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DAVID MARROQUIN and FAVIOLA S. ROBLES, *Plaintiffs,* vs. RACHEL K. RICHMOND, WENDY SCHULMAN, CITY OF NORTHFIELD, ABC CORPORATIONS, XYZ PARTNERSHIPS, and JOHN DOES (said names being fictitious), jointly, severally or in the alternative, *Defendants.*	SUPERIOR COURT OF NEW JERSEY ATLANTIC COUNTY LAW DIVISION DOCKET NO: ATL-L-8031-11 Civil Action **ORDER GRANTING SUMMARY JUDGMENT**

THIS MATTER, having been brought before the Court by way of Notice of Motion field by Thomas G. Smith, Esquire, "Of Counsel" to the Law Offices of Neil Stackhouse, PC, attorneys for the defendants, City of Northfield & Wendy Schulman; and

THE COURT having considered same, and for good cause having been shown;

IT IS on this 7th day of June, 2013 ***ORDERED AND ADJUDGED*** that summary judgment is granted to defendants, City of Northfield and Wendy Schulman, and the Complaint of plaintiffs, as well as any cross-claims, are dismissed, with prejudice.

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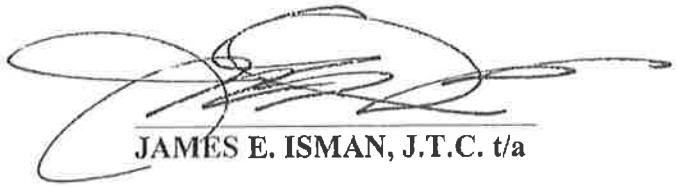
IT IS FURTHER ORDERED that Summary Judgment is being GRANTED with regard to both Plaintiffs for the reasons set forth in the Memorandum of Decision and for the reasons and issues presented at oral argument, held on June 7, 2013.

IT IS FURTHER ORDERED that a copy of this order shall be served on all parties within seven (7) days of the date of this order.



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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

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MEMORANDUM OF DECISION

Case: **Marroquin v. Richmond, et al.**

Docket #: **ATL- L- 8031-11**

Date: **June 11, 2013**

Motion: **Summary Judgment**

HAVING CAREFULLY REVIEWED THE PAPERS SUBMITTED CONCERNING THE ABOVE CAPTIONED MOTION, I HAVE RULED AS FOLLOWS:

Nature and Background of Motion:

Defendant, the City of Northfield (hereinafter "Northfield"), brings this motion for summary judgment arguing that it cannot, as a matter of law, be held liable for Plaintiffs' injuries. Plaintiffs oppose this motion.

Relevant Facts:

The facts, viewed most favorably to plaintiff, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), are as follows. On May 11, 2010, Plaintiffs, David Marroquin and Faviola S. Robles, were struck by a vehicle owned and operated by Co-Defendant, Rachel K. Richmond, while attempting to walk across Cedarbridge Road at the intersection of New Road, in Northfield, New Jersey. At the time of the accident,

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Plaintiffs were legally crossing the street, having a green light to do so, and while the pedestrian "WALK" sign was on. According to Plaintiffs' expert, Co-Defendant Richmond was "traveling at an unsafe speed, too fast for existing conditions and failed to maintain a proper lookout and failed to take evasive action to avoid the crash."

The Northfield Community Elementary School is located on the northeast corner of the intersection where the accident occurred. At the time of the accident, the intersection was an active school crossing, controlled by a Crossing Guard, Wendy Shulman. It is not disputed that Ms. Shulman, as a crossing guard, is an agent of Northfield. Prior to the subject accident, Ms. Shulman performed her functions as a crossing guard to "cross" Plaintiffs children, who were walking a few feet in front of the Plaintiffs.[1] At the time Plaintiffs were struck, Ms. Shulman had already crossed Plaintiffs' children, and was standing on the corner opposite to that from which Plaintiffs initiated their cross. It is not disputed that, at the time the Plaintiffs were struck, Ms. Shulman was on the corner. Plaintiff Robles testified that the crossing guard, Ms. Shulman, was already on the corner and had completely crossed the children before she and Mr. Morroquin started to cross the street. Additionally, Mr. Morroquin has testified that Ms. Shulman did not make any kind of gesture to the adults. As a school crossing

[1] There is some dispute as to how far in front of the Plaintiffs their children were walking. Defendant contends it was 25 feet, while Plaintiffs contend it was merely a few feet. For purposes of this motion, in light of the principles set forth in Brill, supra, this Court will assume the children were only a few feet in front of Plaintiffs.

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guard, however, it is presumed that her function is to assist the students in crossing and not adults. (emphasis added).

Plaintiffs claim that Ms. Shulman, as an agent of moving defendant, Northfield, was negligent in her supervision, care and control of the crosswalk and that said negligence was the proximate cause of the accident.

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." Id. (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. Id. (citations omitted).

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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 factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

Discussion:

Northfield brings this motion for summary judgment making the following arguments. First, Northfield argues that Plaintiffs cannot make out a *primia facie* case of negligence. Northfield argues that the Plaintiffs have not provided any evidence to show that the City of Northfield or its Crossing Guards had a duty to safely cross adults across the street. Northfield cites to Article VII, Section 43-27 of the City of Northfield Ordinance Code which states that "the duties of adult crossing guards shall be limited to the protection of children..." (emphasis added). At oral argument, held on June 7, 2013,

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Plaintiffs' counsel argued that Defendant Shulman owed a duty to adult pedestrians by virtue of her previous conduct of crossing adults when accompanied by children. However, Plaintiffs' counsel was unable to cite to any Statute, Regulation or Municipal Code to support his argument that Defendant Shulman should have stayed in the street and crossed the adult pedestrians, after she safely crossed the children.

Additionally, Northfield argues that even assuming that Defendants did owe Plaintiffs a duty, any alleged negligence by Crossing Guard Schulman, as an agent of Northfield, did not, as a matter of law, proximately cause the subject accident. Rather, it is undisputed that Plaintiffs were injured because Defendant Richmond did not look properly before making a left turn. Plaintiffs legally crossed the street, having a green light to do so, while the "walk" sign was on. Moving Defendant argues that the subject accident occurred because Defendant Richmond "must not have looked carefully enough to determine if the crosswalk was clear of pedestrians before making the turn." As such, moving defendants, citing Brown v. United States Stove Co., 98 N.J. 155, 172 (1984), argue that any alleged negligence of the crossing guard is too remotely or insignificantly related to plaintiffs' accident, so that in a legal sense, the alleged fault of the crossing guard does not constitute crossing guard cannot control a moving vehicle, and does not constitute a "cause of [the] accident, ...[but] simply presents the condition under which the injury was received." This Court agrees with defense counsel that even assuming that Defendant Shulman owed a duty to adult pedestrians, there is simply no evidence that her

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acts and/or omissions caused the Plaintiffs injuries. The adult Plaintiffs crossed the street, without their children and with the pedestrian right-of-way.

Plaintiffs' counsel, in opposition, relies heavily upon the recently submitted expert report of John E. Langan, of the Traffic Safety Institute, dated April 13, 2013. N.J.R.E. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Furthermore, N.J.R.E. 703 requires that an expert's opinion be based on facts, data, or another expert's opinion, either perceived by or made known to the expert, at or before trial. Under the "net opinion" rule, "an opinion lacking in such foundation and consisting of bare conclusions unsupported by factual evidence is inadmissible." Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002).

Our Supreme Court addressed the admissibility of net opinions in Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 372 (2011). There, the Court explained that:

> [o]ur Rules have fixed, clear guidelines that govern the admissibility of expert opinions and against which trial courts must make their evaluations. *See N.J.R.E. 702, 703.* Expert testimony must be offered by one who is 'qualified as an expert by knowledge, skill, experience, training, or education' to offer a 'scientific, technical, or . . . specialized' opinion that will assist the trier of fact, see N.J.R.E. 702, and the opinion must be based on facts or data of the type identified by and found acceptable under

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> N.J.R.E. 703... a court must ensure that the proffered expert does not offer a mere net opinion.
>
> Id.

The Pomerantz Court further explained that "an expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered." Id. The admissibility rule has been aptly described as requiring that the expert "give the why and wherefore" that supports the opinion, "rather than a mere conclusion." Id. See also Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540, (App. Div.), certif. denied, 145 N.J. 374 (1996).

The Appellate Division recently reviewed a trial court's finding that the Plaintiff's expert's opinions, as expressed in his report and deposition, were net opinions under circumstances similar to this case in Wellinghorst v. Arnott, 2013 N.J. Super. Unpub. LEXIS 529, 9-10 (App. Div. Mar. 8, 2013). There, the plaintiff retained William Poznak, a professional engineer, with more than thirty years of experience as a civil engineer, as her expert. Id. at 2. Poznak conducted a site inspection more than three years after the plaintiff was injured, during which he took measurements and made observations. Id. He also took photographs and made a diagram of the area in question. Id. The court, summarized the objective data upon which Poznak's opinion was based as:

> essentially limited to a visual inspection of the area three years following the accident and a review of photographs taken of the area of the fall three days after plaintiff's accident. He performed no tests, stating there were no tests he could perform to determine whether there was insufficient

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> compaction of the trench because such tests would have had to have been performed at the time the trench was backfilled. He testified 'the patch was put in probably even with the road and then it started sinking. Maybe the first week or two it was an eighth of an inch and then maybe six months later it was down to three quarters of an inch.' Yet, he provided no facts to support these conclusions beyond his experience.
> Id. at 9.

The court concluded that "not only is there an absence of any reliable evidence identifying when the sinking commenced, there is also no reliable evidence addressing why the sinking occurred. In short, Poznak's expert opinion is flawed because it was not 'derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field.' *Landrigan v. Celotex Corp., 127 N.J. 404, 417, 605 A.2d 1079 (1992).* By contrast, in Greenberg v. Pryszlak, 426 N.J. Super. 591, 607-608 (App. Div. 2012), the Appellate Division held that the trial judge was entitled to conclude that the expert report was not a net opinion because the report sufficiently explained the bases for the expert's opinions. (emphasis added). There, the expert "related the facts of the case to 'generally accepted practices within the law enforcement profession' and to specific sources of those practices, including the policies and practices of the State Police." Id.

According to Plaintiffs' counsel, Mr. Langan "articulates proximate cause with his opinion that Schulman's decision to leave the intersection likely gave the impression to Richmond that the intersection was clear." See Plaintiffs' Letter Brief, p. 2. Plaintiffs'

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attorney appears to be referencing the portion of the expert report which states: "Richmond stated that she saw the crossing Guard in the intersection and prior to the collision and may have improperly assumed the intersection was clear of pedestrians once the Crossing Guard returned to the corner." (emphasis added). Notably, Plaintiffs' expert never opines that Ms. Shulman "proximately caused" the subject accident. Instead, Plaintiffs' expert opines that Ms. Shulman was a "major contributing factor in the sequence of events leading up to this crash."

However, Plaintiffs' expert's report lacks any foundational evidence or support, is without any explanation of his methodology and fails to demonstrate that both the factual basis and underlying methodology are scientifically reliable. Mr. Langan simply provides no basis in fact for his conclusion that Ms. Shulman's alleged negligence proximately caused the subject accident. Such a net opinion alone is insufficient to sustain a plaintiff's burden of establishing liability. See Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 372 (2011) (holding that "an expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered"). See also N.J.R.E. 702; N.J.R.E. 703.

Although Plaintiffs' expert states that his opinions are based upon safety standards, physical evidence and "vehicle and pedestrian dynamics," he never explains how that evidence forms the basis for his opinion. In fact, Plaintiffs' expert's report does not even identify what "physical evidence" he considered or what the "vehicle and

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pedestrian dynamics" were and how same would support a finding that Ms. Shulman proximately caused the subject accident. Therefore, similar to the expert opinion in Wellinghorst, supra, Plaintiffs' expert's report is "flawed because it was not 'derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field.'" Wellinghorst, supra, 2013 N.J. Super. Unpub. LEXIS at 9. (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417, (1992)). Mr. Langan does not cite to any statutes, publications, scientific basis or generally accepted principles in his field as the basis for his opinions. As such, the expert report submitted by Plaintiffs is nothing more than a net opinion and Plaintiff has failed to provide any evidence sufficient to show Ms. Shulman proximately caused the subject accident.

Therefore, Defendant Northfield is entitled to summary judgment. However, for completeness purposes this Court will briefly address Northfield's second argument that Plaintiff Robles cannot satisfy the threshold requirement of a permanent injury as required by the New Jersey Tort Claims Act.

When a plaintiff's negligence claim arises against a government entity, the New Jersey Tort Claims Act (hereinafter "TCA"), codified as N.J.S.A. 59:9-1, *et seq.*, governs the claim. N.J.S.A. 59:1-3 defines a "public entity" to include "...any...public authority, public agency or any other political subdivision or public body in the state." It is not disputed that Plaintiff's claim against Defendant Northfield is governed by the TCA, as Ms. Shulman was an agent of Northfield when serving as a Crossing Guard at the time of

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609-594-3386

the accident. Therefore, any tort claim against Northfield is limited by the provisions of the TCA. Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 329 (N.J. 2003).

The dominant theme of the TCA was to reestablish the immunity of all governmental bodies in New Jersey, subject only to the TCA's specific liability provisions. Garrison v. Tp. of Middletown, 154 N.J. 282, 286, (1998); Rochinsky v. State, Dep't of Transp., 110 NJ 399, 407-408 (1988). As such, "[t]he requirements of the Tort Claims Act are 'stringent' and place a 'heavy burden' on plaintiffs seeking to establish public entity liability." Charney v. City of Wildwood, 732 F.Supp.2d 448, 452-53 (D.N.J. 2010) (quoting Bligen v. Jersey City Hous. Auth., 131 N.J. 124, 136,(1993)), appeal docketed, No. 10-3739 (3d Cir. Sept. 16, 2010). Indeed, our Supreme Court has recognized that the "guiding principle" of the TCA is "that 'immunity from tort liability is the general rule and liability is the exception.'" Coyne v. State Dep't of Transp., 182 N.J. 481, 488 (2005) (quoting Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998)).

To recover non-economic losses from a public entity, a plaintiff must establish that the injury alleged constitutes a "permanent loss of a bodily function, permanent disfigurement or dismemberment" and that medical treatment expenses for the injury have exceeded $3,600. N.J.S.A. 59:9-2(d) In Brooks v. Odom, 150 N.J. 395 (1997), the Supreme Court held, that in order to satisfy the injury threshold of the Act, the plaintiff must have sustained a "permanent loss of the use of a bodily function that is substantial."

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Id. at 406. (emphasis added). Along these lines, a plaintiff must satisfy a two-prong standard by proving (1) an objective permanent injury, and (2) permanent loss of a bodily function that, even if not total, is substantial. Gilhooley v. County of Union, 164 N.J. 533 (2000). The Gilhooley court further held that whether a claimant has injuries sufficient to meet the threshold under the Act is fact sensitive.

In Brooks, supra, the plaintiff was struck by a bus and suffered from back pain, headaches, straightening of cervical curvature, cervical spasms, paravertebral spasms of the dorsal spine, and decreased flexion and range of motion. Brooks, 150 N.J. at 399. The plaintiff received a discharge diagnosis from her physician of "residuals of post-traumatic headaches, residuals of flexion/extension injury of the cervical dorsal and lumbar spine with post-traumatic myositis and fibromyositis." The doctor "concluded that plaintiff had sustained a significant and permanent loss of function with chronic pain that was exacerbated by the usual activities of daily living." Id. at 399-400. The Court found that, although it was accepted that the plaintiff's injury represented a permanent loss of motion, the plaintiff did not surmount the threshold precluding noneconomic damages for pain and suffering since N.J.S.A. 59:9-2(d) required the permanent loss of a bodily function to be "substantial." Id. at 406. The Court stated:

> Although the legislative intent in the Tort Claims Act is not completely clear, we believe that the Legislature intended that a plaintiff must sustain a permanent loss of the use of a bodily function that is substantial. A total permanent loss of use would qualify. We doubt, however, that the

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> Legislature intended that a claimant could recover only for losses that were total. As the Workers' Compensation Act demonstrates, the Legislature is aware of the distinction between permanent injuries that are total and those that are partial. In the Tort Claims Act, however, the Legislature did not specify that the right to recover was limited to injuries that were total. We conclude that under that Act plaintiffs may recover if they sustain a loss that is substantial.
>
> Id. (citation omitted).

Applying that standard to the facts before it, the Brooks Court concluded, as a matter of law, that the plaintiff did not suffer a "permanent loss of bodily function." Ibid. The Brooks decision makes clear that a Plaintiff can only recover under the TCA where the Plaintiff suffers a substantial loss. (emphasis added).

In Gilhooley v. County of Union, 164 N.J. 533 (2000), the Court determined how the Brooks standard applied to a different type of injury. The Court, citing approvingly from Brooks, indicated that a plaintiff must demonstrate an objective permanent injury and permanent loss of a bodily function that is substantial. Gilhooley, 164 N.J. at 541. The plaintiff in Gilhooley suffered a fall and sustained a knee fracture that left her without "quadriceps power," and required the restructuring of her patella through a surgical procedure, an "open reduction internal fixation" which utilized two metal pins and a tension band wire. Id. at 536-37. The Court found that the plaintiff's injury, a fracture requiring the installation of hardware to restore function, was permanent and resulted in the substantial loss of a bodily function. Id. at 541-42. (emphasis added). The

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Court found that a permanent injury could be considered to result in the substantial loss of a bodily function even though modern medicine can supply replacement parts to mimic normal function. Id. at 542-43. The Court distinguished this from the case of a "completely healed fracture without any objective evidence of permanent substantial impairment." Id. at 541 (citing Hammer v. Township of Livingston, 318 N.J. Super. 298 (App Div. 1999)).

In Karhar v. Borough of Wallington, 171 N.J. 3 (2002), the plaintiff suffered injuries to her arm, shoulder, ankle and knee as the result of a fall in the roadway caused by a defective water valve junction lid which ineffectively covered a seven-and-a half inch diameter hole. Karhar, supra, 171 N.J. at 5-6. The Court applied the Brooks standard and found that the plaintiff's shoulder injury, a torn rotator cuff which was surgically repaired but involved the shortening and reattachment of the tendon constituted a permanent injury resulting in the substantial loss of a bodily function since the injury resulted in a forty percent loss of the range of motion of the plaintiff's arm. Id. at 15-16.

The Court in Karhar reviewed two Appellate Division decisions dealing with "healed" fractures under the TCA limitation on noneconomic damages, one which satisfied the threshold and one that did not. The court stated:

> In *Hammer v. Township of Livingston, 318 N.J. Super. 298 (App. Div.1999)*, the Appellate Division ruled that a plaintiff whose fractures had healed did not demonstrate a permanent loss of a bodily function that was substantial. The sixty-four year old plaintiff was struck by a fire wagon and thrown into the air. She suffered severe lacerations to her knee,

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> left elbow, right eye, nose and lip. She also sustained several fractures of her nose, elbow, and knee. Plaintiff underwent several operations, but her physician noted that within three months of the accident plaintiff was functioning well. Thereafter, plaintiff started to complain of pain in her right shoulder and was diagnosed with post-traumatic tendonitis. The court noted that plaintiff's gait was not limited by her injuries, and that plaintiff had acknowledged that her left fibula and left elbow had healed completely. ***On the issue of plaintiff's fractures, the court concluded that plaintiff had presented no objective medical evidence to satisfy the second prong of Brooks***.
>
> In comparison, in *Gerber v. Springfield Board Of Education, 328 N.J. Super. 24, (2000)*, the Appellate Division ruled that a plaintiff diagnosed with nasal fractures had demonstrated a permanent loss of a bodily function that was substantial. There, plaintiff, a high school student, was attacked by a classmate. She sustained multiple nasal fractures and underwent surgery for a " 'closed reduction of nasal bone and septal fractures.' "After surgery, the plaintiff still had difficulty breathing through her nose. ***Her physicians concluded that her injuries were permanent, her symptomology would worsen, and that there was no possibility that she would ever breathe normally again. The court held that a "substantial loss of bodily function encompasses permanent and constant difficulty breathing."***
>
> Id. (emphasis added).

In Ponte v. Overeem, 171 N.J. 46 (2002), the plaintiff was a motorist whose car had stalled in the right lane of a highway with no "shoulder" lane and was hit by a New Jersey Transit bus. The plaintiff suffered a cervical sprain and a contusion to his knee. Ponte, 171 N.J. at 47. Despite arthroscopic surgery, the plaintiff's knee injury caused the knee to occasionally "give out." This condition was diagnosed as possibly permanent in nature. Id. at 50. The Court found that the record was devoid of evidence which would

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support a finding of the substantial loss of a bodily function, such as loss of range of motion, impaired gait, or restricted ambulation. Id. at 54 (stating that "Plaintiff's evidence consists only of answers to interrogatories and numerous medical reports. Noticeably absent from the record, however, is any evidence that plaintiff's range of motion is limited, his gait impaired or his ability to ambulate restricted"). The Court concluded that the "plaintiff's allegations concerning the injury to his knee do not establish a loss of normal bodily function that is both permanent and substantial, but merely 'iterates a claim for pain and suffering.'" Id. (citing Brooks, supra, 150 N.J. at 403). The Court therefore granted Defendant's Motion for summary judgment reasoning that there was no genuine "issue of fact about whether plaintiff's knee injury constitutes a permanent loss of a bodily function that is substantial." Id.

In Knowles v. Mantua Tp. Soccer Ass'n, 176 N.J. 324 (2003), the plaintiff's automobile was struck by the large barricade metal gate at the exit of a park, crashing through plaintiff's windshield, striking him in the shoulder. Knowles, 176 N.J. at 326-27. The plaintiff suffered an L4-5 disc herniation and radiculopathy from the accident, which the Court found was 'an objective permanent injury," satisfying the first prong of the Brooks standard. Id. at 331. The Court, recognizing that plaintiff was able to continue working as a teacher, held that the ability to work is not the test for recovery of pain and suffering damages under the TCA. Id. The Court reviewed the "continuum of cases" discussed above, and found that the plaintiff's "lack of feeling in his left leg and the

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Atlantic City, NJ 08401-4527
609-594-3386

inability to stand, sit, or walk comfortably for a substantial amount of time, engage in athletics, and complete household chores," id. at 333, were sufficient to withstand summary judgment with respect to the second prong of Brooks and raise a triable issue of fact as to whether the plaintiff suffered a substantial loss of a bodily function under the TCA[2]. The Court classified the following four categories of injuries:

> 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, supra, 171 N.J. at 54. 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[3], 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

[2] However, it must be noted that in Knowles, the Plaintiff's doctor expressly "concluded that the accident permanently damaged plaintiff's lumbar spine" Id. at 328.

[3] Brooks v. Odom, 150 N.J. 395, 402-403 (N.J. 1997)To recover under the Act for pain and suffering, a 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.' Ayers v. Township of Jackson, 106 N.J. 557, 571, 525 A.2d 287 (1987). Judicial and secondary authority interpreting the phrase 'permanent loss of a bodily function' is scant. One recognized text states '[t]o be considered permanent within the meaning of the subsection, an injury must constitute an 'objective' impairment, such as a fracture.' Absent such an objective abnormality, a claim for permanent injury consisting of 'impairment of plaintiff's health and ability to participate in activities' merely iterates a claim for pain and suffering.

JAMES E. ISMAN, J.T.C. t/a

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> she is entitled to pain and suffering damages under the TCA. Kahrar, supra, 171 N.J. at 15-16, 791 A.2d 197.
> Knowles at 331-332.

Furthermore, the qualifications for a "**permanent loss of bodily function**" are defined in Model Charge 8.70, which provides:

> [t]he loss need not be total, but must be substantial. Mere limitation is insufficient, by that I mean the plaintiff must prove this loss by a demonstration of objective credible medical evidence of permanent injury, because damages for temporary injury are not recoverable. The proof must be both objective and credible. Objective means that the evidence must be verified by physical examination, diagnostic testing and/or observation. Credible means that the evidence is believable.

Here, as a result of being struck by Co-Defendant Richmond's vehicle, Plaintiff Robles was taken to Atlantic City Medical Center where she was admitted for several days and subsequently released with a prescription for pain medication, muscle relaxer and a non-steroid anti-inflamatory medication. Defendant argues that there is no issue of material fact that would permit a trier of fact to conclude that Plaintiff has overcome the injury threshold provided in the TCA. Therefore, Defendants submit that they are entitled to summary judgment as a matter of law pursuant to the standard set forth in Brill, supra, 142 N.J. 520.

The Plaintiff testified that her neck and back still bother her and that she takes Oxycodone to help her with the pain. When asked if there is anything that she can no longer do, as a result of her injury, Plaintiff responded that she can no longer play with

her children like she used to, she has difficulty cooking and cleaning, but still does some of both, and she cannot ride her bike like she used to with her children.

Defense counsel argues that Plaintiff Robles' own testimony contradicts the diagnosis of own doctor, Dr. Giamporcaro, because Plaintiff Robles' complaints of pain are on the opposite side of her body than where her scans show herniation. Furthermore, defense counsel argues that a comparison of Plaintiff Robles' injury to those found by New Jersey courts not to satisfy the threshold requirement of the Tort Claims Act, reveals that Plaintiff's injuries do not satisfy the threshold. Moreover, defense counsel argues that while Plaintiff Robles asserts subjective complaints of pain on her right sided upper and lower extremities, the scans reveal no right sided disc herniation or nerve impingement. Significantly, by Plaintiff Robles' own testimony, her subjective complaints of pain do not result in a substantial loss of bodily function. Defense counsel argues that the Plaintiff did not testify as to any significant restrictions she faces in her day to day responsibilities at home; nor any problems with respect to sleeping patterns; nor any difficulty walking, standing or sitting; nor any restrictions with respect to her professional responsibilities because she is currently not working.

Therefore, under Ponte v. Overeem, 171 N.J. 46, 53 (2002), Plaintiff's proofs are insufficient to satisfy the permanent injury requirement. Pursuant to, Ponte, supra, it is "the nature or degree of the ongoing impairment that determines whether a specific injury meets the threshold requirement under the Tort Claims Act. Id. Here, although Plaintiff

continues to experience some pain and discomfort, she is not currently receiving any treatment for the neck or back pain, and the limitations on her activities are minor.

Accordingly, Defendant Northfield's motion for summary judgment is hereby GRANTED. An appropriate Order has been entered. Conformed copies will accompany this Memorandum of Decision.

James E. Isman, J.T.C. t/a