

VERBAL THRESHOLD UPDATE

FALL 2004

New Jersey Office

The Executive Mews
1930 East Marlton Pike
Suite X-115
Cherry Hill, NJ 08003
(856) 751-5285
Fax: (856) 751-5281



Philadelphia Office

1601 Market Street, 16th Floor
Philadelphia, Pennsylvania
19103-2393
(215) 561-4300
Fax: (215) 561-6661



Central Pennsylvania Office

313 West Liberty Street
Suite 371
Lancaster, PA 17603
(717) 393-4400
Fax: (717) 393-4322



Blue Bell Office

Five Valley Square
512 Township Line Road
Suite 200
Blue Bell, PA 19422
(267) 654-1100
Fax: (267) 654-1122



Editor

Glendon E. Danks, Esq.

www.bbs-law.com

Verbal Threshold Update is a quarterly publication designed to keep the automobile insurance industry apprised of this rapidly developing area of New Jersey tort law.

I. In Woodards v. Kien, Docket No. CAM-L-8178-01, the Superior Court of New Jersey, Camden County, granted defendant's motion for summary judgment on the verbal threshold. The plaintiff was involved in an accident on December 13, 1999 and presented to the hospital immediately following the accident complaining of neck pain. X-rays of her cervical spine revealed degenerative discogenic narrowing of the cervical spine.

The plaintiff presented to Dr. Friedman on December 16, 1999 complaining of neck, back, and left shoulder pain. She did not return to Dr. Friedman again until February 14, 2000, approximately two months later. She then returned to Dr. Friedman on February 21, 2002, two years after her last visit on February 14, 2000, for one additional visit. At that time, she was still complaining of neck, back, and left shoulder pain. She received physical therapy from January 6, 2000 through June 30, 2000. At the end of physical therapy, her work status was regular and her tolerance for work was good.

Dr. Friedman authored a certification opining that the plaintiff sustained a permanent injury to her left shoulder. New Jersey law requires the certification to be based on objective, credible evidence. The plaintiff contended that Dr. Friedman based his permanency evaluation on the objective, clinical physical testing of the plaintiff's shoulder, including findings of tenderness and restricted range of motion of the left shoulder. The defense contended that tenderness and decreased range of motion of the left shoulder were subjective, not objective, findings in that these findings relied solely on the plaintiff's pain response.

An MRI of plaintiff's left shoulder revealed impingement with mild supraspinatus tendinitis and small joint effusion. However, Dr. Friedman's certification failed to address a herniated disc from a 1993 accident which resulted in leftsided neck pain and pain down plaintiff's entire left arm including her left shoulder. Furthermore, plaintiff denied at deposition any prior history relative to her left shoulder.

The plaintiff was employed by Verizon as an administrative assistant at the time of the accident. Although she missed approximately 60 half days from work for treatment as a result of the accident, she did not miss any full days from work at Verizon. She was fully compensated for the time that she missed work at Verizon.

The only activities plaintiff did before the accident that she was completely unable to perform following it were bowling and pushups. She bowled once per month prior to the accident, but had not attempted to bowl since the accident. Plaintiff also admitted she did not do pushups very often before the accident. Further, contrary to plaintiff's assertion, a note from her physical therapy indicates that she was able to do "wall pushups 20 reps."

Based on the above, the court granted defendant's motion for summary judgment.

Plaintiff Attorney: Marshall Kressman, Esquire

Defense Attorney: Glendon E. Danks, Esquire

II. In Arter v. Smith, Docket No. ATL-L-3278-02, Superior Court of New Jersey, Atlantic County, the court granted summary judgment on the verbal threshold in favor of defendant. The plaintiff was involved in a motor vehicle accident on October 8, 2000. She sustained injuries to her neck, back, and right knee, and was treated by Dr. DelGiorno intermittently for two years. She also produced a certification of permanency from Dr. DelGiorno.

Plaintiff received intermittent treatment with Dr. DelGiorno and physical therapy from November 2, 2000 through December 7, 2000. As of December 7, 2000, she was complaining of intermittent neck and back pain, and denied any radiating pain into the extremities. Her pain varied from 0 to 3 on a scale of 0 to 10, 0 being no pain, 10 being the most severe pain. There was nothing she was completely unable to do as a result of the



2ND Floor
204 White Horse Pike
Haddon Heights, NJ 08035
www.bbs-law.com

injuries she sustained in this accident and only missed 10 to 15 days from work as a result of the accident.

The plaintiff did not contend that her injuries pierced the verbal threshold, but rather, that she was not bound by the verbal threshold because she was a New Jersey resident at the time of the accident and her Pennsylvania insurance policy provided for "full tort." However, pursuant to N.J.S.A. 17:28-1.4, the "Deemer" statute, the plaintiff was bound by the verbal threshold notwithstanding the fact that she resided in New Jersey at the time of the accident. The requirements of the "Deemer" statute were: 1. The insurer be authorized to transact automobile insurance business in New Jersey; 2. The insurer issued a policy providing automobile liability insurance coverage in another state; and 3. The automobile insured under the policy is used or operated in New Jersey.

It was undisputed that the plaintiff's insurer, State Farm, was licensed to transact automobile insurance in New Jersey, that State Farm sold this automobile insurance policy to the plaintiff in Pennsylvania, and that the plaintiff was operating her automobile insured by State Farm in New Jersey at the time of the accident. Accordingly, all of the "Deemer" statute requirements were satisfied.

The court agreed with defendant's analysis on the "Deemer" statute issue, and held that the defendant's motion for summary judgment established that the plaintiff's injuries failed to pierce the verbal threshold. Accordingly, the court granted summary judgment in favor of defendant.

Plaintiff Attorney: Vincent Bonaventura, Jr., Esquire
Defense Attorney: Glendon E. Danks, Esquire

III. In Chung Nam Lee v. Tali Furman, Docket No. CAM-L-656-03, the Honorable Michael J. Kassel granted summary judgment on the verbal threshold in favor of defendant on June 11, 2004.

The plaintiff was a passenger in her husband's vehicle when it was struck from behind. She did not go to a hospital following the accident. Five days later, she presented to Kab S. Hong, M.D., complaining of neck pain, back pain and headaches. The plaintiff treated with Dr. Hong for seven months after which she had normal range of motion of the neck and no spasm was detected. The plaintiff returned to Dr. Hong almost two months after discharge still complaining of neck pain. An MRI of plaintiff's cervical spine was within normal limits.

At the time of the accident, the plaintiff worked for a nail salon in Philadelphia. She only missed four days from work at that job as a result of the accident. Other than those four days, she continued to work from 9:00 a.m. to 7:00 p.m., five days per week. Furthermore, the plaintiff was able to drive, cook, bathe, and dress herself. Based on the above, the court held that plaintiff did not sustain a permanent or serious injury as a result of this accident and granted defendant's motion for summary judgment.

Plaintiff Attorney: Howard Sobel, Esquire
Defense Attorney: Glendon E. Danks, Esquire

IV. In Labas v. Molina, 369 N.J. Super. 331 (App. Div. 2004), the plaintiff's 1994 Mitsubishi was stolen. The automobile was insured under a policy of insurance issued by Liberty Mutual Insurance Company in which the plaintiff elected the verbal threshold. The vehicle was never found. On October 4, 2001, in exchange for \$8,626.60, the plaintiff transferred the Mitsubishi's title over to Liberty Mutual. Plaintiff owned no other vehicles.

On October 11, 2001, while plaintiff was operating his father's 1991 Mercury Sable, the plaintiff was involved in an accident. The Mercury was also insured by Liberty Mutual under a separate policy issued to plaintiff's father who had elected the verbal threshold. At the time of the accident, the plaintiff was not a resident of his father's household. On October 24, 2001, the plaintiff applied for personal injury protection benefits under his father's policy of insurance. The trial court held that the verbal threshold defense applied; however, the Appellate Division reversed. The verbal threshold did not apply because the plaintiff no longer owned a car after he transferred title to his insurer following the theft of his vehicle. He was not bound by his father's election of the verbal threshold because he was not a resident of his father's household. The fact that plaintiff received PIP through his father's insurance policy did not subject him to the verbal threshold. The father's selection of the verbal threshold would only bind his spouse and resident children.