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ON THE RECORD

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NOTABLE CASES AND VOICES FROM THE BENCH

SUPERIOR COURT AFFIRMS STRICT INTERPRETATION OF CERTIFICATE OF MERIT REQUIREMENTS AGAINST PRO SE PLAINTIFF

The Pennsylvania Superior Court in Warner v. University of Pennsylvania Health System, affirmed the Entry of Non Pros against a pro se Plaintiff in a Philadelphia County medical malpractice action. Plaintiff initially filed the Complaint in the Federal District Court for the Eastern District of Pennsylvania against the University of Pennsylvania Health System. The Complaint alleged that Plaintiff was caused emotional distress when he was involuntarily committed to a mental health facility. The matter was transferred to the Court of Common Pleas of Philadelphia County. The Complaint was filed on April 19, 2004, reissued on May 5, 2004, and served on the Defendant on May 10, 2004.

Pa. R.C.P. 1042.3 states that in any medical malpractice action, a Certificate of Merit must be filed within sixty (60) days of filing a Complaint. On June 15, 2004, Plaintiff requested an extension of time to file a Certificate of Merit. The request was denied because Plaintiff had failed to provide a reason for his inability to file the Certificate of Merit in a timely manner. On July 15, 2004, Plaintiff delivered a Certificate of Merit to the Prothonotary's Office; however, Plaintiff affixed a Motion Court Cover Sheet to the Certificate and identified the type of motion as a "Certificate of

Merit." The Clerk in the Prothonotary's Office time-stamped the Motion Court Cover Sheet with the July 15, 2004 date. On July 22, 2004, the Prothonotary entered a Judgment of Non Pros, based on Plaintiff's failure to file a Certificate of Merit.

Plaintiff appealed, arguing that the Certificate of Merit was filed prior to the Court entering the Judgment of Non Pros. While the Superior Court recognized that under Pa. R.C.P. 1042.6, a Judgment of Non Pros may not be entered if a Certificate of Merit has been filed prior to the filing of the Praecipe, the Court did not find that the Certificate of Merit was "properly filed" under the Rules of Civil Procedure.

The Superior Court looked at Pa. R.C.P. 205.1, which lays out how to determine when a document is filed. Under Rule 205.1, "any paper not requiring the signature or action by a Judge prior to filing may be delivered or mailed to the Prothonotary, Sheriff or other appropriate officer..." The Court acknowledged that the term "filing" is not the equivalent of either the Prothonotary's time-stamping of a document, or the recording of receipt on the docket; instead, documents are deemed 'filed' when received by the appropriate officer.

In the instant case, the Superior Court determined that the Certificate of Merit could not have been considered 'filed' on July 15, 2004 because it was presented as a Motion to the Prothonotary and was handed to the Motion Clerk; thus, the Certificate of Merit was not received by "the appropriate officer." Plaintiff, by affixing a Motion Court Cover Sheet,

transformed a Certificate of Merit into a Motion. As the face page of the Motion Court Cover Sheet clearly stated that the document would be held pending a response, the Court found that this placed Plaintiff on notice that the Certificate of Merit was not being officially filed until after the response date.

The Court rejected Plaintiff's argument that it was the fault of the Prothonotary's Office that the Certificate was sent to the Motion Court. The Court found that Plaintiff, himself, had placed the Motion Court Cover Sheet on the Certificate of Merit, and therefore, must take responsibility for his own actions. The fact that the Plaintiff was pro se, was also addressed by the Superior Court, citing the case of Hoover v. Davila, 862 A.2d 591 (Pa. Super). The Court noted that a pro se litigant must comply with the procedural rules and "to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing."

Based on the Court's holding that Plaintiff had not timely filed the Certificate of Merit, the Prothonotary was correct in entering a Judgment of Non Pros. There are two interesting aspects of this case. The first is that the Court, through inference, supports the proposition that once the sixty (60) days has expired for the filing of a Certificate of Merit, it becomes a race to the court house with the filing of the Praeceptum to Enter Judgment of Non Pros and the filing of the Certificate of Merit. Plaintiffs may still avoid the entry of Non Pros, even after the expiration of the sixty (60) days, as long as their Certificate of Merit is filed prior to the Praeceptum. The second interesting aspect is the fact that the Court seemed to go to great lengths to find that the Certificate of Merit was not timely filed. It is possible that the Court's language would infer a message to all future pro se litigants that ignorance of procedural rules will not be tolerated or accepted.

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PENNSYLVANIA SUPREME COURT HOLDS PEDESTRIANS NOT BOUND BY LIMITED TORT SELECTION

In a case of first impression, The Pennsylvania Supreme Court has ruled that pedestrians are not bound by limited tort election in an automobile policy. L.S. v. Eschbach, 2005 WL 1225954 (Pa. 2005).

A minor child's mother brought a negligence action against a school bus company and driver for injuries her child sustained when she was struck by a vehicle while attempting to cross the street after exiting the school bus. The bus company filed a Motion for Summary Judgment and argued that absent an allegation that the minor suffered a "serious injury," the minor was bound by her mother's limited tort election in her automobile insurance policy.

The trial court granted the bus company's Motion for Summary Judgment. The court determined that the minor was bound by her mother's limited tort election and that the injuries sustained did not rise to the level of "serious injury," and, therefore, dismissed the action.

The minor filed an appeal to the Pennsylvania Superior Court, arguing that as a pedestrian who was struck by a vehicle, she should not be bound by her mother's limited tort selection. The Superior Court affirmed the trial court's order and concluded that the limited tort option applied to pedestrians. The Superior Court reasoned that Section 1705 of the MVFRL provides that "an insured who has elected limited tort coverage and has not suffered a 'serious injury' can not recover noneconomic damages when involved in a motor vehicle accident, whether as a driver, a passenger in someone else's car, or a pedestrian." L.S. ex rel A.S. v. Eschbach, 822 A.2d 796, 800. The minor appealed to the Pennsylvania Supreme Court.

The relevant statute, Section 1705(d) of the MVFRL, provides that each person who elects limited tort and sustains a personal injury in a motor vehicle accident is eligible to recover economic damages, but may not recover noneconomic damages unless the injury is a "serious injury." Section 1705 does not specifically address a pedestrian's right to recover noneconomic damages. The minor argued that failure to specifically address pedestrians causes Section 1705 to be interpreted as inapplicable to pedestrians.

The Supreme Court agreed with the minor's position and concluded that Section 1705 does not apply to pedestrians and specifically does not apply to the minor injured in this matter. The Court found that Section 1705 fails to inform consumers that their election of limited tort could limit their recovery if injured as a pedestrian. Further, the Court reasoned that the intent of Section 1705 was to lower insurance premiums, while maintaining a coverage requirement, and that applying Section 1705 to pedestrians would only serve to punish pedestrians without assisting to deter individuals from failing to possess motor vehicle insurance.

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FAMILY MEMBER DENIED WORKERS' COMPENSATION BENEFITS

In *Olessi v. Colavita*, (Claim Petition No. 2001-5995, Decision by Colsey, J.WC), the petitioner, Angeline Olessi, was the paternal aunt of Respondent Anthony Colavita. Olessi filed a workers' compensation claim against Colavita after she tripped and fell at Colavita's home and injured her neck. The claim alleged that she was Colavita's employee because she provided domestic services on a regular basis in exchange for financial consideration.

Olessi testified that she would go to Colavita's home to help him with household chores "once in a while." According to Colavita, Olessi used to do "whatever she wanted" in his home, including household chores, but he never told her what to do. He did give her weekly checks in the same amount over an eight month period. There was also testimony from other family members who indicated that they would also give money to Olessi, due to the fact that she was almost 90 years old.

The judge of compensation noted that the definition of 'employment' under N.J.S.A. 34:15-36 excludes "casual employees." Because Olessi's alleged employment was not connected to Colavita's business, the judge found that petitioner needed to establish she performed services in exchange for financial consideration on a "regular, periodic, or recurring basis." Therefore, the judge applied the 'control test' and the 'relative nature' of the work test to determine whether petitioner qualified as an employee.

The judge found that Olessi did not meet the requirements of the 'control test' because evidence regarding her activities indicated that petitioner followed her own dictates while performing work in the home. The judge also found that petitioner did not meet her burden regarding the 'nature of the work

test' because petitioner's activities were not in furtherance of business for Colavita, a teacher. Finally, it was determined that Olessi did not establish "substantial economic dependence" on Colavita.

Accordingly, the claim was dismissed because petitioner failed to establish an employer-employee relationship by a preponderance of the evidence.

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NJ COURT AWARDS PIP BENEFITS TO DRUNK DRIVER

A New Jersey Appellate Court ruled that a drunk driver can still collect medical expenses from her insurance carrier. *Walcott v. Allstate N.J. Ins. Co.*, 870 A.2d 691. The provision in Allstate's policy excluded drunk drivers from collecting benefits. The Court ruled the policy's provision was unenforceable and against legislative intent.

The insured was hospitalized for three days and incurred medical bills of nearly \$34,000. In connection with the one car motor vehicle accident, she pleaded guilty to driving while intoxicated (DWI), in violation of N.J.S.A. 39:4-50. Allstate denied PIP benefits to the insured based on an exclusion in their insurance policy. The exclusion stated that any person whose conduct contributed to their own injuries by drunk driving was not entitled to receive PIP benefits. Allstate also argued that N.J.S.A. 39:6A-4.5 indicates that any person convicted of DWI "shall have no cause of action for recovery of economic and non-economic loss sustained as a result of the accident." Further, N.J.S.A. 39:6A-7 denies PIP benefits to those persons whose intentional or criminal conduct contributed to their own personal injuries, and to those owners and registrants of New Jersey vehicles who failed to maintain PIP coverage.

The Court noted that all vehicle owners in New Jersey must have insurance, and that every policy must also provide for PIP benefits that guarantee, without regard to fault, medical expense benefits to the named insured and his family household members in the event that they suffer bodily injury in an automobile accident. This system of first-party self-insurance through PIP benefits is designed to provide benefits promptly and efficiently to all injury victims. PIP coverage is also given the broadest application and any exception to its coverage must be narrowly construed consistent with that purpose and the plain meaning of the language.

In awarding PIP benefits to the insured, the Court did not "enlarge" the specific language of section 39:6A-4.5. The language of §39:6A-4.5 bars a drunk driver, among others, from having a cause of action for economic or non-economic losses. Non-economic loss is defined as uncompensated loss of income or property, or other uncompensated expenses including, but not limited to, medical expenses. The Court held the insured's losses in this matter were compensable under her own insurance policy for PIP benefits, as N.J.S.A. 39:6A-4 required. Accordingly, the exclusion was unenforceable and the policy was deemed amended to provide the insured with standard PIP benefits.

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RECENT VERDICTS

DEFENSE VERDICT FOR LOCAL HOSPITAL

George Dale, Esquire, of the Law Offices of Kent & McBride, P.C., recently obtained a defense verdict in a medical malpractice case filed against a local hospital.

Plaintiff was admitted to Abington Memorial Hospital with an intracerebral hematoma, after he fell from a ladder and struck his head. On the day of admission, he underwent brain surgery and remained in a coma for several days. Plaintiff remained in the hospital for twenty-six days and was then transferred to Moss Rehab. On the first day of admission to Moss Rehab, Plaintiff was diagnosed with having a fracture of the elbow.

Plaintiff, who was employed as a stone mason, claimed that as a result of Abington's failure to diagnose and treat the elbow fracture, he sustained a permanent injury which prevents him from performing his job duties. Plaintiff's economist testified that Plaintiff's loss of earning capacity was in excess of \$900,000.

Plaintiff's expert testified that while at Abington, the trauma surgeon and members of the trauma surgical team (both of which Plaintiff alleges to have been ostensible agents of the hospital) failed to respond to reports of edema, as well as complaints of grimacing with movement of Plaintiff's right arm. Plaintiff's experts testified that considering the nature of the fall and Plaintiff's reported complaints, Defendant should have ordered x-rays of the right elbow, consulted with an orthopedic surgeon, and considered having the elbow casted.

Defense experts stated that fractures of this kind are often overlooked when treating patients with life threatening injuries. The defense experts also testi-

fied that the edema was the result of a superficial thrombophlebitis, and that considering the nature of the fracture, casting was contra-indicated

After deliberations, the jury found no negligence on the part of the trauma surgeon, or any members of the trauma surgical team. Thus, a defense verdict was entered in favor of the hospital.

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ANOTHER WIN FOR MED MAL DEFENSE BAR

Jeffrey McDonnell, Esquire, of the Law Offices of Kent & McBride, P.C., recently obtained a defense verdict on behalf of an internist in Philadelphia County.

A 48 year old lawyer presented to the internist's office in order to obtain refills for his high blood-pressure medicine. After examination, the surgeon diagnosed him with hypertension and "questionable" chronic renal failure, since the patient was unclear about his medical history though he had seen a kidney specialist less than four months earlier. The internist prescribed high blood-pressure medication and asked the patient to have blood tests done, to sign releases for prior medical records and to make a follow up appointment. Other than obtaining his medicine, the patient failed to follow through with any of the suggested treatment.

The next time the patient sought medical treatment was eight months later, when he went to another internist for another refill of his high blood-pressure medicine. At that time, however, he was also allegedly vomiting, and was experiencing weight loss, heartburn, difficulty ambulating, and was exhibiting signs of stress and anxiety. The second internist's impression was GERD, hypertension, dermatitis and anxiety. The internist then prescribed additional high blood pressure medicine, and also suggested Plaintiff have a blood test. Consults for a gastro-enterologist and neurologist

were also ordered. Again, the patient declined to have a blood test done. The second internist was also a named Defendant in this litigation. Less than two months later, the patient went into cardiac arrest and died. An autopsy indicated that the cause of death was hypertensive cardiovascular disease, and noted that chronic renal failure was a significant condition.

Plaintiff alleged that the first internist failed to obtain prior medical records, failed to ensure that the patient came back for another appointment (and prescribed too much medication so as to discourage the patient from following up), and failed to ensure that the patient obtained a blood test. As to the second internist, Plaintiff alleged that he failed to diagnose the patient with uremia, which is indicative of end-stage renal disease. Plaintiff claimed that had the standard of care not been breached, the patient would have had an opportunity for hemodialysis and/or kidney transplant, thus preventing his premature death. Plaintiff claimed Wrongful Death and Survival damages, including pain, suffering and substantial loss of earnings.

On behalf of his client, Mr. McDonnell argued that it was the patient's responsibility to follow up with medical records, an appointment and a blood test. Further, he argued that the amount of medication prescribed was appropriate. The attorney for Co-Defendant argued that the symptoms the patient presented with were non-specific and that the diagnosis of uremia would have been made had the patient agreed to a blood test. After several hours of deliberations over a period of two days, the jury returned a verdict in favor of both Defendants, finding that the patient was more than 50% comparatively negligent, thus barring any recovery by Plaintiff.

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LEGISLATIVE UPDATE

OSWIN'S SERIOUS LIFE IMPACT STANDARD HELD INAPPLICABLE TO AICRA'S LIMITATION ON LAWSUIT THRESHOLD

The Supreme Court of New Jersey held unanimously in the long awaited decisions of DiProspero v. Penn (A-66-03) and Serrano v. Serrano, (A-99-03) that the plain language of N.J.S.A. 39:6A-8(a) does not contain the serious life impact standard created in Oswin v. Shaw, 129 N.J. 461 (1991).

The Court methodically explored the history of the verbal threshold in arriving at its conclusion that the second prong of the *Oswin* case is inapplicable to AICRA's limitation on lawsuit threshold.

In *Oswin*, the Court held that to vault the verbal threshold, Plaintiff had to prove that the injury fit into one of the nine statutorily defined categories and that the injury had a serious impact on her life.

In response to the soaring costs of PIP benefits and insurance premiums, the legislature enacted AICRA which reconfigured the verbal threshold's nine categories into the six categories making up the limitation on lawsuit threshold. The limitation on lawsuit threshold, codified at N.J.S.A. 39:6A-8(a), bars recovery for

limitation on lawsuit threshold, codified at N.J.S.A. 39:6A-8(a), bars recovery for non-economic damages unless Plaintiff suffers from (1) death; (2) dismemberment; (3) significant disfigurement or scarring; (4) displaced fractures; (5) loss of a fetus; or (6) a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

In holding that *Oswin's* serious life impact standard was not incorporated into AICRA, the *DiProspero* Court refused to re-write what it termed a plainly written enactment of the Legislature. The Court reasoned that the explicit incorporation of the objective medical evidence standard in N.J.S.A. 39:6A-8(a), and the absence of the serious life impact standard strongly implied that the Legislature did not intend serious life impact to apply to AICRA. The Court presumed that the Legislature was well aware of the *Oswin* decision, and would have codified the serious impact prong just as it codified the objective medical evidence prong when it required that the requisite treating physician's certification "be based on and refer to objective clinical evidence."

The Court addressed and rejected all of Defendant's arguments, instead favoring a straight interpretation of the statute. The Court concluded that the Legislature created the threshold categories for the purpose of denominating six classes of injuries which are "serious" just by virtue of being included in the statute.

The *DiProspero* and *Serrano* decisions reversed and remanded the decisions of the Appellate Division, and in effect turned the oft-cited decisions of James v. Torres, 354 N.J. Super. 586 (App. Div. 2002) and Rios v. Szivos, 354 N.J. Super. 578 (App. Div. 2002) into bad law. The *James* and *Rios* Courts both held that the serious life impact prong survived AICRA's legislative amendments.

The Court's holdings in *DiProspero* and *Serrano* have essentially opened the proverbial flood gates of litigation, and changed the fate of all stayed appeals and active litigation in the State of New Jersey. Unless and until the Legislature amends N.J.S.A 39:6A-8 (a) to include the serious impact prong, these flood gates will remain open.

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OFF THE RECORD

K & M WELCOMES SUMMER LAW CLERKS

Kent & McBride

would like to welcome and introduce the law clerks who have joined our Philadelphia office this summer:

Michael Abbott and Steven Zelinger.

Michael Abbott

will be starting his final year at Widener University Law School this fall. He joined K&M in 2000 as a file clerk. This summer marks Mike's third year as a law clerk at K&M. Mike is currently on the

Dean's List and is ranked in the top 10% of his class for academic achievement. He is actively involved in the Moe Levine Trial Advocacy Honor Society and was elected to sit as a Board Member in the Brehon Law Society for this upcoming academic year.

Steven Zelinger

is starting his first summer as a law clerk at Kent & McBride's Philadelphia office.

He is presently attending Widener University Law School, where he is also currently on the Dean's List. Steve anticipates a 2007 graduation.



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