STERNS & WEINROTH,
A Professional Corporation

ICNJ 28TH Annual Meeting and Conference

"JUDICIAL UPDATE "

A SUMMARY OF PENDING ISSUES AND RECENT INSURANCE DECISIONS
from mid-September to date

PENDING SUPREME COURT APPEALS

Gazis v. Miller (58,181) A-32-05. Does the usual rule that requires an insurer to show prejudice in order to deny coverage based on a late notice of claim apply to this risk retention group, an entity that issued excess indemnity insurance to its members, where the insured had contracted with an insurance professional to be responsible for such notices? (Certification granted September 12, 2005.)

Thomsen v. Mercer (58,077) A-35-05. Where an insured is covered by two insurance policies and one of the insurers is insolvent, is the New Jersey Property-Liability Insurance Guaranty Association entitled to a set-off for the amount payable from the solvent insurer, even when the insured's claim far exceeds the coverage limits of the solvent insurer's policy? (Appeal perfected September 13, 2005.)

Turkowsky v. Motor Club of America Insurance. Co. (57,057) A-1-05. Where a person who is a named insured under both an automobile insurance policy and a separate motorcycle insurance policy is injured while operating the motorcycle, is the step-down clause in the uninsured/underinsured endorsement of the automobile policy effective to limit uninsured/underinsured coverage to the amount available under the motorcycle insurance policy? (Certification granted June 9, 2005.)

Johnson v. Braddy (57,853) A-5-05. Can a defendant who is a holder of an insurance policy issued by an insolvent insurance company be held personally liable for the amount of any judgment in excess of the maximum coverage available through the Insurance Guaranty Association? (Leave to appeal granted June 9, 2005.)

Caballero v. Martinez (57,863) A-8-05. Is an undocumented alien a resident of the State and therefore eligible to collect benefits from the Unsatisfied Claim and Judgment Fund for injuries sustained in an automobile accident? (Appeal perfected July 13, 2005; argument scheduled November 7, 2005.)

American Fire and Casualty Co. v. New Jersey Division of Taxation (57,777) A-134-04. In calculating the insurance retaliatory tax due under N.J.S.A. 17:32-15, is the Division of Taxation required to exclude consideration of the lower New Jersey premium tax the insurance company may pay under N.J.S.A. 54:18A-6? (Certification granted May 25, 2005; argument scheduled November 7, 2005.)

RECENT INSURANCE DECISIONS

VERBAL THRESHOLD: "Serious Life Impact" and "Permanent Injury"
Summerton v. Braun (Law Div., Ocean Cty.) (O'Brien, J.S.C.) DDS# 23-3-1947. (Decided September 23, 2005, Approved for Publication, November 2, 2005). The trial court grants plaintiff's motion to reinstate his automobile negligence complaint, which originally had been dismissed for failure to surmount either prong of the verbal threshold test. On appeal, the Appellate Division suggested that it might reverse the trial court's finding on the objective medical evidence and permanency issue, but found it unnecessary to do so because the court agreed that plaintiff had not demonstrated a serious impact on his life. Plaintiff did not, thereafter, file a further appeal. After the serious impact requirement was abrogated in *DiProspero* and *Serrano*, plaintiff moved to restore the matter, arguing that relief should not depend on whether the case was still "in the pipeline." The court gives plaintiff the benefit of the doubt as to whether the Appellate Division would have found sufficient objective evidence of permanency to survive summary judgment and grants the motion.

Roach v. Deets (Law Div., Cape May Cty.) (Visalli, J.S.C.) DDS# 23-3-1946. (Decided September 26, 2005, Approved for Publication, November 2, 2005). The trial court denies plaintiff's motion seeking reconsideration and reinstatement of his complaint, which had been dismissed because he failed to satisfy the now-abrogated "serious impact" prong of the verbal threshold test. Plaintiff neither appealed the dismissal nor filed a timely motion for reconsideration under *R*. 4:49. Although his motion for reconsideration is brought pursuant to *R*. 4:50-1, the court notes that this rule may be used only if there are exceptional or compelling circumstances to provide extraordinary relief. While the Appellate Division held in *Beltran v. Delima* that it would apply "pipeline retroactivity" to those pre-judgment cases pending in the trial courts and those matters which were on direct appeal, it did not address the application of retroactivity to cases outside of the pipeline. The judge determines here that retroactivity should not apply in a non-pipeline case, as the three-part test enunciated in *Beltran* does not tip in favor of allowing a non-pipeline case filed under *R*. 4:50-1 to be reopened.

Harrison v. Lora (App. Div.) (Kestin, Seltzer, J.J.A.D.) (November 1, 2005). Plaintiff appeals from summary judgment dismissing her action for damages resulting from a multi-car accident for failure to meet the serious impact requirement of the verbal threshold. The court reverses and remands in light of *DiProspero* and *Serrano*.

Hacking v. Himmelberger (App. Div.) (Stern, Grall, J.J.A.D.) DDS# 23-2-1927 (November 1, 2005). The trial court dismissed plaintiff's automobile negligence case for failure to satisfy the "substantial impact" prong. It is not clear whether the trial court ruled on the objective medical evidence aspect of the case. Therefore, the court reverses the dismissal order and remands for the trial court's further consideration of whether plaintiff's disc herniation, based on the objective medical evidence presented, constituted a "permanent injury" within the meaning of the statute.

Lee v. Cinquina (App. Div.) (Collester, Lisa, J.J.A.D.) DDS# 23-2-1899 (October 28, 2005). The trial court erred in concluding that plaintiff had not presented sufficient objective medical evidence of injury to survive summary judgment, where diagnostic tests, including MRIs, revealed bulging cervical and lumbar discs attributed to the accident by her physicians, and plaintiff continued to exhibit muscle spasm and limitation of range of motion throughout her medical treatment; she also was diagnosed with TMJ problems. The trial court impermissibly usurped the jury's function and engaged in fact-finding in its effort to analyze the details of the medical records in a manner that would discredit the opinions rendered by plaintiff's medical experts.

Giannetti v. Taylor-Willner (App. Div.) (Collester, Lisa, J.J.A.D.) DDS# 23-2-1852 (October 25, 2005). Defendant did not contend in the trial court or on appeal that plaintiff's injuries, including several disc herniations as confirmed by MRI studies and other objective testing, were caused by the accident and were permanent. Instead, defendant was granted summary judgment because plaintiff failed to surmount the serious life impact prong of *Oswin*. In light of *DiProspero* and *Serrano,* the order is vacated. Defendant also asserted as another ground for dismissal plaintiff's failure to file the required physician's certification. However, the trial court declined to dismiss on that basis, concluding that where there had been a challenge to the application of the verbal threshold option in the first instance, and multiple procedural dismissals resulting in long periods where the case was inactive, the proper remedy is to afford plaintiff time to provide the required certification because plaintiff had furnished enough information, and defendant was not prejudiced. The court affirms and remands, directing plaintiff to produce the certification.

Pollner v. Perry (App. Div.) (Parker, Grall, J.J.A.D.) DDS# 23-2-1831 (October 24, 2005). The court reverses the dismissal of plaintiff's verbal threshold case, where the motion judge concluded that plaintiff had not produced objective medical evidence of a permanent injury because she had shown only a lumbar disc bulge, without herniation or impingement. Although courts differ in deciding whether a disc bulge, as opposed to a herniation, constitutes a permanent injury, in construing a summary judgment motion, the trial court must accept as true the opinion of plaintiff's physician that the injury is permanent.

Brice v. Renga (App. Div.) (Weissbard, Sapp-Peterson, J.J.A.D.) DDS# 23-2-1782 (October 18, 2005). The court agrees with the trial court that plaintiff failed to provide the requisite objective medical evidence of permanent injury within the meaning of AICRA and rejects her contention that the trial court did not give due consideration to her doctors' opinions related to her post-traumatic vestibular dysfunction. The court finds that subjective complaints of pain, not verifiable through objective clinical evidence, are insufficient to vault the verbal threshold, and without any positive neurological findings, the doctor's certification is essentially based on plaintiff's subjective complaints. Moreover, the doctor consistently recommended that plaintiff seek vestibular therapy, which she did not do. None of plaintiff's doctors opined that plaintiff's condition could not heal with this therapy; therefore, she did not meet the statutory requirement of a showing that she would not heal to function normally with further medical treatment.

Patterson v. Penamon (App. Div.) (Skillman, Francis, J.J.A.D.) DDS# 23-2-1770 (October 17, 2005). The court affirms the verdict in favor of plaintiff, rejecting defendant's contentions that the trial court erred in: (1) denying her motion for a directed verdict based on plaintiff's failure to meet the verbal threshold; and (2) failing to instruct the jury on mitigation of damages, thus warranting a new trial. Inter alia, as to the former, plaintiff's physician opined that her cervical injuries, objectively manifested through MRI testing, were permanent and causally related to the subject accident; and, as to the latter, since defense counsel elected not to offer any testimony regarding plaintiff's alleged unreasonableness in failing to seek a neurological consultation, and, instead relied on the testimony of plaintiff's treating doctor -- who did not state that a neurologist could have provided treatment that would have alleviated the symptoms -- the trial court correctly concluded that this was an inadequate basis for a failure-to-mitigate instruction.

Norris v. Altamar (App. Div.) (Lisa, Reisman, J.J.A.D.) DDS# 23-2-1756 (October 14, 2005). The court finds that plaintiff presented sufficient objective medical evidence of permanent injury to survive summary judgment where two MRIs revealed the presence of a herniated disc in her lumbar spine, and two doctors diagnosed the condition as permanent and causally related to the subject accident. Since the trial court dismissed the complaint for failure to surmount the serious impact prong of the verbal threshold, the dismissal must be reversed and the matter remanded for further proceedings.

Miskelly v. Lorence, __ N.J. Super. __ (App. Div. 2005) (Stern, Fall, Levy, J.J.A.D.) DDS# 23-2-1745 (October 13, 2005). Where plaintiff asserted a permanent brain injury and cognitive disabilities, the jury's finding of no permanent injury precluded the award of future lost wages, even though the verbal threshold does not have to be satisfied in order to recover economic losses, where plaintiff's future lost wages are necessarily based on plaintiff's claim of a permanent injury.

Timko v. DiFalco (App. Div.) (Lefelt, Hoens, J.J.A.D.) DDS# 23-2-1744 (October 13, 2005). Because the trial court found that plaintiff's objective medical evidence of permanent injury was sufficient -- including MRI evidence of multiple cervical disc herniations and a reversal of cervical lordosis -- and that she had therefore satisfied the first prong of the verbal threshold test, the dismissal of the case based on plaintiff's failure to satisfy the second prong -- the now-defunct "serious impact" requirement -- must be reversed, and the matter remanded.

Kelly v. Liu (App. Div.) (Alley, Yannotti, J.J.A.D.) DDS# 23-2-1734 (October 12, 2005). Since the trial court appeared to base the dismissal of plaintiff's complaint on her failure to surmount the now-abolished serious impact requirement of the verbal threshold, the matter must be reversed and remanded for reconsideration. While the trial judge mentioned the absence of electro-diagnostic testing, which he said was a factor in objective permanency, he did not specifically address plaintiff's other objective medical evidence, including MRI studies showing lumbar and cervical disc herniations with nerve root involvement, and muscle spasm almost two years post-accident.

Valentine v. Bruno (App. Div.) (Collester, Reisner, J.J.A.D.) DDS# 23-2-1650 (October 3, 2005). Although the trial court dismissed plaintiff's complaint because plaintiff failed to prove that his injury was "serious," a standard no longer required under AICRA, and because the court agrees with the trial court's further finding that plaintiff failed to present medical evidence distinguishing the injuries he suffered in an earlier slip and fall from those he allegedly suffered in the subject auto accident, the dismissal of the complaint on summary judgment is affirmed.

Wooten v. Martilla *(*App. Div.) (Payne, Kimmelman, J.J.A.D.) DDS# 23-2-1649 (October 3, 2005). In light of *DiProspero* and *Serrano*, the trial court erred in ruling that although plaintiff had proved a permanent injury, her complaint must be dismissed because she failed to meet the "substantial impact" prong of *Oswin*. Since the case must be remanded, the court expressly finds that plaintiff's proofs were adequate to defeat summary judgment on the issue of permanent injury, where there was MRI evidence which showed a cervical disc bulge and a partial thickness tear of a tendon in her right shoulder, as well as electrodiagnostic evidence of right cervical radiculopathy, all causally related to the accident by her physician.

Ragoonanan v. Conley (App. Div.) (Fisher, Yannotti, J.J.A.D.) DDS# 23-2-1630 (September 29, 2005). The trial judge did not err in denying, as untimely, plaintiff's motion seeking to amend his answers to interrogatories to include a new neurologist's report, since the motion to amend was filed two months after defendant had initially moved for summary judgment and five days before the scheduled trial date. Moreover, the judge did not err in then granting summary judgment to the defense, concluding that the existing medical reports did not provide the required objective, credible medical evidence that would support a jury's finding in his favor, where: (1) the doctor's diagnosis was based on range-of-motion tests that reflected plaintiff's subjective

responses; and (2) the last notation of muscle spasm was four months after the accident.

Pitaresi v. Clark (App. Div.) (Fuentes, Graves, J.J.A.D.) DDS# 23-2-1614 (September 28, 2005). In this case, the jury found that defendant was 51% negligent in the motor vehicle accident, and that his negligence was a proximate case of plaintiff's hip injury, which resulted in his having to undergo a complete hip replacement approximately once month after the accident. However, no damages were awarded, because the jury found that plaintiff had not shown that his injuries seriously affected his life. In light of the Supreme Court decisions holding that AICRA did not continue the serious impact requirement, the judgment is reversed and the matter remanded for a new trial.

Berrios v. Stremlo (App. Div. (Stern, Levy, J.J.A.D.) DDS# 23-2-1613 (September 28, 2005). Since the trial court, in dismissing plaintiff's case, relied on the now-reversed *Serrano* in concluding that plaintiff had not sustained a "serious" injury, the court remands for reconsideration of plaintiff's objective medical evidence -- which included magnetic resonance image findings of a cervical disc bulge and neurological electro diagnostic findings consistent with carpal tunnel syndrome and radiculopathy.

Berdugo v. Modrzynski (App. Div.) (Weissbard, Sapp-Peterson, J.J.A.D.) DDS# 23-2-1603 (September 27, 2005). Although the trial court, in a tentative written decision on defendant's summary judgment motion, found that plaintiff's muscle spasm was intermittent and thus insufficient to meet the permanency requirements of the verbal threshold statute, the trial court did not address plaintiff's additional claim that the magnetic resonance image testing, which confirmed a lumbosacral disc bulge, was further evidence of a permanent injury, because the case was dismissed for plaintiff's failure to show a serious impact. In light of *DiProspero*, the matter is remanded for further consideration of plaintiff's objective medical evidence of permanent injury.

Dladla v. Vollmer (App. Div.) (Axelrad, Kimmelman, J.J.A.D.) DDS# 23-2-1588 (September 26, 2005). The trial court granted summary judgment to defendant, finding that plaintiff, who suffered from pre-existing osteoarthritis and who injured her back in the subject accident, failed to establish that she suffered a serious injury from the subject accident that had a serious impact on her life; the trial court also found that plaintiff failed to present an appropriate comparative analysis of her pre- and post-accident conditions. The court reverses, holding that the trial court should reconsider the matter on remand in light of *DiProspero* and *Serrano*.

Opizzi v. Harris (App. Div.) (Payne, Graves, J.J.A.D.) DDS# 23-2-1587 (September 26, 2005). The court reverses the dismissal of plaintiff's complaint, where the trial court found that plaintiff failed to satisfy either prong of the verbal threshold test. The court finds that plaintiff presented sufficient objective, clinical evidence to establish permanent injury to his lumbar spine through a magnetic resonance image and electrodiagnostic tests. However, the court notes that neither party addressed the more crucial issue,

namely, whether the injuries and their sequelae, including pain and muscle spasm, were causally related to the subject accident. Since the trial court expressed no views on this issue, the matter is remanded for further proceedings.

Helminski v. Burak (App. Div.) (Stern, Fall, J.J.A.D.) DDS# 23-2-1557 (September 22, 2005). Since the trial court concluded that even if plaintiff's proofs were accepted as showing objective, credible medical evidence of permanent injury, the case failed because plaintiff did not survive the "serious impact" portion of the verbal threshold, the case must be remanded in light of *DiProspero* and *Serrano*. *Rios v. Szivos* is still viable to the effect that a physician's certification is not dispositive on a motion for summary judgment.

DeMaio v. Degross (App. Div.) (Lintner, Gilroy, J.J.A.D.) DDS#23-2-1556 (September 22, 2005). Since the trial judge, in granting summary judgment to defendants, limited her findings to plaintiff's failure to meet the "serious impact" subjective standard of the verbal threshold test, the dismissal of plaintiff's case is reversed, and the matter is remanded for further proceedings.

VERBAL THRESHOLD: Polk Analysis

Hardison v. King __ N.J. Super. __ (App. Div. 2005) (Kestin, Lefelt, Coleman, J.J.A.D.) DDS# 23-2-1945. (Approved for Publication, November 2, 2005.) The court holds that a *Polk v. Daconceicao* comparative analysis was not required in this verbal threshold case because plaintiff claimed his injuries were solely caused by the subject automobile accident, and there was no aggravation of the minor injuries he had suffered approximately nine to ten years earlier.

Sagui v. Devine (App. Div.) (Alley, Fisher, J.J.A.D.) DDS# 23-2-1853 (October 25, 2005). The court affirms the judgment entered on the jury's verdict in favor of defendant, where defendant's negligence in an automobile accident was admitted, and the issues tried included whether plaintiff's injuries were causally related to the accident and whether she had met the verbal threshold. The court below did not err in refusing to direct a verdict in plaintiff's favor (or in denying her judgment NOV motion later), as reasonable minds could differ whether her asserted neck, back and jaw injuries were causally related to the accident, especially where she was involved in a subsequent accident.

Davidson v. Slater, __ N.J. Super. ___ (App. Div. 2005) (Conley, Weissbard, Winkelstein, J.J.A.D.) DDS# 23-2-1807 (October 20, 2005). The court finds that the *Polk* requirement, mandating a comparative analysis of prior injuries in the context of a verbal threshold motion for summary judgment, most likely does not survive *DiProspero* and *Serrano*. The court disagrees with *Ostasz v. Howard*, 357 N.J. Super. 65 (App. Div. 2003), and *Lucky v. Holland*, ___ N.J. Super. ___ (App. Div. 2005), as well as the

statement in *Bennett v. Lugo*, 368 N.J. Super. 466 (App. Div.), *certif denied*, 180 N.J. 457, 473 (2004), that a *Polk* analysis is required even if aggravation is not claimed.

Sottile v. Flemming (App. Div.) (Wefing, Graves, J.J.A.D.) DDS# 23-2-1805 (October 20, 2005). The court reverses summary judgment in favor of defendant, concluding that plaintiff presented sufficient evidence of permanency of his lower back and jaw injuries to create a jury question. Although the court notes that the *Polk* comparative analysis requirement survives AICRA and that plaintiff was involved in a prior accident, plaintiff did not claim injury to either his lumbar spine or jaw in that prior accident. Thus, the motion judge erred in dismissing plaintiff's complaint for failure to supply the comparative analysis required by *Polk*. Because the trial court did not specifically refer to any of plaintiff's medical reports, it is not clear whether it considered that information. In the court's view, if a jury determines that plaintiff and his experts are credible, it could reasonably find that plaintiff sustained permanent injuries as defined by the verbal threshold.

Jones v. Trunk (App. Div.) (Rodriguez, Alley, J.J.A.D.) DDS# 23-2-1806 (October 20, 2005). Citing *Ostasz v. Howard*, which held that AICRA did not affect the *Polk* comparative analysis requirement, the court affirms the dismissal of plaintiff's complaint based largely on the lack of such an analysis and found that plaintiff's lower back injury did not meet the objective prong of the verbal threshold test, as she had been involved in four other accidents prior to the subject accident.

Williams v. Illge (App. Div.) (Coburn, Lisa, J.J.A.D.) DDS# 23-2-1743 (October 13, 2005). The court finds no error in the trial court's denial of plaintiff's motion to vacate summary judgment dismissing her complaint, where: (1) her hip replacement procedure was known to plaintiff and her attorney long before the summary judgment proceedings and there was more than ample opportunity to obtain from the surgeon or any other medical expert a proper report causally relating it to the subject accident; and (2) the physician's certification submitted was substantively deficient, stating an unsupported conclusion of causation and failing to contain a comparative analysis of plaintiff's pre- and post-accident hip conditions.

Lucky v. Holland, __ N.J. Super. __ (App. Div. 2005) (Coburn, Collester, Lisa, J.J.A.D.) DDS# 23-2-1735 (October 12, 2005). The trial court erred in dismissing plaintiff's complaint for failure to provide a *Polk* comparative analysis, where plaintiff's expert's report provided ample, credible, objective medical evidence of multiple injuries caused to plaintiff by the subject accident, including injuries to her cervicodorsal spine, left shoulder and left knee -- body parts not affected by her prior accident; no *Polk* comparative analysis was required as to these injuries. As to aggravation of the injury to her lumbosacral spine, the expert's attribution of 30% of plaintiff's injury to the prior accident and 70% to the current accident is supported by objective medical evidence, and should not have been dismissed. The trial court's dismissal of plaintiff's claim with respect to her right knee injury is affirmed, however, since the expert's report did not

differentiate between prior and present injuries and resulting residuals, rendering only a conclusory opinion of aggravation.

Petrillo v. Drake (App. Div.) (Alley, Fisher, J.J.A.D.) DDS# 23-2-1576 (September 23, 2005). The trial court properly dismissed plaintiff's automobile negligence complaint, reasoning that plaintiff failed to provide a sufficient comparative analysis of his pre-accident injuries with his post-accident complaints, as required by *Polk*. The court rejects plaintiff's argument that the case must be remanded and re-examined in light of *DiProspero* and *Serrano*, as those cases did not alter the *Polk* requirement.

Sargentelli v. Singh (App. Div.) (Rodriguez, Yannotti, J.J.A.D.) DDS# 23-2-1558 (September 22, 2005). The trial court properly dismissed plaintiff's automobile negligence complaint, finding that the report submitted by his treating physician did not meet the comparative-analysis requirements of *Polk v. Daconceicao.*

AGENTS

Jackson v. Atlantic (App. Div.) (Alley, Yannotti, J.J.A.D.) DDS# 23-2-1870 (October 26, 2005). The court considers an issue of first impression: whether an insurance agent's professional liability policy covers alleged professional negligence for failure to obtain a policy including lead exposure coverage, in a case where the underlying suit involves lead paint exposure. Plaintiffs sued their landlords for lead paint exposure. The landlords filed a third-party complaint against their insurance agents, asserting that they had requested coverage for such exposure. The agents filed a fourth-party complaint against their insurance carrier, seeking a defense and indemnification for the professional liability claims. The carrier refused, based upon the "absolute pollution exclusion - professional" included in the policy. On cross-motions for summary judgment, the trial court ordered the carrier to defend and indemnify the agents and to reimburse the agents' reasonable attorneys' fees. The court affirms, holding the indirect language in the pollution exclusion inapplicable when the clear language in the policy covers wrongful acts, such as professional negligence, and finding that no reasonable construction of the policy would require an agent to expect coverage for all professional negligence claims, except those that arise from the failure to obtain coverage for a pollutant.

Tweer v. John Hill Agency (App. Div.) (Wecker, Graves, J.J.A.D.) DDS#23-2-1661 (October 4, 2005). Although plaintiffs prevailed at trial and were awarded almost $51,000 on their claim that defendants negligently procured insurance for their property and negligently advised them that their coverage was adequate to protect them from the fire loss later sustained, they appealed from the denial of their application for counsel fees, arguing that their lawsuit was similar to a legal malpractice action, involving a breach of fiduciary duty and justifying a similar measure of damages. The court holds that the trial court accurately rejected this claim, enforcing New Jersey's strong policy against the shifting of counsel fees.

ALTERNATIVE PROCEDURE FOR DISPUTE RESOLUTION ACT

***Allstate Ins. Co. v. Sabato*, __** N.J. Super. __ (App. Div. 2005) (Cuff, Lintner, Gilroy, J.J.A.D.) DDS# 23-2-1648 (October 3, 2005). Allstate denied the PIP claim of the assignee-defendant-medical provider, citing defendant's failure to satisfy the requirements of the Patient Records Rule, which it contended precluded his recovery of PIP benefits. Defendant sued, and two hearings before alternative dispute resolution umpires were held. The court affirms that portion of the trial court's order vacating the second umpire's award which found that Allstate acted in bad faith in denying the claim and notes that the judge's finding respecting bad faith is not reviewable by the appellate panel under the Alternative Procedure for Dispute Resolution Act (APDRA), because it does not embrace a "non-delegable special supervisory function" exercisable by a court on review. However, the court reverses and remands that portion of the order which reduced defendant's attorney's fees and limited them to those incurred in the second ADR hearing; counsel's efforts in successfully litigating the PIP claim necessarily included both time spent before the trial court as well as before both umpires. While the court has serious concerns about the constitutionality of the administrative provision cited limiting an insured's access to the courts based on the insurer's decision to require dispute resolution in its policy, the court does not decide this constitutional issue, because it is satisfied that it may review the issue of reasonable attorney's fees, notwithstanding APDRA's proscription of appeal, as one of those rare circumstances where public policy triggers the general supervisory power of the courts.

CHIROPRACTORS

***Afram v. Heller*, __** N.J. Super. __ (App. Div. 2005) (Kestin, Coleman, Seltzer, J.J.A.D.) DDS# 23-2-1662 (September 23, 2005; Approved for Publication, October 4, 2005). Under AICRA, chiropractors are qualified to render opinions on causation and permanency in respect of the types of injuries they treat. The rationales of the trial court opinions in *Pensabene v. Straus* and *Olarte v. Crocker* are substantially adopted.

COMPREHENSIVE GENERAL LIABILITY INSURANCE: Water and Mold

Crivelli v. Selective Ins. Co. of America (App. Div.) (Skillman, Axelrad, Payne, J.J.A.D.) DDS# 23-2-1600 (September 27, 2005). Plaintiffs sought coverage from defendant under a comprehensive general liability policy issued to the insured roofing contractor for water infiltration and resulting mold contamination in their home as a result of the insured's negligent roofing work. The court affirms the trial court's findings that plaintiffs suffered no bodily injury or property damage during the applicable policy period; that there was no basis to extend overage under the continuous trigger theory of liability; and that the policy's pollution exclusion applied to bar recovery of their claim.

CONTRIBUTORY NEGLIGENCE

Chunga v. Wells Fargo Auto (App. Div.) (Lintner, Parrillo, Holston, Jr., J.J.A.D.) DDS# 05-2-1728 (October 12, 2005). Rejecting defendant's contentions of evidentiary error, the court holds that the evidence supports the jury's findings that: (1) defendant-driver was negligent and his negligence was a proximate cause of the automobile/pedestrian accident in question; and (2) plaintiff-pedestrian -- who was wearing dark clothing and attempting to cross the roadway at an intersection -- was contributorily negligent, but his negligence was not a proximate cause of the accident. Likewise, the record supports the jury's award to plaintiff of $725,000 in damages, to which the judge added $128,687 in prejudgment interest; although the award was generous, it was not excessive.

INTENTIONAL ACT: "Bodily Injury"/Workers Compensation

New Jersey Manufacturers Ins. Co. v. Delta Plastics Corp., __ N.J. Super. __ (App. Div. 2005) (Coburn, Wecker, Reisner, J.J.A.D.) (September 30, 2005). The court adheres to its decision in *Charles Beseler Co. v. New Jersey Mfrs. Ins. Co.,* and holds that the C-5 exclusion for "bodily injury intentionally caused," in an employer's liability policy (issued as Part Two of a package, where Part One provides workers' compensation coverage), is not congruent with the "intentional wrong" exception to the exclusive remedy provision of the Workers' Compensation Act, N.J.S.A. 34:15-8. The insurer must provide a defense to an employee's common law complaint for injury resulting from employer conduct that was "substantially certain" to cause injury, but was not specifically intended to injure. (Judge Coburn filed a dissenting opinion, entitling NJM to an appeal before the New Jersey Supreme Court as of right.)

Charles Beseler Company v. O'Gorman & Young, Inc., __ N.J. Super. __ (App. Div. 2005) (Stern, Reisner, Graves, J.J.A.D.) (September 9, 2005). Employers' liability insurance policy which excludes "bodily injury intentionally caused or aggravated by you" excludes coverage for injury caused by an act intended to cause injury, not injury caused by a wrongful intentional act where injury is a substantial or virtual certainty. (NJM filed a petition for certification of the issue with the New Jersey Supreme Court on September 29, 2005.)

MOTIONS TO VACATE

Gorzynski v. Humiec (App. Div.) (Fisher, Yannotti, J.J.A.D.) DDS# 23-2-1602 (September 27, 2005). The trial court accurately denied plaintiff's motion to vacate the order dismissing his automobile negligence case, which had been entered on defendant's motion for summary judgment, and treated as unopposed by the motion judge when plaintiff's counsel, having called to request an adjournment, failed to follow up and simply did not appear or file opposition. Moreover, once plaintiff's counsel learned that the motion was not adjourned and that the case was dismissed, he neither filed for reconsideration nor appealed; instead, he moved, 11 months later, to vacate the judgment under R. 4:50-1. Noting that such a motion must be made within a

reasonable time, the judge properly denied it. Counsel's decision to wait for further medical reports for the purpose of "nailing down" the facts to make certain that the record would justify denial of the summary judgment motion is an inadequate explanation for the delay.

PHOTO INSPECTIONS

Ruiz v. Clarendon Natl. Ins. Co. (App. Div.) (Alley, Fisher, Yannotti, J.J.A.D.) DDS# 23-2-1720 (October 11, 2005). The court reverses the trial court's ruling that defendant's policy, covering an automobile leased by plaintiff, was in effect when plaintiff was involved in an accident because the acknowledgment of requirement for photo inspection form used by its authorized producers did not comply with N.J.A.C. 11:3-36.5(c). The trial court erred in its conclusion that the form was defective because it did not clearly state the deadline for completion of the inspection, and was a general form in which the insured had to figure out in which category it belonged in order to determine when the inspection had to be completed. The court holds that the form provided the minimum information required by Appendix A and more.

PIP BENEFITS: ATTORNEY'S FEES

Moore v. Allstate N.J. Ins. Co. (App. Div.) (Alley, Yannotti, J.J.A.D.) DDS# 23-2-1601 (September 27, 2005). The trial court properly granted in part, and denied in part, plaintiff's application for attorney's fees incurred in prosecuting an action to compel defendant-insurer to provide her with additional PIP benefits for injuries she sustained when she, as a pedestrian, was struck by a van. Although counsel's hourly rate was reasonable, the trial court found that he had devoted an unreasonable amount of time to what was a relatively uncomplicated case, and reduced the fees accordingly. The trial court also properly found that Allstate acted in good faith, having a legitimate concern as to whether plaintiff's urinary incontinence was causally related to the back injuries she sustained in the accident.

PIP BENEFITS: FRAUD

Perez v. Ohio Casualty Ins. Co. (App. Div.) (Skillman, Collester, Parrillo, J.J.A.D.) DDS# 23-2-1629 (September 29, 2005). The trial court granted summary judgment to defendant-insurer for continuation of PIP benefits, finding that plaintiff, an illegal alien, failed to corroborate his assertion that he lawfully obtained his New Jersey driver's license, and that his knowing use of a false social security number was a material and fraudulent misrepresentation that entitled defendant to void the automobile policy, recoup the monies it had already paid plaintiff and his wife for PIP benefits, and to recover treble damages under the Insurance Fraud Prevention Act. Although the court agrees with defendant that the trial judge misapplied the *Brill* standard in finding, as a matter of law, that plaintiff did not possess a valid New Jersey's driver's license, it nevertheless affirms the grant of summary judgment to defendant based on the

fraudulent use of the false social security number. The court rejects plaintiff's further claim that defendant is estopped from denying coverage because it collected premiums from him and failed to investigate or verify the validity of the social security number until many months after he filed his PIP application.

PIP DEDUCTIBLES

Lugo v. N.J. Mfrs. Ins. Co. (App. Div.) (Rodriguez, Alley, Yannotti, J.J.A.D.) DDS# 23-2-1851 (October 25, 2005). Summary judgment in favor of defendant PIP insurer is reversed where the sole issue is whether the $2,500 deductible is applicable to plaintiff's claim, the third filed for PIP benefits arising out of a 1995 motor vehicle accident. The insurer had asserted the defense of the deductible to all three claims, the first two of which settled. The trial court found that defendant did not raise the issue of the deductible in either of the other two proceedings, and thus was not precluded from asserting it in the third. In reversing, the appellate court notes that the availability of the deductible was put in issue in all three proceedings by the insurer, and it was released twice in the settlements.

RESCISSION

I/M/O Tri-State Armored Svcs., Inc., Debtor; Great American Ins. Cos. v. Subranni (U.S. Bankruptcy Ct.) (Wizmur, U.S.B.J.) DDS# 42-6-1811 (October 20, 2005). The adversary plaintiff-insurance company issued crime insurance policies to the armored car company-debtor to cover the company for losses due to the fraud or dishonesty of its employees. When the company went bankrupt, it was discovered that several employees had engaged in extensive theft of money and property belonging to the company's customers; these individuals pled guilty to various conspiracy, money laundering and tax evasion charges, and the bankruptcy trustee sought coverage for the benefit of the bankruptcy estate. The court finds that the insurer is entitled to rescission of the policies, agreeing that the estate is not entitled to coverage due to material misrepresentations in the debtor's applications about its loss history, upon which the insurer reasonably relied. The court rejects the trustee's arguments, inter alia, that: (1) the "loss" question on the application was ambiguous and must be construed in favor of the insured; (2) the insurer's underwriting practices and procedures before issuing the policies were deficient, substandard and inadequate, and the insurer was negligent in failing to note certain red flags which would have placed a prudent insurer on notice to inquire further before issuing the policies; (3) public policy considerations require the balancing of the equities in favor of the innocent parties (creditors) who would be negatively impacted by rescission; and (4) the insurer is liable for violation of the New Jersey Consumer Fraud Act, and breaches of fiduciary duty and the covenant of good faith and fair dealing.

Culver v. First Jersey Ins. Agency (App. Div.) (Rodriguez, Alley, Fisher, J.J.A.D.) DDS# 23-2-1702 (October 7, 2005). Although plaintiff's wife suffered from, and told her

insurance agent about, several debilitating diseases, including chronic obstructive pulmonary disease and kidney problems requiring dialysis, he did not place those conditions on the life insurance application, which she signed. When the wife died four months after issuance of the policy, the carrier investigated and declined coverage, based on the insured's failure to disclose material facts about her health condition. Plaintiff sued, contending that the insurance agent was an agent or employee of the carrier, and therefore that the knowledge of his wife's condition should be imputed to the insurance company. The trial court granted summary judgment to defendants, and plaintiff appeals. The court affirms, rejecting plaintiff's assertions that: (1) the summary judgment process was flawed because he was deprived of the opportunity to sufficiently rebut defendants' contention that the insurance agent was independent and not an agent or employee of the carrier; and (2) there was sufficient evidence to create a genuine factual dispute about the agency issue.

MBIA Ins. Corp v. Royal Indemnity Co. v. PNC Bank, N.A. (Third Cir.) (Alito, C.J.) DDS# 23-8-1669 (October 4, 2005). Defendant Royal Indemnity agreed in a series of contracts to insure repayment of principal and interest on several hundred million dollars of student loans. Plaintiffs, beneficiaries of the policies, sued after the loans went into default, and defendant failed to pay the claims submitted. Defendant claimed that the lender on the underlying obligations fraudulently induced it to issue the policies and that this fraud entitled it to rescission. The District Court granted summary judgment to plaintiffs-beneficiaries. While the Third Circuit agrees that defendant's policies unambiguously and effectively waived defenses to its obligations based on fraud, it nevertheless concludes that defendant has raised a triable issue as to whether all of the losses claimed by the beneficiaries were covered under its policies.

RETURN OF PREMIUM

Std. Funding Corp. v. Universal Roadmaster, Inc. (App. Div.) (Collester, Lisa, Reisner, J.J.A.D.) DDS# 23-2-1733 (October 12, 2005). The court affirms judgment in favor of plaintiff on its claim against defendant, Lancer Insurance Company, for a return of an unearned insurance premium that plaintiff had paid on behalf of its borrower, the insured, defendant Universal Roadmaster, which owned a fleet of trucks used in interstate commerce. As part of its loan agreement with Universal, plaintiff retained a security interest in any return on unearned premiums up to the amount of the unpaid balance on the loan. The policy was cancelled seven months before the end of the paid policy period; thus, on a prorated basis, the return premium due was $101,486. As a result of an adjustment to reflect credit for a sum collected by plaintiff from a settling party, the judgment was properly entered for a slightly lower amount. The trial court properly rejected Lancer's argument that Universal had misrepresented the number of vehicles in its fleet and that the premium should be recalculated.

STEP-DOWN

National Union Fire Ins. Co. of Pittsburgh, PA v. Jeffers (App. Div.) (Lintner, Parrillo, Holston, J.J.A.D.) DDS# 23-2-1781 (September 26, 2005). Defendant, a Pennsylvania resident, appealed summary judgment in favor of plaintiff, National Union Fire Insurance Company, declaring that defendant was not entitled to National Union's commercial auto policy with $1,000,000 UM and UIM limits, which was issued to defendant's employer in New Jersey. Defendant's personal Pennsylvania UIM policy had limits of $15,000/$30,000. National Union's step-down clause provided that its limits would be reduced provided that defendant was not a named insured under the National Union policy and was insured by a policy providing similar coverage that had lower limits than those provided in the National Union policy. Because the Pennsylvania policy provided excess coverage while the National Union policy provided gap coverage, the court reversed.

Rutherford v. AIG American Int'l. Ins. Co. of N.J. (App Div.) (Rodriguez, Hoens, J.J.A.D.) DDS# 23-2-1674 (October 5, 2005). The court reverses the trial court's determination that plaintiff, a 47-year-old North Carolina resident who was injured driving his mother's Blazer in New Jersey while he was here to attend a wedding, was entitled to the maximum uninsured motorist coverage provided by his mother's policy, despite the existence of a step-down exclusion clause. The trial court erroneously ruled that the step-down clause was ambiguous, confusing and contrary to the reasonable expectation of the insured; and, under the clear terms of the clause, plaintiff was not a "family member" entitled to coverage on these facts.