness, intra-nasal scarring, intermittent headaches.	PTSD, nightmares, difficulty sleeping, loss of interest in normal activities, further nasal surgery possible.	Plaintiff's PTSD and disfigurement claims do not alone satisfy the threshold requirements, but Plaintiff's nose injury is a substantial loss of bodily function
<u>Gilhooley v. County of Union</u> 164 N.J. 533 (2000)	Supreme Court of New Jersey  <u>Decided:</u> 7/11/2000	Broken patella required pins and wires to reestablish the knee's integrity. Surgery resulted in a 4-5" scar across plaintiff's knee.	Out of work for months due to surgery. Experiences constant stiffness and pain in her knee. Her knee cannot function without permanent pins and wires.	Permanent injury under the statute.
<u>Leuallen v. Paulsboro Police Dep't</u> , 2001 U.S. Dist. LEXIS 22631	New Jersey District Court  <u>Decided:</u> 12/5/2001	Minor lumps and scratches	No medical treatment sought for injuries and no medication taken.	Plaintiff submitted no medical evidence of permanent physical or psychological sufficient under the stat tort law claims.
<u>Kahrar v. Borough of Wilmington</u> 171 N.J. 3 (2002)	Supreme Court of New Jersey	Torn rotator cuff. Limited range of motion.	Plaintiff was able to continue her duties as a secretary; typing,	Permanent and substantial loss found. Despite surgical intervention, her

	<u>Decided:</u> 2/27/2002		answering phone calls. She noted that it took longer for her to do the tasks, but that she was still able. Overuse of her non-dominant hand caused weakness and loss of mobility in her injured arm. Difficulty performing household duties, driving, sleeping, reaching, and continuing her hobbies (woodworking and furniture stripping).	ability to use her arm to complete normal tasks has been significantly impaired and has lost approximately 40% of normal range of motion in her left arm.
<u>Ponte v. Overeem</u> 171 N.J. 46 (2002)	Supreme Court of New Jersey <u>Decided:</u> 2/27/2002	Car accident (rear-ended by a bus). Suffered a knee injury that required arthroscopic surgery and rehabilitative treatment.	Plaintiff was able to "function reasonably well at work and at home, regardless of the nature and degree of the impairment."	Court applied a case-by-case analysis and held that there was no evidence that the injured party had not eventually fully recovered the use of his knee.
<u>Heenan v. Greene</u> 355 N.J. Super 162 (2002)	Superior Court of New Jersey, Appellate Division <u>Decided:</u> 11/20/2002	Herniated cervical disc with radiculities and some loss of range of motion	Plaintiff missed no days at work, continued to play sports and do interval training, and could perform household chores "to some extent."	No substantial loss of bodily function.
<u>Knowles v. Mantua Twp. Soccer Ass'n</u> 176 N.J. 324 (2003)	Supreme Court of New Jersey <u>Decided:</u> 5/29/2003	Herniated disc. Claimed neck and back pain that radiated into the lower back, severe lower back pain radiating into his left buttock, and numbness and tingling from his	Lost feeling in his left leg, unable to stand, sit, or walk comfortable for a substantial amount of time, engage in athletics, or complete household chores. Plaintiff has had to adjust	Satisfies the threshold of a permanent injury.

		left leg to his foot.	his work schedule and give up his second job as a referee. Plaintiff has trouble sleeping and his pain makes him irritable and moody. He cannot sit for more than 30 minutes. He cannot stand for more than 15-30 minutes without pain. He cannot walk more than a 1/4 mile. He claims he is no longer able to play baseball or softball, bowl, or complete household projects.	
<p><u>Leopardi v. Township of Maple Shade</u> 363 N.J. Super. 313 (2003)</p>	<p>Superior Court of New Jersey, Appellate Division</p> <p><u>Decided:</u> 10/14/2003</p>	<p>Back and neck surgery requiring a fusion of three vertebrae in his neck and three in his lower back.</p>	<p>Decreased mobility, indecisiveness, anxiety, stress, and depression. After the first surgery, Plaintiff was able to walk a mile a day and his prior urinary problems had abated. After the second surgery, the doctor noted that he was able to walk a mile a day and his pre-operative symptoms were absent and were neurologically intact. Plaintiff failed to make any showing that he is physically restricted in carrying out his daily work</p>	<p>Even though Plaintiff had preexisting degenerative disease, and even though the surgery did not involve the installation of hardware, the surgical intervention changed the structure of the vertebral bodies and normal bodily function, resulting in permanent dismemberment and disfigurement as explained in <i>Gilbooley</i>.</p>



			and/or recreational activities.	
<p><u>Caruso v. Blanchard</u> 2008 N.J. Super. Unpub. LEXIS 197 (2008)</p>	<p>Superior Court of New Jersey, Appellate Division</p> <p>Decided: 1/3/2008</p>	<p>Car accident – sustained multiple contusions and an injury to her left shoulder. 1 ½ scar at surgical site. Plaintiff sustained a “hypertropic thickening” where the tendons meet the tip of the acromion joint. Plaintiffs muscles forms a “frozen shoulder.”</p>	<p>Plaintiff testified that after the surgery, she remained unable to lift her arm over her head, or lift or carry heavy objects. Pain and limitations left her dependent on her family for usual daily routines and household duties. Her relationship with her husband suffered because she was “always in pain” and never wanted to leave the house. She had to sleep on the couch, further impacting her marital relations. Six months after surgery, plaintiff’s husband had to assist her with bathroom functions.</p>	<p>Motion to Dismiss denied. Permanent and substantial loss found.</p>
<p><u>Bellvue v. New Jersey Transit Bus Operations</u> 2009 N.J. Super. Unpub. LEXIS 2672 (2009)</p>	<p>Superior Court Appellate Division</p> <p>Decided: 10/26/2009</p>	<p>Cervical and lumbar back pain and sprain, with cervical radiculopathy, disc bulges, and lower back pain. Depression and anxiety due to pain. Difficulty sleeping.</p>	<p>Missed two days of work. Plaintiff testified that he had trouble sleeping, pain when engaging in certain activities (shoveling snow and carrying heavy objects – which he now refrains from doing), and takes Advil for pain.</p>	<p>Plaintiff did not provide sufficient evidence to satisfy the threshold. Bulging discs were consistent with the typical aging process for an individual of plaintiff’s age. No medical evidence that the bulging discs were caused by the accident. No permanent loss of bodily function.</p>
<p><u>Baligian v. Hunterdon Cent. Reg’l High Sch.</u> 2009</p>	<p>Superior Court of New Jersey,</p>	<p>High school cheerleader fell forward during a</p>	<p>Initial behavior modifications and soft food diet.</p>	<p>Plaintiff did not demonstrate proof of a permanent or substantial injury.</p>

<p>N.J. Super. Unpub. LEXIS 2823 (2009)</p>	<p>Appellate Division  <u>Decided:</u> 11/12/2009</p>	<p>stunt and hit her chin. She was diagnosed with a jaw strain, laceration of the chin, hairline fracture through her central incisor and fractured mandible. She was later diagnosed with TMJ, jaw pain, difficulty chewing, neck pain, jaw clicking and popping, visual disturbances, and dizziness. She received post-accident complaints of intermittent lower back pain, scoliosis, and mild-to-moderate stenosis in her spine. The chin injury also left mild scarring.</p>	<p>She was able to resume participation in several extracurricular activities, and working two part-time jobs. She also resumed participation in gym class without restrictions.</p>	
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