PREPARED BY THE COURT

LUIDA RIVEROS, Plaintiffs, v. VICTOR GUADALUPE and CITY OF PLEASANTVILLE, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY DOCKET NO.: ATL-L-2277-21 *CIVIL ACTION* **ORDER**

THIS MATTER being opened to the Court, on October 27, 2023, by way of Notice of Motion filed by Thomas G. Smith, Esquire, of the Law Offices of Thomas G. Smith, PC, Attorneys for the defendants, Victor Guadalupe and City of Pleasantville; and the Court having considered the submissions of the parties and good cause having been shown, for reasons set forth in the memorandum of decision and on the record:

IT IS on this 6th day of December 2023 **ORDERED** as follows:

Defendants' motion for summary judgment is hereby **GRANTED**, and the Complaint of Plaintiff is hereby **DISMISSED with prejudice**.

IT IS HEREBY FURTHER ORDERED that a copy of this Order shall be deemed served on all attorneys of record via e-filing on the date set forth herein. Pursuant to Rule 1:5-1 (a), movant shall serve a copy of this Order on all parties not served electronically, nor served personally in court this date, within seven (7) days of the date of this Order.

Ralph A. Paolone

RALPH A. PAOLONE, J.S.C.

[X] Opposed

[ ] Unopposed

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

RALPH A. PAOLONE, J.S.C.

1201 Bacharach Boulevard
Atlantic City, N.J. 08401-4527

MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

TO: Jeff Sheppard, Esquire
Attorney for Plaintiff,
Luida Riveros

Thomas G. Smith, Esquire
Law Offices of Thomas G. Smith, PC
Attorney for Defendants,
Victor Guadalupe and City of Pleasantville

RE: Luida Riveros v. Victor Guadalupe and City of Pleasantville

DOCKET NO. ATL-L-002277-21

NATURE OF MOTION: Defendant's Motion for summary judgment.

HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION AS FOLLOWS:

NATURE OF MOTION AND PROCEDURAL HISTORY

On or about July 21, 2021, Luida Riveros ("Plaintiff") filed a Complaint in the Superior Court of New Jersey, Atlantic County, Law Division, Civil Part against Victor Guadalupe, and the City of Pleasantville alleging that on January 16, 2020, Plaintiff was involved in a motor vehicle accident with a vehicle owned by Defendant City of Pleasantville and operated by Defendant Victor Guadalupe which resulted in permanent injury. This matter went to arbitration on September 13, 2023. A request for a De Novo Trial was submitted on behalf of Plaintiff on or about September 30, 2023. On or about October 27, 2023, Defendants filed this motion for summary judgment asserting there is nothing in the record that indicates there is a permanent injury that satisfies the threshold requirements set forth in N.J.S.A. 59:9-2(d). On or about November 10, 2023, Plaintiff filed opposition to the instant motion. On or about November 27, 2023, Defendant filed a reply brief.

STATEMENT OF UNCONTESTED FACTS

1. This matter arises out of an auto accident wherein impact occurred between a vehicle operated by Plaintiff and a City of Pleasantville Police vehicle operated by Victor Guadalupe. Pl.'s Compl. ¶ 1-3.
2. Plaintiff has alleged that because of the aforesaid auto accident, she sustained severe injuries to her person. Pl.'s Compl. ¶ 5.
3. In Plaintiff's answers to interrogatories, she has asserted that she sustained the following injuries: left arm, head, back, and neck. She asserts her injuries to these four areas are permanent. Pl.'s Resp. to Def.'s Interrog. No. 3-4.
4. Plaintiff is no longer treating for these injuries. Pl.'s Resp. to Def.'s Interrog. No. 8.
5. Plaintiff's expert is Dr. John L. Gaffney, DO, who authored a report, dated May 10, 2023. See Pl.'s Resp. to Def.'s Interrog. No. 23; Def. Mot. Ex. C. (Pl.'s Expert Report).
6. Dr. Gaffney provided a summary of Plaintiff's treatment in his narrative report:
    - Plaintiff was taken via ambulance to AtlantiCare Regional Medical Center for emergency evaluation and treatment after the accident;
    - Plaintiff saw chiropractor Neuner for treatment;
    - MRI studies of the neck and back revealed a broad central disc herniation to the left at C6-C7, a mild broad herniation slightly to the left at C7-T1, a small central disc herniation at L2-3, and an irregular disk herniation at L5-S1;
    - Plaintiff saw Dr. Andrew Glass, a neurosurgeon, who discussed various treatment options with her, including surgical intervention; and
    - Plaintiff also saw a pain management specialist. Def. Mot. Ex. C; Pl.'s Expert Report at 1.

7. Dr. Gaffney's May 9, 2023 examination revealed Plaintiff had neck pain and stiffness, which was bilateral and radiating into the shoulder and trapezius area; some weakness of her right and left arm, and her neck; low back pain, which was bilateral, and which radiated into the buttocks and leg region; numbness and tingling in the buttock region; increased pain while sitting, standing, and attempting to lift or bend; pain affecting her sleep; and all of her activities were limited, including routine daily activities, household activities, and work-related activities. Def. Mot. Ex. C; Pl.'s Expert Report at 2.
8. Dr. Gaffney's physical examination revealed: spasms with tenderness over the paracervical muscle regions and in the bilateral trapezius region; a range of motion of the cervical spine approximately eighty-percent (80%) of normal; muscle strength of the right and left upper extremity of 4+/5, with deep tendon reflexes of +2; spasm with tenderness over the paralumbar muscle regions bilaterally; a positive seated root test bilaterally; a positive straight leg raising test bilaterally; a range of motion of eighty-percent (80 %) of normal; and muscle strength of the bilateral lower extremities of 4+/5. Def. Mot. Ex. C; Pl.'s Expert Report at 2-3.
9. Dr. Gaffney opined the following injuries were permanent:
    - Posttraumatic herniated disc in the cervical spine at C6-C7 and C7-T1;
    - Posttraumatic cervical radiculopathy;
    - Posttraumatic cervical fibromyositis syndrome;
    - Chronic pain in the cervical spine;
    - Posttraumatic herniated disc in the lumbar spine at L2-L3 and L5-S1;
    - Posttraumatic lumbar radiculopathy;
    - Posttraumatic lumbar fibromyositis syndrome; and

- Chronic pain in the lumbar spine. Def. Mot. Ex. C; Pl.'s Expert Report at 3.

10. Plaintiff was kept out of work until February 18, 2020, by Dr. John S. Neuner. See Def. Mot. Ex. F. (Doctor's note). Plaintiff stayed out of work a few additional weeks. Then Covid-19 Pandemic shut down New Jersey. Plaintiff did not return to work until July 4, 2020. See Def. Mot. Ex. E; Pl.'s Dep. 21:8-22:15. Since then, Plaintiff has continuously worked from the date of her return through August 2023. See Def. Mot. Ex. E; Pl.'s Dep. 21:10-23:5.
11. Plaintiff is employed as a supervisor in housekeeping at the Hard Rock Casino. She currently works 40 hours a week. She checks the rooms. She is required to walk up and down the hallways. These are the same duties she had prior to the accident. See Def. Mot. Ex. E; Pl.'s Dep. 25:8-26:9.
12. Plaintiff resides with her daughter. She does the housecleaning, the cooking, the laundry, and the grocery shopping, but usually asks someone to come with her because sometimes she buys 40-packs of water and cannot carry it. Plaintiff contends she cannot carry anything heavy. She has someone do the yardwork. At the time of the accident, she resided with her mother, but immediately after, purchased a house. See Def. Mot. Ex. E; Pl.'s Dep. 26:10-28:7.
13. Plaintiff does not have any hobbies. She spends her free time with her daughter. See Def. Mot. Ex. E; Pl.'s Dep. 28:8-12.

PARTIES' CONTENTIONS

Defendants

Defendants argue that Plaintiff's injuries fail to satisfy the threshold requirements set forth in N.J.S.A. 59:9-2(d). Pursuant to Brooks v. Odom, 150 N.J. 395 (1997), a plaintiff must establish

an objective permanent injury ***and*** a permanent loss of bodily function that is substantial. Brooks, supra, 150 N.J. at 406. (Emphasis added). Defendants argue there are no diagnostic tests confirming radiculopathy. Defendants submit Plaintiff cannot demonstrate a permanent injury. Defendants submit Plaintiff cannot establish "permanent loss of bodily function."

Plaintiff has returned to work. She works the same hours as she did pre-accident. She performs the same duties. She is able to do the housecleaning. She is able to do the cooking. She does the laundry. She does the grocery shopping. Plaintiff's only limitation is her inability to lift a 40-pack of water bottles while grocery shopping. Defendant submits this limitation is not enough to pierce the Title 59 threshold under N.J.S.A. 59:9-2(d).

Plaintiff

Plaintiff has complained for years of residual pain to her left arm, head, back and neck. Plaintiff asserts the objective findings are consistent with limitations to the body parts mentioned above. Plaintiff argues the MRI findings at C6-C7, C7-T1, L2-L3 and L5-S1 have resulted in radicular symptoms into the shoulders, weakness, stiffness and pain into the arms, radicular symptoms into the legs and buttocks, along with numbness and tingling. Plaintiff asserts she has issues sitting, standing, lifting, and bending. Def. Mot. Ex. C; Pl.'s Expert Report at 2. Plaintiff further argues routine household activities and work-related duties are affected and limited. She also has limited range of motion in her extremities.

Plaintiff asserts Dr. Gaffney performs four test modes to make these determinations in which he found spasms upon palpation. Plaintiff contends she spent months out of work and is unable to pick up a carton of water. Def. Mot. Ex. E; Pl.'s Dep. 21:10-22:15; Pl.'s Dep. 27:9-20. Plaintiff further contends she is only able to do the household chores with the assistance of family

members. Plaintiff asserts she has numerous body parts affected with severe impairments. Plaintiff argues that objective and subjective evidence has been provided to vault over the restrictions imposed by Title 59.

Defendants' Reply Brief

Plaintiff's time out of work was not all attributable to her injuries. Defendants further argue there is no testimony indicating she is incapable of doing yardwork, she simply purchased a home and has someone else doing the yardwork. There is also no testimony indicating that Plaintiff has the assistance of family members in doing household chores.

DISCUSSION

All facts considered for a motion for summary judgment are viewed in a light most favorable to the non-moving party; thus, all facts are construed as true, as long as supported by the record, and as favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). A judge does not act as the factfinder when deciding a motion for summary judgment. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73 (1954).

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The Court must "consider whether the competent evidential 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." Brill, 142 N.J. at 540. "[T]he courts must accept as true all the evidence which supports the position of the party defending against the motion and must accord [that party] the

benefit of all legitimate inferences which can be deduced therefrom[.]" Id. at 535 (citations omitted). Pursuant to R. 4:46-2(c), the moving party must "show that there is no genuine issue as to any material fact challenged."

When an individual sues a New Jersey public entity or public employee, the New Jersey Tort Claims Act ("TCA") applies. N.J.S.A. 59:1-1 et seq. N.J.S.A. 59:2-1, Immunity of public entity generally, states: "a) Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any person. b) Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person." "N.J.S.A. 59:2-1(a) 'provides that the basic statutory approach of the [TCA] shall be that immunity of all governmental bodies in New Jersey is re-established'." Rochinsky v. State, Dept. of Transp., 110 N.J. 399, 407 (1988), quoting, N.J.S.A. 59:2-1(a), Legislative Comment. N.J.S.A. 59:9-2(d), provides:

> No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of **permanent loss of a bodily function, permanent disfigurement, or dismemberment where the medical treatment expenses are in excess of $3,600.00.** 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. (Emphasis added).

The New Jersey Supreme Court developed a two-prong standard that a plaintiff must satisfy "in order to vault the pain and suffering threshold under the [TCA]." Gilhooley v. Cnty. of Union, 164 N.J. 533, 540-541 (2000). A plaintiff must prove that she suffered "(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." Id. at 541. When a trial court considers whether a plaintiff suffered a "permanent loss of a bodily function

that is substantial," it must engage in a fact-sensitive analysis. Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 331 (2003). "To recover under the [TCA] for pain and suffering, a plaintiff must prove by objective medical evidence that the injury is permanent. Temporary injuries, no matter how painfully and debilitating, are not recoverable." Brooks v. Odom, 150 N.J. 395, 402-403 (1997). Plaintiff must meet both parts of the test initially developed under Brooks.

The New Jersey Supreme Court has recognized as examples of injuries that satisfy the threshold "injuries causing blindness, disabling tremors, paralysis and loss of taste and smell." Gilhooley, 164 N.J. at 541. An injury requiring a prosthetic or other medical device to replace the natural function of a body part or organ satisfies the threshold. Id. at 542-543. On the other hand, "[a]n injury causing lingering pain, resulting in a lessened ability to perform certain tasks because of the pain, will not suffice because '[a] plaintiff may not recover under the [TCA] for mere subjective feelings of discomfort.'" Knowles, 176 N.J. at 332 (quoting Gilhooley, 164 N.J. at 540). If a plaintiff can function daily at home, school or at work, there is no loss of "bodily function" for purposes of N.J.S.A. 59: 9-2 (d). Brooks v. Odom, 150 N.J. 395, 402 (1997). Injuries that amount to a loss of a bodily function typically involve a loss of eyesight, taste, or smell. Brooks, supra, 150 NJ at 403. Also, an injury in which bodily function can only be restored with placement of permanent devices like surgically implanted pins, wires, plates lens or hearing aids and other artificial devices, Gilhooly, supra, 164 N.J. at 541.

Specifically, the court in Brooks v. Odom, 150 N.J. 395 (1997), effectively established the two-prong standard discussed above: (1) objective medical evidence of a permanent injury and (2) a permanent loss of bodily function that is ***substantial***. Brooks, supra, 150 N.J. at 406. (Emphasis added). The plaintiff in Brooks suffered from permanent neck and back injuries giving rise to chronic pain and limiting motion but did not preclude her from functioning in her employment or

as a homemaker. Because of this, the court in Brooks concluded that she had not suffered a "permanent loss of bodily function" under the TCA. Brooks, supra, 150 N.J. at 406. Similarly, in the case of Heenan v. Greene, 355 N.J. Super. 162 (App. Div. 2002), where the plaintiff was injured after being hit by a truck driven by municipal employees. The court found the plaintiff had established objective credible evidence of a permanent injury, a herniated disc, but that she had failed to establish a substantial loss of bodily function as she continued to function as she had prior to the accident, with minor limitations. Heenan, supra, 355 N.J. Super. at 167 (plaintiff continued to play sports, interval train, and work as a teacher).

Additional cases where the court found the plaintiff **did** meet the N.J.S.A. 59:9-2(d) threshold include: Gilhooley v. County of Union, 164 N.J. 533, 542 (2000) (surgery requiring the insertion of pins and a wire resulting in complete loss of quadricep power); Knowles v. Mantua tp. Soccer Ass'n., 176 N.J. 324 (2003) (plaintiff could still work as a teacher but could not engage in athletics or complete household chores); Kahrar v. Borough of Wallington, 171 N.J. 3 (2002) (surgery requiring the removal of a portion of the bone resulting in difficulty performing daily tasks); Gerber v. Springfield Bd. of Educ., 328 N.J. Super 24 (App. Div. 2000) (permanent and constant difficulty breathing as a result of a nasal injury).

Cases where the court found the plaintiff **did not** establish a loss of normal bodily function include: Ponte v. Overeem, 171 N.J. 46 (2002) (plaintiff not restricted in performing his work, household chores, yardwork, weightlifting, or bike riding); Newsham v. Cumberland Reg. High Sc., 351 N.J. Super. 186 (App. Div. 2002) (plaintiff was able to resume cheerleading, attend school, exercise, and work as a waitress and bartender with minor limitations); Rocco v. NJ Transit Rail Operations, 330 N.J. Super. 320 (App. Div. 2000) (where there were no limitations on plaintiff's

daily life other than a subjective feeling of pain); Heenan v. Greene, 355 N.J. Super. 162 (App. Div. 2002) (plaintiff continued to play sports, interval train, and work as a teacher).

In the matter *sub judice*, Plaintiff has established a prima facia case of a permanent injury through objective medical evidence. injury. Plaintiff's expert, Dr. Gaffney, opines Plaintiff suffered a broad central disc herniation to the left at C6-C7, a mild broad herniation slightly to the left at C7-T1, a small central disc herniation at L2-L3, and an irregular disc herniation at L5-S1 based on Plaintiff's MRI. Def. Mot. Ex. C; Pl.'s Expert Report. Dr. Gaffney's physical examination revealed a decrease in Plaintiff's range of motion of the cervical spine (approximately eighty-percent (80%) of normal), reduced muscle strength in both the upper and lower extremities, as well as spasms with tenderness over the paracervical and paralumbar muscle regions. Def. Mot. Ex. C; Pl.'s Expert Report at 2-3. Dr. Gaffney further opined the following injuries were permanent in nature: Posttraumatic herniated disc in the cervical spine at C6-C7 and C7-T1; posttraumatic cervical radiculopathy; posttraumatic cervical fibromyositis syndrome; chronic pain in the cervical spine; posttraumatic herniated disc in the lumbar spine at L2-L3 and L5-S1; posttraumatic lumbar radiculopathy; posttraumatic lumbar fibromyositis syndrome; and chronic pain in the lumbar spine. Def. Mot. Ex. C; Pl.'s Expert Report at 3. In the light most favorable to Plaintiff, Dr. Gaffney's opinions, based upon his positive findings in the MRIs, are enough to defeat Defendant's motion for summary judgement on the permanent injury prong of the tort claims act.

In determining whether Plaintiff has established a permanent loss of bodily function that is substantial, the Court must engage in a fact-sensitive analysis. In light most favorable to Plaintiff, the Court accepts the following facts as true: Plaintiff did not return to work until July 4, 2020. Def. Mot. Ex. E; Pl. Dep. 21:8-22:15. Thereafter, Plaintiff has worked continuously through August 2023. Def. Mot. Ex. E; Pl. Dep. 22:16-21. Prior to, and since the accident, Plaintiff has

been employed as a supervisor in housekeeping at the Hard Rock Casino in Atlantic City. Def. Mot. Ex. E; Pl. Dep. 24:14-25:10.

Plaintiff has not established a permanent loss of a bodily function that is substantial. Currently, Plaintiff works 40 hours per week and does not do any heavy work in her job. Def. Mot. Ex. E; Pl. Dep. 25:11-19. Plaintiff's job requires her to walk all the time, going up and down the hallways. Def. Mot. Ex. E; Pl. Dep. 25:24-26:2. These are the same duties she had prior to the accident. Def. Mot. Ex. E; Pl. Dep. 25:16-26:9. Plaintiff currently resides with her daughter and does all the housecleaning, cooking, and laundry. Def. Mot. Ex. E; Pl. Dep. 26:25-27:8; Pl. Dep. 28:2-3. Plaintiff can do the grocery shopping but will ask someone to come with her because she needs help lifting the 40-pack of water bottles she sometimes buys. Def. Mot. Ex. E; Pl. Dep. 27:9-28:1. Plaintiff does not have any hobbies and spends most of her free time with her daughter. Def. Mot. Ex. E; Pl. Dep. 28:8-12.

Even in the light most favorable to Plaintiff, the only tangible impact Plaintiff's injuries have on her life is that she now occasionally asks someone to go grocery shopping with her to lift the one item she purchases that is too heavy for her to lift (the 40-pack of water bottles). Although Plaintiff may have reported to her doctor that she has pain throughout the day while performing some tasks, the court in Knowles specifically stated, "[a]n injury causing lingering pain, resulting in a lessened ability to perform certain tasks because of the pain, will not suffice because '[a] plaintiff may not recover under the [TCA] for mere subjective feelings of discomfort.'" Knowles, 176 N.J. at 332 (quoting Gilhooley, 164 N.J. at 540). Plaintiff has failed to demonstrated her injuries have a substantial impact on her daily life. Consequently, Plaintiff has failed to satisfy the threshold set forth in Brooks.

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

Dated: 12/6/2023

RALPH A. PAOLONE, J.S.C