

Memorandum of Decision on Motion

**NOT FOR PUBLICATION WITHOUT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

Dennis Knitowski
v.
Frank Gunby, State of New Jersey and John Glover

Docket No. HNT-L-182-07

Defendant Gunby's Motion for Partial Summary Judgment and To Bar
Testimony

Defendants New Jersey's and Glover's Motion for Summary Judgment

Opposed

Argued & Decided January 22, 2010

The Honorable Peter A. Buchsbaum, J.S.C.

This is an automobile collision case.

Facts:

On June 5, 2005 the plaintiff was driving west on I-78 near Perryville, N.J. His car developed a flat tire and he pulled over to the left near the median to try and change it. Mortenson Cert., Exhibit A, Police Report. John Glover, a New Jersey Department of Transportation employee, pulled up behind the plaintiff. He told the plaintiff he could not change his tire where he was. The plaintiff stated Glover pointed to the other side of the road. Babar Cert., Exh. D, Knitowski Dep. 31:15-25. The plaintiff then attempted to cross the highway and move to the right hand shoulder when he saw a red truck driven by defendant Gunby (Gunby)¹. Exhibit A and Knitowski Depo. 31:15-32:22. The plaintiff apparently believed Glover instructed him to immediately cross the highway due to Glover's statement that he would order a "slow down" of traffic on the highway. The record is unclear at this point but it appears the plaintiff swerved to avoid hitting Gunby's truck and thereby crashed into a tree near the right hand shoulder. See Exh. A.

The plaintiff was subsequently transferred via helicopter to Morristown Memorial Hospital (Morristown Memorial) with apparent head injuries. Stern Cert., Exh. E, Clinton First Aid

¹The complaint improperly plead this defendant as Frank Gundy.

Report. A report from Morristown Memorial dictated by Joseph Fodero, M.D. indicated the plaintiff suffered from a right zygoma fracture "as seen on a head CT." Stern Cert., Exh. G.

A report derived from a CT scan dated June 6, 2005 indicates the plaintiff suffered "mildly displaced fractures involving the lateral wall of the right maxillary sinus and the right zygomatic arch." Stern Cert., Exh. B.A subsequent report from Steven Brownstein, MD interpreted CT scans from June 6, 2005 and found "comminuted displaced fractures" of both the right zygomatic arch and the right orbit. Stern Cert., Exh. C. Dr. Brownstein also found a non-displaced fracture of the right mandibular condyle. Based on an MRI performed in 2008, Dr. Brownstein found the plaintiff suffered from disc herniation at C4-5 and C5-C6. Id.

In July of 2007 the plaintiff presented himself to Edward Maitz, PhD, for a neuropsychological evaluation. Stern Exh. J. Dr. Maitz is a licensed psychologist in New Jersey and Pennsylvania and is a Diplomate in Clinical Neuropsychology. Id. Dr. Maitz administered an array of neuropsychological tests and found the plaintiff suffered "cognitive impairment" in the form of lessened word finding skills, difficulty in nonverbal abstract reasoning, and memory problems. Id.

Before the accident, the plaintiff worked for J.P. Morgan from 1999 to just prior to the accident. Knitowski Dep. 10:5-7. Given that his salary often took the form of bonuses the plaintiff would estimate his compensation in his last year at J.P. Morgan at \$650,000. Id. at 18:20-19:5. The plaintiff's W-2 statements for 2004 indicate he earned \$816,181.21 that year. Mortenson Cert. Exh. E.²

The plaintiff testified that a few days prior to the accident he accepted a job with Deutsch Bank. He started the job one week later than planned due to the accident and earned \$1,213,107 in 2006. Plaintiff asserts most of this compensation was fixed before his accident.

The plaintiff states he continues to experience symptoms such as difficulty calculating tips, memory problems, and sleep problems. In December of 2007, the plaintiff interviewed with a vocational economist, A.M. Gamboa, PhD (Dr. Gamboa). Dr. Gamboa opined the plaintiff will suffer \$7,195,290 in lost earnings due

² The W-2s provided by Gunby's counsel included the plaintiff's unredacted social security number despite the requirements of R. 1:38-7(b).

to the accident. Babar Cert., Exh. G, Vocational Economics Report. He reviewed the plaintiff's educational background and job history. Id. Dr. Gamboa based his finding in part on his conclusion that the plaintiff suffered from lower worklife expectancy than a similar person without a cognitive disability. Id. at page 4. He opined that the effect of the plaintiff's lost earnings would start in 2009 because at that point the plaintiff's employment agreement with Deutsch Bank would expire. In reaching his conclusion on lost earnings Dr. Gamboa reviewed the plaintiff's health records, including the neuropsychological evaluation from Dr. Maitz. Dr. Gamboa reached this conclusion through a five step process involving (1)defining pre-injury earning capacity, (2)finding a pre-injury worklife expectancy, (3) determining a post-injury earning capacity, finding a post-injury worklife expectancy, (5) then calculating this based on present value. Id. at page 10.

Procedural History:

On April 11, 2007 the plaintiff filed his amended complaint. Count I of the complaint is against defendant Gunby and alleges he negligently caused a collision with the plaintiff. The Court previously determined on November 23, 2009, that the plaintiff satisfied the limitation on lawsuit threshold as codified in N.J.S.A. 39:6A-8(a) as to this defendant.

Count II is against defendants State of New Jersey and John Glover (collectively the State). It alleges Glover negligently instructed the plaintiff to drive from the shoulder onto the roadway where he was hit.

Gunby's Arguments:

Defendant Gunby moves for partial summary judgment to dismiss the plaintiff's claims for loss of income. He first argues the claim for lost income lacks a factual basis. He next argues the plaintiff cannot support the claim through expert testimony because Dr. Gamboa's opinion should not be admitted. He argues it constitutes net opinion and also the probative value of his report is outweighed by its prejudice.

Gunby argues the plaintiff's claim lacks a factual basis. They point to the large increases in the plaintiff's income between 2005 to 2007. They also point to the plaintiff's testimony that he believes he is not in line for a promotion where he should be and noting that much of his compensation is

discretionary. Knitowski Dep. 58:7-18. They also rely on his testimony that no one at Deutsch Bank ever told him he was passed over for a promotion due to any cognitive difficulties. Id. at 59:2-8.

Gunby next seeks summary judgment based on his argument that the plaintiff's claim for lost income requires admissible expert testimony which cannot be provided here. They assert cases involving technical issues require an expert to assist the jury in understanding and cite *Schueler v. Strelinger*, 43 N.J. 330, 345 (1964). They argue an expert's testimony is necessary here, especially since the plaintiff worked as an investment banker. Gunby argues Dr. Gamboa's report glossed over or ignored the plaintiff's occupation and categorized him too broadly into the category of "average" men with master's degrees. Gunby points to a brief description of the plaintiff's educational and employment history along with the W-2s as the only information reviewed by the expert as to the plaintiff's job status. See Report at page 3. Gunby asserts these descriptions constitute the sum of the report's discussion specific to the plaintiff's individual job status.

Given Gunby's description of the report, he argues it constitutes net opinion because it lacks a sufficient basis. He argues the report improperly used the plaintiff's earnings from 2006 to 2007 of \$1,351,602 as a reasonable representation of the plaintiff's pre-injury earning capacity. Gunby notes that the plaintiff earned this money after the accident. He argues Dr. Gamboa's conclusion that this post-accident figure represents the plaintiff's pre-accident earnings capacity constitutes a bare conclusion without evidentiary support. He cites to *State v. Townsend*, 186 N.J. 473, 494-495 (2000), to argue the earnings conclusion is not admissible.

Gunby next objects to Dr. Gamboa's conclusion that the plaintiff will lose 6.1% in annual earnings based on his statement that "male workers with a professional degree with a cognitive disability earn at an average rate of 6.1% less than their counterparts without a disability." See report page 4. The portion of the report prior to this quote states Dr. Gamboa used data from the Census bureau's American Community Survey. Gunby argues the plaintiff cannot fit into these averages because he earned more after the accident than before.

Lastly, Gunby argues the Court should exclude the expert report and any testimony from Dr. Gamboa under N.J.R.E. 403. They argue a jury could grant undue weight to Dr. Gamboa's

report because of his credentials and expertise. They cite to *State v. Cavallo*, 88 N.J. 508, 518 (1982), to underscore the dangers of admitting an unreliable expert report. They also question the validity of the report's conclusion that the plaintiff will suffer from a shorter working life because of his assertion that few older employees work in investment banking. Gunby also asks the Court to take judicial notice of the recent economic downturn and find it particularly hurt the investment banking industry.

New Jersey's Arguments:

Defendant State of New Jersey seeks an order granting summary judgment for all economic and non-economic claims against it, with the exception of an ERISA lien for approximately \$1,200. The State first argues that the report from Dr. Gamboa constitutes inadmissible net opinion. The State next argues the plaintiff's injuries do not meet the permanency threshold contained in the Tort Claims Act as codified in N.J.S.A. 59:9-2 (TCA).

The State argues Dr. Gamboa's report lacks a sufficient basis, similarly to defendant Gunby. It points to the evidence indicating the plaintiff left Deutsche Bank for reasons unrelated to the accident. The state cites to *Coll v. Sherry*, 29 N.J. 166, 174 (1959), as requiring a plaintiff seeking damages for lost income to show (1) a reasonable probability that injuries will impair his future earnings and (2) adequate facts for a reasonable determination of the earnings loss.

The State argues the plaintiff cannot demonstrate a reasonable probability of earnings loss because of his increase in earnings. The State, like defendant Gunby, takes issue with the expert's use of post-accident earnings for a pre-accident base. The State also argues the lost earnings cannot be reasonably determined through the expert report. It asserts the report failed to consider the plaintiff's individual employment field and relied on generalizations. The State cites to *Dombroski v. Atlantic City*, 308 N.J. Super. 459 (App. Div. 1998), as rejecting an expert opinion on future earnings which did not include a probability of lost earnings or a finding that a plaintiff was performing his job inadequately. The State also argues the report would be unduly prejudicial under N.J.R.E. 403. The state invokes N.J.S.A. 59:9-2(e) as precluding a recovery of the plaintiff's medical expenses because collateral sources covered them.

In its second argument, the State argues the plaintiff's injuries do not meet the requirements of the TCA. The State invokes *Knowles v. Mantua Twp. Soccer Association*, 176 N.J. 324 (2003) and similar cases, as requiring plaintiffs to show (1) a permanent qualifying injury by objective medical evidence and (2) a permanent loss or limitation of a bodily function which is substantial.

The State focuses on the second portion of the TCA requirement. It argues the plaintiff failed to provide evidence of a permanent and substantial loss. It relies on *Heenan v. Greene*, 355 N.J. Super. 162, 167 (App. Div. 2002), where a plaintiff worked in a similar field after her injury and could not recover. The State notes the plaintiff secured work shortly after the accident and subsequently earned a higher income. It points to the plaintiff's deposition testimony that his physical status does not prohibit from undertaking any activities. Knitowski Dep. 70:6-13. The plaintiff noted that "there are just things I don't do as well, but not things I'm prohibited from doing since the accident." *Id.* at 70:9-12. The plaintiff also described his problems as relating to memory, reading comprehension, word finding, sleep difficulties, and headaches. *Id.* at 70:14-21. The State also points to the report from the plaintiff's neuropsychologist noting the plaintiff retains "excellent verbal skills" and "reasonably good problem-solving skills." The State concludes the facts cannot justify a finding that the plaintiff suffers from substantial and permanent limitations.

In its reply the State again argues the plaintiff failed to show a reasonable probability of lost income. It asserts that the Dr. Gamboa did not focus on the plaintiff's status as an investment banker. The State attempts to distinguish a case relied on by the plaintiff, *Lesniak v. County of Bergen*, 117 N.J. 12, 21-22 (1989), because that case involved the earnings capacity for an infant. The plaintiff attempts to distinguish the expert in *Statham v. Bush*, 253 N.J. Super. 607, 612 (App. Div. 1992), because Dr. Gamboa does not hold a degree in economics in contrast to the expert in *Statham*.

On its TCA argument, the State's reply attempts to compare this case to *Gilhooley v. County of Union*, 164 N.J. 553, 541 (2000), where the court stressed that not every objective injury is substantial. The State notes the plaintiff in *Gilhooley* lost the normal use of her knee permanently. 164 N.J. at 542. The State concludes the plaintiff did not provide evidence of a substantial loss of bodily function as required under the TCA.

Plaintiff's Arguments on Lost Income:

The plaintiff first argues against both defendants' characterization of Dr. Gamboa's report as net opinion. The plaintiff invokes *State v. Freeman*, 223 N.J. Super. 92, 116 (App. Div. 1988), as showing the absence of particular facts do not render an opinion net opinion if the expert provided sufficient reasons for an opinion. The plaintiff relies on *Statham v. Bush*, 253 N.J. Super. 607, 613-614 (App. Div. 1992), to show a vocational expert who performs an interview, reviews medical records, and statistics is not a net opinion. He relies on *Constantino v. Ventrigli*, 324 N.J. Super. 437 (App. Div. 1999), to show a vocational expert can rely on a medical expert to provide an opinion on lost earnings.

The plaintiff argues he provided evidence showing a reasonable probability of lost earnings. He relies on *Lesniak v. County of Bergen*, 117 N.J. 12, 21-22 (1989), as showing expert testimony as to lessened word retrieval and comprehension skills can show a reasonable probability of lost earnings. The plaintiff emphasizes the court in *Constantino*, supra, found a vocational expert could rely on medical doctors' conclusions in formulating his own opinion. The plaintiff also relies on *Statahm*, supra, where the court held an expert could use statistics from the Department of Labor in formulating a lost wage opinion.

The plaintiff emphasizes that Dr. Gamboa enjoys 30 years of experience as a professor and vocational expert, including experience with disabilities. He asserts that Dr. Gamboa properly relied on opinions from Dr. Maitz and Dr. Greenwald in starting with the conclusion that the plaintiff suffered from cognitive disability. He describes the statistics relied on by Dr. Gamboa, the American Community Survey (ACS) from the Census Bureau as relevant to cognitive disabilities. ACS describes cognitive disabilities as a range of limitations affecting employment. The plaintiff points to Dr. Gamboa's assertion that people with disabilities earn less and suffer from a shorter worklife expectancy. The plaintiff argues that given these factors Dr. Gamboa properly concluded the plaintiff suffered from a disability which would reduce his income.

The plaintiff defends Dr. Gamboa's reliance on his post-accident income to formulate a pre-injury earning capacity. The plaintiff notes that almost \$1,000,000 of his salary was fixed through a letter from Deutsche Bank prior to the accident. Stern

Cert., Exh. N, Knitowski Aff. ¶¶5-9. The plaintiff asserts that since Dr. Gamboa concluded 80-90% of his earnings from Deutsche Bank were discretionary, it was reasonable to conclude the accident hurt his earnings capacity there. The plaintiff relies on Dr. Gamboa's review of articles showing bonuses paid in the banking industry.

The plaintiff next defends his expert's conclusion that he would suffer from a 6.1% yearly loss in earnings capacity. The plaintiff relies on *Dumbroski*, *supra*, as showing unemployment statistics can provide a basis for lost income. He notes Dr. Gamboa's assertion that statistics from ACS indicate a male employee with a professional degree who suffers from a disability earns this lessened amount.

The plaintiff also defends Dr. Gamboa's assertion that he will suffer from a reduced worklife expectancy. He points to Dr. Gamboa's report as showing the methodology of examining ACS statistics and using professional judgment to determine he work fewer years because of the accident. He asserts the statistics used include a representative sample for the plaintiff's disability. The plaintiff argues the defendant took his statement that investment bankers work until 40 out of context because he meant not many managing directors stay past 40. See Knitowski Dep. 58:19-60:17. The plaintiff next argues that Dr. Gamboa's methodology is based on generally accepted standards and is therefore reasonable and reliable. He cites to *Kemp v. State*, 174 N.J. 412, 430 (2000), as requiring a court to focus on an expert's methodology. He relies on *State v. Harvey*, 151 N.J. 117, 170 (1997), as showing the three ways to assess reliability are (1) general acceptance among the professional community, (2) authoritative writing which accept the premises underlying proffered testimony, and (3) judicial opinions indicating the methodology achieved general acceptance.

The plaintiff points to Dr. Gamboa's reliance on published data from the Census Bureau in formulating his opinion. He argues that these statistics provided the only way for Dr. Gamboa to estimate his lost earnings. He points to Dr. Gamboa's assertion that the Bureau of Labor Statistics determined that questions from ACS provided the best measure of employment for people with disabilities. He also argues Dr. Gamboa's methodology is subject to peer review and enjoys general acceptance in the field of vocational economics. He points to three articles Dr. Gamboa wrote on the subject of brain earnings and employment which used ACS statistics. The plaintiff suggests the survey enjoy a large measure of reliability due to their large sample size of over 100,000 individuals. The plaintiff

argues the surveys are valid because both types of surveys, ACS and the Current Population Survey (CPS), included similar findings of lower income for disabled workers. The plaintiff also relies on other jurisdictions which admitted vocational expert testimony through this methodology. He attaches several opinions from other states.

The plaintiff also argues Dr. Gamboa's testimony should not be barred under N.J.R.E. 403. He relies on his arguments as to the reliability of the opinion. Lastly the plaintiff takes issue with defendant Gunby's request for judicial notice. He notes the defendant did not provide a basis for the fact noticed in contradiction to N.J.R.E. 201. He also points to Dr. Gamboa's findings that the investment banking industry paid more in bonuses in 2008 than 2007.

Plaintiff's Arguments on the TCA:

The plaintiff relies on diagnosis from his neuropsychologist and Brian Greenwald, MD to show he suffers from a permanent injury and a permanent and substantial loss of bodily function.

The plaintiff first argues he provided evidence showing he suffered an objective permanent injury. He argues his CT scans and MRIs show he suffered facial fractures and the reports from his doctors show he suffered brain injuries. The plaintiff relies on the results of his neuropsychological tests as performed by Dr. Maitz. He points to Dr. Maitz's assertion that unlike CT scans and other similar procedures which measure the brain's structure, neuropsychological tests measure the brain's function. He emphasizes that Dr. Maitz performed the tests under the governing neuropsychology guidelines and points to an article describing a neuropsychological evaluation as an "objective assessment ... of brain functions." He also quotes a statement from Medicare describing neuropsychological tests as objective.

He points to Dr. Maitz's observations that the plaintiff suffered from word retrieval difficulty, comprehension problems, and anxiety while performing a test. He notes Dr. Maitz diagnosed him as having problems with memory, visual scanning, and nonverbal abstract reasoning. He emphasizes Dr. Maitz's finding that the plaintiff used his above average intelligence to cope with injuries that he suffers from permanent brain injuries. The plaintiff next argues his injuries result in permanent and substantial limitations. The plaintiff cites

Knowles, supra, 176 N.J. at 30 as requiring a fact sensitive analysis as to whether a plaintiff meets the required threshold. He argues that he provided evidence showing permanent cognitive disability which will reduce his earnings capacity. He again relies on Dr. Matiz's findings that he suffers from problems with word retrieval, comprehending test instructions, and maintaining thoughts. He also relies on Dr. Gamboa's findings of lost income. The plaintiff attempts to distinguish *Heenan, supra*, 355 N.J. Super. 162, as relied on by the State, because it did not involve a plaintiff with a loss of earnings and promotional opportunities due to cognitive impairments. He emphasizes that in *Heenan*, the plaintiff did not suffer any lost opportunities for advancement. The plaintiff concludes that cognitive problems hurt his ability to earn a living and this requires finding that he suffers from a substantial and permanent loss of bodily function.

Summary Judgment Standard:

"A motion for summary judgment is not unlike the unveiling of a statue. The motion substantially supported requires the opposition to remove the shielding cloak and demonstrate the existence of a controversial issue concerning a material fact." *Templeton v. Scudder*, 16 N.J. Super. 576, 585 (App. Div. 1951).

A party is entitled to summary judgment 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). "Summary judgment procedure pierces the allegations of the pleadings to show that the facts are otherwise than as alleged." *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 75 (1954) (citation omitted).

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to 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 fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 530 (1995). Accordingly, "when the evidence is 'so one-sided that one-party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." *Id.* (citation omitted).

Furthermore, a trial court should not grant summary judgment when the matter is not ripe for such consideration, such as when discovery has not yet been completed. *Driscoll Constr. Co. v. DOT*, 371 N.J. Super. 304, 317 (App. Div. 2004). The court should afford "every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case." *Id.* (quoting *Velantzas v. Colgate-Palmolive Co., Inc.*, 109 N.J. 189, 193 (1988)).

However, if a motion for summary judgment is made during discovery, and the incompleteness of discovery is raised as a defense that party must establish that there is a likelihood that further discovery would supply the necessary information. *J. Josephson, Inc. v. Crum & Forster Insurance Company*, 293 N.J. Super. 170, 204 (App. Div. 1996) (citing *Auster v. Kinoian*, 153 N.J. Super. 52 (App. Div. 1977)).

Analysis:

Loss of Income Claims:

N.J.R.E. 702 allows for the admission of expert testimony when it would help the trier of fact understand evidence or a fact at issue. N.J.R.E. 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

"An expert is required to give the 'why and wherefore' of his or her opinion, not just a mere conclusion or speculation." *Riley v. Keenan*, 406 N.J. Super. 281, 295 (App. Div. 2009) (quoting *Koruba v. Am. Honda Motor Co.*, 396 N.J. Super. 517, 525-526 (App. Div. 2007)). Specifically the expert should base testimony on personal observations, evidence admitted at trial, or data relied of the same type normally relied on by experts in the field. *Polzo v. County of Essex*, 196 N.J. 569, 583 (2008) (citing *State v. Townsend*, 186 N.J. 473, 494 (2006)). If the court finds experts in the field rely on this information, it is presumed as reasonable. *Adelman v. Lupo*, 291 N.J. Super. 207,

217 (App. Div. 1996) (citing *Ryan v. KDI Sylvan Pools*, 121 N.J. 276, 289 (1990)).

With specific reference to lost earnings report, "before a jury can consider loss of earning capacity, there must be evidence demonstrating a 'reasonable probability that [plaintiff's] injuries will impair future earning capacity.'" *Lesniak v. County of Bergen*, 117 N.J. 12, 21 (1989) (quoting *Coll v. Sherry*, 29 N.J. 166, 176 (1959)). The plaintiff must also provide evidence from which "the quantum of diminishment can reasonably be determined." *Lesniak*, 117 N.J. at 25 (quoting *Coll*, 29 N.J. at 176). However, with this kind of report, as with others, the Court's discretion to reject expert testimony should be used with great caution in light of the strong policy of Evid. R. 402, to admit all relevant evidence. Comment 2, Evid. R. 702 (Biunno, 2009). Thus, a court should ordinarily leave the testimony to be scrutinized by cross-examination and evaluated by the good sense of a jury. *Rubanick v. Witco Chemical Corp.*, 242 N.J. Super. 36, 48 (App. Div. 1990), mod. on other grounds, 125 N.J. 421 (1991).

The issues here are whether Dr. Gamboa's opinion is inadmissible because it constitutes net opinion and whether he properly relied on surveys and medical evidence in reaching his conclusion.

First the defendants argue Dr. Gamboa did not provide an adequate basis for his opinion because he used post-accident incomes and did not adequately consider the plaintiff's individual characteristics. They also argue the plaintiff's increased income indicates no factual basis for his claim for lost income. Dr. Gamboa used the plaintiff's post-accident earnings to set a base average income. Although these earnings occurred after the accident, the plaintiff stated Deutsche Bank set the majority of his income before the accident. *Knitowski Aff.* ¶¶5-9. This provides a basis for Dr. Gamboa's use of these figures since they were established before the accident. Therefore Dr. Gamboa could rely on these figures and the plaintiff's claim for lost income does not lack a factual basis.

The defendants next focus their argument on Dr. Gamboa's assertion that the plaintiff will suffer a 6.1% yearly loss of income based on statistics he reviewed. Dr. Gamboa used ACS and CPS surveys which appear on the Census Bureau's website. Report page 2. He included the criteria used by the Census Bureau to determine whether a disability hurts a person's work potential. Report, page 3. The ACS survey included cognitive disability as

"difficulty learning, remembering, or concentrating because of a physical, mental, or emotional condition lasting 6 months or more." Id. at page 4. Dr. Gamboa also described the plaintiff's symptoms as reported to his doctors and their diagnosis.

The plaintiff included a research report from Cornell University which relied on the CPS surveys to estimate the prevalence of disabled individuals in the workplace. Stern Cert. Exh. R. The plaintiff also pointed to articles published by Gamboa which rely on ACS data to discuss the effects of brain injury on employment. Stern Cert. Gamboa Aff. Exh. R, page 7. Given these publications and the analysis of the studies contained in the report, Dr. Gamboa did provide a basis for his conclusion that the plaintiff would suffer a 6.1% loss in yearly income. The report and his affidavit stated the whys and wherefores of the 6.1% loss in year income conclusion. See *Riley*, 406 N.J. Super. at 295. The defendants question this conclusion given its basis on census surveys which may not be targeted to ferret out less severe disabilities like Mr. Knitowski's. However, Dr. Gamboa's qualifications are unchallenged. He has asserted especially in his reply certification that use of such surveys is scientifically acceptable, sufficiently tested, as accurate, and accepted in the Field Affidavit at 7 to 10. See also the reference to a Seventh Circuit Court of Appeals decision at 5. While the Court may have some doubt as to the fit with the survey questions, which may relate to more severe disabilities than the plaintiff's, this observation goes to the weight of the evidence which is for the jury to decide. *Rubanick*, supra, at 48.

The defendants also similarly challenge Dr. Gamboa's assertion that the plaintiff will be able to work fewer years. They rely on the plaintiff's assertion at his deposition that few bankers work past age 40. The plaintiff stated this assertion was taken out of context and he intended to convey that although many people over 40 work in the investment banking industry, few reach the status of managing director after age 40. Knitowski Aff. ¶3. The Court must consider this evidence in a light most favorable to the plaintiff. *Brill*, 142 N.J. at 530. Therefore the Court will consider the plaintiff's few employees over 40 comments as taken out of context. Furthermore as indicated in the report, Dr. Gamboa considers worklife expectancy as dependant on gender, career pattern, education, age, and disability. Report page 7. His summary states he reached his conclusions according the plaintiff's "unique traits," so this focus and the factors typically used such as gender and education indicates a basis for the worklife

expectancy conclusion. Therefore Dr. Gamboa's worklife expectancy, conclusion is not a net opinion. Because Dr. Gamboa's report and affidavit includes the basis for his opinion, the Court will not exclude them as net opinion.

The plaintiff's evidence also demonstrates a reasonable probability for lost income as required by *Lesniak v. County of Bergen*, 117 N.J. 12, 21 (1989). The plaintiff there provided medical evidence that a falling tree limb caused him to suffer difficulties with motor control, word retention, and psychological problems with adjustment. *Id.* at 21. The evidence consisted of testimony from three of the plaintiff's doctors. *Id.* The Court concluded that the "rudimentary nature" of the disabilities led to the conclusion that the plaintiff suffered from lost earnings. *Id.* at 22.

In contrast here, the plaintiff does not rely on just medical testimony but provided evidence from an expert with vocational and business expertise. See Sterns Cert., Exh. O, Dr. Gamboa's resume. Dr. Gamboa used surveys and the plaintiff's diagnosis to conclude the plaintiff will suffer lost earnings in the future. This provided a reasonable basis for plaintiff's claim of lost income.

Finally, both defendants seek to exclude Dr. Gamboa's report on the basis of N.J.R.E. 403. Given the evidence for the basis of his opinion and lack of apparent unfair prejudice the Court finds the probative value is not substantially outweighed by dangers of prejudice, confusion, or waste of time. It would be extraordinary for a court to exclude an otherwise admissible expert report on this basis, and this Court finds no basis for doing so.

Tort Claims Act:

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

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.

In order to recover for pain and suffering the Plaintiff must provide evidence of both (1) an objective permanent injury and (2) a permanent loss of a substantial bodily function. *Gihooley v. County of Union*, 164 N.J. 533, 541 (2000), see also *Knowles v. Mantua Twp. Soccer Association*, 176 N.J. 324, 330 (2003). Whether a plaintiff meets the second requirement depends on a fact sensitive analysis. *Knowles* 176 N.J. at 331. Even though a plaintiff can "function reasonably well at work and at home" a permanent and substantial injury can exist based on the circumstances and duration of the injury. *Ponte v. Overeem*, 171 N.J. 46, 53 (2002). Plaintiffs cannot recover based on temporary injuries or any "subjective feelings of discomfort." *Brooks v. Odom*, 150 N.J. 395, 403 (1997). (citations omitted). "[N]either an absence of pain nor a plaintiff's ability to resume some of his or her normal activities is dispositive of whether he or she is entitled to pain and suffering damages under the TCA." *Knowles*, supra, 176 N.J. at 332 (citing *Kahrzas v. Borough of Wallington*, 171 N.J. 3, 15-16 (2002)).

The State focused its argument on whether the plaintiff suffered a substantial and permanent loss of a bodily function. It argues the plaintiff continues to function and does not suffer from any substantial loss of bodily function. The plaintiff relies on his diagnosis from Dr. Maitz and continuing difficulties with memory and other cognitive functions. The plaintiff stated that although he no longer works at Deutsche Bank due to reasons unrelated to the accident, he believes he will start a new job in early 2010 at a salary commensurate with his previous pay. *Knitowski Aff.* ¶4.

In *Knowles*, supra, the Court determined that the ability to work, resume some normal activities, and the absence of pain do not constitute dispositive factors in evaluating a TCA claim. 176 N.J. at 332-333. The Court in *Knowles* focused on whether the plaintiff presented objective evidence that he suffered from a "substantial inability to perform many of the functions he previously enjoyed." *Id.* at 333. That plaintiff mentioned an incident of not calculating a tip suggests that his disability is not significant.

Here the plaintiff's report from Dr. Maitz indicated he was "not functioning at his previous level of cognitive capability," and this was a permanent change due to the accident. page 8. However, the report also noted the plaintiff developed "effective coping strategies." Page 8. Furthermore, the report does not demonstrate a substantial limitation on the plaintiff's

activities. Although the plaintiff may suffer from cognitive problems, he still possess overall concentration skills in the "average range." Report, page 7. In addition it does not appear that his memory problems substantially impair his ability to perform his previous functions in contrast to the plaintiff in *Knowles*. See 176 N.J. at 333.

The plaintiff himself described his injures when he went to see Dr. Maitz as "trouble with computational matters and something very simple like converting Celsius to Fahrenheit ... I used to be able to do something like that quick in my head where now I think a lot more through it ... I definitely still have trouble remembering things." Knitowski Dep. 54:21-55:25. These symptoms and Dr. Maitz's diagnosis do not indicate a substantial permanent loss of bodily function even if the findings are considered objective. A "moderate traumatic brain injury" (plaintiff's words) followed by partial recovery, and compensating strategies that enable plaintiff to work simply does not vault the substantial permanent loss of body function threshold. The Court has reviewed, and re-reviewed the evidence, especially as summarized in plaintiff's response to Statement of Fact ¶24. It cannot find that the lists of items set forth therein anything singly or in combination, that constitute a substantial loss of functioning. While he may have some impairment, neither plaintiff nor his doctor ever said he can no longer do what he formerly did. His job loss had nothing to do with his condition and he has a new job. Even Dr. Gamboa's testimony of a 6.1% decrease in earning capacity suggests impairment, but not the substantial impact on functioning demanded by the Tort Claims Act. Therefore the Court will grant the State's motion for summary judgment on the plaintiff's claims for non-economic damages only in accordance with N.J.S.A. 59:9-2(d).

Conclusion:

Based upon the foregoing, Defendant Gunby's motion for partial summary judgment is **DENIED**. The State of New Jersey's motion for summary judgment is **DENIED in part**. The motion is **GRANTED only** for the plaintiff's claims for non-economic damages.